IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

18/4/2018
DATE

SIGNATURE

18/4/18

Case Number: 37975/12

In the matter between:

IBYISI FURAHA FRANCOISE Applicant

and

THE BODY CORPORATE OF UNICADIA Respondent

RULING

KUNY AJ

[1] This matter is an application that was set down for hearing on the unopposed motion court roll on 9 February 2018. The applicant is an adult female of foreign origin who is resident in South Africa. She applies to rescind an order finally sequestrating her estate granted by this court on 26 June 2013.

[2] On 4 July 2011 the respondent obtained a default judgment against the applicant for an amount of R4 053,33. Pursuant to this the Sheriff attempted to attach property belonging to the applicant in satisfaction of the judgment debt. No property could apparently be found and the Sheriff issued a *nulla bona* return.[1]

[3] The applicant alleges that she was unaware that summons had been issued against her and that a default judgment had been taken. She also alleges that she was the owner of immovable property which could have been attached in satisfaction of the respondent's judgment and that the Sheriff failed to carry out a diligent search as claimed in the return of service in respect of the writ of execution.

[4] The *nulla bona* return of service resulted in the respondent bringing an application to sequestrate the applicant.

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[1] Record, p160

[5] It appears from the founding affidavit that on 12 June 2012 a provisional order was granted in the North Gauteng High Court for the sequestration of the applicant's estate.[2] In terms of this order the applicant was on 16 November 2012 called upon to advance reasons if any, why her estate should not be finally sequestrated. The court ordered that the provisional sequestration order be served on the applicant personally.

[6] In or about July 2012 the respondent made application for leave to serve a sequestration papers on the applicant by substituted service. It appears that leave for substituted service was granted. However, no court order to this effect was annexed to the application papers.[3] Strangely, the application for substituted service makes no mention of the fact that a provisional order for the sequestration of the applicant was granted on 12 June 2012.[4]

[7] The applicant annexes an extract of the Citizen Newspaper dated 21 September 2012 containing a notice that calls upon the applicant within 10 days of publication to notify the respondent of her intention to defend "an action" wherein the respondent seeks to sequestrate the applicant's estate. The notice further states that if the applicant fails to give such notice, her estate may be placed under

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[2] Record, p65
[3] Record, p19, para 89
[4] Record, p116-127

sequestration in the hands of the Master of the High Court without further reference to her. The notice that appears in the Citizen Newspaper is dated 3 July 2012.

[8] The applicant alleges in her founding affidavit that on 12 October 2012 a provisional order for her sequestration was granted by Phatudi J. A return date of 16 November 2012 was given for final consideration of the order. The court ordered that the provisional sequestration order be personally served on the applicant.[5] A copy of this order is not annexed to the founding affidavit.

[9] It is not clear what happened on the return date of 16 November 2012. However, on 26 June 2013 Tolmay J granted a final order for the sequestration of the applicant's estate. This order is annexed to the applicant's founding affidavit.[6]

[10] The applicant complains that there was no service on her of the provisional sequestration order of 12 October 2012 and that the final order for her sequestration was granted in her absence.

[11] The applicant states that the first time that she became aware that she had been sequestrated was in September 2015 when she received a telephone call from Lisl Loubser who advised the applicant of this and called her to a meeting.[7] It appears

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[5] Record, para 96, p19/20
[6] Record, p171
[7] Record, p12, para 42

from the founding affidavit that on 18 May 2016 the Master of the High Court appointed Ms Loubser as trustee to the applicant's estate ("the Trustee").

[12] The applicant states that she relocated to Cape Town in 2010 and returned to Pretoria in 2013. During her period of absence from Gauteng she leased her flat in Unicadia to her brother. She appears to attribute the fact that she did not receive notice either of the summons issued by the respondent and the sequestration application, to her absence from Gauteng.

[13] The applicant alleges however, that the respondent was in possession of her telephone numbers and email address and could have ascertained her whereabouts. She alleges that the application for substituted service was an abuse of the process of court.

[14] On 12 October 2016 Pillay Thesigan Inc acting on behalf of the applicant forwarded an offer of compromise to the Trustee. She responded that subject to certain amendments, she would accept the offer of compromise. On 9 December 2016 a revised offer of compromise was forwarded by Pillay Thesigan Inc on behalf of the applicant.[8] However, in a letter dated 17 August 2017 the Trustee alleges that certain of the applicant's accounts were in arrears and that she was of the view that

[8] Record, p99

the offer of composition had lapsed. The Trustee afforded the applicant 14 days within which to serve an application to set aside the sequestration order.[9]

[15] The applicant alleges that she is not insolvent as she has assets in the amount of R1 114 000. Her liabilities are said to be less than R350 000. She states that there are no other judgments or legal proceedings pending against her and that she has made arrangements to pay all her creditors and is paying them as arranged.[10] She also states that she has paid all legal fees (I assume these are the fees associated with the sequestration of her estate).

[16] The rescission application was served on the respondent by the Sheriff on 20 October 2017. It does not oppose the application.

[17] The applicant annexed to her application an affidavit by one Mabaso who states that she is employed by Pillay Thesigan Inc and that on 20 October 2017 she served the application on the Master of the North High Court and thereafter on Loubser and Loubser Inc at 825 Rubenstein Drive, Moreleta Park. The affidavit is dated 31 January 2018. There is further evidence of service of the application on Loubser and Loubser Inc in the form of a stamp indicating that the application was received

[9] Record, p111
[10] Record, p25

on 23 January 2018. It appears that the application was also again served on the Master on 17 January 2018.

[18] In terms of Rule 42 of the Uniform Rules the court has the power to rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. I accept that the orders that the applicant seeks to rescind were granted in her absence. The applicant must also show that there was an error which meets the requirements of Rule 42(1) in order to bring herself within the ambit of the rule. Rule 42(2) provides that the court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

[19] The alleged failure to comply with the court's provisional sequestration order of 12 October 2012 that there be personal service on the applicant in my view, would amount to a serious error. It also appears that the application to sequestrate the applicant may have been ill-founded in that she apparently had attachable assets and may well not have been insolvent.

[20] However, in my view there are aspects of the application for the rescission of the sequestration orders which are not completely satisfactory. One of these is the failure, for no apparent reason, to annex the provisional sequestration order of 12 October 2012. No notice of this application appears to have been given to the

applicant's creditors who would have an interest in these proceedings. Whilst notice was given to the applicant's Trustee, she has a direct and substantial interest in the outcome of these proceedings. Accordingly, in my view the Trustee should have been joined. The court has a discretion to *mero motu* direct that a party be joined in proceedings.[11]

[21] In the circumstances, I am not prepared to grant an order as prayed for by the applicant. However, I do not dismiss the application which in my view, may well have merit in it. The applicant should be given an opportunity to rectify those aspects of the application with which the court is not satisfied. Accordingly, I make the following order:

1. The matter is removed from the roll.
2. The applicant is directed to join her Trustee as a party to these proceedings and to again serve this application on the Trustee.
3. The applicant shall prior to setting the matter down give notice to all known creditors of her intention to make application on a specified date for the rescission of the orders placing her estate under sequestration.
4. The applicant is granted leave to supplement her founding affidavit insofar as she may consider it necessary.
5. No order is made as to costs.

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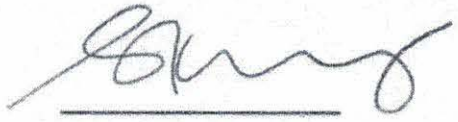
[11] *Harding v Basson* 1995 (4) SA 499 (C)



S. KUNY

ACTING JUDGE OF THE HIGH COURT

CASE NO: 37975/12

HEARD ON: 9 February 2018

FOR THE APPLICANT: ADV.

INSTRUCTED BY: Pillay Thesigan Inc.

DATE OF JUDGMENT: 18 April 2018