Return date as per Order dated 1 June 2021 is set for August 2, 2021

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:

..12/5/2021.....
.....
DATE SIGNATURE

CASE NUMBER: 29675/20

In the matter between:

NEDBANK LIMITED **Applicant**

(REGISTRATION NUMBER: 1951/000009/06)

V

NZEBA TSHIBUMBU KATOMPA **First Respondent**

(IDENTITY NUMBER: [….])

MWAMBA BERNARD KATOMPA **Second Respondent**

(IDENTITY NUMBER: [….])

JUDGMENT

BAQWA J

Introduction

[1] This is an application for the provisional sequestration of the respondents joint estate. The respondents have also lodged a counter application for the setting aside of attachments made by the sheriff which are opposed by the applicant.

[2] The applicant is a bank and the respondents are married in community of property. The applicant bases its claim on the fact that the joint estate is factually insolvent, alternatively that the respondents have committed an act of insolvency and that there is reason to believe that it will be to the advantage of creditors if the joint estate is sequestrated.

[3] The application is being opposed by the respondents who have filed an answering affidavit which was responded to by way of a replying affidavit.

Points in limine

[4] At the commencement of these proceedings counsel for the respondent, Mr Cohen, raised points of law in *limine* which had not been raised in the Heads of Argument.

[5] Firstly, he submits that applicant's Security for payment of fees and charges issued by the Master of this Court, submitted as part of the sequestration application does not comply with the provisions of Section 9(3) of the Insolvency Act, 2 of 1936 ("The Act") in that it has become "stale". Secondly he submits that the *nulla bona* return upon which the applicant *inter alia* relies for the granting of the provisional order for sequestration of the joint estate is open to challenge as it has not been served on the second respondent.

First Point in Limine

[6] At the request of the Court counsel filed supplementary Heads of Argument in which they both refer to Mars: The Law of Insolvency in South Africa, Tenth Edition, Bertelman et al, at paragraph 5.4 on page 127 regarding the first point in *limine*. Paragraph 5.4 reads thus:

"*A creditor who commences sequestration proceedings against a debtor is bound to prosecute them at his own expense until a trustee is elected, and is guilty of a punishable offence if he allows himself to be induced by any valuable consideration to refrain from so doing. In view of this liability to proceed at his own expense, he must deposit with the Master security for the payment of all fees and charges necessary for the prosecution of all costs of administering the estate until the election of a trustee, or if no trustee is*

appointed, all fees and charges necessary for the discharge of the estate from sequestration. A certificate from the Master, given not more than 10 days before the date of the application, that he has done so must be attached to his application. Such certificate need not be attached to the application served up on the debtor but must be produced in court at the hearing of the application. The date of the application is the date of signature thereof; the relevant date is the date of the Notice of Motion, not the affidavit. The certificate of the Master may be dated after the application when it is lodged with the court. It has been held that failure to comply with Section 9(3) is a fatal defect and cannot be condoned, see further paragraph 5.5.4 below in respect of service of the application."

[7] It is common cause that the Security Bond which is dated 9 July 2020 and signed by applicant's attorney, Mr Hamman, was made available on the morning the application was heard whilst the notice of motion had been signed by the attorney on 29 May 2020.

[8] Evidently, the date of the notice of motion predates the date of the Security Bond by a measure of two months which means that the Security Bond was not furnished within ten days of the date of the application.

[9] The requirement of furnishing security is to discourage frivolous or vexatious proceedings against solvent persons and to safeguard such individuals against financial loss where such proceedings are nevertheless embarked upon. See *Arnawil Investments v Stamelman and Another* 1972(2) SA 13 (W) at 14.

[10] The issue of furnishing security in terms of Section 9(3) of the Act has been the subject of numerous court decisions. In *De Wet NO v Mandelie (Edms) Bpk* 1983(1) SA 544(T) at 546 (C-E). The following was said:

> *"It seems to be clear that the certificate need not be attached to the application when it is signed. Indeed, it need not exist. (Rennies Consolidated (Transvaal)(Pty) Ltd v Cooper 1975(1) SA 165(T); Mafeking Creamery Bpk v Mamba Boerdery (Edms) Bpk; Mafeking Creamery Bpk v Van Jaarsveld 1980(2) SA 776(NC) at 780 F.) There is some controversy, however, as to when, thereafter, the certificate may be taken out. At the extreme end of the scale in Franks and Another v Hairdressers' Supplies (Pty) Ltd 1934 CPD 92, in which the court, dealing with S 113(1) of the 1926 Companies Act, dismissed a point in limine which was based on the security certificate having been filed after the presentation of the petition. Henochsberg (op cit at 610) cites this case with approval and goes on to say: "It is submitted that this is still the position, despite the requirement that the certificate is to be issued by the Master not more than ten days before the application,*

i.e, that the requirement, although intended to be adhered to, is directory, and not a condition precedent to the court's granting a winding up order, the condition precedent being the actual furnishing of the required security (the most satisfactory proof of which, however, would be by way of the Master's certificate even though the latter were furnished at the hearing of the application). It is not required to be lodged ten days before the application."

[11] The above *dictum* fully addresses the point raised in limine in the present application. The condition precedent, namely, the master's certificate was furnished at the hearing after being obtained two months after the lodging of the application. In the circumstances I find that there had been proper compliance with the requirements of Section 9(3) and that the interpretation given to the section by counsel on behalf of the respondents is incorrect.

[12] The conclusion I come to is that the respondents' first point *in limine* is found wanting both in fact an in law and as such falls to be dismissed.

Second Point in Limine

[13] The second point in *limine* is that the *nulla bona* return was not served on the second respondent.

[14] Section 8(b) of the Act on which the applicant bases its application describes an act of insolvency in the following terms:

"*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."*

[15] Counsel for the respondents bases the second point in limine on the authority of Ratilal v Dos Santos 1995(4) SA 117(W) which the applicant disputes and submits should be distinguished from the facts of the present case.

[16] In Ratilal, the applicant who was relying on a *nulla bona* return, sought and was granted a provisional sequestration order against the respondent without the service of the application on the latter. This fact alone immediately positions the present case on a different pedestal from Ratilal. In *casu* both respondents oppose this application with the second respondent also having deposed to an opposing affidavit.

[17] The rationale behind the Ratilal decision is to be found at P119 H to 120C of that decision where the following was said: *"The problem that has risen in this*

matter is that a provisional order of sequestration has been granted without notice to an interested party. The practice that allows the grant of such an order without notice where a nulla bona return is relied upon arose before, and does not have regard to the statutory provisions which render it necessary to serve an application for sequestration of a joint estate on both spouses. The logic that appears to be behind the grant of a provisional sequestration order without service is the existence of satisfactory proof in the form of a return of service by a deputy sheriff, that the respondent, when served with a writ of execution, has already intimated that he has no assets with which to satisfy the judgment. In cases where there are two respondents and the return of service reflects that the writ has been served on one of them only, it does not seem to me to be appropriate that a provisional sequestration order which may affect the rights of the other respondent should automatically be granted without notice."

[18] On a proper reading of the Ratilal judgment, so the applicant submits, nothing prohibits this court from granting a provisional order for sequestration where the application was served on both parties and where the nature and content of the application came to both spouses' attention before the granting of a provisional order.

[19] In this application this court has had regard to the following facts: Judgment was obtained against the first respondent based on a deed of suretyship executed by her in the applicant's favour on 2 July 2013 and as part of the Deed of Surety, the first respondent completed a "Marital Status Declaration" stating that she is married to the second respondent in community of property.

[20] Further, the second respondent also completed a "Marital Status Declaration" and he cannot be said to have been unaware that the first respondent was binding herself and the joint estate as surety and co-principal debtor in favour of the applicant.

[21] Summons was served on the first respondent on 4 November 2015 and the matter was defended. On 5 September 2019 judgment was granted in favour of the applicant against the first respondent.

[22] The judgment having gone unsatisfied, the applicant caused a writ of execution to be issued against immovable property on 26 September 2019, and the said warrant was served on the first respondent on 2 October 2019.

[23] The first respondent was unable to point out assets to the sheriff (movable or immovable) of sufficient value to satisfy the judgment debt as a result of which the sheriff delivered a *nulla bona* return, the accuracy of which the second respondent has not taken issue with.

[24] It is not disputed that the second respondent received service of the writ of Execution as well as the *nulla bona* return through the service of the Application for Sequestration to which those documents were attached. The second respondent does not take issue with the validity of the judgment, the nature and amount of the judgment debt, the content of the writ of execution or the accuracy of the *nulla bona* return of service. Absent the contestation of the validity of these documents, it remains an enigma what the purpose of another service of the *nulla bona* on the second respondent would achieve.

[25] Counsel for the applicant, Ms Schoeman, submits, and I accept that the respondents are not only being overly technical but also engaging in stratagems and shenanigans to delay an inevitable sequestration day.

[26] In light of all the above, I come to the conclusion that the second point in limine is not sustainable and falls to be dismissed.

Background

[27] The applicants' claim arises from a written agreement entered into on 31 May 2013 in terms of which the applicant granted borrower facilities to a close corporation known as Belfry Trading CC ("Belfry Trading") of which the first respondent was a sole member.

[28] All conditions precedent the banking facilities agreement were fulfilled and the applicant lent and advanced monies to Belfry Trading through the said overdraft facilities.

[29] Additionally to the aforesaid agreement the parties concluded a further written agreement on 8 August 2013. In terms of the Term Loan Agreement the applicant and Belfry Trading agreed that the applicant would lend and advance to Belfry Trading an amount of R 9 200 000.00 which Belfry Trading would repay together with interest, charges and fees which would be debited to its account in terms of the Term Loan Agreement, in four instalments of R188 515.49 each.

[30] The applicant complied with its obligations in terms of both agreements referred to above but Belfry Trading failed to comply with its obligations in terms of the agreements resulting in the outstanding amounts becoming due and payable by Belfry Trading.

[31] Belfry applied for Business Rescue resulting in a business rescue plan in which the indebtedness to the applicant as at 19 January 2015 was admitted.

[32] On 2 July 2013 the first respondent bound herself as surety and co-principal debtor with Belfry Trading towards the applicant for the repayment of all the amounts owed by the corporation to the applicant in an unlimited amount.

[33] Resultantly, the first respondent and the joint estate of the parties became liable to the applicant for the indebtedness of Belfry Trading as a result of which summons was issued on 4 November 2015 and served on the first respondent.

[34] The first respondent defended the action on 22 June 2017. The case was adjudicated by this court on 5 September 2019 and judgment was granted in favour of the applicant for payment of R235 519.08; R388 435.45; R8 232 194.41 together with interest and costs.

[35] The said judgment has remained unsatisfied as a result of which a warrant of execution was issued by this court on 26 September 2019. The warrant was for a total amount of R8 911 515.25.

[36] On 2 October 2019 the sheriff served the warrant upon the first respondent who declared to the sheriff that she had no money, property or assets with which to satisfy the warrant. Neither could the sheriff locate any disposable assets, movable or immovable, with which to satisfy the judgment, debt. The sheriff's return was a *nulla bona* return.

[37] The first respondent's action constituted an act of insolvency as defined in the Insolvency Act on which the applicant bases these proceedings for the sequestration of the joint estate.

[38] It was established that the respondents are the registered owners of two immovable properties as a result of which warrants of execution and notices of attachment were served upon the respondents. Despite such service the judgment debt remains unsatisfied.

Applicant's claim

[39] As is evident from the applicant's replying affidavit an outstanding amount of R8 911 515.25 is still outstanding by the respondents to the applicant.

[40] Regarding the relief sought by the respondents in the counterclaim it is apparent that they do not seek to vary, rescind, set aside or appeal the judgment granted on 19 September 2019. The judgment constitutes irrefutable evidence of a debt owed by the respondents to the applicant. In the circumstances applicant's *locus standi* to apply for sequestration of the respondent's joint estate cannot be disputed.

[41] It is trite that in order to successfully defend an application for sequestration the respondents have to show on a balance of probability that their indebtedness to the applicant is disputed on *bona fide* and reasonable grounds. See *Kalil v Decotex (Pty) Ltd* 1988(1) SA 943 A at 980 B-D.

[42] In the opposing affidavits the respondents do not deny the Agreements of Loan and that the applicant performed in terms thereof. Neither do they dispute that they failed to comply with their monthly repayment obligations. Instead, they raise a rather spurious defence that the execution of the warrants of execution against both the movable and immovable property of the respondents are a nullity. In the face of the documents filed and in particular annexure "L" annexed to the founding affidavit they claim that no *nulla bona* return from the sheriff is annexed. This statement under oath is astounding and challenges the credibility of the respondents. Strangely enough they do not even deal with the content of the return of service nor do they challenge the accuracy thereof.

Factual Insolvency

[43] With the challenge on the validity of the *nulla bona* return, the respondents have failed to disclose any assets available with which to satisfy the judgment debt. A logical inference from that act of insolvency can only be that they are unable to pay their debts.

[44] It is abundantly clear from the founding affidavit Annexure "O" that the respondents have a number of creditors and that *ex facie* that report the first respondent alone has two judgments against her totalling nearly R1.1 million rands. There is therefore a reasonable prospect which is not too remote, that some pecuniary benefit will result for the creditors. See *Meskin & Company v Friedman* 1948(2) SA 555 W at 559.

Warrants of Execution – a nullity

[45] Whilst the respondents allege that the warrant of execution against immovable property is a nullity, they do not appear to submit that the judgment granted in respect of monies owed by them to the applicant is a nullity or that it was granted in error. No application for rescission or setting aside of the relevant order for payment was made. Neither is it correct that the warrant against movable property was granted without passing judicial scrutiny. The documents filed by the applicants dispel those allegations.

Counterclaim

[46] In an affidavit disposed to by the first respondent, the respondents seek an order "setting aside the attachments made by the sheriff being annexures "K""L""M""N" to the founding affidavit at paragraphs 5.10.1 to 5.10.4 respectively together with costs of suit.

[47] Strangely enough the respondents do not seek the variation, rescission or setting aside of the judgment upon which the *nulla bona* was based. Yet it is stated: "the basis to set aside the warrant of execution is that no judicial supervision was obtained by the applicant to execute against the movable

property" and further that: "the entire application for sequestration is predicated upon a *nulla bona* return which includes, legally and by definition immovable property."

[48] What is confusing about the relief sought by the respondents is that it is brought in the face of a valid court order for the payment of monies lent and advanced by the applicant to the respondents. That judgment has neither been satisfied, varied, rescinded or set aside. It is not clear under what statutory provision Rule or principle of common law the counterclaim is brought. In the circumstances I am compelled to accept the submission by the applicant that the relief sought by the respondents is ill-considered, bad in law and incapable of being granted. There is neither a statutory provision, common law nor rule of this court that would justify the granting thereof.

ORDER

[49] In the result, I make the following order:

49.1 The points *in limine* raised by the Respondents are dismissed, with costs;

49.2 The Respondents' Counter Application is dismissed, with costs;

49.3 The Respondents' joint estate is placed under provisional sequestration in the hands of the Master of the High Court returnable on **31 May 2021** to the unopposed motion court roll;

49.4 The Respondents, and all other interested parties, are called upon to show cause, if any, why a final order for the sequestration of the Respondents' joint estate should not be granted on the return date mentioned in paragraph 49.3 above;

49.5 This order be served upon the Respondents at the residential address by Sheriff, and that service on the one Respondent shall be regarded as proper service on the other;

49.6 This order be served upon the Master of the High Court and the South African Revenue Services by way of filling notice, by hand;

49.7 The Sheriff serving this order upon the Respondents is to enquire if the Respondents have any employees in their service. If so the Sheriff is to serve a copy of this order on the employees of the Respondents;

49.8 This order is to be published as follows:

a) By publication in 1 (ONE) edition of Citizen Newspaper;
b) By 1 (ONE) publication in the Government Gazette.

49.9 The costs of this application shall be costs in the administration of the insolvent joint estate

SELBY BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appearances

For the Applicant:	Adv AJ Schoeman
Instructed by:	Snyman De Jager Attorneys
For the Respondents:	Mr SS Cohen
Instructed by:	Messrs Thomson Wilks Ink