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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA**

CASE NO: 49323/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

09.05.23

In the matter between:

M B

Applicant

And

J P M

Respondent

Neutral Citation: *M B v J P M* (Case: 49323/2021) [2023] ZAGPJHC 449 (9 May 2023)

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.*

JUDGMENT

SENYATSI J:

A. INTRODUCTION

- [1] This is an opposed application for sequestration of the respondent following a *nulla bona* return of the warrant of execution. The warrant was issued because of the court order arising from divorce settlement occasioned by a settlement agreement which was made an order of court following the divorce of the parties during 1995. The applicant was never paid in accordance with the court judgment and avers that the respondent failed to provide for the parties only child as required by the judgment.

B. BACKGROUND AND FACTS

- [2] The parties were married to each other out of community of property. When they divorced during September 1995, their only child was 34 months old. The divorce settlement agreement concluded by the parties made provision for payment of maintenance and other related monetary payments to be made by the respondent to the applicant. The decree of divorce was granted incorporating the settlement agreement which was made the order of the court on the 19th of September 1995. Accordingly, the settlement agreement became a judgment.

The applicant defaulted in making payments over the period because of which a warrant of execution of the judgment by court was issued by the registrar after an affidavit was deposed to by the applicant during February 2021. The amount in the warrant was R2 154 461,81 at the time of issue by the registrar of court.

- [3] When the Sheriff served the warrant of execution on 26 April 2021, no judgment assets could be pointed out by the respondent for payment of the amount mentioned therein. It is appropriate at this stage to state that the warrant was served on the respondent at the Sheriff's office. The return of service of the warrant was *nulla bona*, meaning no assets could be pointed out by the respondent to satisfy the judgment amount. In the sheriff's return of service, the respondent states as follows: "I Mr JP M being the judgment debtor against whom the relevant judgment has been given, acknowledge that B Chambers the Deputy Sheriff explained to me the nature, and the exigency of the writ and demanded payment from me to satisfy the judgment. I informed him that I have no money or disposable property to satisfy the judgement. The consequences of signing a *nulla bona* has been explained to me and I am willing to sign this document and same to be forwarded to the instructing attorney." (my own emphasis).
- [4] It was because of the return of service of the warrant that the sequestration proceedings were launched by the applicant through a notice of motion on the grounds that the respondent committed an act of insolvency in terms of the Insolvency Act of 1936. An unsuccessful application to set aside the warrant was made by the respondent under case number 45131/2021. Judgment on the application to stay the warrant of execution was handed down by Adams J under case number 23281/1993 on 22 August 2022 in terms of which the application was dismissed and the warrant was held to be valid. What remains to be finalized is the determination of the validity of the same warrant under

case number 45131/2021, the outcome of which in my view would be academic because of the judgment by Adams J.

- [5] As a defence to the sequestration application, the respondent contends that he is not insolvent because the value of his assets exceeds his liabilities. He does so by stating in his answering affidavit, that the number of assets that he owns whose value he claims far exceeds his total liabilities. He also contends that the current application should not be adjudicated upon because of the pending application under case number 45131/2021 to set aside the warrant. The latter contention stands to be dismissed out right.

C. ISSUE FOR DETERMINATION

- [6] The issue for determination is whether the respondent is insolvent within the meaning of the Insolvency Act of 1936 and whether the application should be considered because of the alleged dispute of the claim.

D. THE LEGAL PRINCIPLES AND REASONS FOR THE JUDGMENT

Acts of Insolvency

- [7] The acts of insolvency are regulated by section 8 (b) of the Insolvency Act, No: 24 of 1936 ("the Act"), which 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 judgment found sufficient disposable property to satisfy that judgement.”

It is therefore a prerequisite for the establishment of the acts of insolvency created by section 8(b) of the Act that the judgment on which the execution is levied must have been granted against the debtor who is alleged to have committed such acts, and judgment against for instance a firm of which the debtor is the sole proprietor.¹

- [8] The provisions of section 8(b) create two separate and independent acts of insolvency: the first is where the debtor actually is served with the writ of execution by the execution officer, and the debtor fails to satisfy the judgment or to indicate to the execution officer disposable property sufficient for that purpose; the second is where the execution officer is able to serve a warrant on the debtor and the former is unable himself to find sufficient disposable property to satisfy the judgement.² both the debtor’s failure to satisfy the judgment upon the execution officer’s demand and the debtor’s failure to indicate disposable property sufficient to satisfy the judgment are essential elements of the first act of insolvency.³ In this context, a demand made of someone other than the judgment debtor is insufficient unless that other is the latest agent, authorised accordingly.⁴

¹ See *Stocks & Stocks Industrial Holdings (Pty) Ltd and Another v Roberts t/a Premier Timber & Trading* [1998]4 All SA 231(SE).

² See *Corner Shop (Pty) Ltd v Moodley* 1963 (3) SA 55 (T) at 57-59; *Dicks v Marais* 1952 (3) SA 165 (N) at 168; *Moodley v Hedley* 1963 (3) SA 453 (N) at 454.

³ See *Natalse Landboukoooperasie Bpk v Moolman* 1961 (3) SA 10 (N) at 11.

⁴ See *Rodrew (Pty) Ltd v Rossouw* 1975 (3) SA 137 (O) at 138. Boraïne et al: *Insolvency Law Service* Issue 49 at p 2-6(8)

- [9] Once it was permissible to rely on *nulla bona* return to a writ issued under a judgment such as provisional sentence.⁵ Our law recognises the defence raised in the sequestration application such as the fact that the judgment debt has been paid in full.⁶
- [10] The creditor bears the *onus* to establish either of the relevant acts of insolvency: he discharges disorders *prima facie* whether the return adequately establishes the commission of such act and there is then an *onus* on the debtor if he wishes to impeach the return.⁷ More importantly, the creditor must establish that the sequestration will be for the benefit of the general body of creditors.⁸
- [11] In the unreported case of *Investec Bank Ltd v Le Roux*⁹ the court rejected the respondent's defence in the sequestration proceedings in which the respondents' express admissions precluded him from attacking the sheriff's return and from contending that the founding affidavit had judgment established an act of insolvency.
- [12] A court may also have regard to undisputed and unexplained indications of a debtor's inability to pay his debts, or failure to make an open and honest disclosure of his financial position in this regard.¹⁰
- [13] If the court hearing the application for sequestration is satisfied that the debtor has committed an act of insolvency and that it will be to the advantage of the

⁵ See *Meskin v Amod* 1956 (3) SA 120 (N) at 122.

⁶ See *Kent v Transvaalsche* 1907 TS 765 at 770-771; 779; 781-782.

⁷ See *Sussman & Co (Pty) Ltd v Schwarzer* 1960 (3) SA 94 (O) at 96; *De Wet v Le Riche* [2000] 4 All SA 25 (T).

⁸ See section 12(1)(b) of the Act.

⁹ case no:575/2014 (GJ) (2016) ZAGPJHC 11 at paras 18-21

¹⁰ See *DP Du Plessis Prokoreurs v Van Aarde* 199- (4) SA 1333 (TPD) at 1335E-G; *Uys and Another v Du Plessis* 2001 (3) SA 250 (CPD) at 255B-G.

creditors if the estate of the debtor is sequestrated, then the court has discretion to grant either the provisional order of sequestration.¹¹

[14] As a defence to the sequestration proceedings, the respondent gave what he calls a bond of security by way of a notice to the applicant. The notice attempts to state what assets and shares will be disposed of to take care of the claim. In my view, this so-called a bond of security listing assets, does not accord with the security bond in the normal sense because it is not a security bond sound in money. Security bonds are usually issued by the financial institutions as a guarantee to pay the sum mentioned in the bond in satisfaction of a claim. Accordingly, I hold the view that the applicant was entitled to reject the notice of security bond as an adequate security to the amount stated in the writ of execution.

[15] In his defence against the sequestration proceedings, the respondent in this application also states that his assets are worth more than his liabilities. He challenges the return of service on the basis that he went to the sheriff's office when he signed off the *nulla bona* return. There is not factual or legal basis for the defence in my view. The respondent fails to take this court into his confidence by for instance challenging the application on the basis that he paid the amount claimed in the warrant of execution. It is understandable that he is not able to raise such a defence and the only inference that is drawn is that the debt remains unpaid and he has committed an act of insolvency by stating that he has no disposable assets to meet the claim.

¹¹ See section 10 of the Act.

[16] Regard should be had of the fact that when the warrant itself was issued the supporting documents thereof ran into more than 2000 pages as supporting evidence of the debt. The invitation was offered to the respondent to inspect the documents at the applicants' attorneys offices. This invitation was not taken as the respondent insisted that he wanted to inspect the documents at the applicant's residence. This in my view, is an adequate effort to challenge the basis of the amount claimed in the warrant. What is not disputed is the fact that maintenance and other monetary claims as averred by the applicant in the warrant were never paid in respect of the child of both parties in terms of the divorce judgment.

[17] Accordingly, I am satisfied the applicant has established on papers that an act of insolvency has been committed by the respondent as required by the Act. This is supported by the return of service from the sheriff. The respondent had more than adequate time to either point out his assets to the sheriff to enable the latter to execute the judgment of the court but failed to do so. He does not provide sufficient explanation on his failure to meet the payment required in the warrant. The judgment has remained unsatisfied for an entire period of 29 years. I am also satisfied that the applicant has established that it will be to the advantage of the creditors that the estate of the respondent be sequestrated.

The alleged disputed claim

[18] It is evident from the papers that the existence of the court order made during the divorce proceedings is judgment and this fact is not disputed by the respondent. The respondent does not dispute the fact that he has never paid

any amount mentioned in terms of the court order. What is challenged is the basis upon which the amount proof of which runs into more than 2000 pages is based. The dispute on the validity of the warrant has, as stated before, become an academic exercise because of the judgment by Adam J. What may be the subject of debate is the quantum of the claim which will be dealt with by the trustees of the insolvent estate at an appropriate time as part of the administration of the estate. Accordingly in my view, there is no factual or legal merit in the defences raised by the respondent in these proceedings.

[19] It follows in my considered view, therefore that the applicant has discharged the *onus* to establish that the respondent committed an act of insolvency and that it will be to the advantage of the creditors that his estate be sequestrated.

ORDER

[20] The following order is made:

- (a) The estate of the respondent is put in the final sequestration;
- (b) the cost of the application will be cost in the sequestration.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE JUDGMENT RESERVED: 7 November 2022

DATE JUDGMENT DELIVERED: 9 May 2023

APPEARANCES

Counsel for the Applicants: Adv RG Cohen

Instructed by: Glynnis Cohen Attorneys

Counsel for the Respondent: Adv I Posthumus

Instructed by: JNS Attorneys