
IN THE HIGH COURT OF SOUTH AFRICA



**GAUTENG DIVISION, PRETORIA
REPUBLIC OF SOUTH AFRICA**

Case No: 55669/22

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
25 October 2023	
DATE	SIGNATURE

In the matter between:

ANMANI ESTATES HOME -OWNNERS ASSOCIATION

Applicant

and

SELLO ISHAMEL MABENA

First Respondent

NEO LORRAINE MABENA

Second Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 25 October 2023

JUDGMENT

BOTSI-THULARE AJ

Introduction

[1] Amani Estate Homeowners Association NPC (the applicant) seeks a final sequestration, pursuant to a provisional sequestration order granted on 10 November 2022, against Mabena SI Family Trust (the Trust). The final sequestration order is opposed by Sello Mabena (first respondent) and Neo Lorraine Mabena (second respondent) acting in their capacity as the trustees of the Mabena Trust. (the Trust will be referred to as the respondent hereinafter)

[2] This application is premised on a *nulla bona* of the warrant of execution, on the back of an unsatisfied judgment granted against the Trust in the Magistrate Court for the District of Tshwane on 16 March 2021.

[3] As it stands, rule nisi that was granted by this court on the 10 November 2022 was extended to 31 July 2023 at 10:00 or as soon thereafter as counsel may be heard on the opposed roll.

Facts

[4] Pursuant to its establishment, the applicant has been collecting levies from its members, the levies are/were used to pay for the applicant's financial contributions. On 8 October 2018 the respondents became a member of the applicant when it purchased the property and registered it in its name.

[5] The respondent is currently imposed with a levy for the property it has purchased at an amount of R2 665.00 per month. The respondent has failed to pay its contributions towards the property, and it is indebted for an amount of R91 678.67. The respondent has not paid its contribution charged by the applicant since the start of the ownership of the property.

[6] Due to the respondent's failure to pay contributions, the applicant issued summons under case no 37319/2020 against the respondent at the Magistrate Court Pretoria. The summons was duly served to the respondent on 21 January 2021 and the judgment was granted for the amount of R48,412.21 on 21 March 2021 in favour of the applicant. Notwithstanding the failure to pay their debt, the respondent also owes the applicant R100.00, which is a liquidated claim. The applicant holds no security in respect of the claim.

[7] Pursuant to the magistrate court's judgment, a warrant of execution against the property was issued and served personally to the trustees of the respondent's residential address on 30 September 2021. The Sheriff confirmed that the respondent does not have enough money nor movable property to satisfy the judgment debt and accordingly the *nulla bona* returns of service were received.

Issues for determination under the facts

[8] 8.1 Whether the respondent has committed an act of insolvency or is insolvent?

8.2 Whether the applicant has satisfied the requirements for a final sequestration?

Law applicable to the facts

Acts of Insolvency

[9] The main issue to determine in this case is whether the respondent has committed an act of insolvency? 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."

[10] This section generates two separate 'acts of insolvency', one is where the debtor fails to satisfy the judgment by pointing out the sufficient property to satisfy the judgment, the other is where the Sheriff upon return of service, has not found the property to satisfy the judgment.¹

[11] The court *Natalse Landboukoöperasiebeperk v Moolman*² held that an 'act of insolvency' is committed when a warrant of execution is served on a debtor, and when the debtor fails to satisfy the judgment by pointing out sufficient disposable property to satisfy it. However, the mere failure to point out does not constitute an 'act of insolvency', there must be a failure to indicate sufficient disposable property on demand the Sheriff. The warrant of execution is to be served personally to the debtor, and if the debtor fails to point out to satisfy the judgment, there is no need for the for the Sheriff to state in his return that there is no sufficient disposable property.³

¹ *Wilken NO and others v Reichenberg* [1998] JOL 1735 (W) at p4.

² [1961] 3 ALL SA 162 (N) at p 164.

³ Shamrock *Hockly's Insolvency Law* 36-37.

[12] Once it was permissible to rely on *nulla bona* return to a writ issued under a judgment such as provisional sentence.⁴ Our law recognises the defence raised in the sequestration application such as the fact that the judgment debt has been paid in full.⁵

[13] A creditor may have good grounds that a debtor has committed acts of insolvency,⁶ however the creditor is not in a position to prove that a debtor's liabilities have exceeded his assets since he cannot scrutinise the debtor's books. It is usually impossible for creditor to establish this fact.⁷

[14] In this final sequestration stage, the degree of proof required from the applicant is higher than that required for provisional sequestration⁸ For the latter, only a *prima facie* case need be established, whereas, for the granting of a final order, it must be shown, on a balance of probabilities, that the three *facta probanda* exist.⁹ The applicant bears the onus to establish acts of insolvency by proving whether the return of service establishes the commission of such act, there is then an *onus* on the debtor if he wishes to impeach the return.¹⁰ More importantly, the creditor must establish that the final sequestration will be for the benefit of the general body of creditors.¹¹

Application

[15] In these circumstances a *nulla bona* return of service by the sheriff indicated that the respondent has no monies or attachable movable assets inter alia wherewith to satisfy the judgment debt, no movables assets are pointed out or could be found.

⁴ *Meskin v Amod* 1956 (3) SA 120 (N) at 122.

⁵ *Kent v Transvaalsche* 1907 TS 765 at 770-771; 779; 781-782.

⁶ *Shamrock Hockly's Insolvency Law* 35.

⁷ *Ibid* 35.

⁸ *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* [1954] 2 All SA 74 (N) at p 78.

⁹ *London Estates (Pty) Ltd v Nair* [1957] 4 All SA 1 (D) at p 4.

¹⁰ *Sussman & Co (Pty) Ltd v Schwarzer* 1960 (3) SA 94 (O) at 96; *De Wet v Le Riche* [2000] 4 All SA 25 (T).

¹¹ section 12(1)(b) of the Insolvency Act.

[16] The applicant as a creditor has established a claim against the respondent exceeding R100, and there is a reason to believe that the final sequestration will be to the of the creditors of the trust.

[17] As a defence to the final sequestration, the respondent argues that, since there has been a material difference in how the persons who act in the capacity of the Trust were cited in the summons in which a judgment for the warrant of execution relies, this renders the judgment is defective, thus rendering the warrant of execution voidable and unenforceable against the Trust, and that the *nulla bona* does not constitute an act of insolvency.

[18] The applicant's argument also proceeds from a base of the insolvency relied upon. The legislature has, however provided that the act of insolvency itself as opposed to actual insolvency is a sufficient ground for the purpose of obtaining a sequestration order.

[19] Again, I am persuaded by the fact that this application is not about extinguishing the indebtedness of the respondent. It is about the sequestration of his estates to the benefit of the creditors. That is the purpose for this application.

[20] The respondent nowhere in his answering affidavit addresses his financial position. Accordingly, the Court is left entirely in the dark as the true position of his estate. It could well be that the debts of the respondents, together with the debt owed to the applicant exceed the value of the said property in which event the interests of the creditors of the estates are better protected by his sequestration.

Reasons for decision

[21] Based on the circumstances before the court and taking into account the respondent's defence, I find that respondent's bases for its argument is only on the defect of the summons in which the applicant confirmed the reasons for the citation in their submissions, in which this court accepts.

[22] The respondent did not dispute whether there are any assets to satisfy the judgment debt or not.

[23] For these reasons I find that the applicant has satisfied the requirements for a final sequestration order and the respondent has committed an act of insolvency by failing to satisfy a judgment debt.

Order

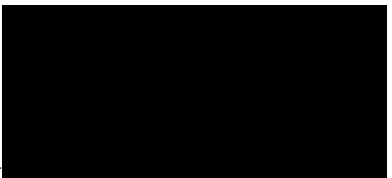
[24] It is hereby ordered that:

24.1 The estate of the Mabena SI Trust (IT1190/2016) is finally sequestrated and placed in the hands of the Master of the High Court.

24.2 The application for discharge brought by the respondents dated 22 January 2023 is dismissed

24.3 The respondent to pay the cost of the application for discharge on a scale as between attorney and client

24.4 The cost of the application be costs in the insolvent estate



MD BOTSI-THULARE AJ
ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES

Applicant

Counsel for the Applicant

Instructed by

Adv SN Davis

EW Serfontein & Associates Inc

Respondent

Counsel for the Respondent

Instructed by

Self -represented

Date of hearing:

31 July 2023

Date of Judgment:

25 October 2023