Reportable:	*Yes/No*
Circulate to Judges:	*Yes/No*
Circulate to Magistrates:	*Yes/No*

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)

CASE NO.: 1219/2017

Date heard: 01-12-2017
Date delivered: 16-03-2018

In the matter between:

GA-SEGONYANA LOCAL MUNICIPALITY **Applicant**

And

MOHAMMED ISMAIL SULLIMAN **Respondent**

(Identity number: [...])

CORAM: WILLIAMS J:

J U D G M E N T

WILLIAMS J:

1. On 6 March 2015 the applicant, the Ga-Segonyana Local Municipality (herein referred to either as the applicant or the

Municipality), obtained summary judgment against Sulliman Attorneys for payment of the amount of R1 283 925, 90 together with interest thereon a tempore morae at the rate of 15.5% per annum. Upon failure to satisfy the judgement the applicant caused a warrant of execution to be issued for payment of the above amount. The warrant of execution was served on the respondent herein, Mr M I Sulliman, on 25 May 2015. The sheriff's return was one of *nulla bona.*

2. This application, launched on 31 May 2017, is for the sequestration of the respondent on the basis that he has committed an act of insolvency as contemplated in s 8(b) of the Insolvency Act 24 of 1936, which reads as follows:

   "A debtor commits an act of insolvency – 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."

3. The respondent opposed the application *inter alia* on the basis that the *nulla bona* return is stale and that the applicant had failed to provide any proof that there was no material alteration in the respondent's financial situation in the meantime.

4. The above proposition is not entirely correct. The applicant has in the founding affidavit provided details of two immovable properties registered in the name of the respondent, his

member's interest in two close corporations, as well as the fact that the respondent is the sole proprietor of the firm Sulliman Attorneys and that the assets associated with the practice fall within his personal estate. The value of these assets have not been determined by the applicant, but the allegation is made that the immovable properties will in all likelihood not realise proceeds by way of execution close to the amount of the applicant's claim, bearing in mind that the interest thereon at time of the application amounted to more that R400 000,00.

5. The respondent has failed to deal with these allegations in his opposing affidavit or to show otherwise that he in fact has sufficient disposable assets to satisfy the judgment. Reliance on a *"*stale*"* *nulla bona* return in these circumstances to fend off an application for provisional sequestration is rather risky since it is but one of the factors to be taken into account in the exercise of the court's discretion not to grant a provisional order of sequestration. (See *Investec Bank Limited vs Le Roux* (575/2014) [2016] ZA GPJHC 11 (11 February 2016))

6. But be that as it may, an issue which I found of more concern about the application is the fact that the judgment had been obtained against the firm Sulliman Attorneys, without the procedures envisaged by Rule 14(5) for execution against the respondent personally having been followed. I referred the parties in this regard to the judgment of Nepgen J in S*tocks vs Stocks Industrial Holdings (Pty) Ltd and Another vs Roberts t/a*

Premier Timber & Trading [1998]4 All SA 231 (SE) and asked them to address me on this aspect.

7. In response Mr Louw who appeared for the applicant, referred me to s 23 of the Attorneys Act 53 of 1979 for the proposition that a person trading under an attorney's name is held personally liable for the contractual debts of the attorney. S 23 of the Attorneys Act however relates to companies conducting attorneys practices and has nothing to do with the position *in casu*. In any event it is not in issue that a firm name is regarded as the alias of its sole proprietor and that the respondent as sole proprietor would be a debtor of the applicant. The issue is that judgment was not obtained against the respondent but against the firm Sulliman Attorneys.

8. The summons under case no 1398/14 does not even contain the allegation that Mr Sulliman is the sole proprietor of the firm neither was a notice delivered on the respondent in terms of Rule 14 (5) (c) which in terms of Rule 14(5) (e) would deem the respondent to be a party to the proceedings, with the rights and duties of a defendant – including being liable to have execution levied against him should the firm be found liable.

9. Having failed to invoke the provisions of Rule 14, the judgment stands only against the firm as the judgment debtor. A judgment in that form limits to the assets of the business the source from which the plaintiff (applicant) may recover the judgment debt (see

Farm Fare (Pty) Ltd v Fairwood Supermarket 1986(4) SA 258 CPD at 262D).

10. As an act of insolvency in terms of s 8 (b) of the Insolvency Act can only be committed by a judgment debtor, the applicant has failed to establish that the respondent has committed the said act of insolvency (see generally *Stocks & Stocks supra*). The application for sequestration should therefore fail.

11. What is most troubling about this matter is the background to the institution of the action against Sulliman Attorneys. It is common cause that the applicant Municipality had instructed Sulliman Attorneys to represent it in an action instituted against the Municipality by attorneys Peyper Sesele Incorporated (Peypers) for the payment of legal fees. The Municipality and Peypers reached a settlement in that matter on the basis *inter alia* that the Municipality pay the amount of R2 508 000.00 (the settlement amount) to Peypers on or before 31 January 2014.

12. The Municipality paid the full settlement amount into the Trust account of Sulliman Attorneys, who in turn paid over to Peypers only an amount of R1 224 074,10.

13. Peypers thereafter instituted legal proceedings against the Municipality for the recovery of R1 283 925,90, the balance of the settlement amount, which in turn led to the Municipality instituting the action against Sulliman Attorneys for the above amount.

14. Mr Sulliman has given various explanations for the retention of the balance of the settlement amount – in the affidavit opposing the summary judgment application as well as in the opposing papers to the sequestration application.

15. The explanation in the summary judgment application is the following: That the Municipality had instructed Sulliman Attorneys not to simply pay over the entire settlement amount to Peypers, but to first determine the actual outstanding amount. This Sulliman Attorneys did and discovered that an amount of R1 283 925,90 had previously been paid by the municipality to Peypers for legal fees and had therefore only paid over to Peypers the balance of the settlement amount. Mr Sulliman maintained that the amount of R1 283 925,90 was still in the firm's Trust account and would only be paid out on instruction of the Court, the Municipal Council or the Mayor. The Municipality denies such an instruction, which is in any event contrary to the settlement agreement reached between the Municipality and Peypers.

16. In the opposing affidavit to the sequestration application, the explanation in the summary judgment application, to pay only to Peypers what was due, is repeated and in addition an oblique reference is made to set-off. The allegation is made that the Municipality is indebted to Sulliman Attorneys on an account outstanding since November 2014. No proof is however provided of the outstanding account and the Municipality denies such indebtedness.

17. Mr Sulliman who appeared in person in the sequestration proceedings, could give no reasonable explanation for what had happened to the amount of R1 283 925,90 which the Municipality had entrusted Sulliman Attorneys with and which is apparently not in the Trust account of Sulliman Attorneys anymore.

18. In these circumstances I consider it imperative that this matter be referred to the Cape Law Society for investigation.

19. As far as costs are concerned, Mr Louw has argued that even if the respondent is the successful party in this application, I should as a mark of the court's displeasure at the conduct of the respondent, order that he pays the costs of the application. I am of the view however that there is no reason why costs should not follow the event in this application and that the Cape Law Society deal with the professional conduct of Mr Sulliman.

The following order is made:

a) **The application is dismissed with costs.**

b) **This judgment is referred to the Cape Law Society for an investigation into the conduct of Mr M I Sulliman of Sulliman Attorneys, Kuruman in the matter of Peyper Sesele Incorporated v Ga-Segonyana Local Municipality held in the Magistrate's Court, Kuruman under case number 355/2013.**

CC WILLIAMS

JUDGE

For Applicant:	Adv. M Louw Van De Wall Incorporated
For Respondent:	Mr M I Sulliman Duncan & Rothman