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

CASE NO: 11789/2019

1. REPORTABLE: YES / **NO**
2. OF INTEREST TO OTHER JUDGES: **YES** / NO
3. REVISED.
- DATE: 17 October 2023

In the matter between:

WILLOW ACRES ESTATE HOME OWNERS ASSOCIATION Applicant
[Registration Number: 2[....]9]

and

PLAATJIE MAHLOBOAGANE
(ID No: 72[....]3)

First Respondent

MODIRWADI MAVIS MAHLOBOGOANE
(ID No: 75[....]3)

Second Respondent

JUDGMENT

(The matter was heard in open court and judgment was prepared by the Judge who heard the matter and handed down electronically by uploading it to the electronic file

of the matter on Caselines and electronically circulated to the parties/their representatives by email and uploading it to Caselines. The date for handing down is deemed the date uploaded onto Caselines)

BEFORE: HOLLAND-MUTER J:

[1] There are two applications before the court; the first application by the respondents to rescind an order granted by consent between the parties and on 31 July 2019 and the second application by the applicant for the sequestration of the respondents' joint estate. There will be referred to the parties as cited in the sequestration application.

BRIEF HISTORY OF LITIGATION BETWEEN THE PARTIES:

[2] The respondents are residing in the Willow Acres complex, the complex managed by the applicant. There is a Home Owners Association ("HOA") in terms of the complex rules and the respondents are members of the HOA to pay certain monthly charges for general maintenance and upkeep of the complex within which then respondents' property is situated.

[3] It is necessary to have an overview of the litigation between the parties as far back as 2016 when the applicant issued summons against the respondents for payment of arrear levies and other charges. Default Judgment was granted on 19 May 2016 in the Magistrate's Court in the amount of R 43 922-09. The alleged outstanding amount has escalated since then to R 172 843-56, but the correctness of this amount is disputed by the respondents for various reasons.

This will be dealt with below.

[4] The amount remained unpaid and a warrant for execution was issued in the Magistrate' Court. The original warrant of execution was lost and a duplicate warrant of execution was issued. The sheriff attended to the warrant of execution on 5 October 2017 and indicated on the return of service that he left a copy thereof at the premises (a vacant stand indicated on the return) because no

other manner of service was possible. The sheriff relied upon Rule 9(3)(d) of the Magistrate's Court Rules for service upon a chosen *domicilium citandi et executandi*).

[5] The applicant relied upon this return of service in the application for the sequestration of the estates of the first and second respondents, the ground for sequestration Section 8(b) of the Insolvency Act 36 of 1944 (the "Act"). The applicant avers that the mentioned return of service constitutes an act of insolvency in terms of section 8(b) of the act.

[6] The applicant obtained a provisional sequestration order against the respondents on 22 November 2011 although the respondents filed answering affidavits on same date. A rule nisi was issued but discharged on 6 April 2022, the court granting the respondents condonation for the late filing of their answering affidavits. The applicant filed a replying affidavit on 14 April 2022 and the sequestration application and the respondents' application to rescind the settlement agreement reached earlier which was made an order of court on 31 July 2019.

[7] The matter was heard by Vermeulen AJ on 18 October 2022 (both the sequestration and rescission applications), and judgment was delivered on 26 October 2022. The rescission application was dismissed and a rule nisi was granted as part of the provisional sequestration order.

[8] The respondents served a supplementary answering affidavit for hearing when the provisional order was to be heard and leave was granted to the applicant to serve a supplementary replying affidavit. This was by agreement between the parties to have a proper ventilation of the matter. The rule nisi was extended to 28 June 2023 when the matter was heard by this court.

[9] The test for a final order is different from when compared with that of a provisional order. To obtain a provisional order the creditor must establish its entitlement to an order on a prima facie basis while for a final order the applicant must establish its case on a balance of probabilities. **Orestisolve (Pty) Ltd t/a ESSA Investments v NDTF Investments Holdings (Pty) Ltd Case No 18414/2014 Western Cape Division, judgment on 28 May 2015** par [7] and [9].

[9] In terms of section 12 of the Act, in order to succeed with a final sequestration order (or the confirmation of a rule nisi), it is trite that the court has to be satisfied on a balance of probability that:

9.1 The applicant has a liquid claim for more than R 100-00;

9.2 That the respondent committed an act of insolvency; and

9.3 That the sequestration will be to the advantage of creditors.

The court may, if satisfied, on the return date, grant a final sequestration order. **Mars, The Law of Insolvency in South Africa, Juta, 9th Edition 134.**

[10] In determining whether the creditor established a claim against the debtor, the court will peruse the applicable affidavits to determine whether certain amounts on the invoice are disputed by the respondents. In particular the recurring penalty levies seems excessive and may be out of proportion in terms of section 3 of the Conventional Penalties Act, 15 of 1962 ("CP-Act"). The act is applicable on matters of kind. **Willow Acres Home Owners Association Case no: 46739/2017 (GSJ) dd 31 October 2018.**

[11] Where facts are disputed, the court cannot determine the disputes on a balance of probabilities but must apply the **Plascon-Evans rule**. **Orestisolve supra [9].**

[12] In the matter before court there are various items disputed by the respondents. There has been reference to the CP-Act supra with regard to penalty levies which may appear excessive. There are other items disputed resulting in that it is not clear what amounts are due. The applicant in my view does not pass the first requirement.

[13] More important is the next requirement to determine whether the respondents committed an act of insolvency. The applicant relies on the provisions of section 8(b) of the act; more appropriate referred to as a *nulla bona* act. **Mars supra at p 84** explains what constitutes a *nulla bona* return; namely (i)

if the debtor has a judgment against him/her and he fails, upon the demand of the execution officer to (a) satisfy the judgment; or (b) indicate to the officer sufficient disposable property to satisfy the order; or (b) if judgment was granted against the debtor and it appears from the return made by the officer charged with the execution of the warrant that he has not found sufficient disposable property to satisfy the judgment. **Western Bank Ltd v Els 1976 (2) SA 797 TPD** what constitutes a proper *nulla bona* return to determine whether an act of insolvency in terms of sec 8(b) of the Act was committed. A similar approach is found in **Richard Goldman Finances v Elm Tree Finances 1977(2) SA 624 WLD at 628-629** with regard to disposable property and the return of service.

[14] In par 4 supra the entry made by the sheriff is set out. I could find no indication that he demanded the respondents to satisfy the warrant because he did not meet them at the place of service. The first leg supra in par [13] is not met. The sheriff further made no entry that he could find sufficient disposable property to satisfy the warrant because he conducted no search at all. He listed that the premises is a vacant stand.

[15] A sheriff should indicate the following on the return of the warrant which is unsatisfied and in which no attachment has been possible the following: (a) that he explained the nature and exigency of the warrant; (b) the person to whom he explained the nature and exigency; (c) that he demanded payment; (d) that the defendant failed to satisfy the judgment; (e) that the defendant failed, when asked to do so, to indicate sufficient disposable property to satisfy; (f) that the sheriff did not find sufficient disposable property to satisfy, despite a diligent search and enquiry. **Mars supra p 87. Absa Bank v Collier 2015(4) SA 364 WC at 366** what the sheriff should do when executing a warrant and demanding payment from a debtor.

[16] The next aspect to determine is what ***disposable property*** entails. Disposable property can be movable or immovable, and a return which mentions only one class (but not the other) would not establish that there was not sufficient disposable property. **Mars supra p 91.**

[17] Disposable property may include movable, immovable, incorporeals such as book debts etc. immovable property mortgaged cannot be regarded as

disposable property unless the mortgagee is the first applicant. It is also practice that to realise immovable property a specific court order be obtained therefore. **Mars supra p 91, Absa Bank v Collier supra at 367** what disposable property is and when execution of immovable property in terms of Rule 46 (l)(a) may take place.

[18] Having seen the return of service supra, I am of the view that the respondents did not commit any act of insolvency as required in section 8(b) of the Act.

[19] In light of the above it is not necessary to determine whether the sequestration will be to the advantage of the creditors in general.

SETTLEMENT AGREEMENT:

[20] The parties entered into a settlement agreement and this agreement was made an order of court on 31 July 2019. In so far as the agreement does not contravene the Conventional Penalty Act regarding in particular the building penalty levies, the agreement is valid. The respondents' argument that this agreement was entered into *iustus error* is not convincing. I find no ground to hold the agreement *contra bonis mores*. The agreement is valid but both parties need to adhere thereto. In particular the respondents must continue payment of concurring levies and the previous amounts. The applicant must, when levying for provided items in the home associations agreement, bear in mind the CP-Act and settlement agreement. The pending sequestration application has been dealt with and the applicant failed the test to obtain a final order.

[21] The applicant should also be reminded that sequestration procedure is not to be abused as disguised debt collection. The applicant ought to note the **Badenhorst Rule (Badenhorst v Northern Constuction Enterprises (Pty) Ltd 1956(2) SA 346, Tat 347 H-348 C**. It may amount to the abuse of court process to issue process for sequestration for a debt of R 43 922-09 or even the later calculated amount where there is a dispute as the debt. There may be some bona fide in the respondents' opposition regarding the excessive penalties and other disputed items. The untaxed legal fees, collection commission and debt

collection admin fees may be unreasonable and a reasonable dispute exists in this regard.

[22] In view of the above I am satisfied that the applicant failed to make out a case on a balance of probabilities for the court to confirm the provisional order and likewise there is not prove on a balance of probabilities doubt that the settlement agreement be rescinded.

[23] I am satisfied that the applicant has no reasonable ground to apply for the sequestration of the respondents because of the lacunas in the return of service by the sheriff regarding the warrant of execution.

ORDER:

[24] The provisional sequestration order is set aside and the rescission application by the respondents is dismissed. In view of the above and exercising my discretion, I am of the view that each party should pay his/her own costs.

J HOLLAND-MUTER
Judge of the Pretoria High Court

Heard on: 31 July 2023.

Judgment delivered on 17 October 2023

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