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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.**

**CASE NUMBER: 5297/2018
12/2/2020**

In the matter between:

M[....] N[....]

APPLICANT

AND

L[....] F[....] G[....]

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant and the respondent both veterinarians by profession, were initially married to each other. They were in partnership operating a veterinary clinic. Their marriage was dissolved by an order of court of the High Court of South Africa Northern Cape Division on the 26th July 2016. The divorce order has also incorporated a settlement agreement which regulated the patrimonial matters of their marriage.
- [2] In terms of the settlement agreement the respondent agreed to pay the applicant R13 000 000-00 in four instalments. First payment was R1 000 000-00 payable within 10 days from date of the order, second payment R 2 000 000-00 on or before 31st October 2016, third payment R5 000 000-00 on or before 31st October 2017, and the fourth and final payment R5 000 000-00 on or before 31st October 2018.
- [3] The respondent did not pay the applicant in terms of the settlement agreement. The respondent made sporadic payments which amounted to R2 056 000-00 between the period 25th July 2016 and 21st December 2017.
- [4] On the 31st December 2016, the applicant 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 2018. However, 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.
- [5] On the 15th February 2017 and 12th May 2017 the respondent wrote letters to the applicant attempting to renegotiate the terms of the debt repayments. According to the applicant, these letters and the sheriff's returns constitute an act of insolvency. That resulted in the applicant instituting an application

against the respondent, seeking an order that the estate of the respondent be provisionally sequestrated, and thereafter finally sequestrated.

[6] The respondent is opposing the applicant's application. The respondent denies that he is indebted to the applicant in the amount she is claiming. The respondent has stated that in terms of the settlement agreement, he was placed in possession of the assets of the former partnership which included the debts and loan accounts owed to the partnership. According to the respondent, the applicant was indebted to the partnership for a substantial amount and that this debt has passed to him and has been set off against any amount he may be indebted to the applicant.

[7] The respondent in his answering affidavit has stated that as at the time of divorce, the livestock was valued in excess of R13 000 000-00 which was a common error preventing consensus and at worst a misrepresentation made to him by the applicant and other persons which induced the settlement agreement. According to the respondent, the settlement agreement does not reflect the true intention of the parties, as the provisions relating to the settlement of the partnership and payment to the applicant were based on what was thought to be the value of the livestock and the value that could be settled in sale.

[8] It is the respondent's contention that the livestock was overvalued, the value of the partnership was incorrect and the value of the applicant's share was also incorrect. That resulted in him undertaking to pay for assets which were not worth R13 000 000-00 based on an incorrect reflection of the value. As a result of that he launched an application which is still pending in the Northern Cape Division of the High Court for the setting aside of the relevant portions of

the settlement agreement based on the defence that the agreement is invalid due to a common error.

[9] He denies that he is insolvent and has stated that his assets exceed his liabilities. He has stated that his personal assets excluding Medivet Diere Kliniek Wildsdienste is valued at R9 438 669-00 and has also attached a copy of his private financial statements as at 28 February 2018. He states that he is the sole owner of Medivet which is a sole proprietor and its total assets is R 10 338 591-50, and he has attached the financial statements. He has also stated that his game is currently valued at R3 186 500-00 and has attached a valuation certificate. He owns immovable property valued at R780 000-00 and has attached a valuation certificate. That Investgil Fifteen CC owns two properties, one valued at R980 000-00 and the other at R3 850 000-00 and has attached the valuation certificate. According to the respondent, none of the immovable properties or his interest in Investgil Fifteen CC were ever taken into consideration by applicant.

[10] It is the applicant's argument that she is having a liquidated claim against the respondent in the sum of R10 944 000-00 together with interest at the prescribed rate, and that as such, she has the necessary *locus standi* to petition for the sequestration of the respondent's estate. That the respondent has committed act of insolvency as envisaged in section 8(b), 8(c), and 8(g) of **Insolvency Act** ("the Act")¹. That the estate of the respondent is factually insolvent and it will be to the advantage of the respondent's creditors if his estate is finally sequestrated. However, at this stage what the applicant is

¹ Act 24 of 1936

seeking is for an order for the provisional sequestration of the estate of the respondent.

- [11] The respondent has argued that that the applicant's application for provisional sequestration of his estate is an attempt by the applicant 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, 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 applicant 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 applicant indicate an inability to pay, but was bring it to the attention of the applicant 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 argues that both returns of service are unclear and contradictory. The first return state that it was handed over to a Ms Elize Kruis, a worker in charge, whilst the second return state that the game was pointed 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 seems also not to be based on what was pointed out to him or found, but rather on a list that was provided to him.

[12] It is not in dispute that in terms of the settlement agreement which has been made an order of court, the respondent agreed to pay the applicant the sum of R 13 000 000-00 of which to date he has not yet paid in full. The applicant is seeking a provisional winding-up order against the respondent, and the respondent is opposing that application. The respondent is basically disputing that he is insolvent and that he is indebted to the applicant.

[13] It is trite that a respondent who dispute 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. **(See Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 980 B-C)**

[14] Even though the settlement agreement has been made an order of court, the parties are not in agreement in relation to interpretation of portions of the agreement. The respondent has submitted 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. The respondent is therefore of the view that some portions of the agreement are invalid due to a common error between the parties. The applicant does not share the same sentiment with the respondent.

[15] That resulted in the respondent launching an application in Northern Cape High Court for the setting aside of the relevant portions of the settlement agreement based on the defence that the agreement is invalid due to a common error. However, this application was instituted after the present application was instituted. Though it may seem to be retaliation to the applicant's application, the court will not simply ignore it. It may have some serious consequences to the present application.

[16] 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 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 by 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."

[17] The respondent is not still thinking about launching the application to set aside the portions of the agreement which he is of the view that they are invalid due

² 1988 (2) SA 208 (C) at 219 F-I

to an alleged common error, but the application is already pending. I did not see or had an opportunity to read the papers filed in the Northern Cape High Court and see his ground of application. However, that is not necessary as at this stage it is immaterial whether he will succeed with his application or not. That application should be given an opportunity to run its course.

[18] The applicant has submitted that the respondent is factually insolvent. The respondent has submitted his private financial statements and the financial statements of other companies in which he is having an interest. The personal assets of the respondent combined with the interest he is having in the other companies, far exceed the R13 million and inclusive of his own personal debts.

[19] Under the circumstance, the court is satisfied that the respondent is disputing the applicant's indebtedness on reasonable grounds. The applicant's provisional winding-up application stand to fail.

[20] In the result I make the following order:

20.1 The applicant's provisional winding-up application is dismissed with costs on party and party scale.

MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCE:**COUNSEL FOR APPLICANT : ADV L.W. DE BEER****INSTRUCTED BY : WESSEL & SMITH INCORPORATED****COUNSEL FOR RESPONDENT : ADV D.MARAIS****INSTRUCTED BY : MARINUS VAN JAARVELD****ATTORNEYS****DATE OF HEARING : 11 DECEMBER 2019****DATE OF JUDGEMENT : 12 FEBRUARY 2020**