

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 3565/2018

Reportable

In the matter between:

A[...] E[...] R[...]

Applicant

and

H[...] W[....] E[....] R[....]

Respondent

JUDGMENT

MAKAULA J:

A. Introduction:

[1] This is an application for the final sequestration of the estate of the respondent by the applicant who is his ex-wife. The provisional application was granted by Mullins

AJ in his judgment dated 22 October 2019. The provisional application was opposed as is the final application before me. The grounds of opposition have not changed apart from the fact that the respondent insisted that the money in the Trust account should be accounted for, utilised to set off his maintenance debt and that he shall lay criminal charges for the misappropriation of those funds.

B. Background:

[2] The parties were married to each other and were blessed with two children who were aged three and five at the time of divorce which was granted on 18 May 2010. Incorporated in the decree of divorce was a settlement agreement the relevant terms of which were that the respondent agreed to contribute towards the maintenance of the children in the amount of R3000.00 per month per child. The applicant avers that the respondent did not comply with the order. At the time of the inception of the application, the respondent was in arrears in the amount of R360 000.00. Judgment was obtained in the aforementioned amount. Before a writ of execution (writ) was executed, attempts were made to trace the whereabouts of the respondent to no avail. The writ could not be executed because the respondent could not be found by the Sheriff. Substituted service had to be resorted to in order to serve the papers.

[3] The respondent opposes the application on the basis that he could not fulfil his maintenance obligations because he has been unemployed since October 2012 and

has no source of income. The defence raised by the respondent has been succinctly dealt with by Mullins AJ as follows:

“5 The respondent makes an attempt to raise defences to the application. He alleges that during 2014 the applicant received R250, 000.00 from a trust, of which trust the children are the beneficiaries, and therefore this amount should be set off against his maintenance of obligation. He also claims that during 2010 the applicant misappropriated R3, 500,000.00 from his former company, Renken Game (Pty) Ltd. This should also be taken into account. Finally, he submits that he has applied for a discharge of the maintenance obligation in the Maintenance Court”.

[4] I do not propose to deal with the issue raised in the oral argument before Mullins AJ about failure to file a Masters Certificate evidencing that security for costs had been filed. This issue was also raised before me. I need not deal with it because it was pertinently dealt with in the judgment by Mullins AJ.

[5] Having considered the facts and the requirements for the granting of the provisional sequestration, Mullins AJ, correctly in my view, granted the provisional order.

[6] The respondent, before me argued, that the applicant has other avenues that she could pursue to get the arrear maintenance payment other than the present application. Reliance was placed in the matter of *South African Revenue Services v Sello Julius Malema* in reported Case No 76306/2015: Gauteng Division: Pretoria, a copy was

attached. With respect I cannot see the relevance of this judgment because it concerns an application for Leave to Appeal an order made by a Judge who had since resigned. It was heard before Makgoka J, who did not deal with the merits of that case in granting the appellant leave to appeal. It has nothing to do with the merits nor the principles of law before me.

[7] The issue of the money invested in the Trust on behalf of the children was also dealt with succinctly by Mullins AJ when granting the provisional order. It would be futile for me to revisit that issue. I agree with his reasoning in this regard.

C. Analysis:

Section 12 of the Insolvency Act,¹ (the Act) states that.

[8] In order for a final sequestration order to be granted the court must be satisfied that:

- 8.1 the sequestrating creditor has established against the debtor a claim of not less than R100.00 entitling him or her to apply for the sequestration of the debtor's estate;
- 8.2 that either the debtor has committed an act of insolvency or the debtor is insolvent; and

¹ 24 of 1936.

8.3 there is reason to believe that it will be to the advantage of creditors if the debtor's estate be sequestrated².

[9] It is common cause that the onus lies with the applicant to satisfy these requirements³. The respondent owes the applicant an amount (to date) in excess of R360 000.00 in arrear maintenance. What is of further importance in this regards is that the judgment is not and has never been challenged by the respondent. The judgment therefore stands. In this regard Roper J⁴ expressed himself as follows:

"The ordinary rule, however, is that the judgment stands and must be recognised as valid until it is set aside by the Court I am obliged, therefore to regard the judgment debt as a valid one and the Applicant as having a valid claim as a judgment creditor"

The respondent does not dispute this fact. It has further not been gainsaid that the respondent is factually insolvent. He has no assets. He is not employable because of his age, standard of education and lack of skills as he states in his papers.

[10] An act of insolvency is a statutory concept which obviates the necessity of providing actual insolvency⁵. The reason behind this is that section 8 of the Act stipulates the acts which the debtor has to commit in order to be declared insolvent. Section 8(a) reads:

² See also Mars: The Law of Insolvency in South Africa 9th Edition page 134 and The law of South Africa: Joubert First Issue, Volume 11 at page 122 paragraph 140.

³ *Enter Centre Enterprise v Brogneri* 1972(1) SA 117 (C) at 121.

⁴ *Behrman v Sideris and Another* [1950] 2 All SA 226 (T) at 230.

⁵ *De Villiers NO v Maursen Properties (Pty) Ltd* 1983(4) SA 670 at 676 E and the authority cited therein.

“8 Acts of Insolvency. – A debtor commits an act of insolvency -

- (a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts”.

[11] The applicant makes the point in the founding affidavit that the respondent was advised on 22 August 2011 per letter addressed to his erstwhile attorney that he was owing an amount of R30 940.22 as at that time. Further correspondence was exchanged until March 2013, whereafter the respondent unbeknown to the applicant and the children sold all his assets. The applicant states that an attempt was made to execute a writ of execution against the property of the respondent but he was not found at the given address. Tracing agents were employed to trace the respondent and a CIPC search was conducted to no avail. The means employed by the applicant’s attorneys to locate the respondent for purposes of service, are spelt out in the application for substituted service. The respondent’s denial that he never evaded service of the papers and was not in hiding is unsubstantiated. He avers that the applicant knew his phone number and if he had been telephoned, he would have told them his address. The applicant has annexed a report from tracing agents who phoned the respondent to no avail. The report dated 22 January 2018 reflects in part:

“R[...] is hiding and we could not establish where his address is at a specific time. R[...] moves around at this moment between Ellisras, Limpopo and 42139 K[...], K[...], Eastern Cape. (This address is the address for his parents). It will be almost impossible to find R[...] at any of these addresses because they shield him these addresses. (Sic)

We made three calls to R[...] during the time of the trace and his is always making excuses which is an indication of his hiding”. (Sic)

National Tracing and Verification Services also on 12 June 2018 reported thus:

“Please note that we have satisfied all our resources and leads herein, and we have no alternative but, to render a no-trace report herein”.

[12] The Sheriff for Kirkwood 04/04/2019 served the Notice of motion by affixing a copy on the address noting that:

“No other manner of service possible after diligent search and enquiries”.

[13] A similar return of service by the Sheriff of Kirkwood dated 08/04/2019 was filed reflecting ‘no trace of the respondent’. It is apparent from the attempts made that the respondent was avoiding to be known where he was. It is only after the Notice of Motion in this matter was served that the respondent appeared, so to speak, by filing a Notice to oppose on 6 May 2019. I am satisfied that the requirements of section 8(a) of the Act were met by the applicant.

[14] Section 8(c) reads that a debtor commits an act of insolvency:

“If he makes or attempts to make any disposition of any or his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another”.

[15] The respondent, as aforesaid, does not dispute his indebtedness to the applicant. By his own admission, for reasons dealt with above, he could not and is unable to fulfil his obligation of paying maintenance for his children. The respondent in his answering affidavit makes startling admissions in regard to the sale of all his

property. The respondent states that he was unemployed as from October 2012 and could not pay maintenance.

He states as follows:

“I admit I sold my belongings, but the monies were paid into the H[...] R[...] Familie Trust. The applicant has been accessing the monies over the years, unlawfully for whatever reason. . . . Approximately 5 years after our divorce, I sold all my assets and put the monies in the H[...] R[...] Familie Trust”.

[16] Referring to such a situation, Innes CJ⁶ expressed himself as follows:

“Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him Of course; the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man’s assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, ‘I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.’ To my mind the best’ proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes”.

[17] If it can be established that the *facto probanda* exist the court has no option but to grant the order. This much was expressed in *Firststrand Bank v Evans*⁷ where Wallis J said:

⁶ *De Waardt v Andrew and Thienhaus* 1907 TS 727.

⁷ 2011 (4) SA 597 (KZN) at p 607 D –E.

“1) Once the applicant for provisional sequestration has established on a prima facie basis the requisites for such an order, the court has a discretion whether to grant the order. There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within a class of cases generally described as involving a power combined with a duty. In other words, where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court’s discretion in his or her favour.”

[18] Based on the uncontroverted evidence of the respondent, he knew two years after the divorce⁸ that he owed money for maintenance as he could not afford to pay as he was unemployed. It is needless to mention that at that stage he had realisable assets he could have disposed to meet this obligation. He continued not to pay the maintenance for five years after the divorce. Well knowing that he had a debt, he decided to sell all his assets and did not settle the maintenance debt. Certainly the disposition of all the assets prejudiced his children to whom he had an obligation to maintain from his assets. The action of disposing all his assets fell afoul of contravening section 8(c) of the Act. I shall not be drawn, for purposes of this application, to the issue involving the Trust. The mismanagement of the Trust funds is not relevant in these proceedings. There are other remedies available to deal with the issue of the Trust. I am satisfied that the applicant has on a balance of probabilities established the requirements for a final order of sequestration.

⁸ Which was granted on 18 May 2010.

[19] As a result the following order is made.

The *rule nisi* is confirmed with costs.

M MAKAULA
Judge of the High Court

Appearances:

Counsel for the Applicant:

Adv DS Bands

Instructed by:

Van Der Merwe & Associates
c/o Du Toit Attorneys

For the Respondent:

Mr Laubscher

Instructed by:

Stuart Laubscher Inc

Date heard:

13 February 2020

Date judgment delivered:

19 May 2020