REPORTABLE COVERSHEET

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: 25477/2010

In the matter between:

ITZECK INCORPORATED Applicant
(Registration No: 2000/025619/21)

and

MARTIN SCHULZ Respondent

Identity No : Unknown
Born on : Unknown
Marital status: Married to Cathrine Schultz I.D. No.

Judgment by:	N Saba, AJ
For the Applicant:	Adv. T Smit
Instructed by:	Itzeck Incorporated
For the First Respondent:	Adv. D van Reenen
Instructed by:	Scheibert & Associates
Date(s) of Hearing:	08 June 2011
Judgment delivered on:	25 August 2011

REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 25477/10

In the matter between:

ITTZECK INCORPORATED Applicant

and

MARTIN SCHULZ Respondent

JUDGMENT: THURSDAY, 25 AUGUST 2011

SABA, AJ

[1] This is an application for a provisional sequestration of the respondent on the ground that he has committed an act of insolvency as defined in section 8(b) of the Insolvency Act 24 of 1936 as amended ("the Act"). Section 8 (b) reads:

> *"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".*

[2] The following is a brief summary of the grounds upon which the respondent opposes this application:

(a) The debt which is the subject matter of this application was paid in full on 8 December 2010, therefore, the applicant is no longer a creditor of the respondent and does not have *locus standi* to bring this application.

(b) Having him sequestrated would not benefit the creditors as he does not have any creditors.

(c) The return of service by the Sheriff is not one of *nulla bona*

[3] The facts giving rise to this application are briefly as follows: On 3 June 2009 the applicant obtained judgment against the respondent in Cape Town Magistrate's Court for an amount of R3, 830-97, interest

thereon at 15.5% from 25 March 2008 and costs (since taxed at R7, 095.08). On 17 June 2010 the applicant issued a warrant of execution in the amount of R12, 528.99 against the movable property of the respondent. The Sheriff was instructed to execute the writ against the movable property of the respondent. On 15 September 2010 the Sheriff served the warrant of execution at the address located by a tracing agent. The Sheriff's return reads as follows:

"Return in accordance with the provisions of the Magistrate's Court Act 32 of 1944, as amended

On this 15th day of September 2010 at 10:50 I served the Warrant of Execution against Property in this matter upon MARTIN SCHULTZ personally at SUITE 503 STUDIOS, 53 ROSE STREET, CAPE TOWN by handing to the abovementioned a copy thereof after explaining the nature and exigency of the said process, RULE 9 (3) (a) / RULE 64 (3). Further it is hereby certified that the amount of 12528.99 in satisfaction of this warrant has been demanded from MARTIN SCHULTZ.

However, HE informed me that HE has no money or negotiable property inter alia, wherewith to satisfy the said warrant or a portion thereof. Except property exempted by law in terms of Section 67 of Act 32 of 1944, as amended, no movable property/disposable property or assets were either pointed out, or could be found by me after a diligent search and enquiry at the given address. Therefore my return is one of NULLA BONA.
It is hereby further certified that MARTIN SCHULTZ has been requested in terms of section 66 (8) to declare whether HE has any immovable property which is executable on which the following answer had been furnished: "DEFENDANT OWNS NO IMMOVABLE PROPERTY< DEFENDANT OWNS PROPERTY AND ASSETS IN KENYA< NGOVE ROAD< SASSON CRESCENT< MALINDE< GERMAN CITIZEN ID PASSPORT NUMBER: C48868HRT, Tel: 0827804339 UNEMPLOYED-RETIRED."

[4] It is not in dispute that after numerous attempts by the respondent to settle the debt, the respondent transferred a sum of R12, 528, 99 into the applicant's bank account on 8 December 2010. This was after the applicant had brought this application for the provisional sequestration of the respondent but before the hearing of the application.

[5] In his opposing affidavit the respondent does not dispute the contents of the Sheriffs return but contends that it is not one of *nulla bona.* In **S *v Van Vuuren v Jansen 1977 (3) SA 1062*** it was stated that a debtor has an onus to show by the clearest and most satisfactory evidence that the return was impeachable. The respondent further contends, in his opposing affidavit, that the Sheriff did not inform him what constitutes 'immovable property' and he thought the word 'immovable property' relates to residential or commercial property. That had he been informed clearly what the word 'immovable property' entails, he would have disclosed that he has parking bays which are not bonded and are in Cape Town. In support of this averment, he attached a copy of a deeds search ('MS2'), showing a new transfer of properties 1 to 10 referred to in the document as 'exclusive use area'. This document was printed on 19 February 2010. Counsel for the applicant argued that this document should be disregarded as it is not an updated document and as such; no one can confirm that the respondent still owns the said parking bays. I agree with counsel for the applicant that I cannot attach any value to this document ('MS2') because between February 2010 and the date this application was launched, the respondent might have disposed of the parking bays mentioned therein. In my view 'MS2' does not prove the facts it seeks to establish.

[6] I am also not persuaded by the respondents' contention that he was not informed what 'immovable property' means. Had the respondent wanted to inform the Sheriff that he has parking bays which are not bonded in Cape Town, he could have done so even if he did not understand the meaning of the words 'immovable property'. In my view, the legal consequence of the facts mentioned in the Sheriff's return is one of *nulla bona.*

[7] Counsel for the respondent submitted that the applicant lacks *locus standi* to bring this application because payment of the debt was made on 8 December 2010. In support of this submission, the counsel referred to the case of ***Ex Parte Bruce 1956 (1) SA 482.*** This case is authority for the proposition that the petitioner loses his status as the creditor if he accepts the payment made before the final order is granted. Counsel for the applicant argued that ***Ex parte Bruce*** mentioned supra is distinguishable from the present matter as in that matter there was no *nulla bona* return and the amount paid was accepted by the applicant, unlike in this present matter where the money has not been accepted. In my view at the time of bringing this application, applicant had *locus standi* to do so because payment had not been made. The question is whether the applicant can still persist with the application after payment had been made.

[8] I turn now to deal with the contention regarding the effect the payment made by the respondent subsequent to this launch of this application has, as well as the *locus standi* of the applicant as a creditor.

[9] Counsel for the applicant argued that the applicant did not accept the money transferred to the applicant's trust account but it merely retained it pending the outcome of the sequestration application. In response thereto Counsel for the respondent argued that the basis upon which applicant kept the money was not communicated to him and as far as he was concerned, he was entitled to take the position that the money was accepted by the applicant. In this regard, it is appropriate to refer to what Miller JA said regarding 'silence as acceptance' in ***McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A) at 10D- G:***

> *"I accept that 'quiescence is not necessarily acquiescence' (see Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such a party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the*

more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion".

Having regard to the principle enunciated in this case, I fully agree with the submission made by the counsel for the respondent that the applicant should have returned the money to the respondent and clearly stated that it was not accepting it. By keeping quiet, applicant gave an impression that the payment was accepted. The submission by Counsel for the applicant that the respondent's tendering of payment indicated that he preferred one creditor above the others is rejected because it has no factual basis.

[10] Counsel for the respondent also referred me to a passage in ***Hammel v Radiocity Contact Centre CC (13778/2008) [2008] ZAWCHC 76*** *(12 December 2006,) a* judgment of Dlodlo J of this division, where the following was stated:

"/ agree with Mr Miller that upon receipt of the payment which constituted the reason for the application, the applicant had three (3) choices open to him, namely: Firstly, the applicant could either have persisted with the application for purposes of recovering the costs it had incurred in bringing the application. In this category, the applicant's principal argument would have been that despite having received payment after the launching of the application, he was nevertheless justified in launching the application and was therefore entitled to his costs. Secondly, the applicant could tender to withdraw the application on the basis that each party pays their own legal costs incurred up to that time. Thirdly and lastly, the applicant could have tendered to withdraw the application on the basis that he pays the respondent's costs incurred up to that time".

I fully endorse the sentiments of Dlodlo J and in the circumstances I am of view that the choices mentioned above are the choices that were open to the applicant in the present matter after the payment of the debt in full by the respondent.

[11] ***Section 10*** of the Act reads as follows: — If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie------*

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated,

It **may** make an order sequestrating the estate of the debtor provisionally.

In ***Julie Whyte Dresses (Pty) Ltd v Whitehead*** (3) SA 218 (D) at 219A-B, Muller J said the following:

"It is clear that section 10 of the Insolvency Act vests the Court with a discretion to be exercised judicially upon a consideration of all the facts and circumstances of the case. In proper

circumstances the Court may refuse to make a provisional sequestration order, although all the requirements of section 10 have been prima facie established by the petitioner. This must be so in view of the serious consequences that flow from the making of a provisional sequestration order".

In my view, the present matter is a kind of matter that calls for the exercise of discretion in favour of the respondent.

[12] To sum up, I am not satisfied that after receiving payment, the applicant retained his status as a creditor of the respondent. I also reject the contention by the applicant that he did not accept the payment which was made by the respondent. The basis upon which the applicant dealt with the payment was never communicated to the respondent and in my view the respondent was entitled to take the position that it was no longer indebted to the applicant.

[13] In the result, I make the following order:

(1) The application for a provisional sequestration order against the respondent is dismissed;

(2) Respondent is to pay the costs of this application up to the date of payment (which is 8 December 2010);

(3) Applicant is to pay the respondent's costs of opposing this application from 9 December 2010 to date.

N SABA

Acting Judge of the High Court