In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No :2831/2012

In the matter between :

Stephen Patrick Smith	Applicant
and	
National Urban Reconstruction and Housing Agency	First Respondent
Nurcha Finance Company (Pty) Ltd	Second Respondent
Nurcha Equity Services (Pty) Ltd	Third Respondent
Burt Silverton-Laing NO	Fourth Respondent
Neil David Button NO	Fifth Respondent
The Master of the High Court	Sixth Respondent

Judgment

Lopes J

[1] The applicant seeks an order declaring void ab initio and of no force or effect a final sequestration order granted against his estate under case number 9845/2010.

In addition he seeks an order restraining and interdicting the respondents from conducting any proceedings consequent upon the final sequestration order.

[2] The first to third respondents, to whom I shall collectively refer as 'Nurcha' obtained four default judgments against the applicant. This was pursuant to the applicant having bound himself as co-principal debtor with, and surety for, various entities to whom funds were advanced by Nurcha. As their efforts to execute against the applicant's assets proved fruitless, in August 2010 Nurcha initiated sequestration proceedings against the applicant. On the 20th September 2010 a provisional order was granted sequestrating the estate of the applicant.

[3] Nurcha had great difficulty in serving the provisional order of sequestration. They served the order on three residential addresses, and in addition, hired a tracing agent who was unable to track down the applicant.On the 18th October 2010 pursuant to Nurcha's unsuccessful attempts to serve the provisional order, an order for the substituted service of that order was made by Ntshangase J. Three forms of service were set out in the substituted service order.There having been compliance with the substituted service order, and in the absence of any appearance on behalf of the applicant, the provisional order was made final on the 8th November 2010.

[4] Mr *Kemp* SC, who appears on behalf of the applicant seeks to have the final sequestration order to be declared null and void because the applicant did not have

served upon him a copy of the application papers as required by s 9 (4A)(a)(iv) of the Insolvency Act, 1936 ('the Act').

[5] Mr *Kemp* made it clear that the applicant relied upon the provisions of s 149(2) of the Act, and submitted that the applicant was not required to demonstrate the requisite 'sufficient cause' as would be the case where a rescission order is sought. He conceded that the applicant had not set out facts which could support a normal rescission of the judgment.

[6] Section 149(2) of the Act provides :

'The court may rescind or vary any order made by it under the provisions of this Act.'

Mr *Kemp* submitted that there were certain instances where the court could simply set aside an order, as set out in *Dada v Dada* 1977 (2) SA 287 (T). In *Dada* the court set out that where an action has been instituted without due citation of the defendant, the subsequent proceedings are null and void, and any judgment given is of no force or effect. The authorities cited by the court for that proposition involved litigants who were not served with notice of the proceedings before they began. The judgment also stated that upon proof of invalidity, the decision can be disregarded, without the necessity of a formal order setting it aside.

[7] The circumstances of the present case are, however, somewhat different. When the proceedings were initiated, the applicant was cited, but there was no

service upon the applicant. It has hitherto been the practice of this court not to insist upon service of the application papers where an act of insolvency is relied upon or where there is other external evidence of insolvency. The service of the application papers leading to the grant of the provisional order is in any event, however, of no moment, because, Mr *Kemp* made it clear in his argument that the applicant did not intend to seek to set aside the provisional order, and the servicer of the provisional order was not an issue.

[8] Mr *Kemp* also relied on *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA). This case is authority for the proposition that where there is no jurisdiction, the proceedings are a nullity without the necessity of a formal order setting the proceedings aside. This case related to arbitration proceedings which were conducted without notice to the respondent. It records that the mere objection to an arbitration award being made an order of court, did not require an application to set the award aside, where notice of the arbitration hearing had not been given to the other party. This case is also distinguishable from the facts of the present matter.

[9] I was also referred to*Tödt v Ipser* 1993 (3) SA 577 (A) where the court set out three cases in which, according to our common law authorities, judgments are void. They are :

(a) where there has been no proper service;

(b) where there is no proper mandate; or

(c) where the court lacks jurisdiction.

[10] Mr *Mossop*, who appeared for the respondents, referred me to *Storti v Nugent and Others* 2001 (3) SA 783 (W) a judgment of Gautschi AJ.The learned Acting Judge carefully reviewed the decisions regarding rescission and dealt in particular with the provisions of s 149(2) of the Act. He concluded that the principles to be gleaned by the authorities, which he cautions are often not harmonious, are the following (806D – G):

1. The Court's discretionary power conferred by this section is not limited to rescission on common-law grounds.
2. Unusual or special or exceptional circumstances must exist to justify such relief.
3. The section cannot be invoked to obtain a rehearing of the merits of the sequestration proceedings.
4. Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for a common-law rescission;
5. Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship to be confined to the ordinary rehabilitation machinery, or the circumstances should be very exceptional;
6. A Court will not exercise its discretion in favour of such an application if undesirable consequences would follow.

Mr *Kemp* submitted that the judgment of Gautschi AJ was not intended to be all-encompassing. In addition the common law rules set out *Vidavsky* above would entitle a court to set aside a judgment without any evidence of 'sufficient cause'.

[11] With regard to the fact that this court should nevertheless ensure that the common-law requirements are satisfied see *Naidoo and Another v Matlala and Others NO*2012 (1) SA 143 (GNP) paras 4 and 5.

[12] Mr *Kemp* submitted that the provisions of s 9(4A)(a)(iv) of the Act are peremptory. In this regard he relied upon *Ratilal v Dos Santos* 1995 (4) SA 117 (W). In that case a provisional sequestration order was refused in circumstances where the nulla bona return of service relied upon was only served on one of two spouses. This matter pre-dated the introduction of s 9(4A), and the facts of that case are distinguishable from the present matter.

[13] Mr *Kemp* also referred me to *Berrange NO v Hussan and Another* 2009 (2) SA 339 (N) where Levinsohn J, after dealing with the previous practice that service of the papers would not be required in certain sequestration proceedings (relying on a nulla bona return or clear documentary evidence of indebtedness), stated at page 352 F – 353 F

'The first respondent has directed an attack at the fact that the applicant moved *ex parte* and without notice for the relief he sought. Now the *ex parte* procedure linked to a rule *nisi* is well entrenched in our High Court practice. Indeed it has also received the Constitutional Court's approval in *National Director of Public Prosecutions and Another v Mahomed NO and Others* 2003 (4) SA 1 (CC) (2003 (1) SACR 561; 2003 (5) BCLR 476).

Proceeding ex parte is also well established in our insolvency practice. (See *Collective Investments (Pty) Ltd v Brink and Another* 1978 (2) SA 252 (N).) Kriek J (as he then was) held that rule 6(2) of the Uniform Rules of Court does not preclude the granting of interim relief such as a provisional winding-up order without proper notice to the respondent. Rule 6(4) does not envisage only applications in which no relief is sought against any person: the phrase '*ex parte*' in rule 6(4) contemplates the situation in which an application is brought without notice to anyone, either because no relief of a final nature is sought against any person or because it is not necessary to give notice to the respondent. *Per* Kriek J at 255G.

It must be said, however, that the *Collective Investments* case, supra, was decided on the footing that applications for the winding up of companies and the sequestration of individuals based on a *nulla bona* return or clear documentary evidence of an indebtedness could be brought ex parte without notice in terms of our practice. A recent amendment to the Insolvency Act introduces s 9(4A)(a)(iv) (see s 2 of the Insolvency Second Amendment Act 69 of 2002) which has brought about an important change. The subsection reads as follows:

> When a petition is presented to the court, the petitioner must furnish a copy of the petition:
>
> . . .
>
> (iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the debtor or the creditors to dispense with it.

Clearly, the legislature intended that in all cases irrespective of the nature of the creditors' claim against the debtor a copy of the petition has to be furnished to the debtor. The section does not use the term 'serve' but rather uses the word 'furnish', which is not a term of general application in our civil practice and procedure. It would seem that the legislature intended a form of informal service. The dictionary definition of 'furnish' is 'to provide, contribute, afford, supply, yield' (*The Shorter Oxford English Dictionary* vol I at 820).

The furnishing to the debtor of the petition may be dispensed with in cases where the court is of the opinion that it is in the interests of the creditor or the debtor. In the first place, it seems to me that a creditor would necessarily have to make out a case in the founding affidavit to dispense with the furnishing of the petition. Factors that could properly be taken into account include the urgency of the matter and the conduct of the debtor in relation to his assets. In general the court will weigh the interests of the creditor and the debtor and, more particularly the prejudice that may be suffered by such creditor if he/she gives notice and the application is heard in due course. The factors that could be taken into account are not exhaustive. Each case will depend on its own particular circumstances.'

[14] In *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C), Dlodlo J referred to the use by the legislature of the word 'must' in s 9 of the Act and, contrasting it with the word 'may' decided that service of the application, as set out in the section, was compulsory and not permissive.

[15] In *Moodliar NO & Others v Hendricks NO & Others* 2011 (2) SA 199 (WCC) Davis J dealt with whether a court had the inherent power to condone non-

compliance with s 346 (4A)(iv) of the Companies Act 1973, which is in similar terms to s 9(4A)(a)(iv) of the Act. At page 205 he stated :

‘[26] In dealing with this question Meskin *Henochsberg on the Companies Act*at 724(1) appears to be uncertain as to the position, as is evident from the following passage:

> 'While sub – s (4A)(a)(iv) specifically provides for the circumstances in which the court may dispense with the delivery of the application of the company, no such provision applies in relation to the delivery of a copy of the application to the persons mentioned in sub-s (4A)(a)(i), (ii), (iii) and non-compliance therewith *may* preclude the grant of a provisional order until there has been compliance.' [My emphasis.]

[27] Insistence that a court cannot under any circumstances condone a deviation from strict compliance may, to some extent, run counter to the inherent jurisdiction of the court. See in this connection Jerold Taitz*The Inherent Jurisdiction of the Supreme Court* at 14 – 18 and the authorities cited therein.

[28] But the answer may well lie, not so much in the inherent jurisdiction of the court to condone non-compliance, as in the nature of the concept of compliance itself. In this connection LC Steyn*Die Uitleg van Wette*5 ed at 201, in dealing with the question of compliance, says the following:

> 'Somtydsegter word ook in hierdie verband slegs sogenaamde wesenlike nakoming vereis, maar dit word oorwegend gegee dat die korrekte standpunt gestel is in *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C – D,waarverklaar word. . . .

“The enquiry, I suggest, is not so much whether there has been 'exact' 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance.”

[29] To sum up: a court cannot condone non-compliance with the requirement that a copy of the application must be furnished on the parties, as specified in s 346(4A)(a). I do not consider that the inherent jurisdiction would extend the power of the court. But a court may, in my view, determine whether the applicant has been in substantial compliance with each of these sections. In other words, it is for the court to determine whether the nature of the furnishing of the application, pursuant to the section, has been met.

[30] To express this point in another way, the means adopted by the applicant to comply with the section is something which the court is required to determine to decide whether there has been substantial compliance, as I have set it out.’

[16] A distinction was drawn in that case between compliance with s 346(4A)(a)(iv) and the remainder of s 346(4A)(a). I understand the comments of Davis J above to refer to the remainder of s 346(4A)(a)other than subsec 346(4A)(a)(iv).

[17] I am in respectful agreement with the views of Levinsohn J as set out above, and would follow his approach as opposed to that of Dlodlo J. In this regard see also *Mthimkhulu v The State* (547/12 [2012] ZASCA 54, 4 April 2013) paragraphs 7 to 11 as to how to deal with interpretation of language which prima facie, appears peremptory.

[18] The logic of Levinsohn J seems particularly apposite as s 9 (4A)(a)(iv) of the Act provides :

'4A(a) When a petition is presented to the court, the petitioner must furnish a copy of the petition –

…

(iv) to the debtor unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or the creditors to dispense with it.'

[19] When the order for substituted service was made, no specific reference was made to the service of the application papers on the applicant. That was clearly a matter which had been dispensed with by the judge who granted the order. Given the history of the matter and the lengths to which the respondents had gone in attempting to obtain service on the applicant, I cannot envisage that this was something which was merely overlooked by the learned judge. The learned judge was no doubt of the view that the order for substituted service was the best way to deal with the problems of non-service.

[20] The service of the provisional order provided everything that the applicant would have needed to know, had it come to his attention. In both the newspaper publication and in the Government Gazette the details of the respondent's attorney were set out and it would have been a simple matter for the applicant to have contacted them in order to obtain a copy of the application papers.

[21] In any case, and even were this to have been an oversight on the part of the learned judge, I cannot see how it has resulted in any prejudice to the applicant. If the learned judge had ordered that the application papers were to be served in the same way as the final order, according to the applicant, they would not have come to his attention anyway because he did not become aware of the provisional order as a result of the substituted service provisions. In any event, it would have been an entirely impractical exercise to have ordered the service of the application papers by way of the substituted service order proposed by the learned judge, at least insofar as that related to publication of the order in a newspapers and the Government Gazette.

[22] In my view in considering an application such as the present one it is also significant to note that although the final order of sequestration was granted on the 8th November 2010 the application to set that order aside was only launched on the 14th March 2012. In his founding affidavit the applicant seems careful not to disclose to the court when he became aware that his estate has been sequestrated.

[23] In their answering affidavits the respondents pertinently pointed out that the applicant had failed to disclose when he first knew of the sequestration proceedings which had been instituted against him. As pointed out in the answering affidavit, his failure to do so reflects poorly on his bona fides as he has failed to make a full, proper and honest disclosure to the court as to the circumstances of the matter. It is significant in this regard that in his replying affidavit the applicant makes no attempt to deal with the implied invitation to disclose when he first became aware of the sequestration proceedings against him.

[24] In all the circumstances I do not believe that the applicant has made out a case for the relief he seeks. Insofar as the exercise of my discretion may be a factor, I would exercise it against the applicant because of his failure fully to disclose the relevant considerations of when he became aware of the final order.

[25] I make the following order :

1. The application is dismissed.
2. The applicant is to pay the costs of the first, second and third respondents in opposing the application.

Date of hearing : 7th May 2013

Date of judgment : 22nd May 2013

Counsel for the Applicant : K J Kemp SC (instructed by ShaukatKarim& Company)

Counsel for the Respondent : R G Mossop (instructed by Daly Maqubela Oliphant)