

SOUTH AFRICA / JUDGMENT

E.K v P.K (079672/2023) [2025] ZAGPPHC 511 (15 March 2025) [2025] ZAGPPHC 511

COURT

North Gauteng High Court, Pretoria

BEFORE

Strijdom

CASE / FILE NUMBER

079672/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Heard on: 17 March

2025

Judgment

on: 15 March 2025

CASE

NUMBER: 079672/2023

(1) REPORTABLE:

YES/NO

(2) OF INTEREST TO

OTHER JUDGES: YES/NO

(3) REVISED: NO

DATE: 15

March 2025

SIGNATURE:

In

the matter between: E[...]
 K[...]
 Applicant
 and
 P[...]
 K[...]
 Respondent

JUDGMENT

STRIJDOM, J

In this matter the Court ordered the provisional sequestration of the respondent's estate on 21 October 2024.[1]

The applicant now seeks an order for the final sequestration of the respondent's estate. The application is opposed by the respondent.

The following issues relevant to the granting of the relief sought are in dispute:

3.1 Whether the respondent has committed acts of insolvency;

3.2 Whether there is an advantage to creditors if the respondent's estate is sequestrated.

The main contention of the respondent is that no case has been made out that there is an advantage to the creditors of the respondent, if the respondent's estate is sequestrated.

REQUIREMENTS FOR SEQUESTRATION

Section 12 of Act 24 of 1936 (The Act) provides that:

“12(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 sub-section (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.”

This application is premised on the fact that the respondent is indebted to the applicant in the amount of approximately R5 439 930,00.

The indebtedness arose out of, inter alia, unpaid maintenance payable towards the applicant and minor children in respect of a Court order granted by this Court on 11 May 2022 under case number 53105/21.

UNDISPUTED

FACTS

The following facts are admitted, not dealt with by the respondent or merely noted by him:

8.1 That all the facts contained in the applicant's founding affidavit is true and correct.[2]

8.2 A Rule 43 order was granted by this Court on 11 May 2022.[3]

8.3 A contempt of Court order was sought and granted as a result of the respondent's failure to comply with the Rule 43 order.[4]

8.4 Respondent instituted a Rule 43(6) application which was dismissed with costs.[5]

8.5 A second contempt of Court application was filed and the respondent was again held in contempt of Court on 31 January 2023.[6]

8.6 Respondent appealed to the SCA and the appeal has subsequently been dismissed.

8.7 Respondent admitted, in various applications between the applicant and respondent, that he is completely unable to satisfy all his financial obligations.[7]

8.8 Respondent confirmed that he does not own any immovable property and has very little movable property at his disposal.[8]

8.9 Respondent admitted that he allegedly only receives a salary of R50 000,00 per month and that he is unable to satisfy his judgment debts.[9]

8.10 Respondent admitted that during the Rule 43(6) proceedings he failed to provide the Court with and refer to the fact that he had made payments of R11 912 264,00 (eleven million nine hundred and twelve thousand two hundred and sixty four Rand) received from the proceeds of the sale of a property from a company, known as T[...] P[...] [...] (T[...] [...]) (the total amount received by T[...] [...] was R13 000 000,00.)

8.11 Respondent further admitted that, despite the order of 11 May 2022, he preferred to pay various creditors the amounts as disclosed by him in his replying affidavit in the Rule 43(6) application. [10]

8.12 Respondent in his answering affidavit admitted to being factually insolvent.[11]

8.13 Respondent admitted that another creditor viz Cashflow Capital (Pty) Ltd also obtained a judgment against him in his personal capacity and when the sheriff attended the premises, the respondent pointed out all the applicant's property to be attached.[12]

8.14 Applicant obtained a writ of execution attempted to execute – and was unsuccessful as the applicant received a nulla bona return. [13]

ACTS OF INSOLVENCY

Section 9(1) gives any creditor of the debtor the right to apply for sequestration once the debtor commits an act of insolvency, whether or not the debtor directed the act at the creditor concerned or intended it to have any bearing on that creditors affairs.

The following are the circumstances under which a debtor commits an act of insolvency:

10.1 Absence from Republic or dwelling;

10.2 Failure to satisfy judgment debt;

10.3 Prejudicing or preferring creditors;

10.4 Intent to prejudice or prefer;

10.5 Offer of arrangement;

10.6 Failure to apply for surrender;

10.7 Notice of inability to pay

10.8 Inability to pay debts after sale of business.

Actual insolvency is found where a debtor's liabilities exceed his assets while commercial insolvency is found where a debtor is unable to pay his debt due to a cash flow or other problem, but his assets still exceed his liabilities.

It was argued by the respondent that from the respective affidavits filed of record, there is a dispute relating to the applicant's

claim and the respondent's indebtedness as the respondent alleged that he currently attempted to resolve the matter in the maintenance Court and that the applicant has compromised her claim by settling the matter two days after signing her supplementary

affidavit.[14]

There is a pending maintenance Court application between the parties in order to determine whether the maintenance due and payable is just and equitable. It was submitted by the respondent that the maintenance application may result in the maintenance being varied, which may have a retrospective component. It was further contended that this matter became settled by virtue of an agreement reached between the applicant and the respondent's father.

In all the above applications the Courts found that the respondent can afford the maintenance ordered. This Court has already found that there was no change in the respondent's circumstances. The respondent's contention that the maintenance Court is entitled to retrospectively vary this Court's orders – and by virtue thereof the arrear maintenance will be extinguished is untenable.

It was contended by the applicant that the respondent fails to inform this Court that more than R300 000,00 of the alleged

R400 000,00 maintenance payable relates to the property that the respondent resides in. The respondent refused to move out of the property and is liable to pay the expenses relating thereto.

The respondent, on his own version was unaware that a maintenance application was instituted by the applicant against his father.

The settlement reached between the applicant and the respondent's father related to future maintenance of the minor children and had no effect on the arrear maintenance.

The applicant and the respondents' father settled the matter on 13 November 2023 and it was made an order of Court on 13 December 2023.[15]

The respondent admitted that he is unable to pay his debts, that various judgments have been granted against him, that he owes approximately R140 000 000,00 and that he has no moveable or immovable property.

It is common cause that the respondent committed various acts of insolvency and that he is factually insolvent. The respondent

failed to provide any evidence regarding his financial position and ability to satisfy the admitted debts.

ADVANTAGE TO CREDITORS:

On behalf of the respondent it was contended that if all the costs be taken in consideration that forms part of the administration costs of an insolvent estate, it is doubtful that there would be any free residue for any concurrent creditors of the respondent's estate.

It was further contended that in order for there to be an advantage to creditors, a pecuniary benefit in the form of a dividend, which is not immaterial, must be anticipated. There must be a reasonable prospect of a not negligible dividend – not necessarily a likelihood, but a prospect which is not too remote.

It was argued on behalf of the respondent that the applicant has failed to aver any facts that there is a concealment of assets, that assets were dissipated. No evidence is provided to substantiate that there is any aspect that should be investigated and which, with the mechanisms of the Insolvency Act, would yield a benefit to creditors.

In *Meskin & Co v Friedman*[16] the following was stated:

“(a) the ‘advantage’ of investigation follows automatically upon sequestration, the Legislator must in my opinion, have had some other kind of advantage in my 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 collusive 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 inquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient.”

It was held in Commissioner SARS v Hawker Aviation Partnership and Others[17] that sequestration was to the advantage of creditors if there existed a prospect not too remote that, as a result of investigation

and enquiry, assets might be unearthed that benefited the creditors.

Respondent admitted that during the Rule 43(6) proceedings he failed to provide the Court with and refer to the fact that he had made payments of R11 912 264,00 received from the proceeds of the sale of a property from a company known as T[...] P[...] (T[...] [...]). The total amount received by T[...] [...] was R13 000 000,00.[18]

The respondent provided no factual basis to dispute the allegations contained in the applicant's founding affidavit relating to advantage to creditors.

In my view should the estate of the respondent be sequestrated, the appointed trustees will be in a position to properly investigate the disposal of the respondents' assets and reclaim such assets when it amounts to a disposition as intended in the Insolvency Act.

Under the circumstances, there is a reasonable prospect that as a result of inquiry under the Act some assets may be revealed or recovered for the benefit of creditors.

In Nedbank Limited v Johan Hendrik Potgieter[19] it was held that the Court should only exercise its discretion in favour of the respondent if it is satisfied that the debt will in fact be paid if the sequestration order is not granted.

The respondent failed to place evidence before me that he can settle his arrears with the applicant and or other creditors.

I conclude that the applicant has made out a proper case for the final sequestration of the respondent's estate..

In the result, the following order is made:

The estate of P[...] K[...] be and is hereby sequestrated for the benefit of the creditors as prayed.

The costs of the application be costs in the estate.

JJ STRIJDOM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

COUNSEL FOR THE APPLICANT: ADV. SCHOEMAN J INSTRUCTED BY: WALDICK INC COUNSEL
FOR THE RESPONDENT: ADV R BRITZ INSTRUCTED BY: GEYSER VAN ROOYEN ATTORNEYS

- [1] Caselines; 0000-3. Court order
- [2] Caselines: 13-5; AA para 7
- [3] Caselines:01-27; FA Annexure FA1
- [4] Caselines: 01-39 FA Annexure FA2
- [5] Caselines: 01-43 FA Annexure FA3
- [6] Caselines: 01-65 FA Annexure FA4.
- [7] Caselines: 13-12 AA para 50
- [8] Caselines: 13-13 AA para 56
- [9] Caseliens: 13-13 AA para 58
- [10] Caselines: p13-14 AA para 67
- [11] Caselines: p13-16 AA para 53 and 81
- [12] Caselines: 02-10 Supplementary Affidavit para 3.4 and 13-24 AA para 141
- [13] Caselines:p02-53 Annexure WA11
- [14] Caselines: 13-7 AA para 13
- [15] Caselines: 14-12 RA para 40
- [16] 1948
- (2) SA 555 (W) at 558
- [17]
- [2006] ZASCA 51; 2006
- (4) SA 292 (SCA)
- [18] Caselines: 01-24 FA para 43; AA 13-14 paras 67 and 68.
- [19] 2013 JDR 2290 (GST) AT PAR 19-20

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