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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 3233/18

25/2/2020

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

_____**25/2/2020**_____
 DATE SIGNATURE

In the matter between:

MATUMI HOMEOWNERS ASSOCIATION

Applicant

And

DR JOHN MOSIMA
 (ID NO: [....])

First Respondent

NTHABISENG LETTA MOTIMA
 (ID NO: [....])

Second Respondent

JUDGMENT

RANCHOD, J

[1] This is an application in which the applicant seeks the sequestration of both the respondents on the grounds that they committed an act of insolvency as contemplated in section 8(b) of the Insolvency Act No. 24 of 1936 (as amended) (the Act).

[2] There is also a counter-claim by the respondents for damages of R82 451-00 and other ancillary relief.

[3] There was an application for condonation by the respondents for the late filing of their heads of argument which was not opposed and it was granted.

[4] There was also an application by the applicant for condonation for the late filing of its replying affidavit and the answering affidavit to the counterclaim which was opposed by the respondents. After hearing arguments I ruled that the application is granted with each party to bear their own costs.

[5] The respondents are the registered owners of an immovable property situated at [...], Pretoria. They are accordingly members of the applicant.

[6] The respondents had failed or refused to pay the monthly levies they were obliged to in terms of the Articles of Association of the applicant. On 06

September 2016 the applicant obtained judgment by default against the respondents in the Magistrate's Court for R11 648-86 together with interest and costs on the attorney and client scale.

[7] The Sheriff attached and therefore sold in execution on 28 February 2017 movable property of the respondents. After deducting his costs, the Sheriff paid over to the applicant R5 372-99 which was not sufficient to cover the judgment debt.

[8] The applicant then applied for the immovable property of the respondents to be declared executable but the Magistrate's Court refused to do so and advised the applicant to rather follow alternative procedures, such as sequestration.

[9] The applicant says it made various attempts to enforce the judgment against the respondents but without success and the amount owing and in arrears up to the time of launching the present application stood at R37 383-98. The applicant says the respondents have, accordingly, committed an act of insolvency as envisaged in s8(b) of the Act.¹ It is a creditor of the respondents with a liquidated claim exceeding R100-00 as provided for in s9(1) of the Act.²

¹ S8(b) provides: 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.

² S9(1) provides: A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of

[10] The applicant further states that there is no reason to believe, within the meaning of section 10(c)³ of the Act, that the sequestration of the respondents will be to the disadvantage of their creditors.

[11] The respondents oppose the application and have also raised two points *in limine* – *lis pendens* and *res judicata*. I will deal with them first.

Lis Pendens

[12] As I said earlier, the applicant had applied on 14 July 2017 in the Magistrate's Court in terms of s66(1)(a) of the Magistrates Courts Act 32 of 1944 for the respondents' immovable property to be declared executable. The application was refused but the respondents contend that that application amounts to a *lis pendens* as it involves the same parties, the same facts, the same issues and the same cause of action and remains pending before the Magistrate's Court. However, while that may have been the case when the respondents opposing affidavit was filed in this matter before me on 07 March 2018, the applicant withdrew that application on 19 July 2018.

[13] In any event, s8(b) of the Act (*supra*) refers to 'disposable property', which, in this context means property, whether movable or immovable which is unencumbered. (See *Tewari v Secura Investments* 1960 (3) SA 432 (N) at

insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.

³ S10(c) provides: if the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* –
(c) there is no reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
It may make an order sequestrating the estate of the debtor provisionally.

433A-F.) The immovable property of the respondents is bonded in furtherance of Absa Bank Ltd for R310 000-00.⁴ It can therefore not be taken into account in considering the question whether the respondents have sufficient disposable property to satisfy the judgment debt, and failing which, whether an act of insolvency has been committed as contemplated in s8(b) of the Act.

[14] The point *in limine* of *lis pendens* is dismissed.

Res judicata

[15] The respondents say that when the Sheriff attached the movable property of the respondents which the respondents say was worth R94 100-00, it was more than sufficient to satisfy the judgment debt of R11 648-86. The valuation is not that of an independent valuator. The respondents say after deducting the R11 68-86 from R94 100-00 there is an amount of R82 451-00 due to them by the Sheriff. Hence, say respondents, the matter between them and the applicant regarding the claim of R11 648-86 has become *res judicata*.

[16] A requirement for a valid defence of *res judicata* is that there should exist a final judgment by a competent court,⁵ and a claimant starts litigation afresh on the same cause of action. That is not the case here. The applicant is seeking satisfaction of the same judgment debt that it obtained in the Magistrate's Court.

⁴ Mortgage Bond No. B 17006/2006

⁵ *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2)SA 38 (A) at 45D-G.

[17] The point *in limine* of *res judicata* falls to be dismissed.

Ad merits

[18] The applicant has based its application for sequestration on the grounds that the Sheriff was unable to realise sufficient disposable property at a sale-in-execution to satisfy the judgment debt.

[19] The respondents have not applied for rescission of the judgment obtained in the Magistrate's Court nor appealed against the order. It thus stands until it is set aside.

[20] The respondents contend that they have sufficient property to satisfy the judgment debt. They state that they currently have movable assets valued at R114 750-00, they have a combined monthly salary of R110 000-00 and the second respondent has debtors of R800 000-00. The best proof of a person's solvency is that they should pay their debts. However, the respondents have instituted a counter-application to which I now turn.

The counter-application

[21] The respondents claim the following in the counter-application:

21.1 Payment of R82 451-00, being the difference between the value of the property attached and the actual proceeds received as a result of the sale in execution.

21.2 An order declaring that the amount of R8 497-00 does not form part of the levy account chargeable to the respondents by the applicant.

21.3 Declaring that the costs of the default judgment are not due and payable by the respondents.

21.4 Declaring that the sheriff's fees are not due and payable by the respondents.

[22] The respondents allege that they have suffered damages⁶ of R82 451-00 being the difference between what the respondents say was the value of the goods attached and removed by the Sheriff and the amount for which they were sold in execution. They submit that the applicant should be held liable for these damages based on the written indemnity provided by the applicant's attorneys to the Sheriff.

[23] Before dealing with the merits of the counter-claim it is apposite to deal with a point *in limine* raised by the applicant, i.e non-joinder of the Sheriff: Wonderboom by the respondents.

Non-joinder of sheriff

[24] The respondents' allegations are directed against the conduct of applicant and against that of the Sheriff for Wonderboom.

⁶ Paginated p61 of the papers.

[25] The respondents' claim for damages however is purely based on the allegation that the Sheriff for Wonderboom is unlawfully retaining the proceeds of the sale in execution, which the Sheriff was obliged to pay over to the respondents.

[26] The applicant on 11 January 2017 provided security to the Sheriff Wonderboom in terms of Rule 38 of the Magistrates Court Rules, indemnifying the Sheriff against any claim whatsoever that may arise against the Sheriff by the respondents.

[27] In their commentary on Rule 38 of the Magistrates Court Rules⁷ the learned authors of Jones & Buckle: Commentary on the Magistrates Court Rules state:

27.1 *'If the execution creditor has given the sheriff an indemnity, and the latter is subsequently sued by the claimant, **it is sufficient for the sheriff to notify the execution creditor of the action and give him an opportunity of defending it. If the sheriff has no valid defence, he may allow judgment to go against him by default and will then have an action against the execution creditor upon the indemnity.***

⁷ Jones and Buckle, Volume 2, Rules, Rule 38, page 38-1 par 9 under the heading "to indemnify him".

[28] Respondents' counsel submitted that the Sheriff was acting as agent of the applicant.

[29] In my view it is clear that the respondents are obliged to institute their action against the Sheriff and not the applicant. Should the respondents be successful in their action against the Sheriff, he will on his part, based on the written indemnity, have a claim against the applicant.

[30] It is the Sheriff who should answer to the several allegations made against him, *inert alia*, that he and or the applicant,⁸ failed to comply with the provisions of Rule 34(1) to (3)(a) to (c); Rule 39(6)(a); Rule 41(1)(a) an (c); Rule 41(8) and Rule 41(11) in that:

30.1 The Sheriff's account of fees and charges furnished by him omitted to contain a note advising the respondents that they may require him to have his account to be taxed and vouched for before payment.

30.2 The Sheriff failed, after the sale-in-execution to complete a voucher roll detailing the property sold, prices realised and details of the purchases and an account of the distribution of the proceeds.

30.3 The Sheriff failed or neglected to make an inventory and valuation of their movable property which was attached.

⁸ Paginated p60.

[31] It is clear that the Sheriff should have been joined in these proceedings. The submissions that he acted as agent of the applicant cannot be sustained.

[32] It falls to be mentioned that the Sheriff is cited as the second respondent in the counter-application but no application was made to join him in the proceedings. The applicant says the respondents have not even served the counter-application on the Sheriff.

[33] In my view there is a non-joinder and the point *in limine* must be upheld.

The merits of the counter-claim

[34] The claim against the applicant is based on an alleged delict committed by the Sheriff. Secondly, the quantum of the damages is unliquidated as a monetary figure has been placed on the damages without the necessary evidence of an expert to support the claim. The counter-claim cannot succeed.

[35] In the prayer at para 57.4 in the counter-application the respondents seek a declaration that 'an amount of R8 497-00 in Annexure "MH6" which comprises of 'legal fees' is not part of the levy account chargeable to the [respondents].' This amount is part of the default judgment granted by the Magistrate. That order still stands. This court cannot, in a counter-claim

against a sequestration application, conduct what would effectively be a re-hearing of that matter.

[36] In all the circumstances the following order is made:

1. The estate of the first respondent, John Mosima (ID NO: 700307 5421 088) and the second respondent, Nthabiseng Letta Mosima (ID NO: 780226 0316 080), be placed under provisional sequestration;
2. That a rule *nisi* is issued calling on the first and second respondents and any other interested parties to show cause to this court on the 15 April 2020 at 10h00 why the respondents should not be finally sequestrated;
3. The counter-claim is dismissed with costs.

RANCHOD, J
JUDGE OF THE HIGH COURT

Appearances

Appearance for the Applicant:	Adv TJ Jooste Instructed by Rene Harris Attorneys 9 Arbitus Street Bougainvillea Estate Montana Gardens Pretoria
Appearance for the First Respondent:	Adv G Sakhoane (SC) & Adv S Gaba Instructed by Mpyane Attorneys 196 Paul Kruger & Johannes Ramokhoase Streets Masada Building 2 nd Floor, Suite 204 Pretoria