**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

**CASE NO: 25067/2020**

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

…… ……..
SIGNATURE DATE

In the matter between:

**CLOETE MURRAY N.O.** Applicant

and

**TSHEPISO DAVID HUMPHREY RAMPHELE** Respondent
(Identity number: […])

**JUDGMENT**

**SAWMA, AJ:**

1. On the 13th of June 2021 the respondent's estate was placed under provisional sequestration in the hands of the Master and a *rule nisi* was issued calling upon interested parties to show cause, if any, why a final order of sequestration ought not to be granted, the return date being the 2nd of August 2021.

2. The applicant now moves for a final order of sequestration and to that end has filed an affidavit of service confirming that the prescripts of the provisional order of sequestration have been complied with.

3. Counsel for the respondent takes no issue with the affidavit of service, nor does he contend that the applicant has failed to make out a case for a final winding up order. Rather respondent's counsel submits that two legal issues are dispositive of this application.

4. As to the first legal issue, respondent's counsel argues that, because the provisional order of sequestration has lapsed, no final order can issue. The argument on this score is that, because the *rule nisi* was

returnable on the 2nd of August 2021, but the matter was only called for argument on my roll on the morning of the 4th of August 2021, the provisional order lapsed. There is accordingly nothing left to adjudicate (the first issue).

5. As to the second legal issue, the respondent's counsel argues that, even if I should find that the *rule nisi* has not lapsed, I ought then, adopting a Constitutional approach that eschews sequestration instead of execution and recovery of outstanding monies, to exercise the discretion (postulated in section 12 of the Insolvency Act)[1] in the respondent's favour (i.e. I ought to refuse the final order for sequestration sought by the applicant).

**THE FIRST ISSUE**

6. It is common cause that:

6.1 the *rule nisi* was returnable on the 2nd of August 2021;

6.2 this application (for a final order of sequestration) was duly

[1] Act 24 of 1936.

enrolled for the 2nd of August 2021;

6.3 it was duly allocated to my opposed roll;

6.4 in regulating my opposed roll I determined the matter would be heard at 10:00am on Wednesday the 4th of August 2021 and accordingly so allocated the matter;

6.5 it was on that basis that argument only commenced at 10:00am on Wednesday the 4th of August 2021.

7. In accordance with the practice manual applicable to this division, all matters are enrolled for the first day of the week in which the matter is to be heard,[2] the senior Judge allocating matters to Judges sitting in the Opposed Court at least 10 days in advance, and each particular Judge then preparing his/her own roll for the week in which the work is to be distributed.[3] The opposed motion roll is a continuous roll that endures from 10:00am on the Monday of the particular week until 16:00pm on the Friday of that week.

[2] North Gauteng Practice Manual, Practice Directive 13.12(1).

[3] *Ibid*, Rule 13.12(2).

8. As is often the case with opposed motions, a matter may commence on one day and only conclude on the next day and, when that happens, opposed motion Courts do not postpone the matter to the following day but simply adjourn until the next day. So too, matters that are enrolled for the Monday of any particular week, but are allocated to any other day of that week, do not get postponed to that day, but simply stand down until the allocated date and time in that week. So too, *in casu*, the matter was on my roll and before me on the 2nd of August 2021 but, in accordance with the published roll, then stood down until Wednesday at 10:00am. In those circumstances I neither discharged the rule on Monday at 10:00am, nor did the period of the validity of the rule expire. That is because the matter was not only properly enrolled, it was before me on the 2nd of August 2021 but then stood down for argument.

9. In arriving at this conclusion, I am fortified by two unreported judgements, similar in effect. The first is the judgement in *Davenport John William v Platfields Limited*.[4] Klaaren AJ was required to decide whether a provisional order of liquidation had lapsed on the morning of the 27th of May 2016 in circumstances where Modida J had given an order in the morning removing the matter from the roll with costs but

[4] 2017 JDR 0334 (GJ).

had issued an order in the afternoon directing that the matter was postponed to the 22nd day of July 2016 and reserving costs. The court file reflected (in consequence of the afternoon order) a deletion of the earlier words of the morning order stating "matter removed from the roll"[5].

10. Klaaren AJ, in dealing with the argument that the rule had lapsed in the morning when the initial order was made, said that:

> *"[20] The action of the Court on 27 May 2016 might be looked at in two lights: in the first, it was one continuous judicial action; in the second, it was two separate judicial actions, an initial order and then a reconsidered order. I prefer seeing the action of the Court in the first light. The judicial consideration continued from morning through the afternoon. As it sometimes does, the judicial process proceeded in steps forwards and backwards. The action of the Court on the day of 27 May 2016 was to postpone the matter to 22 July 2016."*

11. The second judgement is that of Modiba J in *The Body Corporate of Santa Fe v Bassonia Four 07 CC.*[6] A provisional winding up order, returnable on the 6th of August 2018, had served before Ismail J but the

[5] Ibid at paragraph [5]-[8]

[6] 2019 JDR 0516 [GJ].

matter was not on the roll. Ismail J stood the matter down until the 8th of August 2018 to allow Santa Fe's attorney to file an affidavit explaining why the matter was not on the roll. On the latter date (8 August 2018), having accepted the explanation proffered, the *rule nisi* was then extended. On the extended return day Bassonia contended before Modiba J that the extended *rule nisi* was a nullity because, when the matter had not been on the roll of the 6th of August and Santa Fe was in default of appearance, the *rule nisi* had then lapsed. Accordingly, so the argument went, its extension thereafter became a nullity.[7]

12. Modiba J found that when Ismail J had stood the matter down on the 6th of August to the 8th of August, the rule had not lapsed and thus the extension of the rule on the 8th of August 2018 was valid.[8]

13. In like fashion, in this matter, the provisional order was before me from the start of my roll on the 2nd of August 2021 and remained so until argument was disposed of on Wednesday the 4th of August 2021, all of this as part of "one continuous judicial action".

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[7] *Ibid* at [3] – [4.1].

[8] *Ibid* at [10].

14. In any event, to the extent that the rule had in fact lapsed because I had not allocated the matter to my roll on the 2nd of August, but rather to the 4th of August 2021, at the point at which I heard argument and reserved judgement, the matter was plainly still *res integra*.

15. Rule 27(4) of the Uniform Rules of Court permits a discharged *rule nisi* to be revived.[9] Fleming J said,[10] concerning the discretion to revive the rule, that what would be critical would be to determine the effect that revival of the rule would have, suggesting that it would be proper to exercise such a discretion if the rule was revived while the matters were still essentially *res integra*.[11]

16. In the Davenport matter[12], Klaaren AJ said:

> *"[19] … In this case, even on the argument that the rule did lapse in the morning, in the afternoon, the matter was still open for decision and res integra. The relevant time period*

[9] The rule reads:

> "*After a rule nisi has been discharged by default of appearance by the applicant, the Court or a Judge may revive the rule and direct that the rule so revived need not be served again*."

[10] In *Ex Parte S & U T.V. Services; In re S & U T.V Services* 1990 (4) SA 88 WLD.

[11] *Ibid* at 90 I – 91 B

[12] See footnote 4 above.

*here was measured in hours not weeks…."*

and:

*"[23] Even if I am wrong in my view of the action as one continuous judicial action, in the view of the matter as two separate judicial actions, for the reasons above in discussing T.V. Services and Bachir, the Court still had the necessary jurisdiction in the afternoon in a matter that was still res integra to make its order of postponement*."

17. So too, in this matter, as at the time of hearing argument on the matter, being a mere two days later as part of a continuous opposed motion roll, the matter in my view remained *res integra*. To the extent that it is necessary to pertinently revive the rule in those circumstances in order to render this judgement effective, I exercise that discretion. I take into account that there was no fault on the part of the applicant who had been directed to only appear at 10:00am on Wednesday the 4th of August 2021, and also that no other interested party requested electronic access to my court in regard to this matter, whether on the Monday, Tuesday or Wednesday of that week.

18. The second issue I am called upon to decide was articulated by respondent's counsel on the basis that, whilst the respondent did not contend that section 8 of the Insolvency Act (including section 8(b))

was unconstitutional, and accepted that the Sherriffs' return relating to the execution of the writ of execution, fell within the ambit thereof (i.e. that the provisions of section 8(b) were met in the circumstances), it was nevertheless argued that I should adopt a Constitutional approach to the exercise of my discretion and, doing so, ought to refuse the order sought.

19. The constitutional approach, so the argument went, required that I take into account the provisions of section 36(1)(e) of the Constitution of the Republic of South Africa.[13] In doing so counsel argued that I should also take account of the fact that:

19.1 the respondent is the registered owner of the property at Erf 665 Mafikeng (the **"Mafikeng property"**), the value whereof

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[13] Which provides that:

""*The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:*

*(a) …*

*(b) …*

*(c) …*

*(d) …*

*(e) less restrictive means to achieve the purpose.''*

exceeds the debt, and that the applicant was entitled to execute against that property; and

19.2 the order relied upon by the applicant was one that permitted execution against both the respondent and Adv Dauds.

20. The argument accordingly proceeded that knowing that there were less restrictive options available to the applicant, namely executing either against Adv Dauds or the Mafikeng property or both, I ought accordingly to exercise the discretion against the grant of a final order of sequestration as. That is because the applicant ought to have executed against the property and/or Dauds, that being the “less restrictive means to achieve the purpose”.

21. I am not persuaded that this second issue is meritorious. In the first instance this application is not about extinguishing the indebtedness of the respondent. It is about the sequestration of his estate to the benefit of his creditors. That is its purpose.

22. In terms of the argument advanced I am required to accept that execution against the Mafikeng property was the appropriate route to follow and that the applicant ought not to have elected instead to proceed with a sequestration application. That assumption, however,

is not supported by any facts in the application papers. That is because the issue was first raised in argument.

23. The argument also proceeds from a base that does not challenge the act of insolvency relied upon. The legislature has, however, provided that the act of insolvency itself (as opposed to actual insolvency) is a sufficient ground for the purpose of obtaining a sequestration order. For this reason, the estate of a debtor may be sequestrated even though it is technically solvent.[14]

24. The respondent nowhere in his answering affidavit addresses his financial position. Accordingly, this Court is left entirely in the dark as to the true position of his estate[15]. It could well be that the debts of the respondent, together with the debt owed to the applicant exceed the value of the Mafikeng property in which event the interests of creditors of the estate are better protected by his sequestration[16].

25. What is more, the argument only takes into account the respondent's

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[14] See *DP Du Plessis Prokureurs v Van Aarde* 1999 (4) SA 1333 TPD at 1335E-G.

[15] What is known is that the respondent is significantly indebted to the applicant and despite demand has been unable to discharge that indebtedness by immediate payment, instead offering to discharge it by way of instalments

[16] As opposed to the suggested alternative of one creditor (the applicant) executing against the Mafikeng property

position. It ignores the rights afforded to the applicant, including the right to proceed with a sequestration application against the respondent who has committed an act of insolvency.

26. The argument to the effect that the applicant ought to have executed against Dauds suffers from similar shortcomings in my view. There is also no suggestion made that any execution against Dauds would have yielded a positive outcome. In circumstance where the liability is joint and several the applicant was perfectly entitled to proceed to execution against only one of two debtors. The application papers do not explore the basis for the decision on the applicant's part on this score because, again, the issue is raised in argument for the first time.

27. In the final analysis I am also guided by the fact that I ought not to exercise my discretion in favour of the respondent unless there are special circumstances which justify the withholding of a final order, and it is for the respondent to establish those circumstances. In the matter of *Millward v Glaser*[17], Roper J said the following in this regard[18], namely:

[17] 1950 (3) SA 547 W.

[18] at 553H-554A

> "*The discretion of the Court is however not to be exercised lightly, and where an act of insolvency has been proved the onus upon the debtor who wishes to avoid sequestration is a heavy one (De Waard v Andrew & Thienhaus Ltd.; Polunsky & CO. v. Beiles & Others). I agree with respect with the observation of Broom, J., in Port Shepstone Fresh Meat & Fish CO. (Pty.), Ltd. v. Schultz (supra), that where the petitioning creditor has proved an act of insolvency and reasons to believe that sequestration will be to the advantage of creditors, "very special considerations" are necessary to disentitle him to his order*."

28. In the result, I grant an order in the following terms:

28.1 The Estate of the Respondent is placed under final sequestration.

28.2 The costs of this application are to be costs in the sequestration.

**Electronically submitted**

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 September 2021.

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**SAWMA AJ**

**ACTING JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

Date of Hearing: 04 August 2021

Judgment Delivered: 27 September 2021

APPEARANCES

For the Applicant: Adv P Lourens
Instructed by: Roestoff Attorneys

For the Respondent: Adv PW Makhambeni SC
Instructed by: Ramphele Attorneys