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

CASE NUMBER:25067/2020

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

REVISED

DATE 13 June 2021

In the matter between :

CLOETE MURRAY N.O.

Applicant

and

RAMPHELE, TSHEPISO DAVID

Respondent

([...])

JUDGMENT

Heard on: 1 and 4 June 2021

Judgment handed down: 13 June 2021 (by publication on CaseLines)

VAN ZYL AJ

INTRODUCTION

1. This is an application for the provisional sequestration of Mr T. D. Ramphele, an attorney and director of Ramphele Attorneys, in terms of the provisions of sections 8 and 9 of the Insolvency Act (Act 24 of 1936) (“the Act”).
2. The Applicant is Mr Cloete Murray in his capacity as curator *bonis* of Mr Norman Molubi Tloubatla following a provisional preservation order obtained by the South African Revenue Services on 29 July 2014, which was confirmed by Mali J on 31 March 2017.
3. The aforementioned preservation proceedings was followed by proceedings before Windell J brought by Mr Tloubatla, in which he was represented by the Respondent and Adv Dauds. The nature of these proceedings is not relevant, but the costs order made is. In light of conduct described by Windell J as conduct that was “*inappropriate and unbecoming of an attorney and counsel*” and “*a clear deviation from the standard expected of legal practitioners*”, Windell J ordered Mr Dauds and the Respondent to pay the costs of the application before her *de bonis propriis*, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.
4. The Respondent sought leave to appeal against Windell J’s cost order, which was refused. He then petitioned the Supreme Court of Appeal, which was also refused. Not deterred, he then applied to the Constitutional Court for relief, but was also rebuffed. In each instance a cost order was made against the Respondent in person and in favour of the Applicant.

5. As a result of these costs orders, the Respondent is indebted to the Applicant in the sum of R428,723.13, which amount is comprised of taxed legal costs awarded in favour of the Applicant against the Respondent in his personal capacity. This amount was not in dispute, nor was it in dispute that the Applicant was a creditor of the Respondent.
6. The Applicant relies on the Respondent having committed acts of insolvency as contemplated in sections 8(b), (e) and (g) of the Act, as well as the Respondent being insolvent as contemplated in section 10 of the Act. In argument this was challenged. I say in argument, because a study of the answering affidavit shows that these grounds were not materially challenged and the Respondent's opposition is directed at trying to foist the liability which personally bears onto Ramphela Attorneys. He is both wrong upon the facts and wrong in law.

THE PROCEEDINGS IN COURT

7. It is convenient to start with the proceedings before this court during the motion week when this matter was heard.
8. These proceedings were supposed to afford the Applicant a simple and speedy remedy for preserving the Respondent's estate and enforcing his claim. Attempts at derailment by the Respondent were, however, the order of the day. First the Applicant's application to supplement its papers, by the insertion of the statement that it bore no security for its claim, was resisted on grounds as far ranging as that the admission of the statement into the record

would be flogging the proverbial dead horse. The Applicant's application was granted by this court on 1 June 2021.

9. After the aforementioned order was made, the Respondent was offered the opportunity of considering his position. The initial indication was for a request for a postponement. However, after taking instructions from his client, I was informed by counsel for the Respondent that he (the Respondent) did not intend to file any supplementary affidavit to the single statement inserted by the Applicant by way of its supplementary papers. The matter then stood down until 4 June 2021. Prior to standing down, the court was also informed that the Respondent intended making a settlement offer to the Applicant before proceedings commenced again on 4 June 2021.
10. On 4 June 2021, the proceedings recommenced. Fifteen minutes before the start of proceedings a notice of leave to appeal against the order made on 1 June 2021 was served. After hearing full argument from both parties, the application for leave to appeal was dismissed with costs. The court was then informed that the Respondent had instructed his counsel to petition the Supreme Court of Appeal and I was requested to hold the proceedings in abeyance until that process had been completed. The request was refused.

THE FACTS

11. Since these are provisional proceedings, the court need merely be of the opinion that *prima facie* the necessary facts exist to provisionally sequester the Respondent. In order to do so, section 10 of the Act requires that the following requirements have to be met:

- 11.1 the Applicant has established against the debtor a liquidated claim for not less than R100;
 - 11.2 the Respondent has committed an act of insolvency, or is insolvent; and
 - 11.3 there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated.
- 12. The Applicant relies on the Respondent's insolvency as well as the following acts of insolvency contemplated in sections 8(b), 8(e) and 8(g) of the Act.
 - 13. As stated above, the Respondent did not dispute his indebtedness. The Applicant's *locus standi* as a creditor is therefore established.
 - 14. An argument was raised by counsel for the Respondent that the actual creditor of the Respondent is either SARS or the estate of the now late Tloubatla. The argument is without merit – the orders were granted in favour of the Applicant in person (albeit acting in an official capacity) and he is entitled to claim upon them.
 - 15. On 22 July 2019, the Applicant demanded payment of the bills then taxed in the amount of R396,372.84. At that stage it only excluded the taxed costs of the application to the Constitutional Court.
 - 16. In an email dated 19 August 2019, the Respondent wrote as follows:

“I was away yesterday. I have not had any undertaking from Counsel on arrangements and it means I have to make (sic) Ramphele (Pty) separately from his. At moment I am thinking an Offer in the sum of R 15 000-00 per month would be practical.

Kindly let me engage with current company creditors who are owed by government. I have a meeting with some next week and might be able to increase on the Offer.

Will appreciate if you could accept by proposal which by all accounts stretch my practice to the limits.

Sincerely

TDH Ramphele”

17. In his answering affidavit the Respondent contended that his response was on behalf of Rhampele Attorneys because of his interpretation of who was liable for the costs orders. This contention was based on the Respondent's refusal to accept that he was the person liable, not his firm. There is no room to argue away his personal liability on the facts and his persistence in seeking to advance this argument can at best be described as obtuse. In any event, in all the time since the aforementioned email, the Respondent has not paid any portion of the amounts claimed from him.

18. A warrant of execution was issued in the sum of R396,372.84 and on 24 February 2020, the Sheriff sought to execute this warrant. Certain movables were attached which were valued by the Sheriff at R2,254.84. Mrs Ramphele subsequently filed an affidavit claiming that the movables all belonged to her. On that version, the return was without any satisfaction sounding in money.

19. Section 8(b) of the Act provides:

“A debtor commits an act of insolvency—

(b) 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 not found sufficient disposable property to satisfy the judgment;

20. The requirements of section 8(b) of the Act have accordingly clearly been met. In the premises it is not necessary for me to pronounce on the other acts relied upon by the Applicant.

21. An argument was advanced by counsel for the Respondent that because the initial cost order had been granted jointly and severally with Mr Dauds, the Applicant was not entitled to proceed against the Respondent until Mr Dauds had also been claimed from. At the outset this argument overlooks that it is, at best, aimed only at the proceedings before Windell J, but can have no application to the Supreme Court of Appeal and Constitutional Court

proceedings, where Mr Dauds played no role. Be that as it may, counsel for the respondent was unable to point me to any authority that founds an argument that a creditor is not entitled to proceed against only one debtor where a claim lies jointly and severally also against another debtor. I also know of none.

22. The parties are *ad idem* that the Respondent owns a property in the North West Province. What its exact value is, is not clear at this point in time, nor does it have to be.
23. These facts satisfy the test in enunciated in Meskin & Co v Friedman 1948 (2) SA 555 (W) at 559 that there be a reasonable prospect, which is not too remote, that some pecuniary benefit will result to creditors. (See also: Stratford and Others v Investec Bank Limited and Others 2015 (3) SA 1 (CC) at [42] – [45].)

THE COURT'S DISCRETION

24. Counsel for the Respondent entreated me to exercise my discretion in favour of the Respondent by not ordering a provisional sequestration of the Respondent.
25. The argument advanced was that the provisional sequestration order may unduly violate the Respondent's constitutional rights. I could find no authority for such a proposition, nor could I find facts that show that the Respondent's constitutional rights were being impacted by what is a law of general application. But even if I am wrong in my assessment of the facts, the

Respondent is not deprived of raising this argument (buttressed by additional facts if he so chooses) on the return day of the rule.

26. Counsel for the Respondent also entreated me to not order a provisional order for sequestration because there is some indication that the property owned by the Respondent in the North West province exceeds the Applicant's claim. This too may be something that the court hearing the application for final winding-up may consider with the benefit of more facts. As it stands at present, the court has not been furnished with sufficient facts about this property to properly consider what its relevance should be (beyond showing that there is a benefit to creditors should the Respondent be provisionally sequestrated).
27. On the facts before me, I find no grounds to exercise my discretion against the granting of a provisional order sequestrating the Respondent in terms of section 10 of the Act.
28. The Applicant is accordingly entitled to a provisional sequestration order.

ORDER:

In the premises I make the following order:

1. The Respondent estate is hereby placed under provisional sequestration in the hands of the Master of the High Court, returnable on 2 August 2021.

2. The Respondent, and all other interested parties, is called upon to show cause, if any, why a final order for the sequestration of his estate should not be granted on the return date mentioned in paragraph 1 above.
3. This order is to be served upon:
 - 3.1 The Respondent;
 - 3.2 The Master of the High Court;
 - 3.3 The South African Revenue Services; and
 - 3.4 The employees of the Respondent.
4. The costs of this application are costs in the administration of the insolvent estate.

DIRK R. VAN ZYL

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

For the Applicant: Adv Z. Schoeman

Instructed by: Roestoff Attorneys

For the Respondent: Adv P. W. Makhambeni

Adv Shai

Instructed by:

Ramphele Attorneys