IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 20/2814

Date of hearing: 24/10/2022
Date delivered: 12/12/2022
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
12/12/2022

In the matter between:

ANGLOWEALTH SHARIAH (PTY) LTD — Applicant
[Reg No. 2013/126289/07]

and

HUSSAIN ALI ADAM — 1st Respondent
[Identity Number: [....]]

Married by Islamic rites, to
SHENAAZ ADAM — 2nd Respondent

JUDGMENT

KEMACK AJ:

1. The applicant applies for a final sequestration order against the first respondent, his court, having issued a provisional sequestration order on 3 June 2022 returnable on 21 November 2022. The second respondent is the first respondent's spouse by Islamic rites.

2. The time initially allocated for the hearing of this matter was 14:00 on Tuesday 22 November 2022. Owing to an electricity blackout at that time, the courtroom had neither lights nor the recording system. Counsel for both parties accordingly attended on the judge in chambers, and the application stood down for hearing on the morning of Thursday 24 November 2022.

3. Section 12 of the Insolvency Act 24 of 1937 lays down the requirements for the granting of a final sequestration order. The court may sequestrate the estate of the debtor if it is satisfied that the petitioning creditor has established against the debtor a liquidated claim for not less than R100, that the debtor has committed an act of insolvency or is insolvent, and that there is reason to believe that it will be to the advance of creditors of the debtor if the debtor's estate is sequestrated. The applicant is required to establish all three of these requirements on a balance of probabilities.

4. The applicant relies on two settlement agreements incorporating acknowledgements of liability to the applicant by the respondent, in the total sum of R62,351,000 for which the first respondent is jointly and severally liable. Unless the first respondent shows either that this acknowledged indebtedness is unenforceable or that no amount in excess of R100 remains payable, the applicant has satisfied the first requirement for a final sequestration order.

5. The applicant alleges that the first respondent's liabilities substantially exceed his assets so that he is factually insolvent, and that he is commercially insolvent in that he is unable to pay his debts. The applicant also alleges that the first respondent has committed an act of insolvency under section 8(d) of the Insolvency Act, by

removing or attempting to remove property with the intent to prejudice his creditors; and an act of insolvency under section 8(e) of the Insolvency Act by concluding the member's interest transfer agreement (annexure "AF3" to the founding affidavit) with applicant's member Shoayb Joosub. Unless materially disputed, these allegations satisfy the second requirement for a final sequestration order.

6. The applicant alleges that the first respondent owns assets worth approximately R25 million. The first respondent denies this value, and concedes owning a Golf GTi motor vehicle worth approximately R300,000 and a recoverable claim against one Fouzia Mokkadan for an amount no greater than R12 million. The court is satisfied that these amounts, together with the advantage of a trustee investigating the first respondent's financial affairs satisfy the third requirement of advantage to creditors if the first respondent's estate is finally sequestrated.

7. The first respondent disputes the court's jurisdiction on the basis that he resides in Pretoria and the seat of this court is in Johannesburg.

8. This jurisdictional defence cannot succeed because the Johannesburg High Court has had concurrent jurisdiction with the Gauteng division in Pretoria since 15 January 2016, in terms of Government Notice 30 published on that date in Government Gazette 39601. The notice deals with determination of areas under the Jurisdiction Divisions of the High Court of South Africa and *inter alia* states in respect of the Johannesburg High Court "*The local seat has concurrent jurisdiction with the main seat until such time that the area of jurisdiction of the local seat is determined in terms of section 6(3)(c) of the Superior Courts Act, 2013*". Such a determination has not yet occurred, and the Johannesburg and Pretoria High Courts have concurrent jurisdiction.

9. The first respondent raises the defence that the amount of his indebtedness is overstated because he is one of four joint debtors under the settlement agreements incorporating the acknowledgment of indebtedness, and that he is therefore only a debtor for one quarter of the total amount. This defence is unsustainable because the settlement agreements clearly state that the first respondent is a joint and several debtor, not merely a joint debtor.

10. The first respondent alleges that the two Settlement Agreements incorporating the acknowledgements of indebtedness are of no force and effect because they have been replaced by a Member's Interest Transfer Agreement (annexure "AF3" to the founding affidavit).

11. Inconsistently with this allegation, the first respondent also alleges that the Member's Interest Transfer Agreement is inchoate and unenforceable because it not only records the first respondent's agreement to transfer his member's interest in a close corporation named Long Island Trading 55 CC for R18 million, but also and in addition the net asset value of the close corporation as per an annexure A to the agreement which was never attached.

12. This court does not intend deciding whether the Member's Interest Transfer Agreement is valid and enforceable or inchoate and unenforceable. Suffice it to state that in paragraph 15 of the answering affidavit, the first respondent alleges that this agreement does not constitute a binding agreement because it was intended that it would only be binding once signed by both parties, which was not done; and in the absence of annexure "A" setting out the asset value forming part of the purchase price, there was no agreement regarding price.

13. A decision regarding the validity or invalidity of the Member's Interest Transfer Agreement involves disputes of fact as well as disputes of law. For purposes of this opposed final sequestration application, the court accepts the respondents' factual version in accordance with the judgment in Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A), and treats the agreement as inchoate. As that conclusion is reached by applying the Plascon Evans rule to the allegations in the papers before this court in this sequestration application, it is not a binding precedent in any other litigation that might arise involving the same agreement.

14. On this basis, the applicant has made out a sufficient case for a final sequestration order. That, however, is not the end of the matter.

15. On Wednesday 23 November 2022, between the original 22 November and adjourned 24 November 2022 hearing dates, the first respondent delivered a notice in terms of Uniform Rules 35(3) and 35(6) and an application for postponement of the sequestration application. On 24 November 2022, the applicant delivered a response to the Rule 35(3) and (6) notice, and at the hearing on 24 November 2022 the applicant both objected to the notice and opposed the postponement.

16. The respondent's Rule 35(3) and (6) notice seeks production of the following documents: the missing annexure "A" to the member's interest transfer agreement; the applicant's bank statements for the period from 1 May 2019 to 31 November 2022; Long Island Trading CC's audited financial statements for the period February 2019 to date; and the formal computerised stocktake documents from the applicant's computer system for the close corporation, at the time of its takeover by the applicants Mr Joosub in December 2019 in terms of the member's interest transfer agreement.

17. In the postponement application, the first respondent alleged that the requested documents are relevant either to ascertain the net asset value of the purchase price under the missing Attachment "A", or to establish payments made by the first respondent to the applicant. The postponement application is based on the approach that the first respondent needs these documents in order to supplement his defence.

18. Taking into account the timing of the Rule 35(3) and (6) notice and the postponement application, the conclusion is unavoidable that they were opportunistically submitted at an extremely late stage, in order to engineer a postponement of the sequestration application.

19. In its response to the Rule (3) and (6) notice, the applicant correctly points out that under Uniform Rule 35(13) the provisions of Rules 35 (3) and (6) only apply to applications insofar as the court may direct, and that in this instance, the first respondent has not applied for such a direction and the court has not made one. The Rule 35(3) and (6) notice is accordingly invalid in these proceedings.

20. The applicant also points out that on the first respondent's own version in paragraph 15.2 of the answering affidavit, there is no Annexure "A" and it cannot therefore be produced.

21. The applicant correctly points out that it makes no sense for the first respondent to call for the applicant's bank statements to prove payments by the first respondent to the applicant, since the applicant ought to be able to rely on his own bank statements to provide such payments, and that the first respondents own bank statements attached to the answering affidavit marked annexure "E", in support of the allegation that instalments were paid, do not in fact show payments.

22. The applicant states that there are no additional financial statements and computerised stocktaking documents as requested, and that they are therefore incapable of production.

23. On behalf of the respondents, Mr Köhn objected that the applicants Rule 35(3) and (6) response is not in the form of an affidavit as required. This may have been an arguable issue had the respondents' Rule 35(3) and (6) notice complied with Rule 35(13), but since that is not the situation it is not necessary to further consider Mr Köhn's objection.

24. The applicant's responses, however, do demonstrate that the respondents' requests are either for documents which are not relevant or are non-existent and that no prejudice is caused to the respondents by being unable to proceed with this line of enquiry.

25. The respondents' postponement application is premised on a need to pursue their Rule 35 (3) and (6) notice. Since the notice is invalid and irrelevant, and taking into account the lateness of the notice and the postponement application and their obvious underlying strategy of procuring a postponement, the postponement application must fail.

26. For these reasons the court order as follows:

26.1. The respondents' postponement application dated 23 November 2022 is dismissed with costs;

26.2. The first respondent's estate is finally sequestrated;

26.3. The costs of the postponement application and the sequestration application are to be costs in the sequestration.

KEMACK AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

COUNSEL FOR APPLICANT:	ADVOCATE A BOTHA SC
ATTORNEY FOR APPLICANT:	SHAHEED DOLLIE INC. ATTORNEYS
COUNSEL FOR RESPONDENTS:	ADVOCATE D M D KÖHN
ATTORNEY FOR RESPONDENTS:	IMAN ADAM ATTORNEYS
DATE HEARD:	23 November 2022
DATE OF JUDGMENT:	12 December 2022