Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No:	**263/2020**
Heard on:	**09/10/2020**
Delivered on:	**15/01/2021**

In the matter between:

VERMEULENS VERF AND GAS CC t/a VERMEULENS BUILD IT — **APPLICANT**

and

SEPTIMUS BERNARD VAN EEDEN — **1ST RESPONDENT**

JAKIE VAN EEDEN — **2ND RESPONDENT**

JUDGMENT

MAMOSEBO J

[1] The applicant, Vermeulens Verf and Gas CC t/a Vermeulens Build IT (Vermeulens), moved for a provisional order of sequestration against the first respondent, Septimus Bernard Van Eeden, and the second respondent, Jakie Van Eeden, on the grounds that they have committed an

act of insolvency as envisaged in s 8(b) of the Insolvency Act[1] and/or that the their estate is factually insolvent and that the sequestration will be to the advantage of their creditors if it were to be placed in the hands of the Master of the High Court, Kimberley. Having confirmed in the answering affidavit that the respondents are married out of community of property, the applicant abandoned the relief sought against the second respondent. The application is consequently only opposed by the first respondent.

[2] Vermeulens is a Close Corporation selling building materials in Kimberley and surrounding areas. The first respondent is a sole proprietor who conducted business initially under the name Van Eeden Kabinetmakers but is now conducting business under the name Koselo Basins.

[3] During or about 17 November 2003 the first respondent successfully applied for credit at Vermeulens. Of significance in that credit agreement is that he would pay no interest if the outstanding balance was paid within thirty days from the date of the statement. In 2018 the applicant purchased goods on credit to the amount of R64,170.68 and has to date failed to settle the debt despite numerous requests to do so.

[4] On 13 March 2019 Vermeulens sought and obtained judgment in the sum of R70,194.75 against the respondent in the Magistrates Court. A warrant of execution was issued authorising the sheriff of the Magistrates Court, Kimberley, to raise on the property of the first respondent the sum of

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[1] 24 of 1936 which stipulates: **8. Acts of insolvency.** – A debtor commits an act of insolvency –
(b) if a court has given judgment against him and he fails, upon the 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;

R70,194.75 together with the ancillary costs. The sheriff attended first respondent's property on 10 August 2019 and served the warrant of execution on Mrs Jakie Van Eeden, his wife and former second respondent. The following appears on the return of service: *"My return is therefor one of nulla bona. Value of assets not sufficient to satisfy the claim or part thereof."* The first respondent contacted Vermeulens' attorney, Ms Henn, seemingly to make arrangements for payments. The proposed arrangement was not acceptable to Vermeulens. On 05 December 2019 the first respondent made a payment of R500.00. To date the judgment debt to which the *nulla bona* return relates to remains unpaid.

[5] The first respondent admits being indebted to Vermeulens in the capital amount of R64,170.68 for goods purchased, plus accrued/ancillary amounts. The submission by Ms Neethling, on his behalf, relying on *Union Share Agency and Investment, Ltd (in liquidation) v Madsen*[2], that had he been present and the warrant was personally served on him he would have been in a position to meet those requirements by identifying sufficient disposable assets; that the warrant was defective in that the estimated value of his movable assets is R135,890.00; further that he is in a position to pay off his debt in instalments since his current business generates an income of R32,261.75. No proof of the first respondent's assets which he values at R135,890.00 was attached.

[6] The issue that falls for determination is whether or not the first respondent has committed an act of insolvency as envisaged in s 8(b) of the Act, alternatively, whether or not he is factually insolvent and that it

[2] 1927 NPD 439

will be to the advantage of the creditors to grant the provisional sequestration order.

[7] Section 10 of the Insolvency Act provides:

> *"10. **Provisional sequestration** – if the court to which the 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 is 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."*

[8] The first respondent has conceded his indebtedness to Vermeulens to the tune of at least R64,170.68 which therefore means a claim of more than R200.00 has been established against him in line with the first requirement.

<u>Acts of insolvency</u>

[9] In as far as the second requirement is concerned, Vermeulens has relied on s 8(b) of the Act which stipulates:

> *"8. **Acts of insolvency.** – 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."*

[10] While Vermeulens relied on the *nulla bona* return to show that the first respondent committed an act of insolvency in terms of s 8(b) during oral argument however, and relying on the Zimbabwean High Court judgment *Lorac (PVT) Ltd v Musa*[3], Ms Snyders, for Vermeulens, contended that

[3] [1991] 3 All SA 475 (ZH)

she did not place much store on this aspect. For the sake of completeness, the following is indeed essential for a party to succeed on this leg as commented in Mars[4]:

> *"4.3.1 Returns of nulla bona*
> *An execution officer's return to a warrant which is unsatisfied and in respect of which no attachment has been possible, should state inter alia (a) that he explained the nature and exigency of the warrant ; (b) the person to whom he explained it; (c) that he demanded payment; (d) that the defendant failed to satisfy the judgment; (e) that the defendant failed, upon being asked to do so, to indicate sufficient disposable property to satisfy it; (f) that the execution officer has not found sufficient disposable property to satisfy it, despite diligent search and enquiry."* See also *Kader v Haliman*[5]

[11] If the sheriff could not find the first respondent and was consequently unable to demand of him to satisfy the writ or indicate sufficient disposable property, this ought to have been reflected on the *nulla bona* return. The sheriff's failure in those circumstances to find sufficient disposable property would constitute the second of the two acts of insolvency.

[12] The second leg of the applicant's argument relating to s 8(b) is predicated on the phrase "*if it appears from the return that the messenger or sheriff has not found sufficient disposable property to satisfy the judgment.*" It is apparent on the face of the return that the sheriff wrote: "*Value of assets not sufficient to satisfy the claim or part thereof.*"

[13] The following remarks by Goldstein J in *Wilken and Others NNO v Reichenberg*[6] are relevant to this case:

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[4] Mars: The Law of Insolvency in South Africa 9th edition at page 86 para 4.3.1
[5] 1958 (4) SA 31 (N) at 32G
[6] 1999 (1) SA 852 (WLD) at 858C

"There is in my respectful view nothing in s 8(b) to justify the statement that the execution officer must enquire from the debtor what property he has and where it is situate. What he has to do is to ask the debtor to indicate sufficient property to satisfy the writ. The latter then has to point out the property or indicate its whereabouts and describe it in order to demonstrate its sufficiency."

[14] Miller J in *Moodley v Hedley*[7] pronounced that:

"Once the respondent has emasculated the return of nulla bona by showing that its basic premise is false in that she was never asked to satisfy the writ or to point out disposable property, there is no onus upon her to prove that had she been asked she would have been able to indicate disposable property, despite the messenger's inability to find it himself. I respectfully agree with what was said by Potgieter J, as to the onus in regard to a nulla bona return in Sussman & Co. (Pty) Ltd v Schwarzer 1960 (3) SA 94 (O) at 96. (See also Nathan & Co v Sheonandan 1963 (1) SA 179 (N) at 180)."

[15] Vermeulens does not dispute that the writ was served on the first respondent's wife. A concession was further made that because the respondents' marriage regime is out of community of property, there ought to have been personal service on the debtor. To constitute this act of insolvency the debtor must have been personally required to satisfy the judgment or to indicate sufficient disposable property. A demand made to his wife is not sufficient. See *Saber Motors (Pty) Ltd v Morophane*[8] and *Rodrew (Pty) Ltd v Rossouw*[9].

[16] It was neither discernible in the papers nor was it argued on behalf of Vermeulens that the first respondent could not be served with the writ or that he had evaded service.

[17] The second act of insolvency relied upon by Vermeulens is, in my view, dependent on the first act being implemented correctly. It is only where the first cannot be established that the second can be committed. It can

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[7] 1963 (3) SA 453 (N) at 455F - H
[8] 1961 (1) SA 759 (W)
[9] 1975 (3) SA 137 (O)

therefore not be argued that *prima facie* on demand by the sheriff the first respondent has failed to satisfy the judgment or to indicate sufficient disposable property to satisfy it. Besides, from the wording of the Act, there is a difference on how the requirement is couched in the Act and how the sheriff has couched it on the *nulla bona* return. Whereas the Act requires that the following phrase required: *"that the execution officer has not found sufficient disposable property to satisfy it, despite diligent search and enquiry"*, the sheriff's returns merely stated the following: *"Value of Assets not sufficient to satisfy the claim or part thereof."*

Factual insolvency

[18] Ms Snyders referred to the financial position of the first respondent along these lines:

18.1 The first respondent made an offer of arrangement to pay in monthly instalments to Vermeulens' attorney, Ms Henn, but has only paid an amount of R500.00 on 05 December 2019;

18.2 Secondly, he has failed to give proof of his component of assets which he puts at R135,890.00. He has further not attached any proof of his holding the assets which he claims far exceeds what he owes other than his mere say so;

18.3 Thirdly, he maintains that his current business generates a monthly income of R32,261.75 which is less than half of what he owes Vermeulens;

18.4 Fourthly, reasons for his failure to liquidate his indebtedness in full is not discernible on the papers.

[19] The fact that the first respondent made an offer to pay off the debt in instalments is suggestive of his inability to satisfy the judgment. The following responses appear from the first respondent's answering affidavit:

> *"4.8.1 ...I confirm that my estate is far from insolvent and that I have been trading as sole proprietor of Koselo Basins, which generates a monthly income for me.*
> *4.8.2 My average monthly income is estimated at R32 261.75.*
> *4.8.3 I also have movable assets, which value exceeds my liabilities.*
> *4.8.4 I am definitely in a position to pay off my debt in instalments."*

Sec 8(e) of the Insolvency Act stipulates:

> *"A debtor commits an act of insolvency*
> *...if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts."*

[20] The credit arrangement was for the credit to be settled within the 30 days to avoid interest on the balance. No mention was made for payment in instalments which Vermeulens rejected out of hand in any event. The oft-quoted words of Innes CJ in *De Waardt v Andrew & Thienhaus Ltd*[10] *are worth repeating:*

> *"Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him..... Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."*

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[10] 1907 TS 727 at 733

I therefore have no doubt in my mind that the first respondent is unable to pay Vermeulens. I am satisfied that Vermeulens has shown that the first respondent is, at least, factually insolvent.

Advantage to creditors

[21] It was submitted on behalf of Vermeulens that it will be in the interests of the creditors to grant the sequestration, an assertion denied by the first respondent. In *Stratford and Others v Investec Bank Ltd and Others*[11] the Constitutional Court said the following:

> *"[45] The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in Friedman*[12]*."*

Roper J said the following in *Friedman*[13]

> *"In my opinion, the facts put before 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 benefit 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."*

[22] It was argued on behalf of Vermeulens that the first respondent will hide the assets in order to evade creditors. To substantiate this aspect, a concern was expressed that the first respondent has changed its name without providing any explanation and without furnishing any exposition of what became of the assets of the previous business. Ms Neethling submitted that the first respondent has not changed his business name but merely opened a new business.

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[11] 2015 (3) SA 1 CC at 19F (para 45)
[12] Meskin & Co v Friedman 1948 (2) SA 555 (W) at 559
[13] Fn 12 Ibid

[23] Of particular concern to me, relying on *Stratford*,[14] is that Vermeulens is silent in the application with regards to serving notice on the first respondent's employees. In his answering affidavit the first respondent confirms that he has four employees who are not members of organised labour (not members of a trade union). Leeuw AJ, writing for the unanimous court, made the following remarks in *Stratford*[15]:

> *"[33] The parties agree that where s 38(1) of the Insolvency Act refers to 'employees', it envisages all employees, including domestic employees. Thus the section suspends the employment contracts of all employees upon a provisional sequestration order being granted. This means that the contracts of domestic employees are effectively suspended without notice while their business counterparts who could conceivably be doing the same kind of work in the insolvent employer's business will receive notice.*
>
> *[34] Notice prevents a situation where employees would show up at work and suddenly find out that they can no longer render their services or receive remuneration.* ***Notice at an earlier stage, before a provisional sequestration order,*** *will not only warn an employee of the tumultuous financial state of the employer, but also meaningfully enable employees to find alternative jobs or make alternative arrangements. These are the virtues of being informed of the possibility of a sequestration. Notice, ultimately, signifies respect for the human dignity of employees.*
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> *[35] The interconnection between the right to dignity and work has long been articulated by this court. In affordable Medicines it held:*
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> > *'One's work is part of one's identity and is constitutive of one's dignity. ..... And there is a relationship between work and the human personality as a whole. "it is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of the person's existence"'*
>
> *The impact of a narrow reading of employees' on their right to dignity, so illustrated, tilts the interpretive balance decisively in favour of a wider reading. And this is indeed required by s 39(2) of the Bill of Rights."*

[24] The Constitutional Court continued instructively at para 42:

> *"[42] Failure to furnish the employees with the petition may not be relied upon by the debtor for opposing sequestration when the question to be decided is whether sequestration is to the advantage of creditors. In EB Steam the*

[14] Fn 11 above

[15] At paras 33, 34 and 35

Supreme Court of Appeal stated that the purpose is not to provide a 'technical defence to the employer, invoked to avoid or postpone the evil hour when a winding –up or sequestration order is made'. I agree. There may be instances where a provisional order should be granted to avoid the concealing of assets or for other urgent reasons in circumstances where a delay would substantially prejudice the creditors. Thus, non-compliance will not always render the granting of an order fatal, but this should be only in exceptional circumstances."

Discretion of the Court

[25] The courts have a discretion, to be exercised judiciously, in applications of this nature whether to grant or refuse the application for a provisional sequestration. Regard being had to the three requirements that must be met, namely, (i) that the debtor owes a liquidated claim of not less than R200.00; (ii) the debtor has committed an act of insolvency or is insolvent; and (iii) the applicant has reason to believe that it will be to the advantage of creditors of the debtor if the estate is sequestrated. In the circumstances I come to the conclusion that I am not persuaded:

25.1 Firstly, about the process not being served personally on the first respondent. As stated earlier, and at the risk of repetition, there was nothing in the papers that indicated that he had evaded service or could not be served;

25.2 Secondly, even if the applicant wanted to rely on the second leg of s 8(b) the wording in the return is inadequate to comply with the Act;

25.3 Thirdly, the petition was not served on the four employees to afford them an opportunity timeously to consider their appropriate option before the provisional order is granted.

[26] **I am of the view that the applicant is not entitled to the order sought and its application stands to be dismissed. There is no reason why costs should not follow the result.**

ORDER

[27] In the result the following order is made:

The application is dismissed with costs.

[redacted]

pp **MAMOSEBO J**

NORTHERN CAPE HIGH COURT

For the applicant:	Ms J Snyders
Instructed by:	Engelsman Magabane Inc
For the respondent:	Ms L Neethling
Instructed by:	Elliot Maris Wilmans & Hay