IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 10766/2011

In the matter between:

ROBIN CLIVE GRACIE APPLICANT

and

SCOTT COLLIN CUNDILL RESPONDENT

JUDGMENT Delivered on 08 June 2012

SWAIN J

[1] The applicant originally sought the provisional sequestration of the estate of the respondent, based upon an act of insolvency committed by the respondent in terms of Section 8 (b) of the Insolvency Act No. 24 of 1936 (the Act), as a result of a *nulla bona* return rendered by the Sheriff dated 07 September 2011.

[2] It is common cause that the judgment debt, payment of which was demanded by the Sheriff from the respondent, was summary judgment for payment of the sum of R200,000.00, interest on this sum at the rate of 15.5% percent per annum, *a tempore mora* to date

of payment, together with costs.

[3] At the hearing of this matter I referred Counsel to the averment made in the heads of argument of Mr. Pretorious, who appeared on behalf of the applicant, that subsequent to the delivery of all of the affidavits, the respondent had paid the sum of R200,000.00 into the trust account of the applicant's attorneys. I accordingly asked whether it was common cause that the respondent had paid the capital sum owing to the applicant. Mr. Broster S C, who appeared on behalf of the respondent, said this was not the case as the payment had been made subject to certain conditions, which were not acceptable to the applicant. I then requested Counsel to clarify this issue, the upshot of which was that the respondent agreed that the payment was unconditionally made. The respondent also agreed to make payment of the interest payable on this amount, together with the applicant's costs in the action, within fourteen Court days of being presented with a calculation of the interest payable, as well as the Registrar's *allocatur* in respect of the applicant's taxed costs. The respondent also agreed to pay the applicant's costs in respect of the application brought by the respondent to rescind the summary judgment, within fourteen Court days of the applicant presenting to the respondent, the Registrar's *allocatur* in respect of the applicant's taxed costs.

[4] The only remaining issue accordingly was the liability of the respondent for the costs of the present application. Mr. Pretorious

submitted that the respondent should be ordered to pay the applicant's costs, whereas Mr. Broster submitted that each of the parties should pay their own costs.

[5] The basis for Mr. Broster's submission was that the applicant had acted unreasonably in pursuing the sequestration of the respondent, because it was clear on the papers, that the applicant could have obtained satisfaction of the amount owing, by executing against an immovable property owned by the respondent. Mr. Broster pointed to the fact that the applicant in his founding affidavit alleged that the respondent was the owner of a certain immovable property, which was purchased by the respondent for R3,780,000.00 and which was mortgaged in favour of the Standard Bank in the sum of R1,8M. The applicant also alleged that he had obtained a valuation of the immovable property in the sum of R3M. Mr. Broster's argument was therefore that there was clearly sufficient equity in the immovable property, to satisfy the applicant's claim, which applicant should have done by executing against the immovable property, rather than by seeking the sequestration of the respondent. When I asked Mr. Broster whether he was attacking the validity of the *nulla bona* return, he replied he was not.

[6] The latter aspect is of importance in assessing the argument advanced by Mr. Broster, because the return contains the following statement by the Sheriff:

"It is further certified that Cundill Scott Collin was requested to declare whether he owns any immovable property which is executable, on which the following reply was furnished 'No' ".

[7] The respondent's answer to the *nulla bona* return was to state that the address where the Sheriff sought to execute the writ, was not the address of the immovable property in question and was done at an address where the respondent did not have any assets. The respondent alleged that if the attempt to execute had been carried out at "any other place where I have assets, namely Five Streams farm, the result would obviously be different".

It is common cause that the immovable property is the property which was sold by the applicant to the respondent. It is also common cause that the Sheriff attempted to serve the warrant of execution upon the respondent at the immovable property on 20 September 2011, but was unable to do so as he found the premises locked. From the Sheriff's return he had attempted to serve the process at the immovable property on 05 September 2011, but had on that occasion also found the premises locked.

[8] The respondent's answer to the contents of the *nulla bona* return was that the address where the writ was served upon him was that of his girlfriend, who leased the property and "whose furniture and movable assets comprise the contents of the household goods". The respondent then added the following:

"15.5 The abovementioned six witnesses watched as the Sheriff asked if this was my house, heard me say no, asked if I had any assets here, heard me say no again, and then said ‘don’t worry, I’ll take care of it’ and left after tearing off the warrant of execution”.

[9] The applicant in reply, obtained an affidavit from the Sheriff where he states:

“I further confirm the content of the writ as being true and correct in all respects”.

[10] There is consequently a direct dispute of fact as to whether the Sheriff asked the respondent whether he owned any immovable property which was executable. In my view, it is not necessary to resolve this dispute, because on the respondent’s version it is quite clear that the respondent appreciated that the Sheriff’s task was to find property belonging to the respondent, whether immovable or movable wherever situated, which could be attached to satisfy the judgment. The respondent was aware that there was an immovable property, which could be attached but nevertheless concealed its existence from the Sheriff, purely on the basis that the Sheriff had not served the writ at the immovable property in question. Mr. Broster submitted that even if the conduct of the respondent had been misleading, this did not affect the fact that the applicant was aware of the existence of the immovable property and that it could be attached in execution of the applicant’s claim.

[11] Mr. Pretorious, submitted that the availability of the immovable

property for attachment was not clear because the respondent on 03 November 2011, before the present proceedings were initiated sent an email to the applicant's attorneys advising them that he was "currently involved in a High Court case with Standard Bank over the farm". He also drew attention to the failed attempts by the Sheriff to serve the writ upon the respondent on 30 August 2011 and 02 September 2011, at the address where service was eventually effected, as well as the failed attempts at service at the immovable property, referred to above. He also drew my attention to the fact that the respondent alleged in reply that the reason the property was purchased, was to establish a sustainable community and each individual invested funds into the purchase of the property. The respondent alleged that the applicant was aware of this purpose before the agreement was signed, and the applicant was aware of the subsequent activities on and development of the land, which was not denied by the applicant in reply. Consequently, Mr. Pretorious submitted that the ability of the applicant to have the property attached and sold in execution, was not as clear cut as the respondent submitted.

[12] Mr. Broster in reliance upon the decision of Didcott J (as he then was) in

Gardee v Dhanmanta Holdings & others
1978 (1) SA 1066 (N) at 1069 I

submitted that the following dictum was apposite on the facts of the present case:

"Applying these criteria to the case of the single creditor who uses sequestration proceedings as a mode of execution, one draws the following conclusions. He must satisfy the Court, at the least, that there is reason to believe in all the circumstances that, after the costs of sequestration are paid, he will recover an amount which is not negligible. What is more, in my opinion, he must demonstrate some reasonable expectation that it will exceed the likely proceeds of ordinary execution. Unless he does that, the laborious and substantially more expensive remedy of sequestration can hardly be thought advantageous".

However, it is clear that these remarks were uttered by Didcott J in the context of whether the applicant as a single creditor, had established that the sequestration would be to the advantage of creditors. The remarks of Didcott J were never intended as the sole criterion to determine whether a single creditor was entitled to use sequestration proceedings as a form of execution, particularly where such creditor had experienced great difficulty in executing, in the ordinary way. This is particularly so in the light of his remarks at 1069 C that

"Sequestration, it is true, has been described on occasions as a legitimate form of execution".

[13] In similar vein are the remarks of Solomon J A in

Estate Logie v Priest

1926 AD 312 at 319

"It appears to me that it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt. In truth that is the motive by which persons, as a rule are actuated in claiming sequestration orders. They are not influenced by altruistic considerations or regard for the benefit of other creditors, who are able to look after themselves. What they want is payment of their debt, or as much of it as they can get. And more particularly would a creditor be justified in taking proceedings in a case like the present, where the greatest difficulty has been experienced in extracting money from the plaintiff, although it is said that he never in fact was insolvent. What, in such circumstances, is a creditor to do in order to obtain payment of his debt?"

[14] In the present case the applicant has likewise experienced the greatest difficulty in obtaining payment of the amount due by the respondent, payment of which was only made unconditionally by the respondent, when the threat of sequestration loomed ominously over him.

[15] When all of the above is considered, I have no doubt that the applicant acted reasonably in launching the present proceedings and that the respondent should be ordered to pay the applicant's costs.

[16] As regards the application for the sequestration of the respondent's estate, I am of the view that this should be adjourned *sine die.* In the event that the respondent does not honour his undertakings to make payment of the interest and costs referred to above, the applicant would be entitled to renew the present

application, supplemented in so far as may be necessary to deal with any such breach on the part of the respondent.

The order I make is the following:

a) The application for the provisional sequestration of the respondent's estate is adjourned *sine die.*

b) The respondent is ordered to pay the applicant's costs.

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K. SWAIN J

Appearances /

Appearances:

For the Applicant **:** Mr. C. Pretorious

Instructed by	**:**	Mason Incorporated Pietermaritzburg
For the Respondent	**:**	Mr. L. B. Broster S C
Instructed by	**:**	Askew & Associates Durban
Date of Hearing	**:**	04 June 2012
Date of Filing of Judgment	**:**	08 June 2012