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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 2023 – 006240

REPORTABLE: YES/ NO
OF INTEREST TO OTHER JUDGES: YES/ NO

REVISED: NO

DATE: 07 February 2023

In the *ex-parte* application of:

BENESTE DICKS N.O

1st Applicant

RASHID AHMED PATEL N.O

2nd Applicant

[In their capacity as the duly appointed trustees of Seshwahla Edward Nkadimeng (ID: [...]) & Mathukane Evah Nkadimeng (ID: [...]) MASTER'S Ref:[...]

And

SESHWAHLA EDWARD NKADIMENG

1st Respondent

(ID: [...])

MATHUKANE EVAH NKADIMENG

2nd Respondent

(ID: [...])

JUDGMENT

MOJAPELO AJ

1. This is an urgent application brought *ex-parte* by the trustees of an insolvent estate for a warrant in terms of section 69 of the Insolvency Act. The applicants, Beneste Dicks and Rashid Ahmed Patel are trustees in the insolvent estate of the respondents, Seshwahla Edward Nkadimeng and Mathukane Evah Nkadimeng. The respondents are married to each other in terms of community of property.

2. The Applicants seek an order in the following terms:

“1. That condonation be granted to the Applicants for non-compliance with the forms and service and time periods provided for in the Uniform Rules of Court and that same be dispensed with and that this application be heard and finalized as an urgent application as contemplated in Uniform Rule 6(12)(a).

2. That leave be granted to the Applicants in terms of s18(3) of the Insolvency Act, read in conjunction with s386(4) of the Companies Act to launch this application.

3. That the applicants be authorised in terms of s69 of the Insolvency Act to enter the known property(ies) & businesses of the Respondents, and search and take into possession any and all movable assets, books and documents belonging to the Respondents and remove same from the premises.

4. That in the event the Applicants are unable to make such entry without disturbance, the Applicants be authorised:

4.1 to engage the services of a locksmith and/or the South African Police Services members (SAPS) and/or a private security company and/or the Sherriff, as may be necessary, to remove any obstruction to them from entering upon the said property(ies) & businesses of the Respondents;

4.2 to thereafter enter the property(ies) & businesses of the Respondents, where necessary, with the assistance of the South African Police Services members (SAPS) and/or a private security company and/or the sheriff, as may be necessary:

4.2.1 to search for any assets, stock, property, motor vehicles, books, records or documents, computers and office furniture under the control of the Respondents;

4.2.2 to take possession of any and all assets, stock, property, motor vehicles, books, records, documents, computers and office furniture belonging to the Respondents which may be in possession of the Respondents or any other party being under its control;

4.2.3 to remove any such assets, stock, property, motor vehicles, books, records or documents, computers and office furniture so found and hand same over to the Applicants and/or their duly appointed representatives.

5. In effecting the foregoing, a search warrant in terms of s69(2) read with s69(3) of the Insolvency Act, marked as Annexure "X" attached to the Founding Affidavit be authorized by this Honourable Court.

6. The warrant shall be executed in a like manner as a warrant of search of stolen property and the person executing the warrant shall deliver any articles seized thereunder to the Applicants or its duly appointed agents.

7. The said warrant is to be executed either by with the assistance of the South African Police Services members (SAPS) and/or a private security company and/or the Sheriff of the court, as may be necessary.

8. *A copy of the application, together with a copy of the order granted in terms hereof, be served upon the Respondents simultaneously with the execution of the search and seizure warrants.*

9. *Costs of this application be paid by the insolvent estate on an attorneys and own client scale, apart from any cost of opposition which will be sought against the opposing party or person.”*

3. In part B of the notice of motion the applicants seeks a declaration that the insolvents are in contravention of sections 142(1), 142(2) and 145 of the Insolvency Act. There is no proper prayer in part A of the notice of motion to postpone part B. That defect is however insignificant in the circumstances of this matter.

4. The respondents' estate was provisionally sequestrated on 08 August 2018 and the provisional sequestration order was confirmed on 31 May 2019.

5. The first and second applicants, the trustees of the estate of the respondents, were appointed as such by the Master of the High Court on 26 January 2022.

6. It is submitted on behalf of the applicants that they are compelled by law to take possession of the assets of the company in sequestration without delay. They further state that since their appointment they have been diligent in the performance of their duties as trustees.

7. It is stated by the trustees that; *“During our investigation, it became known that the insolvent estate is the owner of luxury vehicles”*. In support of this allegation a document which appears to be have been generated by a computer searching program (SearchWorks) has been attached. The SearchWorks documents lists five (5) vehicles; and those are; a red 2009 Chevrolet, a white 2009 Hyundai and a white 2016 Ford registered in the name of the second respondent. And further a white 1999 Toyota and white 2008 Challenger registered in the name of the first respondent. This SearchWorks document appears to have been generated on 28

November 2022. It needs to be noted that on the papers there appears to have been no activity by the trustees prior to 28 November 2022.

8. The next document is an undated memorandum from a certain Rassie Erasmus who is apparently a tracer addressed the trustees. In the said memorandum it is stated as follows:

“1. Please note that I am a male asset tracer, employed as such at Umvelo Risk Management.

2. I have made contact with the insolvents in an attempt for the insolvents to amicably surrender the motor vehicles.

3. I was advised by the insolvents that they will not bring in the motor vehicle or allow me to collect the vehicles from them.

4. I will accordingly support a Court application giving effect to an order for me to collect the assets by order of Court.”

9. On the date of the hearing, it appears that the applicants’ attorneys filed through caselines a new annexure which was not part of the original application. There was no application to introduce this new annexure but due to the urgency of this matter and the fact that it is being brought *ex-parte*, I shall proceed to consider it. The new document is an e-mail by Mr. Erasmus also on 28 November 2022. The said e-mail read as follows:

“Good morning Elzeri

I have got a matter (case) from Umvelo Risk Management to uplift a 2016 Ford Ranger 2.2 TDCI LDV with Reg [...] or [...] for a sequestration matter that was handed by Icon Insolvency Practitioners for Nkadimeng SE and ME with Master’s Reference Number: [...].

We also received a letter from Icon to uplift the asset dated 15 November 2022. On 23 November 2022 I have phoned Mrs. Nkadimeng on Cell Number:[...] to arrange for the upliftment (which I thought was just a formality).

She was very aggressive from the start of the conversation, and didn't want to give me any chance to explain anything to her. She just scream that she's not my client and that she doesn't own me anything and I must contact her lawyer Maphalele and she refused to give me anymore info regarding Maphalele.

According to me she was totally irrational about the matter, and I couldn't get her to listen to me.

I was supposed to pick up the said asset from her workplace at Sekhukhune Municipality, 3 West Groblesdal.

I then called Icon to ask if they can assist in this matter.

Regards,

Rassie Erasmus"

10. Other than the contacts described herewinabove by Mr. Rassie Erasmus, there appears to be no other activity by the trustees despite filing such a lengthy affidavit. The affidavit is full of the legal conclusions and arguments but, unfortunately, no so much on facts.

11. In a nutshell, the trustees were appointed on 26 February 2022. On 28 November 2022 a computer-based search for the vehicles apparently owned by the respondents was done. On 28 November 2022 the tracer, Mr. Erasmus, contacted the second respondent who referred him to her lawyer. This application was launched on 24 January 2023 as an urgent *ex-parte* application.

12. Section 69 of the Insolvency Act provides as follows:

69 Trustee must take charge of property of estate

(1) *A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in subsection (1) of section nineteen, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.*

(2) *If the trustee has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).*

(3) *If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.*

(4) *Such a warrant shall be executed in a like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the trustee.*

13. The SCA in the matter of **Cooper v First National Bank of SA Ltd 2001 (3) SA 705 (SCA)** has stated that; “The purpose of sec 69(3) is to strengthen the hand of a trustee in carrying out the obligation to take charge of all the assets belonging to an insolvent estate which are being concealed or unlawfully withheld”.¹ The SCA however cautioned that; “Resorting to its provisions has the potential to infringe the

¹ Cooper NO (*supra*) at para 22.

rights of others in relation to both their property (at least to the extent of depriving them of something in their possession) as well as their privacy when it comes to search and seizure. In those circumstances, in my view, as a general principle, a warrant should not be issued without affording the person or persons affected, or likely to be affected (to the extent that their identities are ascertainable or reasonably ascertainable), an opportunity to be heard, unless it can be said that s 69(3) (the authorising provision) excludes that right either expressly or by necessary implication. An opportunity to be heard would require the giving of appropriate notice to the person or persons concerned.”²

14. The SCA in **Cooper NO** (*supra*) went on to differentiate between two classes of items, that is, those that are concealed and those that are otherwise unlawfully held and stated as follows:

[26] As pointed out above, s 69(3) deals with two classes of cases: items (property, books or documents) 'concealed' and items 'otherwise unlawfully withheld'. 'Conceal' means: 'To keep from the knowledge or observation of others; to put or keep out of sight or notice, to hide' (The Shorter Oxford English Dictionary vol I at 388). 'Concealed', in the context in which the word is used, connotes items which have been hidden with a view to denying their existence or preventing their recovery. When seeking to recover concealed items suspected of belonging to an insolvent estate, the giving of prior notice and affording a right to be heard would, or at least might, defeat the very object and purpose of the section. From this it must be inferred, by way of necessary inference, that the Legislature intended to exclude the giving of notice (and the concomitant right to be heard) in cases involving concealed items.

[27] In my view, the position is different, however, where the application for a warrant relates to items suspected of being 'otherwise unlawfully withheld'. These are words of wide import. They could govern situations as widely divergent as where items, though not concealed, are being surreptitiously held, or not disclosed, without any claim of right or for no legitimate reason, to items openly

² Cooper NO (*supra*) at para 22

held under a bona fide and reasonable claim of right to own or lawfully possess them as against a trustee in his capacity as such. The words also comprehend situations where continued possession of an item could prejudice the insolvent estate, as well as those where there is no danger of loss resulting to the insolvent estate from the possession of such item pending determination of any dispute concerning the rights thereto.

[28] In the situations postulated above one would need to have regard to the facts of each particular case to determine whether the matter was one where the audi principle should have application. Where the circumstances are such that the object and purpose of s 69(3) would be defeated by giving notice, or where the identity of the affected person is not known or cannot reasonably be ascertained, the giving of notice would, by necessary implication, be dispensed with. But in other instances it would not. What must, therefore, in every case be asked, and answered, is whether, having regard to the facts which were known, or must be taken to have been known, when the warrant was applied for, the Legislature must necessarily have intended that the audi principle be dispensed with. Unless the answer is an unequivocal 'yes', the audi principle must be complied with by giving notice to the affected person to enable such person to be heard. In each case, therefore, the particular circumstances will dictate whether the giving of notice is necessary or may be dispensed with.

15. In this matter it does appear that after doing a computer based search of the vehicles, the trustees then sent the tracer, Mr. Erasmus, to retrieve the vehicles from the respondents. It does appear from the correspondence by the tracer that although a contact was made with the second respondent, and she was requested to hand over the vehicle she refused and referred the tracer to her lawyer who was identified as Maphalele. The reading of the applicants' founding affidavit shows that the trustees are well aware of the location of the vehicles as they make allegations that those vehicles are sometimes driven by third parties.

16. The contact with the second respondent in relation to the retuning of the vehicles to the trustees was made in November 2022. It is a surprise that an urgent

application is only being made *ex-parte* more than two (2) months later. Ever since November 2022, the respondents were always aware that the trustees are attempting to get hold of the vehicles. The allegation therefore that there is a fear that the assets will be destroyed if the respondents are notified is therefore unsubstantiated.

17. In their affidavit the trustees states that they fear that should they give notice to the respondents of this application that the respondents will dismantle, attempt to dismantle strip, hide, or attempt to hide the asset, making it impossible for the applicants to regain possession of the asset, if at all. They go on to allege that should the respondents be served, they will willfully and deliberately cause damage to the assets, hide and conceal unknown assets, alternatively, cause damage to the assets. In the same breath the applicants states that; *"The applicants attempted to reach an amicable solution with the respondents and afforded it an opportunity assist in the matter without the court's intervention, to no avail, and has all the amicable attempts as directed to the respondent to return estate assets to the trustees been met with the utmost disregard."***SIC**

18. By the time that this matter is brought before Court it is quite clear from the applicants' version that a contact with the respondents was already made in November 2022. It is therefore without doubt that the respondents are aware of the trustees' attempt to take possession of the vehicles. The respondents have referred the applicants to their lawyers. In their own version, the trustees state that they have attempted to reach an amicable settlement with the respondents.

19. Another reason given for the *ex-parte* application is that the applicants fear that;

*"... the respondents will encumber or cause lien over the asset, making it impossible for the applicant to regain possession of the asset, diluting the value of the insolvent estates assets which may further have the cause of unnecessary litigation, which the applicants evenly herewith wish to avoid."***SIC**

20. It has been held that section 69(3) procedure was not intended to provide a means for finally determining competing claims to property which is allegedly belonging to an insolvent estate.³

21. In the matter of ***Putter v Minister of Law and Order and Another No 1988 (2) SA 259 (T)*** a Court was dealing with a person who was holding on to a vehicle which was the subject of a warrant issued in favour of a liquidator in terms of section 69 of the Insolvency Act. He laid claim to a lawful pledge over the motor vehicle concerned. The existence of this claim was known to the liquidator of the insolvent company prior to them applying for a warrant to be issued. The Court then held that under these circumstances the warrant should not have been issued without hearing the other party. The Court stated that;

Section 69(3) enjoins the magistrate to act after he has made a decision:

- (i) that some person has concealed property belonging to the insolvent estate;*
or
- (ii) that a person is holding property, belonging to the insolvent estate, unlawfully.*

It is the second finding that concerns me. If a magistrate finds that the person is holding the property lawfully he must refuse to issue the warrant. A decision by a magistrate in favour of a trustee would clearly prejudicially affect the property or the rights to such property vesting in an individual. In these circumstances the maxim audi alteram partem must be considered. ... When a magistrate is called upon to issue a writ because property is being concealed, obviously hearing the other party could frustrate the whole object of the provision. However, when a person is holding property openly and maintaining that such possession is lawful the position must be different. I balk when it is suggested that a magistrate, on the say so of a trustee, may decide a legal issue without hearing both parties and the subsequent seizure of the property leaves the absentee helpless to prevent its

³ Cooper NO (*supra*).

removal. I reject the respondent's contention that the Legislature intended to exclude the operation of the maxim when a magistrate is called upon to consider whether or not a person holds property lawfully.

22. The suggestion on behalf of the applicants that the rights of the absent insolvents will somehow be protected by filing of papers and appearing in Court on the return day is clearly at odds with the authorities mentioned above.

23. In this particular matter the trustees have identified the vehicles that they seek to take possession of. They have already made contact with the insolvents pertaining to those vehicles. The insolvent has referred, the tracer by implication the trustees, to her lawyers. She is clearly disputing the title of the trustees to take possession of those identified vehicles by referring them to her lawyer. Under the circumstances it is inappropriate for the trustees to approach Court on an *ex-parte* basis. The respondents should have been served with these papers the minute they disputed the title of the trustees to take possession of their property as early as November 2022.

24. Under the circumstances this application should be dismissed, and the applicants should be liable for the legal costs thereof. There is no opposition to the application as it was brought *ex parte*, however it should be clear that the costs of this application should not be passed on to the insolvent estate.

25. I therefore make the following order;

- a. This application is dismissed;
- b. The applicants are liable for the costs.

MM MOJAPELO AJ
07 February 2023

For Applicants: Mr Lacante
Applicants' attorneys: Lacante Attorneys