REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2014/23242

17/6/2015

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

17/06/15 DATE

SIGNATURE

In the matter between:

NEDBANK LIMITED	**APPLICANT**
and	
MMATJALE FLORA MALOKA N.O	**RESPONDENT**

J U D G M E N T

TWALA AJ

[1] On the 24th November 2014 this court made an order in the following terms:

1.1 That the estate of the late Harry Morwamocha Maloka be and is hereby place under provisional sequestration.

1.2 That a Rule Nisi is issued calling upon the respondent and all interested parties to show cause, if any, to this court on 9th March 2015 as to why:

1.2.1 A final sequestration order should not be granted.

1.2.2 The costs of this application, including the costs of the 24th November 2014 should not be costs in the sequestration of the estate.

1.3 That service of this order should be effected as provided for in the Insolvency Act.

[2] It appears from the papers filed of record that there was a delay in obtaining the court order from the court due to the fact that the court file could not be located. On the 9 March 2015 the rule nisi could for this reason not be confirmed. It was extended to the 18 May 2015.

It is to be noted that the respondent has at all times been opposed to this sequestration application. It is common cause that she is the daughter of the deceased and an executrix in the estate. Further, she is a practising attorney.

[3] At the commencement of this hearing, the respondent brought an application for a postponement and tendered the costs for the postponement. The respondent argues that she made a bona fide mistake when submitting the Liquidation and Distribution account to Master of the high Court and when

she admitted on affidavit that the estate is insolvent. The fact of the matter is that the estate is solvent for there is an asset worth R30, million which when realised would extinguish the debt of the applicant. Further, there are no other creditors to the estate since the South African Revenue Service (SARS) and Limpopo Development Agency (Limdev) have been paid in full.

[4] The respondent contends further that the R30 million debt due to the applicant is not owed by the estate alone. It is jointly and severally owed by the estate and Mr Conrad Hedrick Kruger who co-signed as surety with the deceased. The applicant has entered into a compromise agreement with Mr Kruger for payment of a total sum of R6, million. The respondent as well as other heirs to the estate attended a meeting in Cape Town in January 2015 with one Dana van Zyl of the applicant. In this meeting, agreement was reached that the estate pays a sum of R480 000 in February 2015 and thereafter R60 000 per every succeeding month. To date hereof the respondent has discharged her obligations in terms of this agreement.

[5] The applicant argues that the respondent wrote a letter to the Master of the High Court advising that the estate is insolvent. Once the estate is noted as insolvent by the Master, then it falls to be dealt with under the Insolvency Act. Further, the property that is alleged to be worth R30, million does not belong to the estate. It belongs to a company wherein the deceased was a director which company is under liquidation. The property itself has not been valued. The respondent, as executrix of the estate, has failed to list the applicant as one of the creditors of the estate in the liquidation and distribution

account submitted to the Master. Although the respondent alleges to have settled the accounts of the South African Revenue Service and the Limpopo Development Agency, she failed to list them as creditors on the liquidation and distribution account. The January 2015 agreement entered into by the respondent, the heirs of the estate and the applicant relates to the debts of a related trust. The subsequent payment of R480 000 in February 2015 and R60 000 in the following months were made to avoid the applicant from proceeding with two sales in execution in respect of the properties belonging to the related trust. No agreement was entered into between the insolvent deceased estate and the applicant.

[6] Respondent is an attorney and was appointed executrix in estate of her late father on the 13 February 2013 – a week after his death on 4 February 2013. On the 31 May 2013 she was ready to submit and submitted the liquidation and distribution account with the Master of the High Court Polokwane. Respondent was involved in this estate a week after the death of the deceased and has opposed the sequestration application from the beginning. It cannot be accepted that she needs a postponement of the matter to do further investigations on the assets of the estate two years later. It is clear that she has failed to handle and administer the deceased estate properly. I do not agree with counsel's submission that she be given a chance because she is a newly admitted attorney.

[7] It was held by Fleming J in the case of **Ex Parte W J Upton Transport (Pty) Ltd – MAN Trucks & Bus (SA) (Pty) Ltd vs W J Upton Transport (Pty) Ltd 1985 (1) SA page 312 that:**

> *"There should be finality one way or the other in liquidation applications unless a case of adequate strength for the extension of a return date is made out. Undue rigidity in that regard may obviously cause injustice. Injustice should, however, not be caused by a proper scrutiny of the actual existence of true justification of an extension. Such a scrutiny is necessary as inter alia:*
>
> *(a) The existence of a provisional liquidation order creates an inability on the part of creditors to receive payment or to enforce payment by way of execution or other positive conduct, and*
>
> *(b) There is no alternative to such scrutiny which is truly effective to protect the general body of creditors against costs of legal fees, administration costs and other financial disadvantages which are run up in the process of grating extensions".*

[8] The respondent have had all the time it needed to attend to the issues she is now raising. She has, as the executrix of the estate declared to the Master of the High Court that the estate is insolvent. She has not brought an application to the court to reverse her decision and advice to the Master of the High Court that the estate is insolvent. Further, she did not list worthy creditors of the estate on the liquidation and distribution account. She settled the Limdev and SARS without reflecting their accounts on the liquidation and

distribution account. Respondent's counsel's submission that the liquidation and distribution account can be amended is unsustainable considering that the delay in finalising the liquidation and distribution account comes at a cost not only on estate but the creditors as well. It should be accepted that the respondent has shown lack of understanding and experience in handling an estate of this magnitude. The appointment of trustees will be to the benefit of the creditors in this instance.

[9] It is my view therefore that a postponement will be prejudicial to the creditors and will only burden the estate with unnecessary costs. A final liquidation order will place the estate in the hands of the trustees who will administer the estate for the benefit of all the creditors.

[10] In the circumstances, I make the following order:

10.1 Application for a postponement is dismissed with costs.

10.2 A final sequestration order is granted.

10.3 Costs of this application including the costs of the application of the 24 November 2014 to be costs in the sequestration of the estate.

TWALA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Counsel for the Applicant:	Adv. JE SMIT
Instructed by:	EDWARD NATHAN & SONNERBERGS
Counsel for the Respondent:	Adv. LEBALLO
Instructed by:	MF MALOKA ATTORNEYS
Date of Hearing:	20 May 2015
Date of Judgment:	17 May 2015