IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 5797/17

In the matter between:

TREIF DISTRIBUTORS (PTY) LTD	
t/a SACKS BUTCHERY	Applicant
and	
LOUIS LE ROUX BENADE	First Respondent
JACOBA SOPHIA BENADE	Second Respondent

JUDGMENT DELIVERED ON FRIDAY 20 APRIL 2018

GAMBLE, J:

INTRODUCTION

[1] The first respondent, an attorney who previously practiced in Worcester, left the profession a number of years ago to run a number of restaurants through various corporate entities. The applicant butchery supplied meat to certain of those restaurants from time to time. One of the companies utilised by the first respondent in this business venture was Coral Reef Hospitality (Pty) Ltd (*"Coral Reef"*).

[2] During 2009 Coral Reef experienced cash flow problems and the butchery became concerned about its creditworthiness. It accordingly required of the first respondent that he execute an acknowledgement of debt ("*an AOD"*) on behalf of Coral Reef in favour of the butchery. The first respondent begrudgingly obliged and signed the necessary documentation on 16 October 2009. Thereafter Coral Reef was wound up and the butchery sought to prove a claim in liquidation. Eventually, in January 2015, it recovered an amount of R10 213,89, which left a substantial balance due under the AOD.

[3] In 2010 the butchery issued summons out of the Heidelberg Magistrates' Court against the first respondent for payment of his obligations under the AOD. That action was resolutely defended but ultimately the butchery's claim was upheld by the magistrate in the amount of R180 486,29 plus interest and costs. Undeterred, the first respondent soldiered on. He noted an appeal to this court which was dismissed on 25 April 2016 and thereafter sought leave to appeal further from the Supreme Court of Appeal, which application was dismissed on the turn on 15 August 2016. Accordingly, after more than 6 years of litigation aimed at avoiding his contractual liabilities to the butchery, the first respondent was liable to it for the payment of capital, interest and the various costs orders incurred in three courts.

[4] Bills of costs were prepared in respect of the litigation in all three courts and after taxation the total thereof amounted to R120 408,81. Thereupon, the applicant issued various writs of execution out of the Heidelberg Magistrates' Court for service on the first respondent at his residence in nearby Witsand, a holiday resort at the mouth of the Breede River, where he and his wife, the second respondent, have

retired[1]. They live in a house owned by the Sonja Benade Trust ("*the Trust"*) an entity which bears the name of the second respondent.

[5] I shall return to the steps taken by the Sheriff for Riversdale (and who covers the Heidelberg district) later. Suffice it to mention at this stage that returns of *nulla bona* were issued by the Sheriff. Armed with such returns of service, the applicant approached this court on 30 March 2017 for a provisional order of sequestration of the first respondent; the second respondent (to whom the first respondent is married out of community of property) having been cited nominally by virtue of her marital status.

THE SEQUESTRATION APPLICATION

[6] In its founding papers the applicant, relying on the *nulla bona* returns of service, alleged an act of insolvency on the part of the first respondent in terms of s8(b) of the Insolvency Act, 24 of 1936. The first respondent filed an opposing affidavit (termed a "Replying Affidavit") in which a plethora of technical points was raised. The matter eventually came before Burger AJ on 22 June 2017 who refused a last-minute application for a postponement and issued a provisional order of sequestration returnable on 2 August 2017.

[7] In his judgment, Burger AJ noted that the only issue before him was whether there would be any advantage to creditors in the event of sequestration taking place. The Learned Acting Judge was satisfied that the applicant had established a *prima facie* case and granted the provisional order on this basis.

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[1] The first respondent is now 84 years old and his wife 64.

[8] On 2nd August 2017, the matter came before Papier AJ on the return day of the provisional order when the first respondent put up a further answering affidavit in which more points were raised. In the result the matter was postponed for hearing on the semi-urgent roll on 7 November 2017, with the parties being given leave to file supplementary affidavits and with further directions as to the filing of heads of argument. In the result the matter did not proceed on that day for reasons which are not material at this stage and eventually came before this court on 8 March 2018.

[9] On that day the applicant was represented by Adv D. Goldberg and the first respondent by Adv C.W.Kruger. The second respondent did not participate in the proceedings given that no relief was sought against her. The Court is indebted to counsel for their helpful heads of argument and submissions at the hearing.

[10] Notwithstanding a host of points, both technical and otherwise, taken in the opposing papers by the first respondent, Mr. Kruger focused his argument solely on the issue of whether a final order of sequestration would be in the interests of the general body of creditors. Mr. Goldberg joined issue on this point and it is to that point which I now turn.

INTEREST TO CREDITORS

[11] Mr. Goldberg mounted his argument on the basis of the well-known decision in *Meskin* [2] in which Roper J set out the position thus;

> *"…. The facts before the Court must satisfy it that there is a reasonable prospect - not necessarily likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient."*

[12] In *Hawker Air* [3] Cameron JA confirmed that approach :

> "*[29] The question is whether the Commissioner has established that sequestration would render any benefit to creditors, given that the partnership is now defunct. The answer seems to lie in those decisions that have held that a Court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The Court need be satisfied only that there is reason to believe - not necessarily a likelihood, but a prospect not too remote - that as a result of the investigation and enquiry assets might be unearthed that will benefit creditors."*

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[2] Meskin & Co v Friedman 1948(2) SA 555 (W) at 559

[3] Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA) at [29]

[13] Mr. Goldberg submitted that the facts establish that the extent of the first respondent's liability to the butchery is of the order of R 481 000 being the sum of the capital ordered to be paid by the Magistrate, together with interest thereon and the various taxed bills of costs. I did not understand Mr. Kruger to take issue with this calculation. In addition there was said to be a credit card debt of R18691. In the result, said Mr. Goldberg, if the applicant could show that there assets of the order of R50 000 which could be found through an insolvency enquiry, this would render a dividend of about 10c in the Rand which would constitute sufficient interest for the first respondent's creditors. In the answering affidavit the first respondent mentions the applicant as his *"only statutorily relevant creditor"* (whatever that phrase may mean) and points to SARS and ABSA Bank (in respect of the credit card debt) as *"two other creditors".*

[14] The only assets of any value found at the first respondent's home were said to be 2 motor vehicles - a Mercedes-Benz sedan and a Chrysler Grand Cherokee SUV. If the combined value of these vehicles was of the order of R 50,000, a dividend of 10c in the Rand could be attained, said Mr. Goldberg.[4] But it appears as if the vehicles belong to the Trust and, in any event, the first respondent's ownership of these vehicles is inconsistent with the *nulla bona* return. Accordingly, while Burger AJ considered that these assets may afford some benefit to creditors, this now appears no longer to be the case.

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[4] In his supplementary answering affidavit the first respondent suggests that the Mercedes is worth about R85 000 and the Chrysler about R40 000.

[15] The contents of the *nulla bona* return are confirmed in the answering affidavit by the first respondent who says that he has no assets of any consequence. He goes on to claim that his sequestration will not be of any benefit to the applicant. In any event, says the first respondent, the butchery should invoke the provisions of s65A(1) of the Magistrates' Court Act, 32 of 1944 and conduct an enquiry in the local debtors' court. But, said Mr. Goldberg, there is the Witsand house owned by the Trust. And, while there is no attack by the applicant on the way in which the Trust has been run, or that it is the *alter ego* of the first respondent, counsel suggested that there may be an impeachable transaction between the first respondent and the Trust which warrants investigation and which may thereby produce an advantage for the applicant. The provisions of s65A do not afford a creditor the opportunity to attack an impeachable transaction and it is therefore claimed that this procedure does not present the applicant creditor with any realistic prospect of financial reward.

POTENTIALLY IMPEACHABLE TRANSACTION

[16] The facts before the court show that the first respondent previously owned a property in Worcester which was sold in 2015 for R640 000. This occurred while he was in the midst of the litigation relating to the AOD but it is not in dispute that it was an arm's length transaction. The net proceeds of that transaction, says the first respondent, amounted to R340 207,28. While it is common cause that part of this amount was paid into the bank account of the Trust, the first respondent does not disclose what the amount in fact was. But, as Mr. Goldberg pointed out, the provisions of s 26(1)(b) of the Insolvency Act are applicable to that transaction.

> ***"S26 Disposition without value***
>
> *(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent -*
>
> *(a)…..*
>
> *(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:*
>
> *Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."*

Counsel further submitted that because the alleged payment to the Trust (at the earliest at the end of 2015[5]) falls within the two-year period contemplated under that section[6], the first respondent has the onus of establishing that the transaction is not impeachable.

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[5] A bank document attached to the answering affidavit demonstrates that an electronic funds transfer in the sum of R340 207,28 was made by the conveyancing attorneys to the first respondent on 15 December 2015. The payment by him to the Trust accordingly post-dates that transaction.

[6] The sequestration application was launched on 30 March 2017.

[17] At this stage the first respondent has not set out a legal basis for the payment to the Trust. He certainly does not suggest that it was in settlement of an *extant* liability. Rather it appears to have been a neatly "ring-fenced" sum of money to provide a source for the respondents' future living expenses.[7] Whether that amount has now been used up is neither here nor there. If the applicant can establish through an insolvency enquiry that the transaction was impeachable, the Trust will be required to repay the amount in question to the first respondent's trustee. And that, says counsel for the butchery, is where the potential advantage to creditors lies. For example, the Trust could sell the vehicles or dispose of equity in the house to settle any liability found to exist under s26.

[18] In the circumstances I am satisfied that there is a reasonable prospect, (and one which is certainly not too remote) that the sequestration of the first respondent could lead to an enquiry that might establish sufficient assets to settle the applicant's claim, at least a part thereof. Accordingly, in the exercise of my discretion I consider that it is appropriate to grant a final order of sequestration in this matter.

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[7] The first respondent says in the initial answering affidavit that "*(t)his amount became a financial life-line for myself and my two sons who were living and working with me, from our home office; and sustained many of my family's immediate expenses, including my wife's, and Louis Le Roux Benade Attorneys' (as my firm was registered then) overheads; including legal fees and other business expenses, in the ordinary course of business."* (The first respondent had recommenced his legal practice which he was running from home.)

THE NULLA BONA RETURNS OF SERVICE

[19] In his answering affidavit of 11 May 2017 the first respondent took issue with the circumstances under which the Sheriff served the writs of execution and filed his *nulla bona* return, claiming that –

> *"Neither, The (sic) Sheriff, Mr. Gavin Michaels, nor any of his duly authorised representative/s, agent/s or assistant/s have at any material time performed, what could reasonably be described as a 'diligent search', of….my wife's….home and premises..[at]..Witsand, which constitutes her, my and Louis Jnr's primary residence; as he and his assistant have only ever been in one room of the house, namely the open plan living-room on the first story level…"*

The first respondent went on to allege that the return was impeachable and could not be relied upon by the applicant for purposes of sequestration.

[20] As part of the applicant's replying papers filed on 31 May 2017 an affidavit deposed to by the said Sheriff, Mr. Michaels, was attached. This had been drafted by the applicant's attorney, Mr. Kudo, after telephonic discussions with the Sheriff and faxed to him for signature. In the affidavit Mr. Michaels positively asserted and attested to the circumstances surrounding service of the writ by him at the first respondent's home in Witsand.

[21] The first respondent filed a supplementary answering affidavit on 15 June 2017. In it he dealt, inter alia, with the affidavit by Mr. Michaels and pointed out

that he was concerned with the accuracy thereof. The first respondent related how he and his son had visited Mr. Michaels at his offices in Riversdale on 9 June 2017 to establish whether Mr. Michaels was actually the person who had visited his house in Witsand. A discussion ensued during which Mr. Michaels confessed to the first respondent that it was not he but *"his assistant, Claradene, and Adrian or Norman (who subsequently left his service) [who] had indeed attended to all the services which (sic) was alleged he had done personally."* It was said that Mr. Michaels had not properly applied his mind to the affidavit sent to him by Mr. Kudo for signature.

[22] This development elicited a response from Mr. Kudo's candidate attorney, Mr. Kushner, who explained how the initial affidavit had been prepared and sent through to Mr. Michaels for signature. Mr. Kushner went on to point out that on 9 June 2017 he received an email from Mr. Michaels in which the latter had stated that he had not personally effected service of the writs on the first respondent.

> *"Waarde Heer*
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> *Dit is moontlik dat die Beendigde (sic) Verklaring wat u aan my gestuur het moontlik misleidend mag wees aangesien ek net geteken en nie gelees het (sic) en dat my twee adjunkte wel dokumente op verweerders beteken het m.a.w die werk was korrek gedoen. Ek besef dat ek 'n bona fide fout gemaak het.*
>
> *Aangegeheg (sic) is beedigde (sic) verklarings deur my adjunkte.*
>
> *Groete*

G. Michaels"

[23] Attached to that email were affidavits by Ms. Claradene Pietersen and Mr. Adriaan Albertyn, who were both deputies to Mr. Michaels at the time. They confirmed that they were responsible for service of various writs on the first respondent at Witsand and described therein how they had gone about their business there on 17 January and 16 February 2017. They both stated that the first respondent had informed them on each occasion that none of the assets at the residence belonged to him and they claimed that the *nulla bona* returns relied upon by the applicant are therefore factually correct.

[24] In addition to the affidavit by Mr. Kushner the applicant also filed further affidavits by Ms. Pietersen and Mr. Albertyn, which amplified the affidavits attached to the email of Mr. Michaels. In a separate affidavit Mr. Michaels had the following to say in an endeavour to correct certain aspects of his earlier affidavit.

> *"6. As Sheriff for my jurisdiction it is my duty to be accountable and take responsibility for the actions of my deputy Sheriffs. When I deposed to my earlier affidavit I was labouring under the bona fide but mistaken belief that this duty required me to state that I had personally effected service, when in fact the service had been performed by my deputies.*
>
> *7. I have come to understand that this is not correct and since it was certainly never my intention to mislead this Honourable Court I wish to make it clear that the founding papers in this application and prior to that, the warrant of execution in respect of case number 463/2016 in the Supreme Court of*

Appeal ("the SCA Warrant") and the warrant of execution against property issued in respect of case number 212/2010 in the Magistrates' Court for the District of Heidelberg, Held at Heidelberg ("the Magistrates' Court Warrant"), were served by my head deputy Sheriff Ms. Claradene Pietersen ("Ms. Pietersen") assisted by deputy Sheriff Mr. Adriaan Albertyn ("Mr. Albertyn").

8. The events depicted by me in my earlier affidavit were relayed to me by Ms. Pietersen and confirmed by Mr. Albertyn. I verily believe them to be true and correct. Therefore, I maintain, that I, through my deputy Sheriffs acting in my stead, complied fully with my duties and the content of my returns of service are properly set out."

[25] The first respondent did not persist in argument with his attack on the *nulla bona* returns, and Mr. Kruger accepted that the first respondent is factually insolvent. That notwithstanding, it is necessary to deal with the conduct of Mr. Michaels and his deputies.

[26] The office of the Sheriff is a vital cog in the machinery of the justice system. It requires absolute honesty and integrity on the part of the officers in question whose *ipse dixit* in regard to returns of service is implicitly relied upon by the courts day in and day out.[8] The duties and functions of a Sheriff are circumscribed in the Sheriffs Act, 90 of 1986 and Chapter IV of that act specifically deals with improper conduct. In terms of s43(1)(b) thereof the making of a false return is designated as improper conduct on the part of a sheriff.

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[8] LAWSA 2nd ed Vol 25 Part 1 para 28 *et seq.*

[27] In light of the allegations made under oath by Messers Michaels and Albertyn and Ms. Pietersen in this matter, it is necessary that the matter be brought to the attention of the South African Board for Sheriffs for its consideration.

ORDER OF COURT:

A. The rule *nisi* is confirmed and there shall be a final order of sequestration against the first defendant.

B. The Registrar of this court is directed to forward a copy of this judgment to the South African Board for Sheriffs.

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GAMBLE, J