

SOUTH AFRICA / JUDGMENT

## Oosthuizen v Steyn (238969/2019) [2020] ZAGPPHC 161; 2021 (4) SA 307 (GP) (14 May 2020)

[2020] ZAGPPHC 161

COURT

North Gauteng High Court, Pretoria

BEFORE

N M Mavundla

CASE / FILE NUMBER

238969/2019

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC

OF SOUTH AFRICA]

Case No: 238969 / 2019

14/5/2020

In

the matter between:

ELIZABETH  
OOSTHUIZEN  
APPLICANT  
And  
VANESSA  
STEYN  
RESPONDENT

### JUDGMENT

MAVUNDLA, J.

- [1] This is an application for the provisional sequestration of the respondent, brought by her erstwhile attorney, the applicant herein.

- [2] The basis of the application is that, the applicant is a judgment creditor in the amount of R41 258.14 (excluding costs and interest) and the respondent has admitted the debt and also the inability to pay.
- [3] It is common cause that the aforesaid debt emanated as a defamation action under case number 44384/2015 that was instituted by the applicant against the respondent. This resulted in the parties reaching a settlement agreement that was made an order of court by Ledwaba DJP on 7 March 2017. The respondent was ordered to pay R2000. 00 per month to liquidate the aforesaid debt of R41258. 14.
- [4] The applicant subsequently taxed her bill of costs. She also attached] annexure “G” which is the latest statement reflecting the amount of R153 933. 35 which the respondent is indebted to the plaintiff.
- [5] The respondent has acknowledged in writing that she is unable to satisfy the judgment debt and make monthly payments in the amount of R2000.00 per month on 18 October 2017 and 16 January 2018. In this regard annexure “H1” and “H2” respectively were attached to the papers.
- [6] The written acknowledgment that she is unable to pay the judgment debt, which amounts to an act of insolvency in terms of section 8(g) of the Act.
- [7] It is common cause that the sheriff attempted to attach the moveable property of the respondent on 10 July 2018. In this regard a notice of attachment was attached as annexure “I”. The value of the attached goods as per sheriff’s return amounted to R7 100.
00. However, a third party named Chares Bester laid claim on the goods so attached, although this claim was dismissed by Mothle J on 13 March 2019, as Bester failed to deliver particulars of her claim to the attached goods, as per annexure “J”.
- [8] A deed of search was conducted and revealed that the respondent is the owner of immovable property situated within the jurisdiction of the Court.
- [9] The applicant submitted that the respondent is factually insolvent.] Based on the fact that the respondent is the owner of an immovable property, it was submitted that there would be at least something to levy execution against, and be of advantage to the body of creditors, although the applicant is unable to state what dividend in monetary terms would be after sequestration.
- [10] The applicant contended further in her papers that, given the notice of attachment and subsequent interpleader proceedings and massive amount of the judgment debt, it is highly improbable that the applicant respondent has movable assets exceeding the amount of the judgment debt. It is further submitted that on a preponderance of probabilities the applicant (sic) is factually insolvent in that her liabilities exceed her assets. (Although in the papers it is stated that the applicant is factually insolvent-- reading the statement in context it is clear that reference in fact is made to the respondent.).

- [11] The applicant further submitted that it is essential that the hand of the law be placed on the respondent and her estate (which she has been evading for the past two years already, and committed numerous acts of insolvency) so that a trustee be appointed who can investigate the affairs of the respondent, unearth assets and liquidate assets for the benefit of creditors, as it would be in the interest of and benefit of creditors of the respondent if she is sequestrated.
- [12] The applicant further stated that the application would be served on the South African Revenue Services in terms of the provisions of section 9(4A) (a)(iii) of the Act and the Master of the High Court in terms of section 9(4) of the Act.
- [13] The applicant further stated that she was not aware whether there are employees employed by the respondent or not. The sheriff will make the necessary enquiry with the respondent when the sequestration is served on the respondent, and if there are employees. Instructions would be given to the sheriff to serve the application on employees and to indicate in her return what she has done in that regard,
- [14] A Bond of security for the necessary security for the costs of this application, as required by section 9(3)(b) of the Act, has been taken out with the Master of this Court and is attached as annexure "L".
- [15] Accordingly, the applicant prays that the estate of the respondent be provisionally sequestrated.
- [16] On the other hand the respondent in resisting the grant of the order prayed for, raised as a first defence a point in limine that there has been non-compliance with the regulations governing the administering of an oath or affirmation, GN R1258 3619, 21 July 1972 (As amended) in that:

16.1 The deponent has described herself as an adult female attorney in paragraph 1.1 of the founding affidavit, however, as per the graphs below the commissioner of oaths refers to the deponent as a male.;

16.2 The commissioner of oaths certified as follows:

*"Signed and Sworn to before me at Pretoria on this 3rd day of April 2019 after the Deponent declared that she/he is familiar with the contest of this statement and regards the prescribed oath as binding on his conscience and he has no objection against taking the prescribed oath. There has been compliance with the*

requirements of the Regulations contained in Government Gazette R1258M dated 21 July 1972 (as amended.);

16.3 In terms of Regulation 4(1) of the Regulations, regardless of whether the Deponent is male or female, the commissioner of oaths is required to certify below the Deponent's signature or mark that the Deponent has acknowledged that he (where the Deponent is male), or she (where the Deponent is female) understands the contents of the declaration and that he or she (depending on the gender of the Deponent) has stated the manner, place and date of taking the declaration/oath. If the Deponent is female the commissioner of oaths is required to use the pronoun "she".

16.4 The commissioner of oaths certified that the Deponent has acknowledged that "he/she" is familiar with the contents of the statement and regards the prescribed oath as binding on his conscience and has no objection against the taking of the said prescribed oath;

16.5 that the court can place no reliance on the certification of the commissioner of oaths ex facie the affidavit as it is unclear whether the deponent is a male or a female. On a balance of probabilities, the deponent appears from the certification to be a male.

16.6 that the court is unable to give effect to the "presumption of regularity" for purposes of assuming that the oath was sworn to and signed in the presence of the commissioner of oaths as the gender of the Deponent is not properly acknowledged;

16.7 that the court cannot be certain that the applicant as the deponent, in actual fact placed her signature on the founding affidavit as the commissioner of oaths failed to qualify the gender of the person signing the affidavit;

16.8 that the court is requested to ignore the founding affidavit for lack of compliance with Regulations Governing the Administration of an Oath or Affirmation, GN R1258 3619, 21 July 1972 (As amended).

[17] The respondent also raised a second point in limine of Non-compliance with section 9(4A) (a)(ii) of the Insolvency Act, No 24 of 1936 that:

22.1 Section 9(4A) (a)(i) and (ii) stipulate that:

"4(A)(a) When a petition is presented to the court, the petitioner must furnish a copy of the petition---

(i) to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and

(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 debtors premises; of

(bb) if there is no access to the premises by the petitioner and the employees, by 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."

17.2 the respondent contended that she has one employee by the name of Doria who has, on inquiry, not been served with the application nor has the application been brought to her attention through being affixed at the respondent's premises for her employee's perusal;

17.3 accordingly, is requested to find that the application is fatally defective for lack of compliance with the peremptory provisions of section 9(4A) (a)(ii).

[18] The respondent has on the merits contended, inter alia, that:

18.1 She conceded having instructed and subsequently terminated during October 2014 the mandate of the firm Lombard & Partners Inc. because she was dissatisfied with their services

18.2 she conceded that applicant instituted a defamatory claim against her under case number 44384 / 15 and a settlement order was made an order of court in terms of which she was ordered to pay the applicant an amount of 41 258.14

18.3 she stated that she found it disconcerting that the aforesaid amount has since escalated to R153 933.35, although she had made payments towards the judgment costs;

18.4 according to her she challenges the applicant to have a bill of costs prepared and taxed for the divorce proceedings and the defamation case. (I must hasten to state that this is rather too late to demand taxation in the present proceedings.

[19] The respondent further averred that she is not factually insolvent and her liabilities do not exceed her assets, as reflected herein below:

1. ½ share –Erf 824 in the Sectional

R525 000. 00 Scheme Nina Park Ext 27, Pretoria

2. Movable property—furniture, households

R10 000. 00 appliances ect.

Total Assets

R535

000. 00

LIABILITIES

3. a bond registered in favour of ABSA Bank Ltd R379 607.53 over Erf 824 in the Sectional Scheme

Ninapark, 824, Ninapark Ext 27, Pretoria (1/2)

4 The alleged debt to the applicant (to be taxed R153 933.35 TOTAL VALUE

R533 540.88

- [20] The respondent further submitted that it would not be to the benefit of creditors were she to be sequestrated;
- [21] She further contended that she only stated that she was unable to pay her debts as the applicant refused any tender made by her. Her former spouse did not honour the maintenance order as a result she was forced to tender an amount of R1 000. 00 at the time when the applicant refused her tender.
- [22] She further submitted that the applicant could have proceeded in terms of section 65 of the Magistrate's Courts Act No 32 of 1944.
- [23] She further contended that the applicant is litigating vexaciously and maliciously against her since she laid a complaint against the applicant with the LAW Society.
- [24] With regard to the second point in limine of non-compliance with the provisions 9(4A) (a) (ii). in the matter of Gungudoo v Hannover Reinsurance Group Africa[1] at where the Supreme Court of Appeal held that the purpose of the various notice requirements referred to in section 9(4A) (a)(ii). and 11(2A) and 11(4) of the insolvency Act was to ensure that if the debtor were running a business, its employees and their trade unions were notified of sequestration proceedings against their employer so as to enable them to explore ways of limiting any resulting

dismissals. If the employees have not been employed in a business operation, there was no obligation to inform them of the winding up proceedings.

- [25] However, the Constitutional Court in the matter of Stratford v Investec Bank[2] held that "employees" in the relevant section 9(4A) includes domestic employees, and accords with constitutional imperatives. The furnishing of the petition requirements in accordance with s9(4A) requires the petitioner to make it reasonably accessible to the debtor's employees. But since the purpose of section 9(4A) was not to provide the debtor with a technical defence, the petition could conceivably be granted notwithstanding the failure to furnish the required notice.
- [26] In light of the above mentioned Stratford Constitutional judgment, the fact that service was not effected on the respondent's employee, is a technical defence as such, it cannot avail the respondent any protection to the present proceedings, accordingly, the second point in limine is dismissed.
- [27] The first point in limine is non-compliance with Regulation 4(1) of the Regulations, which provides as follows:
- "4.
- (1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking of the declaration."

[28] This issue of non-compliance with regulation 4(1) of the Regulations, was dealt with in a well-reasoned judgment, with respect, in the matter of ABSA Bank v Botha NO[3]. In this ABSA matter the person who attested to the affidavit was a female, but the commissioner of oaths certified that the deponent has acknowledged that “he” knows and understands the contents of the declaration. Kathree-Setiloane J held that:

*“Section 6 of the Interpretation Act makes it clear that the words importing the masculine gender also includes the feminine. It follows that if, in legislation (including subordinate legislation), the masculine gender is used then it includes the female gender. Thus, where the pronoun ‘he’ is used, as in the case of reg4(1), then it includes reference to female pronoun ‘she’ as well. What this means, in the context of reg 4(1), is that regardless of whether the deponent is male or female, the commissioner of oaths is required to certify that he (where the deponent is a male) or she (where the deponent is a female) understands the contents of the declaration and that he or she (depending on the gender of the deponent) has stated the manner, place and date of taking the declaration. Thus, if the deponent is a female, the commissioner of oaths would be required to use the pronoun ‘she’, and if the deponent is a male, the commissioner of oaths would be required to use the pronoun ‘he’. In a case such as this, where the commissioner of oaths certifies that the deponent has acknowledged that ‘he’ knows and understands the contents of the declaration, but from the declaration itself it is apparent that the deponent is a female, because she declares as such, then the court would be unable to place reliance on the certification of the commissioner of oaths because ex facie*

the affidavit it would be unable to give effect to the ‘presumption of regularity’ for purposes of assuming that the declaration was sworn to (or affirmed) and signed in the presence of the commissioner of oaths.”

[29] Various authorities have held that non-compliance with the requirement of a certificate that the deponent has acknowledged that he/she knows and understands the contents of the affidavit is directory, and failure to comply has been condoned at the discretion of the court in a number of cases. See for example Ex Parte Vaughan[4] Van Rensburg v Van Rensburg[5]; Ex Parte Du Toit[6]; E s V Munn 1973 (3) SA 734 (NC).; Swart v Swart 1950 (1) SA 263 (O) at 265-7.

[30] In the S v Munn (supra) it was held that whether there has been substantial compliance with the prescripts of administering an oath is a matter of fact and not law. The court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations: depending upon whether substantial compliance with the regulation has been proved or not; (cf Swart v Swatr[7]; Sopete’s case[8])

[31] In casu it is common cause that the applicant is a female. However, in her affidavit the commissioner of oaths used the pronoun “he” that he understands the contents of the declaration, instead of “she”.

[31] For purposes of exercising my discretion, whether I should condone the affidavit of the applicant, I must have regard to Rule 6(1) of the Uniform Superior Court Rules. This rule in peremptory terms demands that a notice of motion must be supported by an affidavit as to the facts upon which the application is premised.

An affidavit is a written statement sworn to by the deponent in the presence and before a commissioner of oath who has authority to take such oath. In this regard vide *Goodwood Municipality v Rabie*[9]; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*[10].

The deponent to the affidavit must appear in person before the commissioner of oaths. The commissioner must state underneath his

name that the deponent has sworn before him that he or she understands the oath and considers it binding upon his conscience. Where the commissioner of oaths has failed to indicate whether the person who took the oath before him is a “he” or “she” the inference is irresistible that the deponent did not appear in person before him; vide *ABSA Bank v Botha NO*[11] and the document was held not to be an affidavit.

[32] In casu, I do take into account the fact the applicant is not a lay person but an attorney, who is expected to know better about the law

and procedures. Our courts have held that legal practitioners when executing their duty to the court, must do so not in a slavish

manner, but must do so in a meticulous manner. Besides, where condonation would be required, an explanation of that non-compliance

must be explained on affidavit so as to enable the court to exercise its discretion in favour of or against granting such an indulgence.

[33] In the premise I am disinclined to condone the non-compliance and find that the purported affidavit was not properly commissioned and therefore the first point in limine should be upheld.

[34] In light of the above, it stands to reason that the application was fatally defective and therefore stands to be dismissed. That being the case, it stands to reason that this court need not deal with the merits of the application.

[35] It is trite that costs follow the event. The question of costs and the scale thereof is a matter of the discretion of the court. The applicant dragged her own client to court. I see no reason why she must not pay the costs of this matter on a party and party scale.

[36] In the result the application is dismissed with costs on attorney and client scale.

N M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 14 / 05 /2020

APPLICANT'S ADV : ADV J H LERM

INSTRUCTED BY : LOMBARD & PARTNERS INC

RESPONDENT'S ADV: ADV A.M. RAYMOND

INSTRUCTED BY : EILEEN VISSER ATTORNEYS

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[1] 2012 (6) 537 (SCA).

[2] 2015 (3) SA 1 (CC) at 2E-G.

[3] 2013 (5) SA 563 (GNP) at p567A-H.

[4] 1937 CPD 279;.

[5] 1941 (1) PH F9.

1962 (1) SA 445[6]

[7] tSupra at P267;.

[8] 1950 (3) SA SA 769(E)..

[9] 1954 (2) SA 404 (C) at 406B-C.

[10] 1999 (2) SA 279 (T) at 336A-B.

[11] 2013 (5) SA 563 (GNP) at 565H-566G-and 567A.

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