REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.

Signature [redacted]

Date 31/08/2021

CASE NO: HCAA12/2020
Court a quo Case No: 5297/2018

In the matter between:

MARIETTE NOLTE **APPELLANT**

And

LOUIS FOURIE GREEFF **RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] This is an appeal to the Full Court against the judgment and order of a single judge (Kganyago J) of this Division in terms whereof the *Court a quo* dismissed the Appellant's application for the provisional sequestration of the Respondent's estate. The appeal is with leave of the Supreme Court of Appeal.

[2] The Appellant and the Respondent were married, and their bonds of marriage were dissolved on the 26 July 2016 by order of the High Court of South Africa, Northern Cape Division, Kimberley. The parties were also partners in a veterinarian practice known as MediVet Animal Clinic and Wildlife Services ("MediVet") in Thabazimbi. MediVet owned cattle, game and property.

[3] At the divorce court a settlement agreement was made an order of Court and contained a full settlement of all patrimonial issues including the dissolution of MediVet between the parties. The Respondent acquired MediVet and all its assets and he continued practising as a veterinarian through this entity. In terms of the Court order and settlement agreement the Respondent agreed to pay the Appellant R13 000 000.00 (Thirteen Million Rand) in four instalments and as follows:

(1) First payment of R1 000 000.00 payable within 10 days from date of the divorce order;

(2) Second payment of R2 000 000.00 payable on or before 31st October 2016;

(3) Third payment of R5 000 000.00 on or before 31st October 2017; and

(4) Fourth and final payment of R5 000 000.00 on or before 31st October 2018.

[4] The Appellant transferred all her rights, title and interest in MediVet to the Respondent in compliance with the provisions of the Court order. However, the Respondent failed to comply with the terms of the Court order in that he made sporadic payments which amounted to R2 056 000.00 between the period 25 July 2016 and 21 December 2017.

In terms of the Court order, the Respondent was obliged to settle the full indebtedness by October 2018 of which the Respondent only paid the amount of R2 056 000.00.

[5] In terms of the express provisions of clause 4.3.3 of the settlement agreement, the full outstanding balance became immediately due and payable against default of payment of any single instalment. The Respondent's failure to comply with the terms of the Court order led to the launching of the application for the sequestration of his estate.

[6] On the 31st December 2016 the Appellant issued a warrant of execution against the Respondent. The Sheriff attempted to execute the warrant on the 31st January 2017 and also on the 30th March 2017. The Respondent could not satisfy the debt upon demand by the Sheriff, nor could he indicate to the Sheriff disposable property sufficient to satisfy the debt as stated on the warrant.

[7] On the 15 February 2017 and 12 May 2017 the Respondent wrote letters to the Appellant attempting to renegotiate the terms of the debt repayments. According to the Appellant, these letters and the Sheriff's returns of service constitute acts of insolvency. That resulted in the Appellant instituting an application against the Respondent on the 30 August 2018 seeking an order for the provisional sequestration of the Respondent's estate.

[8] The *Court a quo* essentially made two findings being the basis on which the application for provisional sequestration was dismissed, namely, that the Respondent disputed his indebtedness towards the Appellant on reasonable grounds and that on the facts of the case, the Respondent's estate is not factually insolvent.

[9] I proceed hereunder to set out the version of the Respondent to show or establish whether he disputes the indebtedness to the Appellant on *bona fide* and reasonable grounds.

[10] The Respondent in his answering affidavit disputes that he is indebted to the Applicant in the amount she is claiming. The Respondent stated that in terms of the settlement agreement, he was placed in possession of the assets of MediVet which included the debts and loan accounts owed to the former partnership. According to the Respondent the Appellant was indebted to the partnership in a substantial amount and that this debt passed to him and has to be set off against any amount he may be indebted to the Appellant. That at the time of divorce the livestock and game were valued in excess of R13 000 000.00 which was a common error which induced the settlement agreement. That the settlement agreement does not reflect the true intention of the parties.

[11] It is the Respondent's contention that the livestock and game were overvalued, the value of the partnership assets was incorrect and that the value of the Appellant's share was also incorrect. This resulted in him undertaking to pay for assets which were not worth R13 000 000.00 based on an incorrect reflection of the assets value.

[12] It is common cause that the Respondent has instituted an action against the Appellant in the Northern Cape Division of the High Court of South Africa, Kimberley setting aside the relevant portions of the settlement agreement on

the ground that the settlement agreement is invalid due to a common error. This action is still pending.

[13] On the issue of factual insolvency, the Respondent denies that he is insolvent and stated that his assets exceed his liabilities. He stated that his personal assets excluding MediVet are valued at R9 438 669.00 and has attached a copy of his private financial statement as at 28 February 2018. He stated that he is presently the sole owner of MediVet which has assets in the total value of R10 338 591.60 and has attached the financial statement to that effect. He stated that the current value of livestock and game is R3 186 500.00. He owns immovable property valued at R780 000.00. His close corporation of which he is the sole member, Investgil Fifteen CC, owns two properties, one valued at R980 000.00 and the other at R3 850 000.00. Valuation certificates in respect of all the aforementioned assets have been attached to his answering affidavit.

[14] The total value of his aforementioned assets amount to R28 573 760.50. According to the Respondent, none of the immovable properties or his interest in Investgil Fifteen CC were ever taken into consideration by the Appellant when the application for his sequestration was launched.

[15] The Appellant's contention that she has a liquidated claim against the Respondent in an amount of R10 944 000.00 is countered by the Respondent's

contention that the said claim is being disputed on *bona fide* and reasonable grounds.

[16] The Respondent argued that the Appellant's application for provisional sequestration of his estate is an attempt by the Appellant to unfairly and unlawfully exact payment in terms of a settlement agreement which has been made an order of court. The Respondent submitted that to the extent that the R13 000 000.00 was to be paid over a period of time, the very basis of the agreement was that the Respondent would sell livestock from time to time and pay the periodic payments from the proceeds of the sale of the livestock. According to the Respondent, the Appellant does not dispute that the undertaking to pay R13 000 000.00 over a period of time was entirely predicated on the sale of the partnership's assets to raise sufficient funds to make payment. The Respondent denies that the letters he wrote to the Appellant indicate an inability to pay, but was to bring it to the attention of the Appellant of his intention to pay from the proceeds of certain animals. With regard to the sheriff's returns dated 31st January 2017 and 30th March 2018 the Respondent argued that both returns of service are unclear and contradictory. The first return states that it was handed over to a Ms Elize Kruis, a worker in charge, whilst the second return states that the game was pointed out by a certain Mr Kobus, the farm manager. It is the Respondent's contention that the sheriff seems to have attached game that have already been sold, and

also not to be based on what was pointed out to him or found, but rather on a list that was provided to him. This Court accepts the Respondent's contention and submission to be plausible.

[17] The Respondent is of the view that some portion of the settlement agreement are invalid due to a common error between the parties. The Appellant does not share the same sentiment with the Respondent.

It would appear that even though the settlement agreement was made an order of court, the parties are not in agreement in relation to interpretation of portions of the agreement. The Respondent contends that the agreement must be interpreted to mean that in the event of events occurring after conclusion of the settlement agreement materially affecting the market value of the assets, the market value of the relevant partnership assets have to be re-assessed and appropriate adjustment be made. That will also apply in the event of material increase in the value of the assets.

[18] This Court is not in a position to resolve the aforesaid dispute between the parties. The Northern Cape Division of the High Court will be in a better position to resolve this dispute in the pending action instituted by the Respondent.

[19] The Appellant sought an order for the provisional sequestration of the Respondent. There is a duty on an applicant in provisional sequestration

proceedings to only *prima facie* show that there is a liquidated debt owing. Whilst the threshold is low for the applicant it is equally so that the threshold for resistance by the respondent is also relatively low. All the respondent needs to show is that the alleged debt is disputed on *bona fide* and reasonable grounds. In ***Kalil v Decotex (Pty) Ltd and Another***[1] the principle was explicitly set out that a respondent who disputes indebtedness in a provisional winding-up application must show on a balance of probabilities that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds. The onus on the respondent is not to show that it is not indebted to the applicant, but merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds.

[20] On the same principle in ***Hulse-Reutter v Heg Consulting Enterprises (Pty) Ltd***[2] Thring J said:

> *"I think it is important to bear in mind exactly what it is the trustees have to establish in order to resist this application with success. Apart from the fact that they dispute the applicants' claim, and do so bona fide, which is now common cause, what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be*

[1] *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980 B-C.
[2] 1998 (2) SA 208 (C) at 219 H.

brought against it by the applicants to enforce their disputed claims. They do not, in this matter, have to prove the company's defence in any such proceedings. All that they have to satisfy me of is that the grounds which they advance for their and the company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such a trial. This is not an application for summary judgment in which, in terms of the Supreme Court Rule 32 (3), a defendant who resists such an application be delivering an affidavit or affidavits must not only satisfy the court that he has a bona fide defence to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits' the material facts relied upon."

[21] An application for the liquidation of a company or sequestration of a person's estate should not be resorted to, to enforce the payment of a debt which is *bona fide* disputed by the company or the person. This is how far the "Badenhorst Rule" goes. It is so because the liquidation of a company or sequestration of an individual affects the interests of all creditors and shareholders, and thus an order for liquidation or sequestration should not lightly be granted on the application of a single creditor. Hiemstra AJ (as he then was) in ***Badenhorst v Northern Construction Enterprises (Pty) Ltd***[3] aptly put it as follows:

[3] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 at 349 D.

"Likwidasie van 'n maatskappy raak die belange van alle krediteure en aandeelhouers, en behoort nie ligtelik beveel te word op aansoek van 'n enkele krediteur nie".

[22] On the other hand, as appears from this case, where it *prima facie* appears that a respondent is indebted to an applicant in an application of this kind, the onus is on the respondent to show that such indebtedness is disputed on *bona fide* and reasonable grounds. This is not to say that the onus is on the respondent to prove that it is not indebted to the applicant – Such onus is simply to show a dispute on *bona fide* and reasonable grounds.
See ***Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd*** **1979 (1) SA 265 (T) at 269 A – B**.

[23] If there is *prima facie* a valid claim by the applicant for a winding up or sequestration so as to make it a creditor, then it is for the respondent to disturb that *prima facie* situation by showing a dispute on *bona fide* and reasonable grounds. Overall, the position is that in order to establish that the applicant has *locus standi* to bring the application, it must show, on a balance of probabilities, that it is a creditor.[4]

[4] See *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (United Dress Fabrics (Pty) Ltd and Another Intervening)* 1978 (1) SA 70 (D) at 72 D-E.

See also ***Helderberg Laboratories CC and Others v Sola Technologies (Pty) Ltd***.[5]

[24] The principle laid down in ***Kalil v Decotex (Pty) Ltd***, supra, and other authorities referred to above is also applicable in applications for sequestration like in the present case. This was laid down by the Supreme Court of Appeal in the case of ***Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; South African Revenue Services v Hawker Aviation Partnership and Others***.[6]

[25] It was submitted by Counsel for the Appellant that the Appellant had made out a proper case for the provisional sequestration of the Respondent's estate. That the Respondent failed and refused to make payment of the agreed instalments in satisfaction of the judgment debt. That in the circumstances the Respondent committed acts of insolvency as envisaged in sections 8 (b), 8 (c) and 8 (g) of the Insolvency Act 24 of 1936 in that:

25.1. The Sheriff of the High Court returned two *nulla bona* returns of service;

[5] 2008 (2) SA 627 (C).
[6] 2006 (4) SA 292 (SCA) at par 13.

25.2. The Respondent admitted in writing on more than one occasion that he cannot make payment to Appellant of the full outstanding balance or agreed instalments;

25.3. The Respondent dissipated most valuable assets without complying with the provisions of the Court order; and

25.4. The Respondent's estate is insolvent but with sufficient assets to return a substantial dividend in the Rand to the Creditors in his estate.

[26] The aforesaid submission by Appellant's Counsel is misplaced. For the Court to grant a provisional sequestration order on the basis of factual insolvency or an act of insolvency it must first be established that the Creditor has a liquidated claim which is not disputed. The facts of this case as set out hereinabove show clearly that the Appellant's debt is disputed by the Respondent on *bona fide* and reasonable grounds. The findings of the *Court a quo* in this regard cannot be faulted.

[27] The Appellant relied heavily on the "*prima facie*" requirement, seemingly an attempt to argue that at the provisional sequestration stage little is required of an applicant to show a qualifying claim. This must be put in a correct perspective. The authorities are clear that once a respondent disturbs that *prima facie* situation by showing on *bona fide* and reasonable grounds that the debt is disputed, an order for sequestration will not be granted.

[28] Counsel for the Appellant submitted that the application or action brought by the Respondent to set aside the settlement agreement is an afterthought and merely an attempt to overcome the sequestration application. I disagree. The Appellant annexed to her founding affidavit an affidavit deposed to by the Respondent as annexure "E2".

This affidavit was deposed to by the Respondent on 14 February 2017 for purposes of bringing an application to set aside portions of the settlement agreement and Court order on the basis that the settlement agreement was induced by an error common to the parties. The present application was only issued by the Appellant on 30 August 2018 (one and a half years later).

Clearly, this cannot be said to be an afterthought.

[29] In our view this matter will only finally be resolved in the action that is pending in the Northern Cape High Court. The *Court a quo* was also alive to this fact. This Court is enjoined to make a prudent decision by not granting any sequestration order under the circumstances. If the Respondent is successful in the matter pending before the Northern Cape High Court and his interpretation of the settlement agreement is found to be correct, then a grave injustice would have been done if the Respondent's estate was sequestrated.

[30] On the papers before this Court it is evident that the Appellant's claim is disputed on reasonable and *bona fide* grounds. The *Court a quo* did not err in this regard.

Consequently the appeal should fail.

[31] In the result the appeal is dismissed with costs.

[redacted]

E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

I agree

[redacted]

TC TSHIDADA
ACTING JUDGE OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

I agree

[redacted]

LGP LEDWABA
ACTING JUDGE OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	:	20 August 2021
Judgment delivered on	:	31 August 2021
For the Appellant	:	Adv M Naude
Instructed by	:	Wessels & Smith Inc c/o De Bruyn Oberholzer Attorneys
For the Respondent	:	Adv D Marais
Instructed by	:	Marinus Van Jaarsveld Attorneys c/o DDKK Attorneys