

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 34145/20

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED.

22/02/23

A handwritten signature in black ink, appearing to be "JH" followed by a horizontal line.

DATE

SIGNATURE

In the matter between:

MJ BEKKER N.O

1st Applicant

G GOVENDER N.O

2nd Applicant

(In their capacities as appointed trustees in the insolvent estate
of Belinda de Witt and Dane Lee de Witt)

and

RAMA ANNANDALE & MUNONDE ATTORNEYS

Respondent

JUDGMENT

MNGQIBISA-THUSI, J

- [1] In its notice of motion, the applicants seek an order directing the first respondent to repay funds in the sum of R102,307.02 received from an insolvent joint estate and interest calculated from 11 February 2020.
- [2] The applicants are the joint trustees of the insolvent estate of Mr MD and Mrs B De Wit. On 25 March 2019 an order was granted sequestrating the joint estate of Mr and Mrs De Wit, which order has since been made final.
- [3] The applicants allege that after the joint estate of Mr and Mrs De Wit was sequestrated, Mrs paid to the respondent amounts in the total sum of R102,307.02, which funds the applicants contend belong to Mr and Mrs De Wit's sequestrated joint estate. It was submitted on behalf of the applicants that at the time of the sequestration of the joint estate, the respondent was Mrs De Wit's legal representative. Further, that the respondent is Mrs De Wit's legal representative in the De Wit's pending divorce proceedings and criminal proceedings in which Mrs De Wit is facing criminal charges laid by Loreto Convent School.

- [4] The applicant has conceded that in the event that it is found that the source of the funds paid to the respondent are from income accrued from Mrs De Wit's employment, then its application ought to fail.
- [5] On sequestration, the insolvent is divested of control over the assets of the insolvent estate and the insolvent estate vests in the Master until a trustee is appointed¹, unless the source of such assets falls within the exceptions as set out in section 23 of the Act. Further, a *concursum creditorum* is established in order to make sure that there is an equal distribution between creditors. Although dealing with the winding up of a company what was stated in *Walker v Syfret*² rightly applies to the sequestration of a person. In the *Syfret* matter (above) the court held that:

“The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order. Once that stage is reached, the court (although it can ratify a disposition made before the winding-up order no longer has the power in terms of section 341(2) to authorise a company to

¹ Section 20(1) of the Act provides that: “The effect of the sequestration of the estate of an insolvent shall be—(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him.”

² 1911 AD 141 at 166.

make a disposition of its property ... after a winding-up order (whether provisional or final) has been made, the court cannot grant an order for specific performance; for, on the making of the winding-up order, a *concursum creditorum* is established and the creditor loses his right to specific performance (the provisions of section 359 are therefore not relevant) ... The court has no power to permit a company being wound-up to make dispositions of its assets. After a winding-up order has been granted the court may validate dispositions made before the provisional winding-up order was granted, but cannot validate dispositions made after that order."

[6] It is not in dispute that the respondent did receive the claimed amounts. However, the respondent is disputing the applicants' claims mainly on the ground that the source of the impugned amounts are earnings accruing from Mrs De Wit's employment and which are excluded from the sequestrated joint estate in terms of section 23(9) of the Insolvency Act ("the Act"). Section 23(9) of the Act provides that:

"(9) Subject to the provisions of subsection (5)³ the insolvent may recover for his own benefit, the remuneration or reward for work done or for professional services rendered by or on his behalf after the sequestration of his estate." .In

³ Section 23(5) of the Act provides that: " The trustee shall be entitled to any moneys received or to be received by the insolvent in the course of his profession, occupation or other employment which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him, and if the trustee has notified the employer of the insolvent that the trustee is entitled, in terms of this subsection, to any part of the insolvent's remuneration due to him at the time of such notification, or which will become due to him thereafter, the employer shall pay over that part to the trustee.

spite of admitting receipt of the claimed amounts, it is the respondent's contention that the source of the amounts paid to it was Mrs de Wit's earnings,

[7] In its notice of motion the applicants allege that the total sum of R102,307.02 received by the respondent from Mrs De Wit is made up of the following payments:

- 7.1 R4,000.00 on 16 April 2019;
- 7.2 R10,000.00 on 20 April 2019;
- 7.3 R8,307.02 on 3 June 2019;
- 7.4 R20,000.00 on 17 July 2019; and
- 7.5 R60,000.00 on 2 October 2019.

[8] However, on the day of the hearing, it was submitted on behalf of the applicants that it has been discovered that the amount of R8,307.02 Mrs De Wit allegedly paid to the respondent on 3 June 2019 was incorrect and that the true amount paid to the respondent was R30,000.00.

[9] The applicants have, however, abandoned the claim for the amounts paid to respondent by Mrs De Wit on 16 and 20 April 2019, leaving a balance of R110,000.00.

[10] With regard to the funds paid to the respondent, the following contentions were made on behalf of the applicants. It was contended that the source of the

payments made by Mrs De Wit to the respondent on 3 June 2019 was part of proceeds from the sale of a motor vehicle which Mrs De Wit sold to a motor dealer for R125,000.00. It is the applicants' contention that the said motor vehicle is owned by the sequestrated joint estate. It was submitted that at the time the payment was made, Mrs De Wit's bank account had a balance of R118.01, which amount was insufficient to cover the payment made to the respondent.

[11] It was further submitted on behalf of the applicants that on 17 July 2019, Mrs De Wit received a tax refund and that on the day of receipt of the refund she remitted to the respondent the sum of R20,000.00. It is the applicants' contention that before the amount of the tax refund was deposited into Mrs De Wit's bank account, she had insufficient funds to cover the payment made to the respondent.

[12] Regarding the payment made to the respondent on 02 October 2019, it is the applicants' contention that the source of these funds was the sale of a café, Café on Main ("the café") on 14 September 2019, operated by and at which Mrs De Wit was employed. The applicants allege that the café was sold by Mrs De Wit to a certain Sandra Meyer, which sale was confirmed by Mrs De Wit's sister, Ms Celeste de Wet during her testimony at an insolvency inquiry conducted by the Master on 11 February 2019. Furthermore, it is the applicants' submission that from the sale of the café, Mrs De Wit received R130,000.00 and R129,498.41 on 17 September 2019 and 1 October 2019, respectively. It was contended on behalf of the applicants that from the proceeds of the sale of the café, Mrs De Wit paid the respondent the sum of R60,000.00 on 2 October 2019.

[13] In support of the above submissions, the applicants rely on the transcripts of the testimony of Mrs De Wit and Ms de Wet made under oath at the insolvency inquiry; Mrs de Wit's bank statements and documents relating to the sale of the café provided to the applicants by Mrs de Wit's attorneys of record at the time the payments were made.

[14] Inasmuch as the applicants concede that the evidence presented by Mrs de Wit and Ms De Wet at the insolvency inquiry is hearsay evidence, the applicants seek the admission of such evidence as it is relevant to the issues in this matter and that it would be in the interests of justice to admit such evidence.

[15] I do not see any reason why the evidence of the inquiry should not be admitted as correctly pointed out by the applicants, it is not only relevant but also in my view, it would be in the interests of justice to admit same.

[16] On behalf of the applicants it was submitted that the payments Mrs de Wit made to the respondent are dispositions as envisaged by section 20(2) of the Act, which provides that:

“For the purposes of subsection (1) the estate of an insolvent shall include—

- (a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment;

- (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section 23.”

[17] It was further argued on behalf of the applicants that there is no link between Mrs De Wit’s employment and the payments made to the respondent because there is no proof of what Mrs de Wit’s earnings were and whether she had the capacity to pay the amounts paid to the respondent.

[18] The respondent has raised as a point *in limine* the fact that the amount claimed by the applicants falls within the jurisdiction of the Magistrates Court and that should the applicants succeed in these proceedings, the costs granted should be costs on a Magistrates’ Court scale.

[19] In brief, on behalf of the applicants it was submitted that, even though the quantum of the relief sought falls within the jurisdiction of a Magistrates’ Court jurisdiction, the relief sought does not fall within the purview of a Magistrates Court’ jurisdiction.

[20] As correctly pointed out by counsel for the respondent, the quantum of the relief sought falls within the jurisdiction of the Magistrates Court. However, nothing prevents the applicants from pursuing its claim in the High Court provided that if the applicants are successful, the cost order will be on a Magistrates Court scale.

[21] The respondent submitted that since the applicants were aware at the time of the hearings of the inquiry that Mrs de Wit was employed and earning a salary and did not deal with this fact in their founding affidavit, the applicants should not be

allowed to deal with Mrs de Wit's employment and earnings in their replying affidavit.

[22] As appears from the founding affidavit, the applicant's contention has always been that the source of the amounts paid to the respondent were from monies which should have been channelled into the account of the insolvent joint estate as set out above, they cannot be faulted in dealing with Mrs de Wit's earnings as it only came about when raised by the respondent in his answering affidavit. I see nothing wrong in this and the applicants' submissions with regard to Mrs De Wit's earnings as dealt with in their replying affidavit are allowed.

[23] It is common cause that after the sequestration of the joint estate of Mr and Mrs De Wit, the respondent did receive the impugned payments from Mrs De Wit. What is in dispute is the source of the funds used by Mrs De Wit to pay the respondent. According to the applicants, the source of the funds used to pay the respondent were assets which formed part of the insolvent joint estate and that accordingly Mrs De Wit had no authority to transfer the funds to the respondent. On the other hand it is the respondent's contention that the source of the funds received was from earnings accrued to Mrs De Wit from her employment at the café.

[24] There is a dispute of fact as to the source of the funds Mrs De Wit used to pay the respondent. The versions of the applicants and the respondent with regard to the source of the funds are mutually destructive. The dispute has to be determined in

line with the *Plascon-Evans*⁴ principle which provides that where, in motion proceedings, factual disputes occur, final relief may only be granted if the facts averred by the applicant that have been admitted by the respondent, together with the facts alleged by the respondent, justify the order sought. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁵ the court stated that:

“[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.”

[25] The respondent's assertion that the funds received were part of the income Mrs De Wit earned from her employment does not raise a genuine dispute of fact. The respondent failed to provide proof to substantiate its claim the money it received from Mrs De Wit nor did it file a confirmatory affidavit from Mr De Wit or anyone connected with her employment as to the extent of Mrs De Wit's earnings.

[26] In view of the fact that the respondent did not disprove the allegations of the applicants as to the source of the funds Mrs De Wit paid to the respondent, I am

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E-I.

⁵ 2008 (3) SA 371 (SCA).

satisfied that the applicants have, on a balance of probabilities, proven that the source of the funds Mrs De Wit transferred to the respondent came from assets which. In terms of section 20(1) of the Act form part of the sequestrated joint estate and should be paid back to the applicants for the creditors of the sequestrated joint estate.

[27] In the result the following order is made:

1. The respondent is ordered to pay to the applicants the sum of R102, 730.00 within 30 days of service of this order.
2. The respondent to pay the costs of this application on a Magistrate's Court scale.



MNGQIBISA-THUSI J

JUDGE OF THE HIGH COURT

Date of hearing : 08 March 2022

Date of judgment : 22 February 2023

Appearances:

For Applicants: Adv MP van der Merwe SC (instructed by Couzyn Hertzog & Horak Attorneys)

For Respondent: Adv K Groenewald (instructed by Rama Annandale & Munonde Attorneys)