

SOUTH AFRICA / JUDGMENT

C C v D C (2019/27129) [2020] ZAGPJHC 225 (12 August 2020) [2020] ZAGPJHC 225

COURT

South Gauteng High Court, Johannesburg

BEFORE

Gilbert

CASE / FILE NUMBER

2019/27129

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

No.: 2019/27129

In

the matter between:

C,
C
Applicant
and
C,
D
Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email.

Gilbert AJ:

1. The applicant and the respondent were previously married. Twin girls were born of the marriage. The twins are now twelve years old. The applicant and respondent were divorced on 7 December 2011. They entered into a settlement agreement, that was made an order of court. The settlement agreement provided for maintenance in respect of each twin in the sum of R5,000.00 per month, which maintenance was to increase annually linked to the increase in the consumer price index. The respondent would also pay for the twins' typical expenses, such as education, extramural activities, and medical care.
2. It is now nearly ten years later. The respondent has remarried and started a new family. Notwithstanding the terms of the settlement agreement, the respondent is still paying R5,000.00 per month per child. In 2017, the respondent approached the maintenance court for a reduction of his maintenance obligations. The applicant opposed those proceedings, including by way of review proceedings in the High Court. Although those review proceedings were dismissed by the High Court, the maintenance court has yet to determine whether the respondent's maintenance obligations are to be varied and reduced.
3. Since their divorce, the parties have engaged in much litigation, both in the maintenance court and in the High Court. Each of them have had varying degrees of success, with costs orders being granted in favour of one or the other over the years.
4. The present application by the applicant to provisionally sequester the estate of the respondent is a further episode in the series of on-going litigation.
5. One of the previous legal proceedings between the parties resulted in a costs order being granted against the respondent in favour of the applicant, which was taxed on 6 February 2019 in an amount of R94,618.38. The applicant relies upon these unpaid taxed costs to establish that she has a liquidated claim in terms of section 9(1) of the Insolvency Act, 1936 and so as a creditor can seek the provisional sequestration of the respondent's estate.
6. The applicant also relies on what she contends is unpaid maintenance for the period January to December 2018 in the sum of R138,604.00. There are several disputes relating to that indebtedness. Much of the respondent's opposition in these sequestration proceedings is directed at the applicant relying on his unpaid maintenance obligations as a basis for sequestering his estate. There is a dispute whether such indebtedness has not largely been settled by reason of a common cause payment of R123, 604 made by the respondent on 12 August 2019. Another dispute is whether such indebtedness will be retrospectively extinguished or reduced in the event that the maintenance court in due course grants an order reducing the respondent's maintenance obligations with retrospective effect,

rendering the debt not liquidated (as was the position in *MG v KG*

[2016] JOL 37048 (WCC), where the court found unpaid maintenance pendente lite in terms of Uniform Rule 43 was unliquidated and so could not sustain a sequestration order where the respondent had already instituted proceedings in terms of Uniform Rule 43(6) seeking a variation of that maintenance pendente lite). And related to that is whether it would be appropriate for the court now to sequester the respondent's estate, as a form of execution, where the basis for the indebtedness might be extinguished retrospectively, applying analogous reasoning to that in *Strime v Strime* 1983 (4) SA 850 (C).

7. But much of that opposition is of no or little consequence once it is appreciated that the respondent's indebtedness to the applicant on the unpaid taxed costs stands unchallenged.
8. No defence is advanced to this indebtedness other than the respondent contending that he has also succeeded in obtaining costs orders against the applicant in preceding litigation, that those costs awards have been or are in the process of being taxed and that these are or will become capable of set off against his indebtedness owing to the applicant, or otherwise form the basis of a counterclaim by him against the applicant. But at least some of the costs orders relied upon have not been taxed, are therefore not liquidated and so are incapable of being set off against the liquidated indebtedness owing by the respondent to the applicant. And those costs orders in favour of the respondent as have been taxed are insufficient to extinguish by set off the liquidated indebtedness owing by the respondent to the applicant. And the existence of a counterclaim in the form of the as yet untaxed costs orders, at best for the respondent, is a factor to be taken into account by the court in the exercise of its discretion whether to refuse a provisional sequestration order although the requirements for such an order have otherwise been established.[1] In any event it is unlikely that those costs orders when taxed would exceed the taxed costs owing by the respondent to the applicant. And the applicant asserts that she has in any event attached the costs that have been taxed in favour of the respondent towards satisfaction of further unpaid maintenance.
9. The application must be approached on the basis that the applicant has established prima facie that she is a creditor with a liquidated claim against the respondent arising from the taxed but unpaid legal costs, within the meaning of section 9(1) as read with section 10(a) of the Insolvency Act.

"Please note that our client is not able to settle the full amount within 7 days as set out in your letter.

Would your client be amenable to entering into a payment plan?"

11. This constitutes notice in writing by the respondent to the applicant as one of his creditors that he is unable to pay his debts, and more particularly the taxed costs of R94,618.38. The applicant has accordingly established prima facie an act of insolvency, as provided for in section 10(b) of the Insolvency Act.
13. As summarised in *Meskin's Insolvency Law*,[2]

“That there is reason to believe that sequestration will be to creditors’ advantage is established if there are facts proved which indicate that ‘there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors.’ ”

14. Meskin and Co v Friedman 1948

(2) SA 555 (W) at 559 explains that the advantage of a full investigation of the insolvent’s affairs under the very extensive powers of enquiry given by the Insolvency Act would not in itself constitute an advantage to creditors:

“In Awerbuch, Brown & Co v Le Grange (1939 OPD 20), it is suggested that his right of inquisition is in itself an advantage such as is referred to in the sections, so that it is sufficient to make out a reasonable case for enquiry without showing that any material benefit to the creditors is likely to result from the investigation. With great deference I venture to think that this states the position more favourably to the petitioning creditor that is justified by the language of the sections. As the ‘advantage’ of investigation follows automatically upon sequestration, the Legislature must, in my opinion, have had some other kind of advantage in view when it required that the Court should have ‘reason’ to ‘believe’ that there would be advantage to the creditors. The right of investigation is given, as it seems to me, not as an advantage in itself, but as a possible means of securing ultimate material benefit for the creditors in the form, for example, of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collective claims. In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient.” (my emphasis).

15. In Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin; Botha v Botha 1990 (4) SA 580 (W), Leveson J stated:

" . . . a Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that that will be so. That in turn, in my opinion, leads to the conclusion that the expression 'reason to believe' means 'good reason to believe'. The belief itself must be rational or reasonable and, in my opinion, to come to such a belief the Court must be furnished with sufficient facts to support it. In a broad sense it seems proper to say, on the basis of the cases, that 'advantage to creditors' ought to have some bearing on the question as to whether the granting of the application would accrue some useful purpose. I express it thus because Roper J has shown in the Meskin case, there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and enquiry under the relevant provisions of the Act might unearth assets thereby benefiting creditors."

16. It is necessary that the applicant, at this stage in seeking an order of provisional sequestration and as required in terms of section 10, persuade the court to come to the opinion that prima facie there is a reasonable prospect that some pecuniary benefit will result to creditors by reason of an enquiry or such other insolvency processes that arise upon sequestration. This requires an assessment whether on the affidavits the balance of probabilities favours the applicant.
17. The applicant asserts that it would be to the advantage of creditors including herself if the respondent's estate was sequestrated as a trustee will inter alia have the power to ascertain whether the respondent has made any dispositions that fall to be set aside; to investigate all claims against the respondent, to evaluate those claims and to see to it that only valid claims are paid; to ensure that no creditor is preferred above another; and to generally realise the assets of the respondent's estate so as to yield a substantial dividend or benefit to the respondent's creditors.
18. Although these are stated generically, the applicant does set out facts in describing the respondent's financial position to which the generalised advantages are applied. For example, the applicant asserts that the respondent has at all times held himself out to be a man of means and drives a luxurious motor vehicle (a BMW), that he recently sold his residence and that he is a member of various close corporations and/or companies including Once Active CC. The applicant avers that Once Active has recently built a state of the art gymnasium in Parkmore at a cost of approximately R6.5 million and therefore the respondent's members' interest in the CC, of which he is the sole member, must be of considerable value.
19. The respondent does not substantively respond to these factual averments, contenting himself with a bare denial. A bare denial cannot suffice, where a reading of the papers demonstrates that the bare denial is factually wrong in at least certain respects – that he drives a BMW and that he has an interest in Once Active, and where the respondent does not take the court into his confidence in dealing with, for example, his interest in Once Active.
20. The applicant also averred that a duly appointed trustee as a properly qualified person would take control of and properly manage the respondent's financial affairs, and so provide for his minor children. There is substance to this averment when regard is had that the basic maintenance amount for the twins has not increased since 2011, although the respondent's income has increased.
21. The applicant also points out that the disclosures made by the respondent in schedule "AA9" to the answering affidavit as to his monthly income and expenditure differed from that which he had disclosed in the maintenance court proceedings. For example, the disclosure in schedule "AA9" reflects a total nett income of R103,650.61, of which salary and an amount listed as "PT" totals R68,650.61. The difference of R35,000 in income in the schedule is attributed by the respondent to "drawdowns"

on loan accounts with ITA and Once Active. These drawdown amounts do not appear in any previous disclosures. This, the applicant contends, not only demonstrates a lack of forthrightness by the respondent, but that this is also something to be investigated by a duly appointed trustee.

22. Again, there is substance to these averments and submissions. The respondent does not explain what he means in schedule “AA9” by a drawdown on ITA (loan account) and on Once Active. Does this mean that the respondent has a substantial amount owing to him on loan account by ITA and Once Active, which is being repaid each month by those entities to him? If so, the respondent does not disclose these loan accounts as assets and it is something to be investigated by a trustee. On the other hand if it is rather the respondent who is borrowing money from the two entities on loan account, this too is something that needs to be considered by a

duly appointed trustee as then the respondent is incurring further debt in circumstances where he is presently unable to pay his

maintenance obligations.

23. The respondent also does not disclose his assets and liabilities, other than asserting that he has no creditors other than those that are incurred in the usual course on a monthly basis and in respect of the balance outstanding on his BMW, which is not in arrears.

24. In my view, the applicant has, at least on a prima facie basis with reference to the affidavits, established that there is reason to believe that it will be to the advantage of creditors of the respondent if the respondent’s estate is sequestrated, and more particularly that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors.

25. The remaining issue is whether I should in the exercise of my discretion refuse to grant a provisional sequestration order notwithstanding that the applicant has persuaded the court to come to the opinion that prima facie the requirements for such an order in terms of section 10 of the Insolvency Act have been satisfied.

26. In *Julie Whyte Dresses (Pty) Limited v Whitehead* 1970 (3) SA 218 (D) at 219A-D, the court held that although a court is vested with a discretion to be exercised judicially upon a consideration of all the facts and circumstances of the case and that this is justifiable in view of the serious consequences that flow from the making of a provisional sequestration order, “[o]n the other hand, a man who commits an act of insolvency ... must expect his estate to be sequestrated ... It is perfectly

legitimate for a creditor to petition a court for the sequestration of his debtor’s estate for the purposes of obtaining payment of his debt, or as much of it as can be recovered.”

27. Much later, in the same Division, Wallis J, as he then was, in *FirstRand Bank Limited v Evans* 2011 (4) SA 597 (KZD) at paragraph 27 said as follows in relation to the exercise of the discretion against refusing to grant a provisional sequestration order:

“Once the applicant for a provisional order of sequestration has established on a prima facie basis the requisites for such an order, the court has the discretion whether to grant the order. There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for the court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within that class of cases generally described as involving a power combined with a duty. In other words where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then, in the absence of some special circumstances, the court shall ordinarily grant the order. It is for the respondent to establish the special and unusual circumstances that warrant the exercise of a court’s discretion in his or her favour.”

28. Rogers J in the Western Cape Division would subsequently in *Investec Bank Ltd v Lambrechts NO and others* 2019 (5) SA 179 (WCC) in paragraphs 60 and 61 refer to this dictum of Wallis J and distinguish it on the facts. Rogers J held, obiter, that he would exercise his discretion in favour of refusing a provisional order on the facts before him where the degree of insolvency and the benefit to creditors was marginal, and acknowledging that “[o]ne knows from experience that provisional orders for sequestration and liquidation tend to become self-fulfilling prophecies. In borderline cases decided purely on the affidavits, justice might better be done by leaving a creditor to his usual remedies.”
29. Without making a finding that a respondent must establish special or unusual circumstances that warrant the exercise of the court’s discretion in his or her favour in not granting a provisional sequestration order, in my view the respondent has not made out a case why the discretion should be exercised in his favour.
30. I initially had reservations as to whether there was any utility in the applicant obtaining an order provisionally sequestrating the estate of the respondent insofar as it would assist her in recovering arrear, and future, maintenance. It is self-evident that sequestrating the estate of a respondent would not make it easier for him or her to earn a living. The respondent alleged that the sequestration of his estate will adversely affect him in that he would no longer be entitled to be a director and therefore would no longer earn the salary that he did. But the difficulty with this submission is that he does not take the court into his confidence in explaining why this is so. It does not follow that the salary that he earns is necessarily linked to him being a director and he may still be entitled to continue to earn that income albeit not as a director but as a manager and/or other employee of the entities. This is especially so if these are entities which he controls.
31. It is also not for the court to ordinarily second-guess the applicant in her chosen form of execution if she is able to establish the requirements for a sequestration order, as she has.
32. Of course, should it be that the sequestration proceedings are launched by an applicant, not for purposes of bringing about a concursus creditorum but rather for some ulterior motive, and it amounts to an abuse, it is to be refused. For example, should sequestration proceedings be launched by an applicant with the sole or predominant purpose of bringing an end to proceedings by the respondent against the

applicant, that may constitute an abuse and justify the dismissal of the application. In the present matter, I gave consideration to whether the sequestration proceedings were designed to bring to an end or otherwise stall the proceedings by the respondent against the applicant in the maintenance court seeking a reduction of his maintenance obligations. But upon reflection, I am unable to make a finding that that is indeed the predominate purpose of the sequestration application.

33. In any event, it is doubtful whether the proceedings in the maintenance court are the kind of proceedings that would necessarily be brought to an end or stayed by the sequestration of the respondent's estate in terms of section 20(1)(b) of the Insolvency Act. Notwithstanding the sequestration of the respondent's estate, he remains obligated to make payment of maintenance, at least prospectively (*Weinberg v Weinberg* 1958 (2) SA 618 (C) at 620 E). A person whose estate is sequestrated does not so avoid his or her maintenance obligations. Those maintenance obligations continue and an insolvent cannot when called upon to pay maintenance direct his or her spouse or child to his trustee, and wash his or her hands of the obligation. The respondent's pending maintenance proceedings are not proceedings that affect his distributable estate, and his obligation to pay maintenance are enforceable against him personally in terms of section 23(6) of the Insolvency Act (*Weinberg* at 620H).
34. Further, it is debatable to what extent a trustee in reality would become involved in the practicalities of the payment of the maintenance. Section 23(5) of the Insolvency Act provides that the trustee shall be entitled to any monies received or be received by the insolvent in the course of his profession, occupation or other employment which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him. The respondent would be entitled to receive his income arising from his occupation or other employment and would not be obliged to pay that over to the trustee unless in the opinion of the Master those monies are not or will not be necessary for the respondent to support those dependent upon him. There would be no surplus for the respondent to pay over to his trustee if there is insufficient income in the first instance to meet his maintenance obligations. It may well be that a trustee does not, in light of this regime, become involved in payment of maintenance obligations, at least prospectively, as that is something that is left to the respondent.
35. Respondent's counsel submitted that if the respondent's estate was provisionally sequestrated, the difficulty still remained that the respondent contended that his maintenance obligations needed to be reduced and that sequestration of his estate will not address that issue. Respondent's counsel further submitted that the trustee would in any event be obliged to persist with the maintenance proceedings. Whilst it may be so that sequestration of the respondent's estate might not bring an end

to the maintenance proceedings or address the issue of whether the maintenance is to be reduced, that is not the predominate purpose of sequestrating the respondent's estate. In any event the respondent himself would be entitled to persist with those proceedings in the maintenance court, without reference to his trustee. Further, as submitted by the applicant, it

may be that the respondent's financial affairs properly managed at the instance of trustee may result in there being sufficient monies to meet his maintenance obligations without necessarily seeking a variation thereof. It is common cause that there has been no increase in the basic maintenance amount payable by the respondent for maintenance for his twins since 2011, although the settlement agreement provides for an annual increase linked to the consumer price index. Whilst it is not for this court is to make any findings in this regard as that

determination

is for the maintenance court, that the respondent's financial affairs properly managed may obviate the need for any further litigation in the maintenance court is a factor to be considered.

36. Also, any challenges as to the efficacy of relying on the maintenance obligations has no bearing on the respondent's failure to pay the taxed costs, and the applicant's corresponding reliance thereupon as the basis for seeking the provisional sequestration of the respondent's estate.
37. What also weighs heavily, in my view, against the respondent in any exercise of a discretion in his favour is that he has not been forthright and transparent in his disclosures, particularly in relation to his assets and liabilities and his income and expenditure. Instances have already been set out earlier in this

judgment.

38. The respondent takes issues with the applicant not setting out his assets and liabilities, but it does not lie in the mouth of the respondent to so contend as that information is peculiarly within his knowledge.
39. In *Amod v Khan* 1947 (2) SA 432 (N) at 438 the following was stated:
"A debtor knows all about his own affairs and can easily prove the advantage of the creditors. On the other hand, the creditor has normally little knowledge of the exact position of the debtor; he probably does not know what creditors he has, nor the amounts he owes, nor the assets he possesses."
40. Where a respondent in sequestration proceedings has been obfuscatory or evasive, he cannot expect the court to come to his assistance.[3]
41. What is also to be taken into account in the exercise of my discretion is that the respondent's financial difficulties are not limited to his maintenance obligations (which may or may not be varied in due course by the maintenance court) and to the unpaid taxed costs. The respondent was unable to pay his previous attorneys, borrowing money to settle some of what he owed those attorneys and the balance being written off. The respondent also appears to have had difficulties in paying the twins' school fees. The respondent also borrowed money to make payment towards his arrear maintenance obligations in an amount of R123,604.00. And, as described above, it may be that the respondent is borrowing

money from the two entities, describing that as drawing-down on loan account. Whilst the latter may be conjecture, the difficulty is that the respondent has not taken the court into his confidence as to the actual position.

42. The picture that emerges from the papers is that the respondent is not merely a salaried employee with a fixed income. The respondent clearly has business interests and in all likelihood is ultimately self-employed with a substantial interest in a multi-million-rand gymnasium. On his disclosure, his monthly income, whatever the source thereof, exceeds R100,000. The respondent, upon a consideration of the papers, is a candidate for provisional sequestration.
43. Bearing in mind that I am at this stage asked to grant an order of provisional sequestration, and that the respondent has the opportunity to deliver supplementary papers challenging the confirmation of a provisional order in due course and that the provisional trustee once appointed may deliver a report which may prove to be relevant, the exercise of my discretion is not in favour of refusing the provisional order.
44. Two issues remain. The first is whether there was effective furnishing of the application to employees as required in terms of section 9(4A)(a)(ii) of the Insolvency Act. The second is the applicant's failure to comply with section 9(3)(a)(ii) and (c) of the Insolvency Act in setting out the prescribed information relating to the respondent and his wife.
45. Section 9(4A)(a) provides, in relevant part:
- “(4A)(a) When a petition is presented to the court, the petitioner must furnish a copy of the petition –*
- (ii) to the employees themselves - :
- (aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or
- (bb) if there is no access to the premises by the petitioner and the employees, by the affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition.”
46. Section 9(4)(b) provides that:
- “(b) The petitioner must, before or during the hearing, file an affidavit by the person who furnished a copy of the petition which sets out the manner in which (a) was complied with”.*
47. Wallis JA in *EB Steam Company (Pty) Limited v Eskom Holdings SOC Limited* 2015 (2) SA 526 (SCA) at para 16, 17 and 23 held that although it was peremptory that the employees be furnished a copy of the petition, that the modes of doing so as set out in sub-sections (aa) and (bb) are directory and that effective furnishing of the application can be

achieved by other means. The court must be satisfied that that method adopted was reasonably likely to make the application papers

accessible to the employees (EB Steam para 17).

48. The applicant relies upon a return of service that reflects that at the place of employment of the employees a copy of the application “was served by affixing it to the principal door for the display of the employees” and that “after a diligent search and inquiry, no other manner of service was possible at the given address.” The deputy sheriff refers in his return to Uniform Rule 4(1)(a)(v). The return of service further states that a Mr Bryden Cabral, a manager, confirmed that “there is only employees, there is no Trade Unions at the given address.”
49. The applicant did not file an affidavit by the person who furnished the affidavit to employees (which in this instance would be the deputy sheriff), as required in terms of section 9(4A)(b) and instead relied upon the deputy sheriff’s return of service.
50. Often both attorneys and sheriffs fail to see the distinction between service of process, which is regulated by Uniform Rule 4, and the effective furnishing of the application to the specified persons as required by section 9(4A)(a) of the Insolvency Act (and the corresponding section 346(4A) of the Companies Act, 1973 in relation to winding-up applications). Section 9(4A)(a) does not

require service of the application, but that the application be “furnished” to the particular person. Service ordinarily

and in the context of court process, refers to delivery of the document by the sheriff or deputy sheriff, in terms of the rules of court. In contrast, “furnish” does not require formal service by sheriff but, in the context of section 9(4A)(a), that a copy of the application be furnished to the particular person in a manner that is reasonably likely to bring that application to the attention of the particular person, or, in the context of employees, reasonably likely to make the application accessible to those employees.

51. Section 9(4A)(a) of the Insolvency Act, relating to the furnishing of the sequestration application (and the corresponding section 346(4A) of the Companies Act, 1973, relating to the furnishing of a winding-up application) can be contrasted to section 11(2A) of the Insolvency Act, relating to the service of the provisional sequestration order (rule nisi) (and the corresponding section 346A of the Companies Act, 1973 relating to the

service of an winding-up order). The latter sections expressly refer to “service” of the order, and so require service of the order by sheriff. And in effecting such service, the Sheriff is required to have regard not only to the relevant rules of court, such as Uniform Rule 4, but also the specific requirements of section 11(2A) of the Insolvency Act (and of section 346(4A) of the Companies Act, 1973 in the context of a winding-up order).

52. In the present instance, where a provisional order is sought, I am not concerned with the service of the order, but rather where there has been effective furnishing of the application to employees by the deputy sheriff as evidenced by his return of service.
53. I do not have a difficulty that a sheriff or deputy sheriff is the person that attends to furnish the application in terms of section 9(4A)(a)(ii). I also have no difficulty that the sheriff or deputy sheriff does not provide a formal affidavit in terms of section 9(4A)(b), as the contents of the return of service are prima facie evidence of the matters therein stated (section 43(2) of the Superior Courts Act, 2013). In many instances though, it may be practically easier to achieve effective furnishing of the application in terms of section 9(4A)(a) if a properly informed candidate attorney or messenger furnishes the application, who can then depose to the necessary affidavit in terms of section 9(4A)(b), than seek to persuade a sheriff or deputy sheriff to depart from what he or she may have become accustomed to during years of effecting service of process in terms of the rules of court, and to depose to affidavits explaining the manner in which the application was furnished.
54. The difficulty that I have is whether in the present instance there has been effective furnishing of the application to employees by the deputy sheriff as evidenced by his return of service. Absent any further explanation from the deputy sheriff who attended to furnish the application, I can only consider what is contained in his return of service as read with the papers filed in the application. It is not at all clear that the deputy sheriff was aware of what was expected of him, namely to furnish the application in such a way that it was reasonably likely to make the application papers accessible to the employees. It is also not clear that the applicant's attorneys knew what was expected of them, namely to attend to furnish the application in such
- a way that it was reasonably likely to make the application papers accessible to the employees. Both the deputy sheriff and the
- applicant's attorneys appear to have lapsed into a mind-set of service of process under the Uniform Rules, rather than seeking to comply with section 9(4A) of the Insolvency Act.
56. What is immediately notable is that service in terms of Uniform Rule 4(1)(a)(v) has nothing to do with service of a document on an employee – it is a form of service in the case of a corporation or company, albeit that a responsible employee may be the natural person who receives the document on behalf of the corporation or company.
57. The seed of doubt having been sown, the concern that reasonable steps have not been taken to make the application accessible to the employees grows. The deputy sheriff states that he affixed the application to the principal door for the display of employees, and that after a diligent search and enquiry, no other manner of service was possible at the given address. But the deputy sheriff does not describe the search and enquiry that he undertook and why no other manner of service was possible. There is no description of what was to be found at the address that he states to be “the place of employment of the EMPLOYEES”, other than an employee – a manager – was present. Clearly the deputy sheriff had access to the premises

and did not find it locked and unattended, as the manager was present. And it follows that if this is so, then why is there no manner of service possible other than affixing to the principal door? As best as can be gleaned from the papers, the respondent is a director and has an interest in a gymnasium. The respondent states under oath that he has thirty staff, employees and contractors that rely upon him and his companies, and he attached a list of those staff and employees. Should some of those staff and employees be employed at the gymnasium, which is likely on the papers, it seems improbable that there was a no more effective manner of service than affixing to the principal door, exposed as that would be to the vagaries that arise from such a form of service. Was there no notice board in a staff room in the gymnasium? There is also no distinction between those staff and employees that may be based at the gymnasium and those that the respondent employs as domestic staff at his home, which is at a different address. The respondent's list of expenses reflects wages to domestic staff. Clearly the staff and employees are at two different addresses but there is only purported service at one address.

58. And the statement recorded in the return of service that there is no trade union at that address does not amount to there being no registered trade union at all that may represent the employees. This then calls into doubt whether there has been compliance with section 9(4A)(a)(i).
59. In the circumstances I am not satisfied that the application was furnished in such a way that it was reasonably likely to make the application papers accessible to the employees. The question that arises is what is the consequence of non-compliance with section 9(4A)(a)(ii)?

60. Wallis JA in *EB Steam* furnished the answer in relation to liquidation proceedings - in those circumstances the court should grant a provisional order. In *EB Steam* a final liquidation order was sought and granted by the court a quo. On appeal, Wallis JA found in paragraph 26, that the court a quo should instead have granted a provisional winding up order, giving directions if necessary on how the employees are to be

furnished with the papers.

61. In the present instance, what is sought by the applicant is a provisional order of sequestration. And if the provisional order is granted, section 11(2A) regulates the service of that order, including on employees and trade unions, if any. No doubt the applicant's attorneys will take heed of what is stated in this judgment and take care in ensuring effective and compliant service of the provisional order, including upon employees and any registered trade unions.
62. The respondent raised the failure of the applicant to set out in her founding affidavit the details relating to his wife, as required in terms of section 9(3)(a)(ii). The applicant stated in her founding affidavit that the respondent was married, with the name (and maiden name) of the respondent's

wife. What was not stated was the date of birth and identity number of the respondent's wife, and the full marital status of the respondent and his wife. The applicant in her replying affidavit addresses this deficiency by furnishing such details of the respondent's wife that she can ascertain and explains why those details were not furnished in the founding affidavit. Notably the respondent does not in his answering affidavit furnish any of the missing details, although obviously they are in his personal knowledge.

63. In my view, there has been sufficient compliance with section 9(3)(a)(ii). It is apparent from section 9(3)(c) that an inability to furnish any of the information does not prevent the applicant from proceeding, provided the reason for such inability has been stated. In any event, to borrow the language of Wallis J in *EB Steam* in paragraph 8, and apply it in the context of section 9(3)(a)(ii) and (c), the legislative purpose of those sections "is not directed at providing a technical defence to the [respondent], invoked to avoid or postpone the evil hour when a winding-up order or sequestration order is made".

64. In the circumstances, the following order is granted:

64.1. The estate of the respondent is placed under provisional sequestration in the hands of the Master of the High Court, Johannesburg.

64.2. The respondent and all other interested parties are called upon to show cause, if they so wish, on a date to be obtained from the Registrar ("the return date") why the respondent's estate should not be finally sequestrated and why the costs of the application, including the costs relating to the grant of the provisional order of sequestration, are not to be costs in the sequestration of the respondent's estate.

64.3. Copies of the order are to be served by sheriff or deputy sheriff at least two weeks before the return date on the respondent and on the persons as provided for in section 11(2A) of the Insolvency Act, 1936, including on the respondent's employees after the applicant has made diligent enquiries as to the places of employment of those persons as listed in annexure "AA10" to the answering affidavit and whether any of the employees are represented by a registered trade union.

64.4. Copies of the order are to be published at least two weeks before the return date, once in each of the Government Gazette and a newspaper circulating in the Gauteng area.

64.5. This order, in the form as served and published, must reflect the return date and contain in its heading the particulars as provided for in section 9(3)(a)(ii) and (c) of the Insolvency Act insofar as they are known to the applicant.

Gilbert AJ

Date of hearing: 5 August 2020

Date of judgment: 12 August 2020

For the Applicant: N Riley

Instructed by: Bolus Attorneys

For the Respondent: B Manning (Ms)

Instructed by: Fullard Mayer Morrison Inc.

[1] See Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) SA 261 (WCC) para 30 to 33 and Afgri Operations Ltd v Hamba Fleet [2017] ZASCA 24 (24 March 2017), para 7 to 13 in the context of the relevance of a counterclaim in deciding whether to grant a winding-up order.

[2] LexisNexis, Service Issue 53, para 2.1.4.

[3] Nedbank v Thorpe

[2009] JOL 24292 (KZP) at paras 53.

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