



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2023-014909

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. **✓**

SIGNATURE

22 November 2024
DATE

In the matter between

AVENG AFRICA (PTY) LTD

Applicant

And

CHIVESO PETER CHIEDZA

Respondent

JUDGMENT

THOBANE AJ,

Introduction

[1] The crisp issue for determination in this matter is whether the applicant has made out a case, on a balance of probabilities, for the final sequestration of the respondent's estate. On the one hand the applicant is of the view that the requirements have been met and that a final sequestration order is justified. On the other, the respondent argues that the debt is disputed primarily on two grounds. Firstly, that he sold some of his businesses or companies as going concerns including those in liquidation and secondly, that the agreement of sale, in respect of the applicant, included a clause which provided that the purchaser bought the business together with all its liabilities and for that reason, debt obligations of the companies in respect of which he held shares, and debts in respect thereof, were transferred to the purchaser in whole. Consequently, the respondent is free from the obligations brought about by the suretyship he signed and which bound him in his personal capacity.

[2] In addition to the above, the respondent submits, with reference to case law, that liquidation should not be used as a means to recover debt and that it must be used as a measure of last resort. The respondent, it was further submitted, has set out formalities about the sale of the entity previously belonging to him and that the debt of which the respondent was responsible had been passed on, or taken over or subsumed, for lack of a better word, by the new entity, in terms of an agreement of sale of such entity. The respondent's responsibility therefore, so the contention goes, is disputed in that the debt of which the respondent was responsible, in his personal capacity, has been "passed on" to the new entity.

[3] Lastly, relying on the principle set out in *Plascon-Evans v Van Riebeeck Paints (PTY) LTD*¹, the respondent asserts that a final order in this matter can only be granted in favour of the applicant only if the facts alleged by the respondent which have been admitted or not denied by the applicant support such an order. Put differently, the matter can be decided on the respondent's facts. The denial by the respondent is real, genuine and *bona fide*, it is submitted. The respondent seeks dismissal of the application, without referring the matter for oral evidence.

[4] In order to put the matter into better perspective, the following background facts, which are largely common cause, are given.

[5] The applicant commenced action proceedings against the respondent in this court, based on a deed of suretyship. The summons was served on the respondent but he failed to enter an appearance to defend. The applicant as it was entitled to do, proceeded to obtain judgment by default against the respondent in his personal capacity. Basson J ordered payment of the sum of R 1 236 282-19, interest plus costs on attorney and client scale.

[6] After a writ of execution (writ), was issued by this court, the sheriff attended at the respondent's residence on 15 June 2022 to execute same. The writ was executed at the respondent's residential address from which the judgment debt was demanded personally from him by the sheriff. The respondent indicated, personally to the sheriff, that he is unable to satisfy the judgment debt and costs, and that he could not point

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

out movable property which could be attached; and further, the respondent did not have any money, property, or assets on his premises to satisfy the judgment debt. The sheriff's return therefore was that of *nulla bona*. Therefore, it is the applicant's case, an act of insolvency having been committed, the respondent contravened the provisions section 8(b) of the Insolvency Act², which provides that;

'8 Acts of insolvency

A debtor commits an act of insolvency—

(a)

(b) if a Court has given judgment against him and he fails, upon the 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 found sufficient disposable property to satisfy the judgment;'

[7] On 12 January 2023 an order was obtained before Davis J, by agreement between the parties, placing the estate of the respondent under provisional sequestration. The applicant has now approached this court for a final sequestration order. I must pause and observe that the respondent consented to the provisional sequestration of his estate at a time when, on his version, he had been released from a surety agreement signed in his personal capacity as he had sold all shareholding in some of his juristic entities. I will return to the suretyship later.

The Law

[8] Section 12 of the Insolvency Act, (the Act) states that in order for a final sequestration order to be granted the court must be satisfied that:

² Insolvency Act 24 of 1936

8.1. the sequestrating creditor has established against the debtor a claim of not less than R100.00 entitling him or her to apply for the sequestration of the debtor's estate;

8.2. that either the debtor has committed an act of insolvency or the debtor is insolvent; and

8.3. there is reason to believe that it will be to the advantage of creditors if the debtor's estate be sequestrated.

It is common cause that the onus lies with the applicant to satisfy these requirements.

If the applicant does, that would entitle it to a final order.

Points in limine

[9] Before dealing with whether or not the applicant has discharged the onus resting on it, it is apposite to deal with what the respondent has called points *in limine*. The respondent has raised two points *in limine*;

9.1. firstly, that he was no longer a "shareholder" in a number of juristic entities which he listed in his answering affidavit, having sold his shareholding on 20 December 2020 to one Mr. Amos Youmessi, together with the "company books". I will not list the entities in this judgment, suffice it to say that one of those juristic entities, the respondent submits, is an entity for which, in respect of its debts, he stood as surety in his personal capacity. This is not disputed. The respondent further submitted, in the opposing affidavit that;

'Of all the debts declared in the preamble to the sell (sic) included an amount of R1 300 000.00, which amount was still subject to a dispute between myself and the Applicant in respect of the actual figure owed to the Applicant. Upon

signature of the share sale agreement, which agreement confirmed and at the time of the acceptance thereof by the share purchaser, it meant all the liabilities that arose out of my dealings, decisions and actions as a Shareholder now transferred to the Purchaser.' The businesses, the respondent submits, were sold with their liabilities.

9.2. the second point *in limine* has four points to it;

9.2.1. that the applicant has failed to show that the respondent is unable to pay;

9.2.2. that the applicant has failed to show that the respondent does not have sufficient disposable assets to satisfy the judgment debt, and

9.2.3. that prior the disposal of his shareholding, he, the respondent, made a down-payment of R500 000-00, as a gesture of goodwill;

9.2.4. that judgment was obtained based on a wrong amount due;

[10] The respondent then concludes by submitting that he is liquid; that he has a mortgage bond which he services; that he has many assets and has other creditors obligations towards whom he meets; that he has vehicles and other assets and lastly that there is money that is due to him which will be able to take care of the claim of the applicant. The reason why he is not paying the applicant, is not because he is unable to pay, the reason is simply that he disputes the debt and his indebtedness, he contended.

Analysis

[11] It is necessary to deal with the points *in limine* first before delving into the merits of the case. The timelines are, according to the applicant, important. The applicant argues that the first point *in limine* is bad in law in that the judgment debt is a personal debt which came about after the applicant bound himself, in his personal capacity, as surety to/for an entity in which he held shareholding. Secondly, it is submitted that the judgment debt is not being challenged by the respondent. Thirdly, that since judgment for the debt was entered months after the agreement was concluded, it was a physical impossibility that the judgment debt could fall within the ambit of the agreement.

[12] The question that immediately arises is whether a surety is released from a suretyship where he bound himself in his personal capacity, by virtue of the fact that he sold his shareholding in an entity, the principal debtor, for which he stood as surety. The respondent in this matter, at a time when he had shareholding in Tamuda Trading (Pty) Ltd, the principal debtor, concluded a deed of suretyship in which he bound himself in his personal capacity. It is trite that suretyship agreements are accessory contracts in that their existence is contingent on a debt or obligation (principal debt) existing or coming into existence between a debtor and a creditor. The obligation is not contingent on the existence of the principal debtor, shareholding or its ownership. Which is why the obligation remains even if the principal debtor ceases to exist. In *Van Zyl v Auto Commodities (Pty) Ltd*³, a case in which the

³ *Van Zyl v Auto Commodities (Pty) Ltd* (279/2020) [2021] ZASCA 67; [2021] 3 All SA 395 (SCA); 2021 (5) SA 171 (SCA) (3 June 2021)

principal debtor had been placed under business rescue, the Supreme Court found that liability of the surety does not get discharged by virtue of the fact that an entity is under business rescue. In paragraph 12 Wallis JA said the following;

“The general principles

[11] A contract of suretyship is distinct from the contract or contracts between the principal debtor and the creditor that give rise to the principal indebtedness, but it is accessory to that contractual relationship and the principal debtor's obligations under it. Subject to any specific limitation, such as a suretyship in a limited amount, the surety's obligations are coterminous with those of the principal debtor. Where the surety signs as co-principal debtor, as Mr van Zyl did, the addition of those words shows that the surety is assuming the same obligations as the principal debtor. In other words, the obligation of the surety is the same as that of the principal debtor. It follows from the accessory nature of the surety's undertaking that the liability of the surety is dependent on the obligations of the principal debtor.

[12] A consequence of this is that if the principal debtor's debt is discharged, whether by payment or release, the surety's obligation is likewise discharged. If the principal debtor's obligation is reduced by compromise the surety's obligation is likewise reduced. If the principal debtor is afforded time to pay that enures for the benefit of the surety. If the claim against the principal debtor prescribes so does the claim against the surety. This will be subject to any terms of the deed of suretyship that preserve the surety's liability notwithstanding the release or discharge of, or any other benefit or remission afforded to, the principal debtor.”

[13] The surety can only be free from the obligations he has, if the principal debtor's debt is discharged whether by payment or release. It is absurd to reason that a surety is free from obligations that arose against him in his *personal capacity* because he sold his shareholding in the principal debtor. Even a statutory composition under the

Companies Act⁴, does not release the sureties for the company⁵. If it were so, a surety with nefarious intentions would simply stand as surety, even in his personal capacity, for a company in which he has shareholding, rack up a huge debt, sell shareholding, with it his personal obligations, then be free from debt and move on to the next transaction. Even where a principal debtor ceases to exist, the suretyship remains extant. In *Kalk v Barclays National Bank Ltd*⁶ the SCA underscored the fact that a change in circumstances on the part of the principal debtor does not free the surety from his liability, even when the principal debtor ceases to exist, let alone a change in shareholding. In that matter Botha JA, had occasion to say the following; “The appellants pleaded that Dancor’s deregistration had extinguished its debt to the Bank, with the result that the appellants’ liability to the Bank was also extinguished (see the reported judgment of MYBURG J at 249D - F). In my opinion this defence is without merit. In support of it, counsel said: there cannot be a debt without a debtor. Whatever validity such a statement may have in other contexts, it certainly cannot be applied to the facts of this case. It is not the law that a surety is freed from liability to the creditor when the principal debtor ceases to exist. If the principal debtor is a natural person and he dies, his surety remains liable to his creditor; and a surety for a company remains liable to its creditor if it is liquidated and dissolved under s 419 of the Companies Act. In short, there is no foundation

⁴ Companies Act 61 of 1973

⁵ Caney’s THE LAW OF SURETYSHIP, 6th edition by CF Forsyth and JT Pretorius, page 197, and *Lalia v Bodasirg* 1955 (1) PH F49 (D) where the following was said’

‘He contended, firstly, that the compromise of the company’s indebtedness as sanctioned by the court on 3rd March 1933, destroyed the liquidity of the note, that it novated that debt and particularly the debt of defendant who signed as surety: that the proviso to section 103 (2) of the Companies Act, 46 of 1926, must be construed in the light of the ordinary rules of common law that any novation extinguished not only the main debt but any obligation accessory to the debt.

The court could not accept this argument. The wording of the proviso was clear as any wording could be. It was added to sub-section (2) of section 103 by section 64 of Act 23 of 1939, no doubt for the specific purpose of holding a surety liable, under any circumstances contemplated in section 103’.

⁶ *Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A).

for the argument that Dancor's deregistration released the appellants from liability to the Bank." (The underlinings are my emphasis).

By parity of reasoning, the respondent's disposal of his shareholding in the principal debtor, does not free him from his obligations as surety. It follows that the point *in limine* must fail. In addition, a cursory glance at the so called "Share Sale Agreement", on which the respondent relies reads, as follows in paragraph 9 thereof;

"9.0. Sellers Obligations

9.1. The Seller shall pay all debts and liabilities connected with the business and this sale up to the date of settlement."

The agreement that has been attached to the respondent's answering affidavit does not have the so called "date of settlement". On the agreement the portion that deals with settlement has been left blank. Even if one were to be generous in the interpretation of said agreement, the provisions thereof are clear, namely, until the unspecified "date of settlement", the respondent would be liable for all debts and liabilities. That puts paid to the respondent's contention that on signature or conclusion of said agreement, he was freed from all obligations as surety.

[14] The respondent makes many propositions in his answering affidavit. I will highlight a further two where he says;

'The Obligations of the companies as sold therefore fell on the new shareholder and for that reason the Respondent herein ceased to be liable for the debt.'

And

"It is thus trite to therefore mention that the Applicant has failed to discharge the onus to prove that I am still the owner of the said companies and that there was and is still an

obligation for me to pay the judgement debt that was obtained in the course and scope of the business activities of the company...”

They both are bad and not drawn from case law.

[15] In *Van Zyl*⁷ the SCA further quoted with approval from *New Port*⁸ where the following is said;

‘In other words, the fact that in any of those situations the principal debtor would be released in whole or in part from its obligations would not disentitle the bank from recovering the outstanding amount from the sureties.”

On the principles set out above and in addition to what is stated elsewhere in this judgment in showing that a suretyship, accessory as it is, cannot be subsumed in the manner suggested by the respondent and given the distance nature thereof, this being an additional sound, the contention by the respondent must fail.

[16] The second point *in limine* is ambiguous, convoluted and confused, for it poses various questions that are not related to one another and are irrelevant. I list them below.

Has the applicant failed to show that the respondent is unable to pay?

[17] In the current proceedings, the applicant seeks the final sequestration of the respondent’s estate. It is common cause that the applicant relies on the fact that the respondent has committed an act of insolvency, by virtue of the return of *nulla bona*. It is also common cause that it was the respondent in person who failed to pay the sheriff or satisfy the judgment debt and costs when the writ was served at his

⁷ *Supra*

⁸ *New Port Finance Co (Pty) Ltd and Another v Nedbank Ltd* 2016 (5) SA 503 (SCA) para 12.

premises. In addition, the respondent also failed to point any movable or immovable assets. The sheriff, a diligent search notwithstanding, could not locate sufficient disposable assets to satisfy the judgment debt. The respondent's inability to pay has been firmly established and moreover, it is not a relevant question at this stage of proceedings. Particularly because the respondent on his own version, is able to pay but chooses not to pay.

Has the applicant failed to show that the respondent has sufficient disposable assets?

[18] The applicant need not show that the respondent has sufficient disposable assets to satisfy the judgment debt. That ship has long sailed. The respondent personally informed the sheriff that he has no disposable assets and therefore could not satisfy the judgment debt. Once that happened, and in light of the act of insolvency on the part of the respondent, the question becomes whether whatever assets are found to exist, when realised, will be to the advantage of creditors. The respondent's own version supports the proposition that the assets he has, if realised, will be to the benefit of creditors, for the following reasons;

18.1. the respondent says he is employed and earns a salary;

18.2. he says he is a director and holds member's interests in various juristic entities;

18.3. he says he is a man of means;

18.4. he says he is financially sound;

18.5. he says that large sums of money are due to him and his entities both from South Africa and Zimbabwe;

18.6. that he has interests in several immovable properties even though encumbered;

18.7. that he has a number of motor vehicles registered in his name;

18.8. that a substantial amount of money was realised when he sold his shareholding in the principal debtor.

The R500 000-00 down-payment and the wrong amount due.

[19] The respondent states that as a gesture of goodwill he put down R500 000-00 despite the fact that he disputed the actual amount. Then the respondent glibly adds that even the judgment, which was obtained by default, was obtained on the basis of a wrong due amount. It is however clear on the facts that the respondent did not challenge the judgment. If anything, he consented to provisional sequestration and the judgment stands unchallenged to this day. Reference to the judgment and the wrong amount is simply an obfuscation and it is disingenuous. Apart from that, both points fail to rise to the level of them being points *in limine*. Accordingly, these points must also fail.

Is there a dispute of fact?

[20] The respondent argues that because he has sold his shareholding in a juristic entity and because he disputes the amount due, there exists a dispute of fact which the applicant has failed to canvass in its affidavits, which dispute, so the argument goes, can only be resolved by way of oral evidence. These are sequestration proceedings where a final order is sought against the respondent's estate. A judgment for payment of money was obtained against the respondent. A writ was

authorised and served on the respondent personally and the return was that of *nulla bona*. The applicant sought a provisional sequestration order to which the respondent consented. The applicant is in these proceedings seeking a final order. There is simply no dispute of fact. What the respondent refers to as a dispute of fact is clearly contrived. This is another reason why this point *in limine* must fail.

[21] The respondent half-heartedly and without more submits that the judgment is wrong. He took no steps to challenge the judgment which stands to this day. Nothing more need be said about this.

Conclusion

[22] The main argument of the respondent, that since he sold his shareholding in Tamuda Trading PTY (LTD), his liability towards the applicant as surety, was discharged, must fail.

Order

1. The estate of the respondent is finally sequestrated;
2. Costs of the sequestration application shall be costs in the sequestration.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant: Adv. A Laher

Instructed by: Pather and Pather Attorneys Inc.

For Respondent: Adv. M Tau

Instructed by: Gwanagura Inc. Attorneys

Date of the hearing: 20 May 2024

Date of judgment: 22 November 2024

This judgment was handed down electronically by circulating to the parties' legal representatives by e-mail, by being uploaded to the CaseLines platform of the Gauteng Division and by release to SAFLII. The date and time of hand down is deemed to be 10:00 on 22 November 2024.