IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**
KWAZULU – NATAL, DURBAN **CASE: 15713/2009**

In the matter between:

ITHALA DEVELOPMENT FINANCE CORPORATION LIMITED **Applicant**

vs

SIFISO ZULU **Respondent**

JUDGMENT

Delivered on 08 June 2011

Ntshangase J:

[1] This is an extended return day of a provisional order of sequestration granted against the respondent in his absence from court on 19 March 2010. The applicant now seeks a final sequestration order. The application in that regard is opposed.

[2] The applicant contends that the respondent has committed an act of insolvency and is, alternatively insolvent. It is common cause that summary judgment was granted in favour of the applicant against the respondent and others for the payment of R4 824 836.08. The respondent failed to satisfy the judgment debt or to indicate to the sheriff on 25 June 2008 and on 15 May 2009 disposable property sufficient to satisfy it. The sheriff himself did not find sufficient disposable property to satisfy the judgment debt. The sheriff rendered nulla bona returns on 25 June 2008 and 15 May 2009. As at 25 August 2009 an amount of R4 675 192,18 remained outstanding on the judgment debt after the applicant executed its judgment against the sureties and securities that they had provided when they and the respondent procured the loan which they have failed to repay.

[3] The nulla bona return on the warrant executed on the respondent on 15 May 2009 is challenged with reference to *Nedbank v Norton* 1987 (3) SA 619 (N) as only referring to movable property and not to immovable property. The challenge is incorrectly premised. This return of service, as does one served on the respondent on 25 June 2008, refers also to 'assets'. The relevant part thereof reads:

'After enquiry no goods or assets could be pointed out to satisfy the writ. Despite a diligent search and enquiry I could not find sufficient assets at the given address to satisfy this writ I therefore make a return of nulla bona'.

'Assets' would include immovable property. The attack on the nulla bona return on the advanced grounds must fail. Both nulla bona returns do establish the act of insolvency in terms of s 8(b) of the Insolvency Act 24 of 1936 ("the Act"). The respondent is, by his own admission, also clearly insolvent.

[4] I deal now with the issues, one of which pertains to the founding affidavit which, it was submitted *in limine* on behalf of the respondent, is not valid, in consequence whereof it is argued, the application cannot stand. The grounds advanced for this proposition is that the authority of Matome Geoffrey Mashao ("Mashao") to depose to the founding affidavit as derived from a resolution of the Board of Directors whose minutes were signed by 'somebody "PP" on behalf of Ms P Mahamba and not by the Group Companies' Secretary, is invalid. I find no merit in this submission. To Mashao's averment in para 1.2 of the founding affidavit that he was

'. . . authorised to depose to this affidavit and to bring this application on behalf of the applicant'

the respondent's answer was

‘I admit the averments herein’.

[5] The application was also challenged as flawed by failure to furnish a copy of the petition to the respondent and all parties to whom such copy is to be furnished in terms of s 9(4)A of the Act. This point is not well taken. The undertaking in para 72.1 and 72.2 of the founding affidavit to comply with s 9(4)A of the Act pre-dates the provisional sequestration order granted against the respondent. This challenge overlooks paragraphs 8.3 and 8.4 of the applicant’s affidavit deposed to by Mlamuli Jimmy Duma as to the reason for the inapplicability of the provisions of s 9(4)A of the Act, save insofar as such provisions apply to the domestic worker upon whom service was in fact effected in terms thereof.

[6] The court was urged to reject as conjecture the applicant’s averments that it is ‘more probable than not that the respondent is a shareholder in one or more’ of the companies of which he is a director, that he ‘must have a member’s interest’ in Close Corporations of which he is a member; ‘that it is more probable than not that the respondent must receive director’s fees for most, if not all of his directorships in the companies’, and other similar averments. This tends to overlook that this is an arm’s length sequestration. The position is stated appositely in the words of Hathorn, JP in *Amod v Khan* 1947 (2) SA 432 (N) at 438:

‘A debtor knows all about his own affairs and can easily prove the advantage of the creditors. On the other hand, the creditor has normally little knowledge of the exact position of the debtor; he probably does not know what creditors he has, nor the amounts he owes, nor the assets he possesses’.

[7] I also do not think that the applicant’s failure to prove the respondent’s shareholding in companies and member’s interests in close corporations in which the respondent has admitted his involvement, which number no less than 28, defeats, simply for such reason the necessity for investigation of the respondent’s affairs in the interests of creditors. It is fair to adopt the following

view of Roper J expressed in *Meskin & Co v Friedman* 1948 (2) SA 555 (w) at 559:

'In my opinion, the facts put before court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient . . . .'

[8] I now deal with the submission that the applicant has failed in its endeavour to satisfy the court that on a balance of probabilities, there is reason to believe that the sequestration order will be to the advantage of the creditors. In that regard it is argued that the relevant belief in the present matter is not predicated as facts which would engender such belief.

[9] The facts proffered by the applicant in support of the relevant belief relate to the respondent's failure to disclose ownership of immovable property and the misrepresentation of the status of Emtateni Logistics, which the respondent listed as 'dormant (Co. closed)' in a 'schedule of businesses in which (he states he has) been involved'.

[10] The applicant points to the fact that when the sheriff served the warrant of execution on the respondent, on 25 June 2008 he claimed

'. . . . to own no vehicle or any other disposable assets'.

When served with one of 15 May 2009,

'(a)fter enquiry no goods or assets could be pointed out to satisfy this writ'

A Deeds search revealed that he in fact owned 'unit 4 in the Sectional Title St James'. The Deeds search also revealed acquisition of ownership of this property in 1994 and that it was apparently sold for R295 000 on 7 November 2008, some four months after service of the writ on him.

[11] Of the immovable property, the respondent says no more than that

'(t)he property was sold in execution and the bank concerned took everything'.

The respondent does not name the bank; nor has he submitted documentary support for the averment that the property was sold in execution. An investigation would reveal whether or not some creditor was preferred above others.

[12] Contrary to Emtateni Logistics being dormant or closed, the affidavit deposed to by Carlos Alberto Vaz Esteves, ("Esteves") the Deputy Head: Road System Management of the eThekwini Municipality describes its activities as follows:

'6.1 the installations, service, maintenance and general running of all parking metres within the eThekwini Municipality area have been contracted out to a company, namely Emtateni Logistics (Pty) Ltd (hereinafter referred to as "Emtateni"):

6.2 The aforesaid contract is to run until at least 2012; and

6.3 Emtateni is complying with its contractual obligations and is receiving payment for its services in accordance with the terms of the agreement.

6.4 The contract value runs into millions of rands

I am personally aware that Mr Sifiso Zulu, in some way or another, is directly linked to and involved in Emtateni.

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As far as I am aware and concerned Emtateni is not "dormant" nor has it "closed down" as it is still performing its contractual obligations in terms of the agreement and we receive regular reports from Emtateni regarding its contractual obligations.'

[13] The respondent's concealment of the fact of ownership of immovable property and his apparent mendacity in regard to the status of Emtateni Logistics, lend significant weight in support of the reason to believe that the sequestration of the estate of the respondent will be to the advantage of his creditor.

[14] It was argued with reference to *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (N) that the applicant as a single creditor has failed to discharge the onus it bears to demonstrate that the interrogation would be the most appropriate means available to fully investigate the respondent's affairs and that the more expensive and cumbersome procedure of sequestration will exceed the likely proceeds of ordinary execution.

[15] *Gardee*'s case relied upon by the respondent cannot apply in the facts of the case before me. I do not understand the judgment of Didcott J as propounding in *Gardee* a general rule that in every case where the applicant is a single creditor he should rest his efforts on ordinary execution as a mechanism more advantageous to a creditor than sequestration.

[16] It was also submitted that with due regard to the large amount owed coupled with interest it generates, sequestration would yield a negligible dividend, if any. In this regard reliance was placed on *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) in which Jansen J stated:

'It seems to me that a sequestration is to the advantage of creditors only when it results in some payment in respect of the claims of creditors as a body, eg a not negligible dividend'.

[17] Esteves' affidavit in regard to the respondent's involvement in the business of Emtateni Logistics whose

'. . . . contract value runs into millions of rands'

is quite significant. This fact establishes the prospect of discovery or recovery of assets for disposal which would yield a not negligible dividend for the advantage of the creditor, upon a proper investigation of the respondent's affairs.

[18] Added to this is the fact that the actual extent of the respondent's mendacity and concealment of assets still remains to be determined. Coupled with this, is the respondent's involvement in 28 companies and close corporations from which, the respondent professes, he derives no income, as dormant or closed. It of course does not follow that if a company or close corporation be dormant it would necessarily be without assets which would accrue in this case to the respondent. The respondent has not disclosed whether or not he has disposable valuable interests as a director, shareholder or member of the companies and close corporations concerned. He also has not disclosed what became of the millions of rands he had; nor how he sustains himself. Given his past failure to disclose ownership of property, it would be fair to acknowledge that a creditor in the circumstances of this case would harbour a rational apprehension that the respondent would persist in his failure to disclose disposable assets. The facts of this case present to me the prospect that assets might be unearthed for the benefit of the creditor. It is, in my view, a proper case for investigation and inquiry in terms of the Act. As was held in *Hillhouse v Stott; Freban Investments v ITZKIN; Botha v Botha* 1990 (4) SA 580 at 585E-F.

‘It is sufficient if it be shown that investigation and inquiry under the relevant provisions of the Act might unearth assets, thereby benefitting creditors’

[19] I am satisfied in this matter that the applicant has, on a preponderance of probabilities, discharged the onus it bears to demonstrate that the interrogation would be the most appropriate means available to fully investigate the respondent’s affairs and that the results of the procedure of sequestration will in all probability exceed the likely proceeds of ordinary execution, and that there is, in this matter, in fact reason to believe that sequestration of the respondent’s estate will be to the advantage of the creditor.

[20] The following order will issue:

a) The rule *nisi* is confirmed; and

b) the estate of the respondent is hereby placed under final sequestration.

Appearances:

For Applicant: E Crots,
instructed by Strauss Daly Inc. Durban.

For Respondent: M F Moosa,
instructed by Kafu & Dlamini Attorneys, Durban.