

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

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

CASE NO: 2023/043172

19/8/2024
DATE

[Signature]
SIGNATURE

In the matter between:

SHACKLETON CREDIT MANAGEMENT (PTY) LTD

Applicant

and

KEDISALETSE PATRICIA BALOYI

Respondent

JUDGMENT

GRAVES AJ:

[1] This is an application for sequestration of the Respondent. In its founding affidavit the Applicant sets out the background to the application, relying

predominantly upon a judgment granted on 31 July 2028 in the High Court, Limpopo Division, Polokwane, under case number 1852/2018 against the Respondent and Lebone Customer Management Consulting CC, jointly and severally. The judgment was for payment of the sum of R484 651,98, interest on the sum of R242 725,99 at the compounded rate of 2,162% per *annum* from 5 October 2017 to date of payment, and costs on the attorney-and-client scale.

[2] The Applicant alleges in founding papers that a warrant of execution was issued against the Respondent's movable property, following which three payments of R500,00 each were made during January, April and October 2019. No further payments have since been made. During August 2022, the Applicant took further steps in execution of the judgment against the Respondent and recovered a sum of R108 642,24, being the proceeds from the attachment of funds held to the credit of the Respondent with First National Bank. Applying this further credit the outstanding balance in terms of the judgment at that time was R401 346,18, excluding costs and further interest accruing.

[3] A further warrant of execution against movable property was issued against the Respondent during October 2022, was served on her personally on 23 February 2023 and resulted in the Sheriff rendering a *nulla bona* return. During the execution process the Respondent informed the Sheriff that she had no money or attachable assets to satisfy the balance owing. The Applicant relies upon Section 8(b) of the Insolvency Act, 24 of 1936 (insufficient disposable property found by the Sheriff to satisfy the judgment) read with Section 10(b) (*prima facie* evidence of an act of insolvency committed or that the person is insolvent). The Respondent delivered an answering affidavit which I deal with below.

[4] At the commencement of the hearing, the Respondent - who appeared in person - applied for a postponement of the application. This was opposed by counsel for the Applicant and I accordingly heard argument. The essential ground for the postponement being sought was that the Respondent's attorneys had withdrawn by notice dated 20 May 2024. It became apparent that the attorneys previously representing the Respondent had merely acted as a correspondent and that Adv. Sibya, an advocate registered under the Legal Practice Act,¹ had been responsible for all legal advice and services rendered to the Respondent. Adv. Sibya had himself withdrawn as early as 25 July 2024.²

[5] Counsel for the Applicant referred me to a notice of set down delivered by the Applicant's attorneys to Adv. Sibya at his email address on 24 May 2024. The Respondent confirmed that she had herself received an email notification that the matter was enrolled for hearing on 31 May 2024 and that she had communicated this to counsel and instructed him to be in attendance to represent her. She said that she had last spoken to Adv. Sibya some three weeks previously. During a more recent discussion with Adv. Sibya after the notice of set-down had been served, counsel informed her that he was engaged in another matter during the week in question and was unable to attend to represent her.

[6] Counsel for the Applicant pointed out that the sequestration application had been launched during 2023 and that the matter had been beset by delays, largely it was submitted, due to non-compliance by the Respondent's legal representatives.

¹ By all accounts an advocate rendering legal services on request by members of the public in accordance with section 34(2)(a)(ii) read with (b) of the Legal Practice Act 28 of 2014.

² The notice reflects that Adv. Sibya practices with a trust account.

An order to compel heads of argument had been granted and this had not elicited heads being filed. Counsel pointed out that the Respondent was fully aware that the matter would be heard during the week commencing 29 July 2024, that the prospects of success were strongly in favour of the Applicant and that further delay would be to the prejudice of creditors.

[7] I dismissed the request for a postponement on the basis that the Respondent had not shown that in the circumstances she was entitled to a postponement of the matter. I took into account the various delays caused by procedural non-compliance by the Respondent's legal representatives, that the Respondent bore responsibility to ensure that her legal representative (or a replacement, if required) was available to present argument on her behalf, that the request for postponement was only made at the commencement of the hearing and that the interests of creditors require that the matter be finalised without further delay.³

[8] Counsel for the Applicant pointed to further features relevant to the application and order sought. The founding affidavit discloses that the Respondent is the sole director of a company Blue Falcon 33 Trading (Pty) Limited, owning at least four immovable properties, one of which was purchased for R2 500 000,00 on 3 February 2020. During argument, the Respondent confirmed that she was in fact also the sole shareholder of Blue Falcon. It was suggested in the founding affidavit that if the Respondent owned shares in Blue Falcon (which she confirmed to me), then there would be value in these shares by virtue of the underlying assets of the company. Counsel referred to an email addressed by the Respondent to Adv. Sibya

³ Compare: **Myburgh Transport v Botha t/a SA Truck Bodies**, 1991 (3) SA 310 (NmS), at 311.

on 17 April 2023 and forwarded to the Applicant's attorney, in which she said that she did not have money and suggested that she be given three years to settle the indebtedness, without any specific monthly payments. This was not acceptable to the Applicant. Counsel submitted that a particular benefit of sequestration to creditors was that a provisional trustee could investigate and take control of such assets forming part of the estate of the Respondent for the benefit of creditors.

[9] In her answering affidavit the Respondent raised the matters which I list below, together with the Applicant's response in its replying affidavit: ⁴

[9.1] The Applicant failed to comply with Rule 41A. ⁵ The Applicant admits failing to comply with the Rule, asked for condonation and requested condonation in allowing the notice to be served simultaneously with its reply.

- As I understand the authorities referred to in **ERASMUS: Superior Court Practice** dealing this rule various High Courts have found that the failure to engage in mediation does not impact upon the validity or correctness of a judgment granted and that the party complaining of non-compliance must demonstrate that this non-compliance has caused prejudice. The question of whether mediation would be beneficial is also a factor to be considered. In the light of the terse grounds on which the Respondent disputes the allegations in the founding affidavit, I see no benefit that would have flowed from mediation, which would probably have served only further to delay the proceedings. I find

⁴ Condonation for the late delivery of the Respondent's answering affidavit was not opposed.

⁵ This Rule requires a plaintiff or applicant to serve on the defendant or respondent, simultaneously with the summons or notice of motion, a notice indicating whether that party agrees to or opposes referral of the dispute to mediation. The respondent is given an opportunity to respond and the various sub-rules then set out the procedure to be followed.

that the Applicant's failure to invoke the mediation process does not preclude the relief sought.

[9.2] The attachment and freezing of the Respondent's FNB account pursuant to the warrant of execution precluded her being able to receive amounts due to her in the sum of approximately R1 200 000,00. The Applicant in reply says that the account was only non-operational until the judicial process of attachment had been completed and that the account has been "*released*". It further points to the Respondent's email to her advocate referred to above in which she indicated that she did not have funds at that time and did not want to commit because she did not know when she would have money. This email was not disputed or dealt with in the answering affidavit.

- The Applicant's answer provides no details of the source of the expected funds or whether these funds were due to her in her personal capacity or emanating from any of the corporate entities in which she has an interest. Also missing from this narrative is why an alternative method of payment of part of these expected funds could not be deployed to permit settlement of the judgment debt.

[9.3] In her answering affidavit the Respondent contends that she could settle the amount outstanding within a period of 24 months if the warrant of execution could be lifted from her account. The Applicant in reply pointed out that if it was true that the Respondent was owed the amount of some R1,2 million, then it was unclear why she was unable to settle the outstanding indebtedness owed.

- The Applicant's contention was not refuted by the Respondent, whose reason for failing to settle the judgment debt appears from what follows immediately below.

[10] I engaged with the Respondent during the hearing and asked her specifically why she had not taken steps to raise funds on the security of the various properties owned by Blue Lagoon to settle the debt owed to the Applicant. Her answer to this was that the debt was owed by Lebone Customer Management Consulting CC and that the Applicant should have sought recovery of the outstanding amount from this close corporation and not from her personally. When I pointed out and explained to her the implications of the order of the Limpopo Division directing that her liability was joint and several, thereby absolving the Applicant from any obligation of excussion, she merely reiterated her stance. Despite expressing concern about the impact of a sequestration order against her, given her directorship / membership of other corporate entities, she persisted with the stance that the Applicant was required to look primarily to Lebone Customer Management Consulting CC for recovery of the amount outstanding.

[11] On the issue of benefit to creditors, counsel for the Applicant referred to and relied upon the judgment in **Lynn & Main Inc. v Naidoo and Another**⁶ in which reference was made to the requirement in Section 10 of the Insolvency Act which requires the Court in determining whether provisional sequestration should be ordered, to be of the *prima facie* view that there is reason to believe that this will be to the advantage of the creditors. With reference to earlier authority the learned

⁶ 2006 (1) SA 59 (N).

Judge-President said that this postulated a reasonable prospect not too remote, but not necessarily a likelihood, that some pecuniary benefit would result to creditors. All that is required at the provisional stage, is *prima facie* proof of the facts.⁷ In **Body Corporate of Empire Gardens v Sithole and Another**⁸ the SCA endorsed this judgment, adding that although advantage to creditors is not a rigid concept it requires proof of a tangible benefit to the general body of creditors.⁹

[12] I am satisfied that on the conspectus of the papers before me and having made enquiries of the Respondent about her stance during argument, a case has been made out by the Applicant for an order of provisional sequestration of the estate of the Respondent. This is based upon at least *prima facie* evidence that an act of insolvency has been committed and that there is reason to believe that there will be an advantage to creditors if the Respondent's estate is sequestrated. The Respondent has failed to place any evidence before me that displaces this *prima facie* view.

[13] The following order will issue:

1. The estate of the Respondent is placed under provisional sequestration;
2. The Respondent and any other party who wishes to avoid such an order being made final are called upon to advance the reasons, if any, why the Court should not grant a final

⁷ At paras [35] to [37].

⁸ 2017 (4) SA 161 (SCA).

⁹ See paras [9], [10].

sequestration Order in respect of the Respondent's estate on
Monday, 14 October 2024;

3. The costs of this application will be costs in the sequestration of
the estate of the Respondent.



N.J. GRAVES

Acting Judge of the High Court of
South Africa
Gauteng Local Division Johannesburg

APPEARANCES:

Date of hearing:	31 July 2024
Date of judgment:	19 August 2024
Counsel for Applicant: Instructed by:	ADV R Stevenson Lynn & Main Inc Mr M Pedie
Counsel for Respondent:	Appearance in person