



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

REPUBLIC OF SOUTH AFRICA

Case Number: 15781/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 06 JULY 2021

SIGNATURE:

In the matter between:

CORNELIS WALDO MEIER

Applicant

And

MARGO MEIER

Respondent

In re:

Plaintiff

MARGO MEIER

And

CORNELIS WALDO MEIER

Defendant

Case number: 76643/2019

MARGO MEIER

Applicant

And

CORNELIS WALDO MEIER

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The parties, respectively referred to as Mr and Mrs Meier, each launched an application against the other. On 9 February 2021, an order was granted that the respective applications be heard together.

[2] In the matter under case number 15781/2015, Mr Meier claims an order for the suspension of a warrant of execution issued by Mrs Meier and in the matter under case number 76643/2019 Mrs Meier claims for the provisional sequestration of Mr Meier's estate. The subject matter of both applications is arrear maintenance.

Background

- [3] The parties were previously married to each other, which marriage was dissolved by an order of this court dated 23 May 2018.
- [4] In terms of the order the claims in respect of maintenance and accrual were postponed to 29 October 2018. The order further stipulated that, pending the finalisation of the aforesaid issues, the rule 43 order dated 31 March 2017 shall remain in force and effect.
- [5] In terms of the rule 43 order of 31 March 2017, Mr Meier had to pay maintenance to Mrs Meier in an amount of R 42 500, 00.
- [6] The parties agreed to refer the outstanding issues for arbitration. Advocate Pelser SC was appointed as arbitrator and a pre-trial meeting was held on 3 August 2018 before Mr Pelser.
- [7] Prior to the pre-trial, the parties reached an agreement in respect of the outstanding issues in dispute. In terms of the agreement the arrear maintenance payable by Mr Meier to Mrs Meier was R 300 700, 00.

[8] The arbitrator's award was made on 14 December 2018. In terms of the maintenance award, Mr Meier had to pay maintenance to Mrs Meier in the amount of R 47 000, 00.

[9] The maintenance payments had to commence on 1 January 2019.

[10] In respect of arrear maintenance, the arbitrator declared that the arrear maintenance on 15 October 2018 was an amount of R 300 700, 00 and on 14 December 2018 an amount of R 335 700, 00.

[11] Mr Meier was not satisfied with the findings of the arbitrator and launched an application for the review of the arbitration award.

[12] On 26 August 2019 the Registrar issued a warrant of execution against the assets of Mr Meier for an amount of R 564 700, 00. The affidavit in support of the request for a warrant, calculated the arrear amount as follows:

i.	Outstanding maintenance as per agreement	
ii.	October 2018	R 300 700
ii.	November 2018	R 17 500
iii.	December 2018	R 17 500
iv.	January 2019	R 17 500

v.	February 2019	R 17 500
vi.	March 2019	R 32 500
v.	April 2019	R 32 500
vi.	May 2019	R 32 500
vii	June 2019	R 32 500
viii.	July 2019	R 32 500
ix.	August 2019	R 31 500

[13] On 13 July 2020 the Maintenance Court reduced the maintenance payable in terms of the rule 43(6) order from R 42 500, 00 per month to R 16 000, 00 per month.

STAY OF EXECUTION / SETTING ASIDE OF WARRANT OF EXECUTION

[14] Mr Meier issued this application on or about 2 July 2020, in terms of which he claims the following relief:

"1. That the execution proceedings against the Applicant based on the warrant of execution dated 29 August 2019 issued under case number: 15781/15 be stayed and/or suspended pending the finalization of:

1.1 The pending review application of the arbitration award of Q Pelser SC, dated 14 December 2018; and

- 1.2 *The pending maintenance court application in the Pretoria Magistrates' Court under reference number: 1022017MAI00831;*
2. *That the warrant of execution under case number: 15781/15 be set aside;*
3. *That the Respondent be ordered to pay the costs of the application on an attorney and client scale, only in the event of opposition;"*

Point in law

- [15] The consolidated applications were heard in the opposed motion court on 20 April 2021.
- [16] Subsequent to the hearing and on 18 May 2021, the parties filed an *"Updated Joint Practice Note"* and further affidavits. The note followed upon maintenance proceedings that were held on 14 May 2021. During the proceedings the presiding Magistrate mentioned that the arbitration proceedings before Mr Pelser was in conflict with the provisions of the Arbitration Act, 42 of 1965 ("the Arbitration Act") and as a result *void ab initio*. Section 2(a) of the Arbitration Act, prohibits arbitration in respect of any matrimonial cause or any matter incidental to any such cause.
- [17] The parties stated that they were unaware of the aforesaid legal position when the matter was heard. The parties had, however subsequently considered the legal position and are *ad idem* that the matrimonial disputes between the parties could not have been resolved through arbitration.

- [18] Having had regard to the express provisions of section 2(a) of the Arbitration Act and the authorities, I agree with the parties that the arbitration proceedings before Mr Pelser are invalid. [See: *Taylor v Kurtsag NO 2015 (1) SA 362 W* at 394 to 395]

Discussion

- [19] The aforesaid finding disposes of the relief claimed in paragraph 1.1 of Mr Meier's application.

- [20] In respect of the relief claimed in paragraph 1.2, the pending maintenance court application in the Pretoria Magistrates' Court under reference number: 1022017MAI000831 referred to in this prayer, was finalised on 13 July 2020 and is no longer pending.

- [21] This leaves the relief claimed in prayer 2 for the setting aside of the warrant of execution. Mr Meier submitted that the warrant should be set aside because the *causa* underlying the issuing of the warrant of execution is in dispute. In paragraph 8.22 of his founding affidavit, he substantiates the aforesaid submission as follows:

"8.22 It is again submitted that the dispute is definite, namely:

8.22.1 That the maintenance matter is still pending in the Magistrate's Court; and

8.22.2 That the review application is also pending.

8.22.3 The calculation done is not explained as pertaining to the alleged amount due."

[22] As stated *supra* the first two “*disputes*” have fallen by the wayside and the only question to be decided is the one relating to the amount that was due when the warrant was issued.

[23] During the hearing of the matter, the affidavit accompanying the request for a warrant of execution referred to in paragraph [12] *supra*, was made available upon request of the court. Counsel for Mr Meier, Mr Davis confirmed the correctness of the amounts reflected in the affidavit filed by Mrs Meier.

[24] In the result, there is no longer a dispute in respect of the amount that was due when the warrant was issued and the basis for the setting aside of the warrant falls away.

[25] This brings an end to Mr Meier’s application.

SEQUESTRATION

[26] Section 10 of the Insolvency Act, 24 of 1936 (the Act) provides for the provisional sequestration of the estate of a debtor. The section reads as follows:

“If the court to which a petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie —

- (a) the petitioning creditor has established against the debtor a claim such as mentioned in subsection (1) of section nine; and*
- (b) the debtor has committed an act of insolvency or is insolvent; and*
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,*

it may make an order sequestrating the estate of the debtor provisionally."

[27] The arrear maintenance owed by Mr Meier to Mrs Meier satisfies the requirement in section 9(1) that an applicant must have a liquidated claim against a respondent for not less than R 100,00.

[28] Insofar as an act of insolvency is concerned, Mrs Meier relies on section 8(b) to wit:

"(b) if a court has given judgment against him and he fails, upon 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;"

[29] An act of insolvency is therefore established if the Sheriff issues a *nulla bona* return consequent upon the service of a warrant of execution on a debtor / respondent.

[30] *In casu* the sheriff's return of service reads as follows:

"That on 07 September 2019 at 07h37 at 4 A FENCHURCH STREET, MIDSTREAM being the defendant's residential address, payments of the judgment debt in the amount of R 564 700.00, my costs plus VAT was demanded from CORNELIS WALDO MEIER

wherewith to satisfy this warrant. CORNELIS WALDO MEIER declared that he has no money or disposable movable property wherewith to satisfy the said warrant. No disposable moveable assets were pointed out to me, or could after a diligent search and enquiry be found at the given address. It is further certified that Cornelis WALDO Meier was requested to declare whether he owns any immovable property which is executable, on which the following reply was furnished. No Description of property.

...

THUS MY RETURN IS ONE OF NULLA BONA SIGNED ON THE ORIGINAL DOCUMENT BY THE DEBTOR.

PLEASE NOTE MRS SUSAN NEL SAID EVERYTHING BELONGS TO HER ..., THE DEFENDANT HAS NOTHING TO ATTACH."

[31] Mr Du Preez, counsel for Mrs Meier submitted that *ex facie* the return, Mrs Meier has established a deed of insolvency as envisaged in section 8(b) of the Act.

[32] Mr Davis, however, does not agree that the return satisfies the requirements of a *nulla bona* return for purposes of section 8(b).

[33] Mr Davis, submits with reference to *Sithole N.O. v Mahlangu* (A 5011/16) [2017] ZAGPJHC 124 (18 May 2017) that the return is defective in that the sheriff only attempted to attach "*disposal property*" at the respondent's residential address whereas the applicant on her own version stated that the respondent has other "*disposal property*" namely "*numerous shares in TJ Architects (Pty) Ltd*".

- [34] The facts in the *Sithole* matter; however, differ from the facts *in casu*. Mr Sithole indicated to the deputy sheriff, when asked whether he had disposal property with which to satisfy the writ, that he had “*property elsewhere*” as well as “*banking accounts*”. The deputy sheriff did not attempt to execute the assets referred to by Mr Sithole but issued a *nulla bona* because Mr Sithole could not indicate any disposal property to satisfy the writ with at his residential address.
- [35] In the present matter and upon being asked by the sheriff whether he had any disposal property to satisfy the warrant with, Mr Meier answered “*that he has no money or disposable movable property wherewith to satisfy the said warrant*”.
- [36] Van Oosten J in the *Sithole* matter accepted that such an answer meets the requirement of an act of insolvency for purposes of section 8(b) of the Act. The learned judge stated the following at paragraph [22]:
- “The return conveys that the deceased [Mr Sithole] had no money or disposable assets at the address but property elsewhere, as well as bank accounts. In Wilken, relied upon in the court a quo, Goldstein J, having referred to an echoing the dicta in a number of decided cases but declining to follow the counter judgment of Thirion J in Nedbank Ltd v Norton 1987 (3) SA 619 (N) 612 D-F, held that the execution officer is merely required to ask the debtor to indicate sufficient property to satisfy the writ and that s 8(b) does not impose a duty on the execution officer to enquire from the debtor what property he has and where it is situated. It is for the debtor, the learned judge concluded to point out the property or indicate its whereabouts and describe it in order to demonstrate its sufficiency (Generally see Mars The Law of Insolvency in South Africa 9 Ed para 4.3).”*

- [37] In the premises and if Mr Meier had any disposal property to satisfy the warrant with, it was incumbent on him to inform the sheriff of the whereabouts of the property and to describe it in order to demonstrate its sufficiency.
- [38] This he did not do, and I am satisfied that the *nulla bona* return relied upon by the applicant satisfies the requirements of section 8(b).
- [39] The next enquiry is whether there is “*reason to believe*” that it will be to the advantage of creditors if Mr Meier’s estate is sequestrated.
- [40] In *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 558 – 559 Roper J stated:
“Sections 10 and 12 of the Insolvency Act 24 of 1936, cast upon a petitioning creditor the onus of showing, not merely that the debtor has committed an act of insolvency or is insolvent, but also that there is ‘reason to believe’ that sequestration will be to the advantage of creditors. Under s 10, which sets out the powers of the Court to which the petition for sequestration is first presented, it is only necessary that the Court shall be of the opinion that prima facie there is such ‘reason to believe’. Under s 12, which deals with the position when the rule nisi comes up for confirmation, the Court may make a final order of sequestration if it ‘is satisfied’ that there is such reason to believe. The phrase ‘reason to believe’, used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the Court must be ‘satisfied’, it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so.”

[41] Further Roper J stated:

“... the facts put before the court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient.”

[42] This was echoed in *Nedbank Ltd v Groenewald* 2013 JDR 0748 (GNP) and afterwards, this approach was also followed by the Constitutional Court in *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC).

[43] In her founding affidavit, Mrs Meier stated that the parties agreed during the arbitration hearing that Mr Meier has the following assets:

- | | | |
|--------|--|------------------|
| [43.1] | the value of the TJ Business Trust | R 950 000, 00; |
| [43.2] | Dumeier Investments | R 82 971, 00; |
| [43.3] | the value of Mr Meier's interest | |
| | in a property, 14 Glenridge | R 380 477, 20; |
| [43.4] | the value of the Meier Family | |
| | Trust (the alter ego of Mr Meier) in the | |
| | Company, TJ Architect holdings (Pty) Ltd | R 5 986 092, 70. |

[44] Mrs Meier submitted that a curator would be able to realise the aforesaid assets, which would in all probability yield a substantial dividend for creditors.

[45] Although Mr Meier did not explicitly deny the aforesaid exposé of his financial position, he does deny that the sequestration of his estate will be to the benefit of his creditors.

[46] In support of the aforesaid averment, Mr Davis in his heads of argument, submitted that:

"63. At the outset, it is apposite to mention that Mr Meier disputes that it will be to the benefit of Mrs Meier, nor the body of his creditors, should his estate be sequestrated for the following reasons:

63.1 Mr Meier is currently employed by TJ Architects (Pty) Ltd as Director thereof;

63.2 Should Mr Meier be sequestrated, he will be precluded from acting as a Director of the aforesaid company in terms of the provisions of section 69(a), (b)(i) of the Companies Act, 71 of 2008 (as amended), which in turn, would mean that Mr Meier's income will be drastically diminished.

63.3 In the event that Mr Meier's estate be sequestrated, it will undoubtedly diminish Mr Meier's ability to contribute towards future maintenance in respect of Mrs Meier, and more importantly Mr Meier's minor children."

[47] Having regard to the assets in Mr Meier's estate that were not seriously disputed by him, I am satisfied that there is reason to believe that it will be to the advantage of creditors if his estate is provisionally sequestrated.

[48] Mr Meier is a qualified architect and practices as such. It is not clear on the papers which portion of his income is derived from his position as a director of TJ Architects (Pty) Ltd and/or from his profession as an architect. The fact remains that Mr Meier will be in a position to earn an income, even if his estate is provisionally sequestrated.

[49] Mr Davis, furthermore, submits that Mrs Meier should avail herself of alternative remedies to collect the outstanding amount of maintenance, by either approaching the Maintenance Court, instituting contempt proceedings or to execute against Mr Meier's known assets. It does not appear from the facts that these remedies had or will assist Mrs Meier's in the enforcement of the judgment obtained by her in respect of arrear maintenance.

[50] Lastly, Mr Davis emphasised with reference to case law that this court, even if all the other requirements for a provisional sequestration order have been met, still has a discretion, which discretion must be exercised judicially and in accordance with the facts of each matter, to refuse the application.

[51] In *FirstRand Bank Limited v Evans* 2011 (4) SA 597 KZD at 27 the court held that:
"...[I]f the conditions prescribed for the grant of a provisional order of sequestration are satisfied then, in the absence of some special circumstances, the Court should ordinarily grant the order. It is for the Respondent to establish the special circumstances that warrants the exercise of the Court's discretion in his or her favour."

[52] Mr Meier submitted that the special circumstances are:

[52.1] Mrs Meier has instituted the application for some ulterior purpose, i.e. to enforce payment of a claim for maintenance that is genuinely disputed on *bona fide* and reasonable grounds and not to benefit his creditors; and

[52.2] the *nulla bona* return is older than six months.

[53] Firstly, it became clear during the hearing of the matter that the amount of arrears at the time warrant was issued, is not in dispute.

[54] Secondly and although the *nulla bona* was older than six months, at the time of the hearing of the matter, the arrear amount was still outstanding. In the result, nothing turns on the time period since the *nulla bona* return was issued.

[55] In the premises, Mr Meier has failed to convince me that “*special circumstances*” mitigating against the granting of a provisional sequestration exist.

[56] Both parties have placed new facts before court in the respective further affidavits filed by them. I do not deem the facts relevant for purposes of the granting of a provisional sequestration application. The facts may become relevant when a final order of sequestration is considered.

Order

[57] In the premises, I grant the following order:

1. The application under case number 15781/2015 is dismissed with costs.
- 2.

2.1 The application for the provisional sequestration of the respondent's estate under case number 76643/2019 is granted.

2.2 A rule *nisi* is issued returnable on 8 October 2021 on which date the respondent should furnish reasons why the order should not be made final.

2.3 Costs of the application to be costs in the sequestration.



N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 20 April 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 6 July 2021

APPEARANCES

Counsel for the Applicant

Instructed by:

Advocate S.N. Davis

Innes R. Steenekamp Attorneys

Counsel for the Respondent:

Instructed by:

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