

SOUTH AFRICA / JUDGMENT

Mare v De La Rey (NWK Limited Intervening) (89303/2016) [2017] ZAGPPHC 784 (27 July 2017)

[2017] ZAGPPHC 784

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi

CASE / FILE NUMBER

89303/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

Case

Number: 89303/2016

In

the matter between:

CHRISTIAAN

DE JAGER MARE

Applicant

And

JACOBUS

HERCULES DE LA REY

Respondent

NWK

LIMITED Intervening

Creditor

[REG.

NO. 1998/007577/06]

[Applicant

for the sequestration of the Respondent]

JUDGMENT

KUBUSHI J

[1] The applicant applied to have the respondent's estate sequestrated and be placed in the hands of the Master of the High

Court. The matter first appeared before court on 9 February 2017 and a provisional sequestration order was granted returnable on 19 May

2017. The provisional order was extended several times thereafter. When the matter appeared before me on the unopposed roll of 21 July 2017, there was an application by the intervening creditor opposing the sequestration order.

[2] The applicant sought the confirmation of the provisional sequestration order while the intervening creditor sought orders whereby the sequestration application should be dismissed and the rule nisi discharged.

[3] The intervening creditor disputed the sequestration order on various issues, however, before me, only the issue of jurisdiction was argued. Counsel for the intervening creditor accepted without conceding that the other defences were in order.

[4] The applicant when establishing the jurisdiction of this court stated the following and his founding affidavit:

"The Honourable Court has jurisdiction to preside over the matter as the Applicant resides in the Honourable Court's area of jurisdiction as well as the fact that the agreement between the parties was concluded in Pretoria."

[5] The question is whether the applicant has established jurisdiction in terms of the allegations in his founding affidavit. The answer should be in the negative.

[6] The court derives its jurisdiction in sequestration applications from the provisions of section 149 (1) of the Insolvency Act 24 of 1936 (the Act). Section 149 of the Act stipulates as follows:

" 149. Jurisdiction of the court

(1) The court shall have jurisdiction under this Act over every debtor and in regard to the estate of every debtor who

(a) on the date on which a petition for the acceptance of the surrender or for the sequestration of his estate is lodged with the registrar of the court, is domiciled or owns or is entitled to property situated within the jurisdiction of the court; or

- (b) at any time within twelve months immediately preceding the lodging of the petition ordinarily resided or carried on business within the jurisdiction of the court:

Provided that . . ."

- [7] As argued by the intervening creditor's counsel, it is quite clear from the reading of section 149 of the Act that domicile,

property and residency of a debtor finds jurisdiction and that the common law grounds establishing jurisdiction, pleaded by the

applicant, do not apply in sequestration proceedings.[1]

- [8] According to counsel, this court does not have jurisdiction to hear this application because the respondent resides in Koster which falls within the jurisdictional area of the North West High Court. The contention is that the main application for sequestration cannot be entertained by this court and so too the provisional sequestration order granted by this court on 9 February 2017 is null and void and falls to be set aside. I agree.

- [9] The Applicant's counsel requested, in the event I find in the intervening creditor's favour, that I make an order transferring the matter to the North West High Court.

- [10] Section 27 of the Superior Courts Act 10 of 2013 deals with the removal of proceedings from one Division to another and provides as follows:

"Removal of proceedings from one Division to another or from one seat to another in same Division

27 (1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings -

- (a) should have been instituted in another Division or at another seat of that Division; or
- (b) would be more conveniently or more appropriately heard or determined -
 - (i) at another seat of that Division; or
 - (ii) by another Division.

that court may, upon application by any of the party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.

- (2) An order for removal under subsection (1) must be transmitted to the registrar of the court which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question."

- [11] The court in the unreported judgment in the Northern Cape Division in *The Premier of the Northern Cape & Another v L A Gaseemelwe & Others*[2] dealt with a section 3 of the Interim Rationalisation of jurisdiction of High Courts, 41 of 2001. That matter was similar to the one before me in that the question of jurisdiction arose after a rule nisi was granted. In that

judgment the court having concluded that it had no jurisdiction, discharged the rule nisi and made an order transferring the matter to the court which had the necessary jurisdiction even though there was no substantive

application for the transfer. That court stated the following at para 6 of the judgment:

"6. Section 3 of the Act, quoted above, envisages that the Court may order transfer on application by a party. There is no authority, nor has any been relied upon, for the proposition advanced by Mr Van Niekerk on behalf of the Respondents, that a substantive application is required in the circumstances. I do not, in any event, see the need for such an application in these circumstances. It is clear to all concerned that this Court does not have the necessary jurisdiction and that the matter should be transferred to the Bophuthatswana General Division. A substantive application will not elucidate matters any further; on the contrary, such course of action would merely delay the matter unnecessarily. In the circumstances I am satisfied that the oral application brought by Mr Motloun is sufficient. In addition thereto, I have given Mr Van Niekerk adequate opportunity to address the matter of transfer to another High Court in his oral argument. I am accordingly satisfied that I can order transfer of the matter in terms of s3 of the Act to the Bophuthatswana General Division."

[12] I am, with respect, in agreement with the conclusion reached by that court in this regard. As is the case, in this instance, the applicant applied for the transfer of the matter to the High Court of the North West Division without a substantive application. I am, thus, inclined to grant the application and order that the matter be transferred to the High Court of the North West Division.

[13] However it was contended on behalf of the intervening creditor that these proceedings cannot be transferred because a rule nisi had already been issued by this court. This, however, is not true. In the Gaseemelwe-judgment the court at para 7 of the judgment dealt with this issue, as well. The following was stated –

"7. The next thing that arises is the effect of the lack of jurisdiction and the consequent transfer of the matter on the rule nisi which had been issued and also the matter of costs. With regard to the rule nisi, this Court's lack of jurisdiction obviously also prevailed at the time that the rule nisi had been issued. It is clear that this aspect was never considered by the parties or by my colleague who had issued the interim order. In the premises, therefore, the rule nisi should be discharged, in my view..."

[14] I am in alignment with this conclusion. Nevertheless, the applicant's counsel wanted to suggest that at the time of granting the rule nisi the presiding judge considered all the issues before issuing the order, and, as such, the order should stand. But, I do not agree

with him. It is evident that the lack of jurisdiction still prevailed at the time the rule nisi was issued; this aspect was, as such, never considered and if considered, it was not properly considered. The rule nisi ought to be discharged.

[15] In the circumstances, make the following order:

1. Leave is granted to the intervening creditor to intervene and oppose the sequestration application launched by the applicant.
2. The rule nisi issued on 9 February 2017 is discharged.
3. The matter is transferred to the High Court of the North West Division.
4. The applicant is ordered to pay the costs incurred by the intervening creditor with regard to the proceedings in this court.
5. A copy of this order must be transmitted by the Registrar of this court to the Registrar of the High Court of the North West Division.

M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Date of hearing : 21 July 2017

Date of judgment : 27 July 2017

Applicant's Counsel : Adv W P Venter

Applicant's Attorneys : Phillip Markgraaf Attorneys

Respondent's Counsel : None

Respondent's Attorneys : Taute, Bouwer & Cilliers Inc.

Intervening Creditor's Counsel : Adv L Mentjies

Intervening Creditor's Attorneys : Bosman & Bosman Attorneys

[1] Spendiff NO v Kolektor (Pty) Ltd [1992] ZASCA 18; 1992 (2) SA 537 (A) at 5480.

[2] (1043/2007) [2007] ZANCHC 8 (14 December 2007).

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Prepared on 13 October 2026 · Esheria