REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 10097/2008

In the matter between:

KIM THERESA KATHLEEN HILNE **APPLICANT**

and

PETER JOHN HILNE **RESPONDENT**

JUDGMENT DELIVERED ON : 27 NOVEMBER 2008

ALLIE, J

[1] This application for provisional sequestration was first brought on 15 July 2008. It was postponed to 22 July 2008 and when it became opposed it was postponed to 17 November 2008.

[2] Applicant is the former spouse of respondent. The receiver is an accountant Mr A. S. Pocock appointed by the parties in their Consent Paper that was made an order of court on 22 August 2005.

[3] On 30 January 2007, Traverso AJP made an order *inter alia,* referring disputes concerning the valuation of assets and acceptance of liabilities in the receiver's interim account to oral evidence.

[4] On 7 March 2008 the court directed Mr Pocock to allow certain liabilities, disallow others and place a value on certain immovable properties. The order also provided that should the parties fail to pay in accordance with the final account drafted by the receiver, the latter could enforce payment in accordance with the terms of the Consent Paper.

[5] The right granted to the receiver to effect a redistribution of assets in terms of the Consent Paper includes inter alia, the following: The right

5.1 to realise any asset in South Africa or elsewhere by public auction, private treaty or to make a distribution

5.2 to reduce to cash any portion of a party's entitlement

5.3 to sign all documents and take all steps necessary to effect the above

5.4 to apply to court for further directions

5.5 to demand payment over and above delivery of any asset.

[6] Clearly the receiver has the right to enforce a redistribution in accordance with his final account by taking all the necessary legal steps including issuing out a Warrant of Execution.

[7] The receiver's authority to enforce a redistribution does not however oust either party's right to do so in their own names as their respective obligations in terms of the consent paper are binding on them.

[8] It is equally open to the applicant to apply for the execution of a warrant to enforce a judgment compelling either party to give the other an amount to be determined by the receiver.

[9] In applying for a warrant of execution, the applicant in her affidavit accompanying the writ, relied upon the judgment of 7 March 2008 read together with the Divorce Order incorporating the Consent Paper.

[10] In that affidavit, the applicant incorrectly informed the Registrar that the written notice of the receiver demanding payment of the account had the effect of a judgment. Mr Robertson, on behalf of applicant, correctly conceded that it did not have the effect of a judgment.

[11] On behalf of respondent, it was argued that the Divorce Order and the order of 7 March 2008, in so far as they relate to the parties obligation to give effect

to a redistribution of their assets, are orders *ad factum praestandum* and not orders *ad pecuniam solvendam.* Following on that argument, Mr Spamer, for respondent, alleged that the applicant did not have the type of judgment in her favour upon which a warrant of execution could be based in accordance with Rule 45(1) of the Uniform Rules of this court. A further basis of respondent's attack upon the validity of the writ is the allegation that it should contain a full description of the judgment. The writ's validity was also challenged because it was alleged that it should be issued on behalf of the receiver and it contains an amount in excess of what applicant is entitled to. The applicant applied for payment of the full amount stated in the receiver's account which was made up of her entitlement, the fees and disbursement of the receiver and of a firm of attorneys and a payment to be made to respondent's first wife.

The Validity of the Warrant of Execution

[12] In the case of **Du Preez v Du Preez 1977(2) SA 400 (C) at 403 G,** the court referred to the case of **Perelson v Druain 1910 TPD 458** with approval where that court found that a writ is not invalid merely by virtue of it having been issued for an amount in excess of that for which it ought to have been issued. It will remain valid provided it is competent in respect of a portion of the amount stated thereon.

[13] In the case of **Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd 1978(1) SA 74 (D) at 79 A** it was said a judgment is a command to the party at whom it is aimed, together with a warrant to the Sheriff to enforce the command in certain instances.

[14] In the case of **Butchart v Butchart 1996(2) SA 581 (W)** a full bench held that a writ could be issued to recover medical and related expenses based on an order of divorce that compelled payment of medical expenses without determining a specific amount. The court in Butchart cited with approval, the case of **Bennett v Bennett's executrix 1959(1) SA 876 (C)** where De Villiers AJ said that:

> *"…there seems to be no reason in practice or principle why a writ cannot be issued upon submission by the lessor of an affidavit giving particulars of the amount for which the lessee is in terms of the judgment liable."*

[15] The court in Butchart's case went on to state that in that specific case the danger of the respondent not knowing that the amount was due and owing was avoided by the provision in the judgment of a demand first being made. In **Du Preez v Du Preez 1977(2) SA 400 (C)** it was said that a conditional judgment is not necessarily incompetent as a basis for a writ of execution.

[16] Similarly in the present case, the order of divorce contains a provision that the receiver should first demand that a redistribution be effected in

accordance with his final account, which he did. The respondent therefore had sufficient prior notice that the amount was due and owing.

[17] Both the order of divorce and the order of 7 March 2008 command that the final account rendered by the receiver concerning the division of the estate should be given effect to by the parties.

[18] In the unreported case of **Block v Block at 46** which was referred to by Wepener A.J, in Butchart's case it was held as follows:

"Must the judgment creditor approach the court from time to time for an order quantifying the medical expenses reasonably incurred before a valid writ can be issued. Having regard to the fact that the judgment debtor's liability for medical expenses reasonably incurred has already been established in principle by the judgment of the court that suggestion is impractical, not least on ground of unnecessary expense."

[19] By analogy, in the present case the liability of the party who has to pay a sum determined by the receiver has already been determined, a further court order commanding payment of the sum subsequently determined would be tautologous and cause an undue escalation in cost.

[20] The attitude of the respondent towards the final account of the receiver, which also included a paragraph demanding payment, is best described by the

respondent himself in his founding affidavit to the application he brought to have the writ set aside. It reads as follows:

> *"In this time I was also confronted with my preparations for a long-planned visit to Europe and the United Kingdom which was set to run from the middle of April 2008 to 8 June 2008. I decided not to make any payments to the second respondent until I obtained finalisation of the legal position which I trusted would be clarified by my return."*

[21] There is no doubt that the respondent chose to ignore at least two court orders commanding him to pay or redistribute in accordance with the final account of the receiver. He has to date also not challenged the validity of the provisions of the Consent Paper for which he sought to have the "legal position clarified."

The unequivocal nature of the Nulla Bona Return

[22] The *nulla bona* return relied upon by the applicant reads as follows:

> 22.1 *I served the writ attached hereto upon the first respondent personally at 9 Quinan Road, Somerset West on 18 June 2008 by showing him the original and handing a copy to him and simultaneously explaining the nature and effect to first respondent and claiming payment of the amount in the abovementioned writ.*

22.2 The first respondent answered that he has no money or movable or alienable and disposable assets to satisfy this writ or a portion thereof, and I could not find any movable or alienable assets or money belonging to the first respondent which I could attach in order to satisfy this writ or a portion thereof.

22.3 First respondent owns Erf 4301 in Somerset West.

22.4 Thus is my Return one of nulla bona.

[23] In the case of **Kader v Haliman 1958(4) SA 31 (NPD), at 32 G-H** the court outlined what a *nulla bona* return should contain:

In my view generally speaking a messenger's return to a warrant which is unsatisfied and in respect of which no attachment has been possible (commonly called a nulla bona return) should state, inter alia,

(a) that he explained the nature and exigency of the warrant, and the person to whom he explained it;

(b) that he demanded payment;

(c) that the defendant failed to satisfy the judgment;

(d) that the defendant failed, upon being asked to do so, to indicate disposable property sufficient to satisfy it. (The expression 'disposable property' is preferable to the word 'goods', for the former include immovable property. Per BROOME, J. (as he then was), in Horace Sudar & Co. (Pty.) Ltd v Cassja & Co. and Others, 1950 (1) SA 203 (N) at p. 206);

(e) that the messenger has not found sufficient disposable property to satisfy the judgment, despite diligent search and enquiry.

[24] In that case, the court further concluded that *prima facie* it appears that the debtor upon demand by the messenger failed to satisfy the judgment or to indicate sufficient disposable property to satisfy it.

[25] In *casu,* the respondent clearly pointed out no disposable property with which to satisfy the judgment, save for Erf 4301 Somerset West. In applicant's founding affidavit she alleged that the respondent transferred the said erf from his name into the name of D Jeffs on 10 December 2007.

[26] In his opposing affidavit, the respondent admits the transfer although he goes on to allege that he sold the property to D Jeffs on 21 July 2003. The alleged date of sale was before the order of divorce was granted. In the Consent Paper that was incorporated into the order of divorce, mention is made of the Somerset West property as one of the properties that if disposed of, the

receiver may take steps to set the aside. If the property was indeed sold prior to the order of divorce, the question that remains unanswered is why it was mentioned as a property whose disposition may be set aside. It is precisely allegations such as this one, which calls into question the truthfulness of respondent's averments concerning this property. I accordingly conclude just as Holmes J did in the case of Kader v Haliman, that the facts stated by the sheriff in the *nulla bona* return are *prima facie* proof of what the respondent indicated to the sheriff. The respondent was accordingly dishonest in stating that he owns Erf 4301 Somerset West at a time when he knew that it had been transferred off his name. In his papers, he does not indicate that the property was subsequently transferred back to him. This is however a possibility that his counsel asked me to consider. In effect and in substance the return is one of *nulla bona* in a much as, the respondent pointed out one immovable property that did not belong to him.

[27] Section 8(b) of the Insolvency Act 24 of 1936 reads as follows:

"A debtor commits an act of insolvency

(a) *….*

(b) *If a court has given judgment against him and he fails, upon demand of the officer whose duty it is to execute that judgment to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it*

appears from the return made by that officer that he has not sufficient disposable property to satisfy the judgment. (my emphasis)

[28] It clearly appears from the return that the respondent has failed to indicate sufficient disposable property to satisfy the judgment. Indicating immovable property that does not belong to him, does not change the *nulla bona* nature of the return. There was accordingly no need for the sheriff to value the immovable property. I am therefore satisfied that the applicant has shown that the respondent committed an act of insolvency as contemplated by Section 8(b).

Alleged Factual Solvency

[29] On behalf of respondent, Mr Spamer contended that it is common cause that the respondent is factually solvent and it would be contrary to public policy and to the intention of the legislature to allow a sequestration where there was factual solvency.

[30] In the case of **Estate Logie v Priest 1926 AD 312** at 321 Solomon J.A. held as follows concerning the motive for an application for sequestration:

"However wealthy a debtor may be, if he has committed an act of insolvency, a creditor is entitled to sequestrate his estate …….. Where an act of insolvency has been committed nothing more is required and it is immaterial what the means of the debtor may be."

[31] It has been accepted by the courts that a creditor may use any legal means at his/her disposal to enforce payment of the debt, including sequestration proceedings which are often used as a means to compel payment by a recalcitrant debtor.

[32] It is not clear from the papers whether the respondent's estate is at present solvent. In the founding affidavit, the applicant mentions a disposition of immovable property which a Trustee, in due course, may wish to set aside. The account of the receiver reflects the value of the estate of the respondent as at the date of the divorce, that being 22 August 2005. At that date, the respondent's estate appeared to be solvent. The applicant does not however rely on factual insolvency.

Advantage to Creditors

[33] I turn now to whether there is reason to believe that a sequestration will be to the advantage of creditors.

[34] The applicant is clearly not the only creditor entitled to payment in accordance with the final account of the receiver who the respondent has to date failed to pay. The receiver himself has not received payment of his fees and disbursements in the sum of R119 888 nor has attorneys Buchanan Boyes

received payment of their account of R19 655. I am accordingly persuaded by applicant's allegation in her founding paper that there is reason to believe that it will be to the advantage of creditors if the disposal of the assets of the respondent are regulated by a trustee to ensure payment to creditors. It is necessary to regulate the disposal of assets and the payment of creditors as at least one immovable property in South Africa has already been disposed of without the consent of the receiver.

[35] In the circumstances, I grant an order of provisional sequestration. Respondent shall pay the costs including the cost of the hearing on 22 July 2008.

It is ordered that:

1. The estate of the respondent is placed under provisional sequestration in the hands of the Master of the High Court.

2. The respondent shall show cause, if any at 10h00 on Tuesday, 13 January 2009

December 2008 or as soon thereafter as the matter can be heard why the above Honourable Court should not order the final sequestration of the respondent's estate.

3. The Sheriff of this court shall effect service on the respondent of this order or service shall be effected in such other manner as the parties may agree.

4. A copy of this order shall be served by registered post on all known creditors with a claim in excess of R5 000.

5. A copy of this order shall be served on South African Revenue Service, Cape Town.

6. The cost of this application including the cost of the appearance on 22 July 2008 shall be paid from the estate of the respondent.

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ALLIE, J