

SOUTH AFRICA / JUDGMENT

Matsepe NO v Plaatjie NO (471/2019)

[2020] ZAFSHC 120 (6 July 2020)

[2020] ZAFSHC 120**COURT**

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

471/2019

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**IN THE HIGH COURT OF
SOUTH AFRICA
FREE STATE
PROVINCIAL DIVISION**

Case**No: 471/2019****In****the matter between:**

TSIU
VINCENT MATSEPE
N.O.[1] Applicant
(In
his capacity as Trustee of the Insolvent Estate of Josef Tefo
Plaatjie[2] - Master's Ref
B82/2015)
and
MAREA
MAPASEKA PLAATJIE
N.O.[3] Respondent
(In
her capacity as Trustee of the Plaatjie Family Trust - IT73/2013)[4]

Coram:

Opperman, J
Date
of hearing: 25 June 2020

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 6 July 2020. The date and time for hand-down is deemed to be 6 July 2020 at 15h00.

Summary:Final sequestration order

JUDGMENT

- [1] The applicant motions for a final sequestration order. The history of the case is one of delay, dispute and quarrel. The application is consequently opposed.
- [2] In terms of The Insolvency Act 24 of 1936[5] when a provisional order is granted, the Court must prima facie be of the opinion that the applicant has established the elements set out in sections 10(a), (b) and (c).[6] Once a final order is granted, the Court must be satisfied that the applicant has established the elements set out in sections 12(1)(a),
- (b) and (c).[7] This is a stricter test. Notwithstanding that the creditor is able to establish all the elements of the case for sequestration, the Court still has a discretion as to whether or not to grant the provisional or final sequestration order.

“On the return day of the provisional order the Court has a discretion finally to sequester the respondent’s estate provided it is satisfied as to the three essential elements of the applicant’s case, i.e., that the applicant “has established against [the respondent] a claim” upon the basis of which one is able competently to seek sequestration, that the respondent has committed an act of insolvency or is actually insolvent and that there is reason to believe that “it will be to the advantage of creditors of the debtor if his estate is sequestrated.”

“The facts upon which the applicant relies, in respect of the three elements of his case, must be proved, at this stage, on a balance of probabilities, the onus, of course, being on the applicant. Where the facts are in dispute, the initial question is whether, on the papers, the balance of probabilities is in favour of the applicant.”[8]

- [3] Opposition of an application must be on bona fide and reasonable grounds. The opposition of this application is apparently that there is reason to believe that it will not be to the advantage of creditors if the estate is sequestrated.
- [4] The argument of counsel during the hearing of the matter was that the siblings,[9] respondent and insolvent, are genuinely concerned that the interest of the creditors will be prejudiced if the sequestration process rather than the selling of the property with the writ of execution happens. Their concern is speculation and the insincerity of the argument will be shown later. There is not any prove before court that sales in execution by the Sheriff obtain the best prices and public auctions after the sequestration of the respondent will result in deflated prices.
- [5] The court dealt with the other issues voiced by the respondent in paragraphs [13] to [19] of the judgment during the application for the provisional sequestration. The position has not changed and the finding is supported.

[6] In addition, the submissions of care and concern for the creditors by the respondent and the insolvent do not convince. The undisputed history of the matter shows that the sale of the property to serve the interest of the creditors was and is obstructed by the same parties that now plea apprehension that the constitutional rights of the creditors will not be served by sequestration.

6.1 The applicant was appointed on 25 January 2016 after final sequestration of the insolvent on 10 December 2015.

6.2 The Plaatjie Family Trust had the two trustees; namely the respondent and the insolvent but the latter was removed as trustee by the Master of the High Court after said sequestration.

6.3 During 2005 the insolvent purchased the immovable property that is the source of contention in this matter. It is Erf 75, 20 Apollo Crescent, Pentagon Park, Bloemfontein.

6.4 On 17 May 2013 the insolvent sold the property to the Plaatjie Family Trust of which he was a trustee together with his sister. The purchase price of R2 100 000.00 would have been settled by way of instalments in accordance with the provisions of an Acknowledgment of Debt that was appended to the Agreement of Sale.

6.5 As result of the conduct of the insolvent an inquiry in terms of section 152 followed. It transpired that the Trust and the insolvent did not “stand at arm’s length” and that the Trust was for all practical intents and purposes, the alter ego of the insolvent. The insolvent conceded that he was the owner of the immovable property, he purchased the property in cash and it was unbounded, he sold the said property for R2 100 000.00 to the Trust and the conditions of the acknowledgement of debt was breached.

6.6 The applicant obtained an order on 14 December 2016 from the High Court for among others, the payment of the R2 100.00.00 against the Trust.

6.7 The Trust indicated its intention to appeal the order but delayed the application for leave to appeal. The respondents answering affidavit depicts that since the judgment was granted against the Trust it sought leave to appeal to the Appellate Division. The application was ultimately dismissed with costs on 21 October 2019. Apposite to note that the applications were filed out of time. The respondent and insolvent are still, as on 25 June 2020, in the process of obtaining legal advice to take the judgment on appeal to the Constitutional Court.

6.8 The insolvent, as at the time of the writing of this judgment, still resides in the property and made no effort to assist in the sale in execution thereof to serve his noble motive to protect the interest of his creditors.

6.9 To the contrary; a Bill of Costs submitted by the applicant was also taken on review on behalf of both the insolvent and the Trust and is still pending.

6.10 During the insolvency inquiry the respondent in casu could not assist with any substantial information with regard to the workings, business dealings and financial affairs of the Trust. It stands undisputed that the Trust is not trading and cannot generate an income in order to settle the debts and the asset in issue must be sold to comply with the mandate to the applicant.

6.11 I will not entertain the attacks on the professional integrity of the applicant and align myself with the findings in the judgment for the provisional order dated 16 April 2020 by Molitsoane, J. In addition, this is not the platform and forum for it and undermines the constitutional sacredness of access to courts. The core of some of these allegations is irrelevant to this dispute and should be vented in another case on another day and with locus standi.

[7] The matter may not be further delayed. Justice is bigger than the parties involved. The wisdom of the following quote[10] is real:

“The law’s delay in many lands and throughout history has been the theme of tragedy and comedy. Hamlet summarised the seven burdens of man and put the law’s delay fifth on his list. If the meter of his verse had permitted, he would perhaps have put it first. Dickens memorialised it in Bleak House, Chekhov, the Russian and Moliere, the Frenchman, have written tragedies on it. Gilbert Sullivan has satirized it in a song. Thus, it is no new problem for the profession, although we doubt that it has ever assumed the proportions, which now confront us. “Justice delayed is justice denied,” and regardless of the antiquity of the problem and the difficulties it presents, the courts and the bar must do everything to solve it.” Judge Ulyses Schartz of the Illionis Appellate Court (Gray v Gray (1955 (6) III. App. 2d, 571,128 N.E.2d 602)”

[8] The only reasonable resolve is to engage insolvency procedures to regulate the situation on the specific problematic merits of this

case; it will cause an opportunity for the creditors to determine the assets held by the estate and prove their claims. The applicant

complied with the provisional sequestration order dated 16 April

2020. The evidence established the elements and requirements set out in sections 12(1)(a), (b) and (c) of the Insolvency Act.

9.1 In terms of section 97(3) read with 97(2)(c) of the Act, the court can direct that the costs of opposition shall be included in the costs of sequestration. Such direction can be made where the opposition was bona fide and reasonable, or where there were reasonable prospects of success in opposition.[11]

9.2 Meskin[12] suggested that:

“2.1.14.2 Respondent’s costs The respondent’s costs of his unsuccessful opposition to the application for the sequestration of his estate may be directed by the Court to be included in the costs of sequestration. The earlier authorities were to the effect that such direction might be made where the opposition was bona fide and reasonable; but later authorities are to the effect that it may be made only where special circumstances exist justifying such

order.

It is respectfully doubted whether either approach is sound and that the direction in respect of the respondent's costs of opposition should be made only where (i) his opposition was in relation to the issue of whether there was reason to believe that sequestration would be to creditors' advantage or in relation to the issue of whether the Court's discretion should be exercised against the applicant, and (ii) he placed material facts before the Court in respect of such opposition which not only merited serious consideration by it in the exercise of its discretion as to whether the sequestration should ensue, but assisted it to conclude that it should: *ex hypothesi*, such opposition was pursued not only in the respondent's own, but also all his creditors', interests.

Where the application is refused on the basis that it constitutes an abuse of the process of the Court, the Court may, in the exercise of its discretion, grant a punitive order for costs against the applicant."

9.3 The facts in *casu* show that the *Meskin* – approach is too restrictive. *Bona fides* and prospects of success on all the elements of sequestration should be considered. It is the task of the court to determine a just and equitable costs order. The court must traverse the history of a case, the conduct of the parties and the merits of the matter.[13]

9.4 Although the respondent's conduct is of concern the applicant did not propose a costs order against her. I will therefore order for the costs to be costs in the sequestration but order that a copy of this judgment be forwarded to the Master of the High Court: Free State, the Legal Practise Council: Free State and the Director of Public Prosecutions: Free State.

[10] ORDER

1. A final order of sequestration is granted against the estate of the *Plaatjie Family Trust* - IT73/2013.
2. Costs to be costs in the sequestration.
3. A copy of this judgment must be forwarded to the Master of the High Court: Free State, the Legal Practice Council: Free State and the Director of Public Prosecutions: Free State by the Registrar of this Court.

M OPPERMAN, J

APPEARANCES

On behalf of applicant Advocate AP Berry

c/o FJ Senekal Attorneys Incorporated Bloemfontein

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On behalf of respondent: Advocate FG Janse van Rensburg c/o LF Alberts Attorney Incorporated
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[1] “Applicant”

[2] “Insolvent”

[3] “Respondent”

[4] “The Trust”

[5] “The Act”

[6]

10. Provisional sequestration.—If the court to which the petition for the sequestration of the estate of a debtor has been

presented is of the opinion that prima facie—

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; 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 make an order sequestrating the estate of the debtor provisionally.

[6]

10. Provisional sequestration.—If the court to which the petition for the sequestration of the estate of a debtor has been

presented is of the opinion that prima facie—

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; 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 make an order sequestrating the estate of the debtor provisionally.

[7]

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 nine; 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.

[7]

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—

- (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.

[8] Meskin P.M., (Edited by: A Boraine, J A Kunst & D A Burdette), Meskin's Insolvency Law, Last Updated: November 2019, <https://www.mylexisnexis.co.za/Index.aspx> at 2.1.13 on 4 July 2020 with reference to Sussman & Co (Pty) Ltd v Schwarzer 1960 (3) SA 94 (O) at 97 C–D and Senwes Limited v Kruger NO and Others (Afrikaanse Protestantse Kerk (Hoopstad) intervening) [2016] JOL 36332 (FB) at para 11, De Beer and Another v Cowling (49342/13)

[2014] ZAGPPHC 912 (12 November 2014) at para 4, Sacks Morris (Pty) Ltd v Smith 1951 (3) SA 167 (O) at 171 and cases there cited; London Estates v Nair 1957 (3) SA 591 (D) at 593; BP Southern Africa (Pty) Ltd v Furstenburg 1966 (1) SA 717 (O) at 720. The onus on the applicant exists whether or not the application is opposed: London Estates case, supra, at 593; LTR Beleggings (Edms) Bpk v Hechter (Mynhardt Toetredend) 1977 (1) SA 22 (NC) at 24; Fintech Underwriting (Pty) Ltd v Viljoen [2006] JOL 18455 (T) at para 6; Hannover Reinsurance Group Africa (Pty) Ltd and Another v Gungudoo and Another 2012 (1) SA 105 (GSJ) at paras 57–58 in which the court applied this principle and ruled that there is no onus of proof, but only an evidentiary burden on the debtor who opposes the application on bona fide and reasonable grounds. As to the position in Zimbabwe, see Scottish Rhodesian Finance Ltd v Ridgeway 1979 (2) SA 251 (R) at 253. The Court should not refuse to grant a final sequestration order simply because the applicant refuses a settlement offer made after the granting of a provisional order, where all the other requirements are met: Bank Windhoek Ltd v Jacobs 2013 JDR 2580 (Nm) at paras 9 and 10.

[9] The respondent and the insolvent are brother and sister.

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- [10] Obiokoye, Iruoma Onyinye, Eradicating delay in the administration of justice in African courts: a comparative analysis of South African and Nigerian courts, URI: <http://hdl.handle.net/2263/942>, Date: 2005.
- [11] ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and others 1993 (4) SA 436 (C) at 451A–B, Van Wyk Von Ludwig & Hanekom Inc v Ferguson
- [2001] 2 All SA 592 (C).
- [12] Meskin P.M., (Edited by: A Boraine, J A Kunst & D A Burdette), Meskin's Insolvency Law, Last Updated: November 2019, <https://www.mylexisnexis.co.za/Index.aspx> on 4 July 2020
- [13] S J van der Walt v C Murray and another, Case no. 2554/2019, Judgment on 10 September 2019, Free State Division of the High Court, Bloemfontein at [16].
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