REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: **29675/2020**
DOH: 5 AUGUST 2021

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

5/11/2021

SIGNATURE DATE

NEDBANK LIMITED **APPLICANT**

and

NZEBA TSHIBUMBU KATOMPA **FIRST RESPONDENT**

MWAMBA BERNARD KATOMPA **SECOND RESPONDENT**

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE OF HAND DOWN SHALL BE DEEMED TO 5 NOVEMBER 2021

MALI J

INTRODUCTION

1. This is an application for the final sequestration of the joint estate of the respondents. A provisional order was granted on 12 May 2021.

2. The first respondent, Mrs Katompa a business woman and the second respondent, Mr Katompa who is engaged in a political career in the Democratic Republic of Congo are married in community of property. Mrs Katompa was the sole member of Belfy Trading Close Corporation (*"Belfy Trading"*). She bound herself surety and co-principal debtor for the debts of Belfy, which were obtained from the applicant. Due to Belfy's failure to properly service the debt, the applicant obtained judgment in the amount of **R 8 911 515.25** against the first respondent, and later, a provisional sequestration order as indicated above, hence this application.

BACKGROUND

3. It is common cause that the first and second respondents filed a marital declaration with the applicant and by virtue of the marital regime, both became liable and indebted to the applicant for the indebtedness of Belfy Trading.

4. It is not in dispute that the first respondent, pursuant to the Sheriff serving a warrant of execution at her residential premises, declared to the sheriff that she has no money, nor assets with which to satisfy the warrant, or any portion thereof. The sheriff was also not able to locate any disposable assets to satisfy the judgement debt, In the result, the sheriff returned a *nulla bona.*

ISSUE

5. The issue for determination is whether this court must exercise its discretion and grant a final order of sequestration.

6. First I must deal with the supplementary affidavit for condonation filed by the second respondent. In a word, the second respondent states in his affidavit that his wife did not understand Sheriff due to language barrier. In essence this is what led to the Sheriff rendering a *nulla bona* return. The second respondent further submits that warrant of execution was not personally served upon him.

7. The second respondent further submits the joint estate has more than assets of R 195 million an amount way more than the judgment debt. In this regard, a statement filed by an External Auditor is submitted. The hearing of the application is for the respondents to show cause why the provisional order should not be made final. I have found that it is in the interests of administration of justice to grant condonation for the filling of the second respondent's supplementary affidavit.

APPLICABLE LEGISLATION

8. Section 8(b) of the Insolvency Act, 24 of 1936, (the "Act") reads as follows:

"A debtor commits an act of insolvency – if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment".

9. In terms of section 8(b) of the Act two separate and independent acts of insolvency are made. The first occurs where the debtor is served with a writ by the execution officer and the debtor fails to satisfy the judgment debt or to indicate disposable property, sufficient for that purpose. The second is where the execution officer is unable to serve the writ upon the debtor personally and the execution officer is unable to find sufficient disposable property to satisfy the judgment[1]

10. Section 12 (1)(c) of the Act provides that when a final sequestration order is sought, a court must be satisfied that there is: *"...reason to believe that the sequestration will be to the advantage of creditors."*

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[1] 1 See Meskin, page 2-6(7)

ARGUMENTS AND ANALYSIS

11. The essence of the respondents' case is that in the event the sheriff had approached the second respondent the second respondent would had pointed assets. Secondly the first respondent is a lay person and French speaking. Thus, she did not understand what was asked of her by the Sheriff. Consequently, when she gave the answer that she did not have money and did not own immovable property, she simply had no appreciation of the meaning of the statements she made.

12. It was further submitted by Counsel for the respondents that the sheriff asked Mrs Katompa, a legally loaded question. She could not answer because she is a lay person. This refers to when the sheriff wanted find out whether she could point any assets to satisfy the debt. This is the same allegedly lay person who entered into a legal transaction by signing a surety agreement in English. The court is persuaded to believe that an astute businesswoman in the caliber of Mrs Katompa is an ordinary housewife who supposedly believe that all the assets are owned by her husband according to the Counsel for the respondents. This averment is not even in Mrs Katompa's affidavit. The court cannot accept this contention.

13. As to the question of solvency of the respondents' estate, the respondents submit that their joint estate is solvent because the amount of judgment debt is far less than the value of the assets of the joint estate, which currently stands at R195 Million. The amount of R195million does not include the properties in South Africa. The respondents are missing the point. The applicants are not relying on actual insolvency but on an act of insolvency evidenced by the *nulla bona* return. A return already

found good in relation to the granting of the provisional order. At paragraph 26 of the supplementary affidavit the second respondent states:

"The Honourable Court is requested to receive the Supplementary Affidavit. The reception of the affidavit is occasioned by the dismissal by His Lordship Mr Justice Baqwa of the point in limine that a nulla bona return should also have been obtained against myself."

14. As indicated in paragraph 7 above the supplementary affidavit had been allowed on the basis of proper administration of justice. This is not a court of rescission; therefore, the issue of service of the writ giving rise to a *nulla bona* return has been decided. This court is concerned about whether the order of final sequestration should be granted against the joint estate of the respondents.

15. It is trite law that the best act of solvency is the payment and or satisfaction of the judgment debt. It is submitted the first respondent is in the process of rescinding the judgment upon which the warrant is founded. The reason proffered for the delay is the alleged hindrance due to regulations that are aimed at managing the spread of Covid 19 pandemic. The judgment allegedly to be rescinded was granted on 19 September 2019 and it is common cause that the country was placed on strict lockdown on 26 March 2020.

16. At the date of hearing this application for final sequestration Counsel for the respondents submitted that nothing yet had been done to rescind the judgment. Furthermore, the Covid 19 Directives issued by the Chief Justice on April 2020 gave a clear guidance pertaining to the functioning of the courts. In fact, the challenge of this application by the respondents is proof that Courts had never stopped functioning, at best they are functioning well.

17. In *Metje & Ziegler Ltd v Carstens* 10 1959 (4) SA 434 (SWA) at 435A, Hall JP stated that the commission of an act of insolvency by a debtor is the most important factor in a decision as to whether or not his estate should be sequestrated, and that it places the applicant for sequestration in a much stronger position than a mere general allegation of insolvency does. The learned judge further held that if the respondent in sequestration proceedings can show on a balance of probabilities that it is not for the benefit of creditors to sequestrate his estate because he is actually solvent, and he can give some reasonable explanation as to how it came about that he committed the act of insolvency and is thus able to exonerate himself for committing it, then the Court may well exercise its discretion in his favour. In the present matter the respondents did not even touch on the legal element of benefit to the creditors but for echoing their riches.

18. In Millward v Glaser 1950(3) SA page 553-554 at paragraph H Roper J quoting from De Waard v. Andrew &Thienhaus, Ltd (1907, T.S 727) stated the following:

> *"The discretion of the Court is however not to be exercised lightly, and where an act of insolvency has been proved the onus upon the debtor who wishes to avoid sequestration is a heavy one..... where the petitioning creditor has proved an act of insolvency and reason to believe that sequestration will be to the advantage of the creditors; "very special considerations "are necessary to disentitle him to his order."*

19. The question that must be answered then is whether the respondents have made a case that would sway this court to exercise its discretion

in their favour and deny the creditor the final order of sequestration. The case made by the respondents rest entirely on what is said to be the first respondent's challenge with understanding English. For one, the first respondent is said to be conducting business in South Africa, a country where business language is English, amongst others. I find it difficult to accept the respondents' explanation for committing an act of insolvency.

CONCLUSION

20. I find the respondents' reasons wholly inadequate to deny the creditor the final order in the circumstances of this case. There are no special considerations that are necessary to disentitle the applicant to its order. I am persuaded that granting the final sequestration order will be to the advantage of the general body of creditors.

21. In the exercise of my discretion, the application to grant final sequestrate of the estate of the respondents is granted.

ORDER

In the result the following order is made;

1. The Rule nisi granted on 21 May 2021 is confirmed.
2. The application for the final order for sequestration of the first and the second respondent's estate succeeds with costs.

N.P. MALI
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:	Adv AJ Schoeman
Instructed by:	Snyman De Jager Attorneys
For the Respondents:	Adv SS Cohen
Instructed by:	Thomson Wilks Ink
Date of Hearing:	05 August 2021
Date of Judgement:	05 November 2021