

SOUTH AFRICA / JUDGMENT

A.S.J.N v A.M.N and Others (69069/19)

[2020] ZAGPPHC 764 (20 October 2020)

[2020] ZAGPPHC 764**COURT**

North Gauteng High Court, Pretoria

BEFORE

W Hughes

CASE / FILE NUMBER

69069/19

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Policy

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 69069/19**REPORTABLE: YES/NO****OF INTEREST TO OTHER****JUDGES: YES/NO****REVISED****DATE: 20 OCTOBER 2020****In the matter****between:**

A[...]
S[...] J[...] N[...]
APPLICANT
and
A[...]
M[...] N[...]
and
A[...]
M[...] N[...]
A[...] S[...]
B[...]
RESPONDENT
First Intervening Creditor

Second Intervening Creditor

JUDGMENT

HUGHES J

[1] This is an opposed application for the final sequestration of the respondent. The applicant, A[....] N[....] and the respondent, A[....] N[....] were married and on 31 August 2012 they obtained a decree of divorce from this court. In terms of the divorce decree which incorporated a settlement agreement the respondent was ordered and undertook to pay maintenance and other payments to the applicant. The respondent failed to honour the order as he failed to make

certain payments to the applicant. The eventuality is that he fell into arrears with maintenance and payments due to the applicant,

which culminated in the applicant moving an application for contempt of court.

[2] On 23 May 2019 this court granted the contempt order with a suspension of the incarceration of the respondent subject to him adhering to the settlement agreement and paying the maintenance due to the applicant. This failed to garner a positive result from the respondent, as he did not adhere to the contempt order. The applicant

then proceeded to issue a writ of execution for the amount owed by the respondent, which totalled R557 124.96. The sheriff proceeded to serve the writ on the respondent, however he only managed to obtain a nulla bona return as the respondent professed to have no disposable property or immovable property to satisfy the debt.

[3] Hence, in September 2019 the applicant proceeded to launch sequestration proceedings against the respondent's estate. After a prolonged period of avoidance on the part of the respondent, he was eventually provisionally sequestered on 25 February 2020. The initial return date to show cause why a final order should not be

granted was extended on a few occasions, with the respondent ultimately filing his answering affidavit. However, having done so

the respondent on 1 June 2020 filed a supplementary affidavit without the leave of the court. The applicant takes issue with this impugned procedure adopted by the respondent. I deal with this later in the

judgment.

- [4] During the course of the proceedings to show cause there was an intervening application and these intervening parties were granted leave to join the proceedings as they alleged that they were creditors. This application is for the final sequestration of the respondent, with the respondent and the intervening parties defending the application on the basis that the sequestration will not be beneficial to the creditors.

The respondent sought leave to file a supplementary affidavit

- [5] The respondent sought leave to file a supplementary affidavit, which application was duly opposed by the applicant. The respondent in this supplementary affidavit sought to challenge the calculation of the amount in the writ of execution. He submitted that this was not done in his initial papers as his previous attorney had written a letter

dated 23 July 2019 to the applicant's attorney and there had been no reply forthcoming. The erstwhile attorney only became aware of this letter a week before the matter was to be heard, hence the delay in filing the supplementary affidavit.

- [6] On an examination of the correspondence of 23 July 2019, it is evident to me, that the respondent had engaged in making a counter-proposal to the applicant on the basis of providing an explanation as regards each order made in the contempt proceedings. This is evident in the final paragraph, which states:

'We look forward to receiving your client's reply whether our client's life policy and instalment proposals are accepted and that the enforcement of the order be stayed until both parties supplied additional documents (same might even avoid the need for further litigation).'

- [7] It is in light of the aforesaid that I made an order refusing the respondent's application to supplement on the basis that he was disputing the amounts reflected on the writ of execution. The latter was clearly not the case as he had made a proposal and sought co-operation from the applicant to stay the enforcement of an order that was in existence. A contempt order, mind you, which was binding as it had not been rescinded, reviewed or set aside.

- [8] Consequently, the respondent was disallowed from filing a further supplementary affidavit. The application for leave to file was dismissed with costs on an ordinary scale.

The case on hand

- [9] The provisional order was granted as the applicant demonstrated that the respondent committed an act of insolvency when a nulla bona return was attained by the sheriff. This was in respect of the debt owed to the applicant, in terms of the settlement agreement,

arising from the divorce proceedings between the applicant and respondent.

- [10] The respondent does not take issue with the provisional winding-up order granted as he has not sought to rescind same. Instead, the respondent has attacked the fact that the applicant seeks a final winding-up order in the circumstances which prevail. To this end, the respondent submits that a final winding-up would not be in the interest of all the creditors and more so the applicant has failed to comply with the requisite procedure when seeking a final order. In addition, a final order would impact on his career as a bookkeeper.
- [11] In the respondent's answering affidavit, he sets out a list of his creditors and also lists an immovable which is bonded to the turn of R871 962.00 purchased in 2013 and valued at between R1,150 000.00 or R1,400 000.00. The first and second intervening parties cited lodged claims as creditors. The first intervening creditor claimed that the respondent owed him an amount of R650 000.00 in respect of a loan. Whilst, the second intervening creditor states that the respondent owes her R100 000.00 which also constituted a loan. The intervening parties sought to intervene as creditors and on 3 August 2020 the parties reached an agreement allowing the first and second intervening parties leave to intervene.
- [12] Having attained the provisional order, the applicant is adamant that there was compliance with the prescripts of the provisional order, thus she is entitled to a final order. I deal with this in more detail below.

The respondent contentions

- [13] The respondent in his defence raises procedural concerns and submits that the applicant has failed to make out a case for a final winding up order. This is so, as the applicant has failed to effect service in terms of the provisional order, has also failed to submit the application to the Master prior to proceeding for a final order and lastly, has not filed security with the Master as is required.
- [14] In terms of the provisional order, the applicant was required to publish the order in the Government Gazette but yet again failed to do so. In addition, she failed to effect service on the relevant parties as set out in the provisional order.
- [15] The crux of the respondent's defence is that the applicant has not demonstrated that the final sequestration of his estate would be for the benefit of all the creditors. He argues that on the claims lodged by the intervening creditors alone it has already been established that the final sequestration would not benefit all the creditors.

The law

- [16] In terms of section 8 (b) of the Insolvency Act of 1936 (the Act) a debtor would have committed an act of insolvency 'if a Court has given a judgment against him and he fails, upon 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 the officer that he has not found sufficient disposable property to satisfy the judgment.'

It is common cause in this case that the respondent, in person, advised the sheriff that he has no disposable property to satisfy his debt with the applicant.

- [17] That being said, the respondent has committed an act of insolvency and the provisional sequestration order was warranted. The respondent takes issue that the order should not have been granted but has not proceeded to rescind the provisional order. As the order stands until rescinded or set aside.
- [18] The provisional sequestration order specifically stated that if a final sequestration is sought the application seeking same together with this order be served on SARS, the Master of the High Court, all known creditors of the first and second respondents and on all employees of the first and second respondent and any trade union representing these employees.
- [19] In seeking a final sequestration order the applicant has to satisfy the edicts of section 12 of the Act, which states:

‘12 Final sequestration or dismissal of petition for sequestration

- (1) If at the hearing pursuant to the aforesaid rule nisi the Court is satisfied that—
- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section 9; and
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may sequester the estate of the debtor.
- (2) If at such hearing the Court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die.’
- [20] In the current case, the applicant has already demonstrated section 12(1)(a) and (b) for a final sequestration. However, in terms of section 12(1)(c), she still needs to show that a final sequestration of the respondent would be in the best interest of the creditors.

The intervening creditors

- [21] The status of the claims lodged by the intervening creditors is an issue that deserve comment. Notably in this case when the intervening creditors lodged their application to intervene the respondent had already made mention of them in his answering affidavit.
- [22] The respondent sets out a list of his creditors in an annexure dated 8 February 2020 which is attached to his answering affidavit. Conspicuously, the two intervening creditors are listed as creditors and the quantification of the respondent’s debt due to these creditors is characterised as loans.

- [23] The applicant now challenges the veracity of these claims and in response to the challenge the intervening creditors point out, rightfully so I might add, that this challenge has no merit. This is so as the applicant acceded to these creditors asserted claims when she agreed to accept them as bona fide creditors. She cannot now turn around and contend that their claims are not valid, having accepted the locus standi as bona fide creditors reliant on the loan agreements they have with the respondent.
- [24] Much is made out by the applicant about the fact that the first intervening creditor was paid by the respondent via his business bank account. This cannot be regarded as a genuine basis to disqualify this creditor's claim. The agreement is between the creditor and the respondent, both have not concealed the fact that there were payments made to extinguish the debt. Whether the payments were made from his personal or business account does not nullify the fact that there is a debt owed to the first intervening creditor.
- [25] As regards the second intervening creditor the applicant contends that the debt has prescribed, yet again she should have raised this as a point in limine before agreeing to accept the second intervening creditor as a party to these proceedings. In addition, the respondent has demonstrated that he from time to time advised this creditor that he would pay his debt to her, which conduct is only within the knowledge of the creditor and the respondent.
- [26] The applicant raises the issue of collusion between the first intervening creditor and the respondent and collusion between the second intervening creditor and the respondent. Collusion is 'an agreement between parties to refute or to suppress facts, or to out false evidence before the court, or to manufacture evidence, in order to make it appear to the court that one of the parties has caused the action, or a ground of defence, which in fact he has not.' [1] In the papers before me the applicant has not made out a case as dictated by law and the cases. The applicant having failed to put up such evidence as the relationship between the respondent and the intervening creditors, as relatives, had no bearing on the loan agreements on the facts of this case.
- [27] The case made out by the applicant against the respondent and the intervening creditors' claims, are not based on facts, hence are baseless and bad in law.

Advantage to the general body of creditors

- [28] In addressing this issue I am mindful of the dicta in *Meskin & Co v Friedman* [2] which is amplified in *Stratford v Investec Bank Ltd* decision of the Constitutional Court: 'In *Friedman* the court held: [T]he facts put before the Court must satisfy it that there is a reasonable prospect-not necessarily a likelihood, but a prospect which is not remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the [Insolvency Act] some may be revealed or recovered for the benefit of creditors, that is sufficient.' [3]

[29] It is trite that the petitioner bears the onus to prove that the respondent has committed an act of insolvency and that there are assets to be realised for the benefit of the general body of creditors.[4] Though the definition of advantage to the creditors is not spelt out in the Insolvency Act the Supreme Court of Appeal said that: ‘it means that there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole... Although advantage to the creditors is not a rigid concept, it requires proof of a tangible benefit to the general body of creditors.’

[30] The applicant was provided with the annexure illustrating the indebtedness of the respondent in his answering affidavit, being AA2. In her replying affidavit and on her own accord having had site of this annexure she concedes as follows:

‘12.3 Only a trustee, if appointed on a provisional basis will be able to determine the level of insolvency of the respondent.’

[31] Even in the face of the aforesaid concession the applicant proceeds to deal with the estate of the respondent. The Intervening creditors take issue with this conduct arguing that both the respondent and the applicant have an agenda, thus the applicant in proving that the sequestration would be to the advantage of the creditors ought to have awaited the trustee’s input or attained an independent evaluator to provide an independent and informed opinion in these circumstances. In analysing annexure AA2 the applicant proffers her own unsubstantiated opinion of what the worth of the estate of the respondent ought to be, as opposed to what he had advanced. Clearly in these circumstances, let alone that applicant makes out her case in her replying papers and not the founding affidavit,[5] there is evidently a dispute of the facts on the papers per se.

[32] This is amplified by the applicant when she states in the replying affidavit: ‘12.11 If reference is however, made to all the assets estranged by the Respondent, for which the Respondent, as per the contempt Court order, should give account (which the Respondent failed to do to date), these unaccounted values should be taken into account. The Respondent continues to be in contempt of the Court order, and as such only a provisional trustee will be able to identify through, possibly an audit, where the proceeds of those unlawful sales are;’

[33] With the aforesaid back drop in mind it is critical to examine what the Constitutional Court had to say in Stratford as what constituted advantage to creditors;

‘[44] The meaning of the term “advantage” is broad and should not be rigidified. This includes the nebulous “not-negligible” pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or “not-negligible” benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin et al state that— “the relevant reason to believe exists where, after making allowance for the anticipated costs of

sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor’s predicament is likely to yield a larger such

payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order.”

[Footnotes omitted]

[45] The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in Friedman. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body;[6] that there is a substantial estate from which the creditors cannot get payment except through sequestration;[7] or that some pecuniary benefit will result for the creditors.[8]

[34] Thus, in order to achieve the said sequestration there ought to be a reasonable prospect of an actual payment being made to those creditors who prove their claim. In the case at hand without the evaluation of the estate by a credited valuator or the duly appointed trustee, there is no way I am able to establish if there is any value ultimately sequestered and distributed. On the applicant’s own version, she concedes that this case requires the appointment of a trustee to provide a true evaluation of the estate to be sequestered. We do not have the value of the goods of the estate instead we have a dispute of facts as regards the value of the estate, as between the applicant and the first respondent.

[35] In the circumstances, the court is unable to exercise its discretion as the true values of the estate are not at hand. Nor is there an independent valuation that the court can rely on. Hence, I cannot

exercise my discretion to determine if any of the creditors will in fact receive a payment as a result of the sequestration.

Relief

[36] For the reasons set out above I am unable to grant a final winding up of the respondent’s estate. That being so, the provisional sequestration order is discharged and the application for final sequestration is dismissed.

Costs

[37] The costs are to follow the result and such costs are inclusive of two counsel where so employed. Such costs are inclusive of the interpleader application.

Order

[38] Consequently, the order I make is as follows:

- [1] The application for the final sequestration of the respondent is dismissed with costs, such costs to include the employment of two counsel, where necessary. Such costs are inclusive of the Interpleader application.

W. Hughes

Judge of the High Court Gauteng, Pretoria

Heard: 26 August 2020

Electronically Delivered: 20 October 2020

Appearance:

For the Applicant: Adv. S Strauss

Instructed by: Schoeman Borman Inc

For the Respondent: Adv K Reddy Instructed by: Swanepoel Van Zyl Attorneys

For the 1st & 2nd Intervening Creditors: Adv A Coetzee

Instructed by: McTaggart Labuschagne Inc

[1] Kuhk v Karp 1948 (4) SA 825 (T) at 827.

[2] Meskin & Co v Friedman 1948

(2) SA 555 (W) at 559

[3] Stratford v Investec Bank Ltd 2015 (3) SA 1 (CC) at para 43.

[4] Trust Wholesalers and Wollens (Pty) Ltd v Mackan 1954 (2) SA 109 (N) at 112C-D.

[5] Director of Hospital Services v Mistry 1979 (1) SA 626 (AD) at 635H-636D; Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 368H-369H.

[6] London Estates (Pty) Ltd v Nair 1957 930 SA 591 (D) at 591G.

[7] Realization Ltd v Ager 1961

(4) SA10 (D) at 11D-E

[8] B P Southern Africa (Pty) Ltd v Furstenberg 1966 (1) SA 717 (O) at 720E-G.

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