



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

30101/15
CASE NUMBER: 37889 / 2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
<u>30 JANUARY 2015</u>	
DATE	SIGNATURE

In the matter between:

WILLOW ACRES HOME OWNERS ASSOCIATION

APPLICANT

And

MOALE BUSISIWE

RESPONDENT

JUDGMENT

MAVUNDLA, J.

- [1] The applicant was granted a *rule nisi* for the provisional sequestration of the estate of the respondent on the 8 November 2013, calling upon the respondent to appear and show cause on the 14 February 2014 why a final order of sequestration should not be made final.

- [2] It would seem that the *rule nisi* was extended on several occasions and the matter eventually came before this court on 4 December 2014 for the confirmation or discharge of the *rule nisi*. The respondent had filed an affidavit opposing the confirmation of the *rule nisi* and declaring her sequestration be made final. I extended the *rule nisi* to the 30 January 2015, to afford myself time to prepare a written judgment.

BACKGROUND FACTS

- [3] The respondent, a single mother of two girls aged 19 and 12 respectively, is a registered owner of Erf 316, Hadedda Crescent, Willow Acres residential estate and is as such a member of the applicant association and obliged to pay monthly levies of the applicant.
- [4] It is common cause that the respondent fell in arrears with her levy account and consequently, the applicant caused summons to be issued and served on her aforesaid Erf 316, Hadedda in the estate for payment of the amount of R18 845, 86 plus interest and costs on a scale between attorney and client, in respect of which the applicant took default judgment against her on the 5th March 2013.

- [5] The applicant, in an effort to execute and attach the movable assets of the respondent received a *nulla bona* return from the sheriff, which stated that the plot 316 Hadedda Crescent, Willow Acres was a vacant plot.
- [6] The applicant subsequently brought an application for the sequestration of the respondent on the strength of the aforesaid *nulla bona*. The application was personally served on the respondent at 3011 Section K Mamelodi West Mamelodi on 13 July 2013.
- [7] The respondent did not file her notice of intention to oppose, as a result, a provisional sequestration order was granted on 14 February 2014. The respondent only filed her notice of intention to oppose three months later, on the 12 May 2014.
- [8] The respondent subsequently filed her opposing affidavit. It is common cause that the application for sequestration was served on a vacant plot, while the applicant was well aware of the respondent's physical address in Mamelodi. The respondent averred that the said sequestration papers never came to her attention.
- [9] It is common cause that the trigger for the sequestration of the respondent application was the *nulla bona* which was predicated on the judgment debt in the amount of R18 845, 86. The applicant must on a balance of probability satisfy the

court that the respondent is insolvent. The Court has a discretion to confirm or discharge a *rule nisi* on the return date, in terms of s12 (1) of the Act; *vide Ex Parte Van Der Merwe* 1962 (4) SA 71 (O.P.A) at 73 D-E; *Ben- Tovim v Ben-Tovim and Others* 200 (3) SA 325 at 330 H-331.

- [10] The applicant has attached to its papers, *inter alia*, annexure "AA2" which is a provisional statement of levies raised against the respondent during the period of 01 / 08 / 2009 to 01 / 06 / 2014, reflecting a total amount of R47 220. 63. A close scrutiny of the statement reveals that the respondent has been in some instances double charged, for instance:

2010/ 11/01	Cutting of grass	04/ 10/ 2010	R326.00
2010/ 11/01	Cutting of grass	04/ 10/ 2010	R326.00
2010/ 11/01	Cutting of grass	4/ October/ 2010	R325.00
2011/ 01/01	Cutting of grass	04/ 10/ 2010	R326.00

- [11] In some other instances the respondent was slapped with various monthly building penalties of R5 000. 00 and R8 000. 00. In other instances she was slapped with monthly arrear interest ranging from R361. 89; R1 131 .16 and R1 428.02. In other instances she was debited with untaxed attorneys' fees.

[12] The amount of R18 845, 86 forming the basis of the default judgment, in my view, was premised on, *inter alia*, duplicated amounts debited against the respondent's account.

[13] It is common cause that the applicant levied the respondent with the above mentioned amounts on the basis that clause 6 of the memorandum of Incorporation of the applicant makes provision for the applicant to charge levies. I however do not understand the relevant clause to permit for duplicating of charges nor onerous interest rates and untaxed attorney's fees. In any event, duplicating of debts, borders on the verge of dishonesty or overreaching. The applicant is in my view, not different from a person occupying a nominee stature and a position of trust. He must not only act in its own interest but also in the interest of all and sundry of its members, including the respondent. Certainly overcharging the respondent does not, demonstrate the fiduciary duty the applicant holds towards the respondent. Such conduct was frowned upon in the matter of *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) at 478H-I/J.

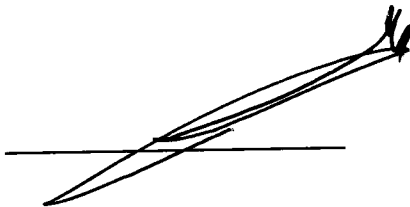
[14] In *casu*, it would seem that the respondent is desirous of contesting the levies she has been burdened with. Confirming the *rule nisi*, would invariably deprive her of that opportunity; which in my view, regard to the fact that in other instances she has been double charged and that would not accord with interest of justice. The courts should refuse to confirm a sequestration order where there is a whiff of

dishonesty or overreaching, as is the case, *in casu*, in my view. I further deem it not necessary to decide the question whether the respondent is solvent or otherwise, for the reason stated herein above.

[15] With regard to costs, I am alive to the fact that mulcting the applicant with costs, would invariably burden its general membership. However, it is trite that costs follow the event. In circumstances such as *in casu*, as pointed herein above, I see no reason why the respondent should not be entitled to a costs order, on attorney and client scale.

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

1. That the *rule nisi* granted on the 8 November 2013 against the respondent is hereby discharged;
2. That the applicant is ordered to pay the costs of this application on attorney and client scale.

A handwritten signature in black ink, consisting of several overlapping loops and strokes, positioned above a horizontal line.

N. M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING	: 04 DECEMBER 2014
DATE OF JUDGMENT	: 30 JANUARY 2015
APPLICANT'S ATT	: EDUARD DE LANGE ATTORNEYS
APPLICANT'S ADV	: ADV M COETZEE
RESPONDENTS' ATT	: HAHN & HAHN ATTORNEYS
RESPONDENTS' ADV	: ADV. A JANSE VAN VUUREN