IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable Yes/No

Case No: 2927/2024

In the matter between:

THE SMALL ENTERPRISE FINANCE AGENCY SOC LTD	**Applicant**
and	
MARGARETHA ALETTA NOTLEY	**Respondent**

CORAM:	**Hefer AJ**
Heard:	**31 October 2024**
Delivered:	**14 November 2024**

Summary:

ORDER

1. The Respondent's estate is hereby FINALLY SEQUESTRATED.

2. The costs of this application to be costs in the sequestration.

JUDGMENT

Hefer AJ

[1] The applicant has obtained a provisional sequestration order in its favour against respondent, on an unopposed basis during July 2024. Subsequent to the provisional order being granted, the respondent filed her opposing affidavit, approximately two months after the date of such order.

[2] The main grounds relied upon in opposition to the application for final sequestration which now serves before Court, are firstly that it is respondent's contention that the application, prior to a provisional order being granted, had not been served on her. Secondly, the respondent denies that the Free State Division has the necessary jurisdiction to grant an order of sequestration against her. Thirdly, it is respondent's contention that the applicant has not satisfied the requirements for a final order of sequestration in terms of section 12 of the Insolvency Act 24 of 1936 (the Act).

[3] At the commencement of the hearing, Mr Reinders, appearing on behalf of the respondent, indicated that the respondent intends not to pursue the point of non- or proper service any further. This judgment will therefore only deal with the remaining two grounds of opposition.

Jurisdiction:

[4] In its founding affidavit in support of the application, the applicant relied upon the chosen *domicilium citandi et executandi*, to be at 1[…] Dersley Street, Bayswater, Bloemfontein. In answer to this allegation, the respondent responded and held that '[t]his Court clearly does not have jurisdiction over me. I am not domiciled here.'

[5] In amplification of respondent's denial of the Court's required jurisdiction, the applicant made the following positive allegation:

'I am resident in Cape Town since 2022 and with address at Izra Towers, Cape Town. In as far as it is alleged that I have chosen a *domicilium citandi* at Dersley Street in Bloemfontein, I deny that. I have not chosen so for purposes of sequestration and these are denied. As stated in any event, I am not resident in the Free State.'

[6] In reply to this denial by the respondent, the applicant then, correctly so, pointed out that the respondent has failed to place any evidence before Court of her alleged relocation. The applicant then further in reply refers to a certain tracing report from which it appears that the residential address of the respondent is in fact not in Bayswater, Bloemfontein, but Langenhovenpark, Bloemfontein. This report is dated 20 August 2024, therefore subsequent to the provisional order being granted, but prior to the filing of the respondent's answering affidavit.

[7] From a return of service by the deputy sheriff, it appears, however, that attempts to serve the *rule nisi* with accompanying papers on 31 July 2024 at the Langenhovenpark address, had been unsuccessful. It therefore shows that the applicant had been aware of the residential address in Langenhovenpark prior to the date of the tracing report.

[8] It is also evident from a further return of service by the deputy sheriff that on 30 August 2024, pursuant to the matter being postponed by an order of court, the deputy sheriff had been unsuccessful in his attempts in serving the relevant *rule nisi*

at 7 Chris Botha Street, Westdene, Bloemfontein. The following appears from this return of service:

‘A certain Ms Charmone Corsettes, receptionist at Corsettes, present occupant, informed me that service could not be accepted as Retha Honiball Accountants is not situated at given address and respondent not present to accept service.’

7 Chris Botha Street also appears in the August 2024 tracing report, already referred to, as the business address of the respondent. However, in the applicant’s founding affidavit the business address of the applicant is alleged to be situated at 7 Chris <u>Hani</u> Street, Bloemfontein.

[9] What is important in regards to the return of service under discussion, is that the following remark further appears in the return of service:

‘Corsettes is believably situated at given address, which according to the receptionist belong to the respondent. I was informed by the receptionist that the respondent rarely visit the office.’

The relevance is this passage will be dealt with later herein.

[10] In respect of the Court’s jurisdiction, the applicant further relied upon a CIPC director report, dated 14 October 2024, which according to the applicant, shows that the respondent is affiliated with at least twenty-six different entities, of which the registered addresses of all such entities are situated in Bloemfontein. That however, is not the case. The relevant CIPC report only deals with RETMIL Consulting. The information contended by the applicant, is however not evident from such report.

[11] As pointed out to Mr Van der Merwe, appearing on behalf of the applicant during argument, the fact that such registered addresses of all the entities may be situated in Bloemfontein may merely serve as proof that the respondent is conducting business in Bloemfontein. It does not show that she is domiciled here or is residing in Bloemfontein.

[12] This CIPC report does however assist the applicant in that the registered address of RETMIL Consultancy, is indicated to be 7 Chris Botha Street, Westdene, Bloemfontein. This is also the same address where the receptionist at the particular business has indicated to the deputy sheriff that the respondent is the owner of the business situated at the said address.

[13] On the facts presented before Court, it shows in the first instance that the *domicilium citandi et executandi* as referred to by the applicant in its founding affidavit is not chosen. The chosen *domicilium citandi et executandi* is only applicable to the deed of suretyship, signed by the respondent during 2012 and which forms the subject of the summary judgment granted against the respondent, the relevance of which will be dealt with herein later. For purposes of the present application however, such address had not been shown to be chosen.

[14] The question remains whether the applicant has shown on a balance of probabilities that this division of the High Court has the necessary jurisdiction over the respondent in the present application. In terms of s 21 of the Superior Courts Act 10 of 2013, a division of a High Court has jurisdiction *inter alia* over all persons residing or being in its area of jurisdiction.

[15] I am in agreement with Mr Reinders that the information pertaining to the respondent's other business interests in Bloemfontein and the information contained in the August 2024 tracing report, are actually new facts which may (but not necessarily do) show that the applicant is indeed resident in Bloemfontein for purposes of s 21 of the Superior Courts Act. Because it was only raised in reply, such information should be disregarded to establish the court's jurisdiction.

[16] What is, however, before Court are two returns of service. The first is the one already referred to wherein the remark was made by the deputy sheriff, to the effect that he was informed that the business of Corsettes, being conducted at the premises of 7 Chris Botha Street, Bloemfontein, belongs to the respondent. I do take into account that the applicant in its founding affidavit, referred to Chris Hani

instead of Chris Botha Street. However, this can be attributed to misnomer on the part of the applicant.

[17] More importantly, forming part of the papers is a return of service in respect of the service of the application prior to the provisional order being granted, namely during May 2024. From this return of service, it appears that the person upon whom service had been affected, namely a certain Mr N Kruger, is being described as co-occupant. This is in respect of the premises at 1[…] Dersley Street, Bayswater, Bloemfontein, being the chosen *domicilium citandi et executandi* in terms of the deed of suretyship referred to.

[18] It is settled law that a return of service is regarded as *prima facie* evidence of the contents thereof.[1] In the absence of evidence in rebuttal thereof, it can therefore be accepted that the respondent is or was a co-occupant of that premises during May 2024, which shows that the respondent's allegation that she has been residing in Cape Town since 2022, cannot be true and correct. Coupled with this, as correctly argued by Mr Van der Merwe, is the fact that apart from the *ipse dixit* of the applicant, she has not produced any evidence in support of the fact to prove that she is in fact residing in Cape Town and not Bloemfontein.

[19] This failure by the applicant is to be considered in view of what was stated in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[2] at paras 12 and 13 where the court held:

'Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd 1984 (3) SA 623 (A) te 634E – 635C . . .

[1] Van Loggerenberg *Erasmus: Superior Court Practice* 2 ed vol 2 at D1-40.
[2] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 SCA.

A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

[20] What is also quite significant is the words used by the respondent's attorney in a letter addressed to the applicant's attorney dated 15 November 2023 which stated *inter alia*, with my emphasis:

'Our client is currently in Cape Town.'

These words are not indicative of the fact that the respondent is in fact residing in Cape Town and not Bloemfontein, but taken as a whole, rather appears to mean that the respondent was indeed staying or visiting Cape Town on a temporary basis but not residing on a permanent basis.

[21] Dealing with the matter on the basis of *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*[3] and taking into consideration all the above facts, I am satisfied that the applicant has succeeded in proving on a balance of probabilities that the respondent is indeed residing in Bloemfontein and that the Court has the necessary jurisdiction in terms of s 21 of the Superior Courts Act to adjudicate upon the matter.

Final sequestration:

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

[22] In terms of s 12 of the Act, a final order of sequestration may be granted if a Court is satisfied that:

(a) the petitioning creditor has established against the debtor a claim such as mentioned in subsec (1) of s 9; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated.

[23] It is common cause that the applicant has obtained summary judgment against the respondent in the amount of approximately R40 000 000.00. This is in respect of the capital amount plus interest which the respondent has loaned from the applicant in terms of a loan agreement.

[24] It needs to be mentioned that pursuant to the said summary judgment being granted, the respondent, aggrieved by the summary judgment, applied to the Supreme Court of Appeal and later to the Constitutional Court for leave to appeal such order which applications were summarily dismissed by both these Courts.

[25] The dismissal of such applications resulted in a letter by respondent's attorney in which the following was stated:

'Our client had to find gainful employment and is employed as a bookkeeper, and earns a salary of R15 000.00 per month. You find hereto attached her tax return to substantiate same. In the circumstances our client is willing to make an offer of R5000.00 per month in this regard.'

[26] In *Lipworth v Alexander & Barkhan*[4] it was held that for a notice of one's inability to pay to be regarded as an act of insolvency, the notice must be such that on its receipt, any reasonable person or business would conclude that the debtor was unable to meet his or her obligations or that he or she would no longer continue to pay the debts in the ordinary course of business or that he or she would be unable to carry on with business unless creditors granted some sort of concession.

[27] In *Court v Standard Bank of South Africa Limited*[5] the Court adopted the aforesaid test and stated *inter alia*:

'The letter of course does not say in expressed terms, that the respondent cannot pay. But a debtor who gives notice that he will only be able to pay his debts in the future gives notice in effect that he is 'unable' to pay. A request for time to pay a debt which is due and payable will, therefore, ordinarily give rise to an inference that the debtor is unable to pay a debt, and such a request contained in writing will accordingly constitute an act of insolvency in terms of s 8*(g)*.'[6]

[28] In *O'Shea NO v Van Zyl and Others*[7] the Court stated as follows:

'The proper approach to determining whether a letter contains a notice of inability to pay in terms of s 8*(g)* is to consider how it would be understood by a reasonable person in the position of the creditor at the time he receives it, taking into account that creditor's knowledge of the debtor's circumstances.'

Furthermore, a debtor may commit an act of insolvency through an agent provided the latter acts with the former's knowledge and consent.[8]

[29] With reference to the authorities relied upon by Mr Van der Merwe, I am in agreement with his submissions that the respondent has committed an act of insolvency as contemplated in s 8*(g)* of the Act.

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[4] *Lipworth v Alexander & Barkhan* 1927 TPD 785.
[5] *Court v Standard Bank of South Africa Limited* 1995 (3) SA 123 (A).
[6] Ibid at 134A-G.
[7] *O'Shea NO v Van Zyl and Others* [2011] ZASCA 156; 2012 (1) SA 90 (SCA) para 26.
[8] *Chenille Industries v Foster* 1953 (2) SA 691 (O).

[30] The main point relied upon by Mr Reinders in his argument in opposition to a final order of sequestration, is the third requisite, namely whether the applicant has shown that the sequestration would be to the advantage of creditors. He argued that there are no allegations in the papers that should the respondent be finally sequestrated there would at least be R0.10 advantage for unsecured creditors.

[31] In *Stratford and Others v Investec Bank Ltd and Others*[9] the Constitutional Court held that the meaning of the term '*advantage to creditors*' has a broad definition and should not be approached rigidly. The Court stated:

'The meaning of the term "advantage" is broad and should not be rigidified. This includes the nebulous "not-negligible" pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or "not-negligible" benefit in the context of a hostile sequestration where there could be many creditors is unhelpful.'

[32] The applicant alleges that she has no assets. The Court can in this regard however take cognisance of the *aliunde* evidence proffered by the respondent in reply to the effect that the respondent appears to have interests in various other entities. Therefore, contrary to what the respondent stated it appears that the respondent does own assets. In this regard, in *Meskin & Company v Friedman*[10] the following was stated:

'[T]he facts before the Court must satisfy it that there is a reasonable prospect – not necessary 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 [Insolvency Act] some may be revealed or recovered for the benefit of creditors, that is sufficient.'[11]

[9] *Stratford and Others v Investec Bank Ltd and Others* [2014] ZACC 38; 2015 (3) SA 1 (CC).
[10] *Meskin & Company v Friedman* 1948 (2) SA 555 (W).
[11] Ibid at 559.

[33] I also agree with Mr Van der Merwe's further contention that the respondent's denial that she owns any assets constitutes a reason enough for concluding that there is a reason to believe that as a result of enquiry under the Insolvency Act more assets may be revealed or recovered for the benefit of the respondent's creditors, more in particular the applicant itself.

[34] In the premises, there is reason to believe that on a balance of probabilities, the sequestration of the respondent will indeed be to the advantage of the respondent's creditors. In this regard, the respondent alleges that apart from having no assets, the claim by the applicant against her is the only claim against her estate and she has no other creditors.

[35] I was referred to the matter of *Rodel Financial Services Proprietary Limited v O'Callaghan*[12] (*Rodel*). In that matter, Windell J held that the applicant bears the onus of establishing *prima facie* that there is a reasonable belief that sequestration will be to the advantage of creditors.

[36] As in the present matter, in *Rodel*, the applicant was the sole creditor of the respondent. In her judgment, Windell J referred to the matter of *Amod v Khan*[13] which also dealt with the matter in which the applicant was the respondent's sole creditor.

'The Court observed that the proceedings therefore lacked resemblance to the typical sort, in which the debtor has variety of creditors, but insufficient assets to meet all their competing claims, and sequestration seems likely to benefit them as a group by ending the danger that some may be preferred to others and ensuring instead that the proceeds are shared fairly. The Court held that there was no reason principle why a debtor with only one creditor should not have its estate sequestrated, but the potential advantages of sequestration in that situation are inherently fewer, and the case for it is correspondingly weaker. Then it is really no more than an elaborate means of execution and because of it costs an expensive one.'[14]

[12] *Rodel Financial Services Proprietary Limited v O'Callaghan* [2017] ZAGPJHC 467.
[13] *Amod v Khan* 1947 (2) SA 432 (N).
[14] Footnote 12 para 33.

[37] Windell J then came to the following conclusion:

'Where execution is cheaper and more expeditious than sequestration and the sole creditor already has a judgment, generally there is no reason to believe that the sequestration will be of an advantage to creditors.'[15]

[38] In the present matter the applicant is armed with a judgment in its favour. However, on face value, the respondent, on her own version, is hopelessly insolvent in that she has no assets while being confronted with the claim by the applicant against her in the amount of approximately R40 000 000.00. On this basis alone it is quite obvious that following the route of execution will be fruitless to the applicant. On the version of the applicant herself, there will not be sufficient assets to satisfy the judgment amount. In this regard, the present matter is distinguishable from *Rodel* in that, according to the respondent in the *Rodel*, her estate consisted of considerable assets which could be used to satisfy the claim by the sequestrating creditor.

[39] In *Rodel*, Windell J also, in respect of the requirement of an advantage to creditors, stated as follows:

'A Court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. This requirement will be met if there is reason to believe, not necessarily a likelihood, but a prospect not too remote, that as a result of investigation and enquiry, assets might be unearthed that will benefit creditors.'[16]

[40] Mention had already been made in regards to the various other entities in which the respondent has interests. Apart from that, a further important factor is that the entity with regards to whose obligations and liabilities signed as surety, namely Retmil Financial Services, is still to be regarded as a debtor of the respondent based on its indebtedness towards the respondent in her capacity as surety of this entity. An enquiry into this indebtedness of Retmil towards the respondent alone, coupled

[15] Ibid para 34.
[16] Ibid para 29.

with respondent's alleged interests in other entities, constitutes a reason to believe that as a result of any investigation and enquiry, assets might be unearthed that will benefit the applicant.

[41] In the result, I am satisfied that applicant has met the requirements of s 12 of the Act and that a final order of sequestration is be to granted.

Order

[42] Therefore, I make the following order:

1. The respondent's estate is hereby FINALLY SEQUESTRATED.

2. The costs of this application to be costs in the sequestration.

HEFER, AJ

Appearances:

On behalf of the applicant: Adv R van der Merwe
Instructed by: PH Attorneys
Bloemfontein

On behalf of the respondent: Adv SJ Reinders
Instructed by: Van Wyk & Preller Attorneys
Bloemfontein