

SOUTH AFRICA / JUDGMENT

Shackleton Credit Management (Pty) Ltd v Mogodi (17233/2022) [2024] ZAGPJHC 662 (16 July 2024) [2024] ZAGPJHC 662

COURT

South Gauteng High Court, Johannesburg

BEFORE

F Bezuidenhout

CASE / FILE NUMBER

17233/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

CASE NUMBER:

17233/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED: YES

DATE: 16 JULY 2024

In the matter between: -

SHACKLETON

CREDIT MANAGEMENT (PTY) LTD

Applicant

and

DINEO

KHOLOFELO

MOGODI

Respondent

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e mail and publication on CaseLines. The date and time for hand-down is deemed to be 14h00 on 16 July 2024.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] The applicant seeks a final order for the sequestration of the estate of the respondent. This court granted an order for the provisional sequestration of the respondent's estate on the 6th of February 2023.
- [2] In terms of the joint practice note filed by the parties, the following facts are common cause:-
 - [2.1] There is a judgment against the respondent that has not been paid;
 - [2.2] There is a nulla bona return;
 - [2.3] The respondent served a rescission application of the money judgment on 6 February 2023 after the provisional sequestration order was granted;
 - [2.4] The respondent pays her home loan, thereby preferring other creditors over the applicant.
- [3] The issue for determination before this court is whether the respondent has discharged the onus to prove that she is not insolvent and that a final order for the sequestration of her estate should not be made.

FACTUAL MATRIX

- [4] The applicant obtained judgment in this court under case number 22076/20 against the respondent in respect of a liquidated damages claim relating to an asset-based finance agreement.
- [5] The judgment was handed down in favour of the applicant on 13 August 2021 in the following terms:-
 - [5.1] Payment of the sum of R271 350.49;
 - [5.2] Interest on the sum of R27 350.49 at the rate of 13.01 % per annum from 3 February 2018 to date of final payment, both days exclusive;
 - [5.3] Costs of suit.

- [6] The applicant caused warrants of execution to be issued in an attempt to recover the judgment balance from the respondent. On 24 May 2022 a net amount of R1 256.95 was paid by the sheriff of this court to the applicant as the proceeds of an attachment of a bank account that was held in the respondent's name. No other recovery has been made in respect of the judgment debt.
- [7] In a further effort to recover the balance due to it in terms of the judgment, the applicant caused a warrant of execution to be issued against movable property. On 21 June 2022 the warrant was served on the respondent personally. In respect of such service, the sheriff rendered a nulla bona return.
- [8] It is accordingly the applicant's case that the respondent committed an act of insolvency as contemplated in section 8(b) of the Insolvency Act, 24 of 1936, which act of insolvency is binding on the estate of the respondent.
- [9] As far as an advantage to creditors is concerned, the respondent is the owner of an immovable property which was purchased by her on the 20th of June 2020 for the sum of R1 600 000.00 and was bonded to South African Home Loans Guarantee Trust in the amount of R1 600 000.00. According to the applicant, the value of the property is R1 750 000.00.
- [10] In terms of a Trans Union Individual Trace Information Report it would appear that the bond account is up to date and that as at 19 August 2022 the outstanding balance on the account stood at R1 524 876.00.
- [11] From a search conducted with the Intellectual Property Commission, the respondent appears to be an active businessperson who has been involved in seven different entities as either a member or a director. Some of the listed entities are in deregistration for annual return non-compliance.
- [12] In terms of the Trans Union Individual Trace Information Report obtained by the applicant, the respondent is employed at HLTC (Pty) Ltd, a construction company. The respondent describes her role at the aforesaid company as that of finance administration manager.
- [13] All statutory requirements have been complied with by the applicant.
- [14] According to the respondent, she does not owe any money to the applicant. The judgment was taken by default and the moment she became aware of it, she applied for the rescission of the judgment.
- [15] The respondent denies that she has committed an act of insolvency and submits that despite her unemployment, she does manage her debts. She generates an income by selling clothes. The respondent states that by way of example she has a credit account with Standard Bank which she was granted whilst she was still employed. She still manages to pay the Standard Bank credit card account and she is up to date. In addition, she owns an undivided half share together with the father of the children in an immovable property. She states that she is also up to date with these home loan payments.

- [16] Subsequent to the hearing of this application, the rescission application was enrolled for hearing on the 21st of May 2024 and dismissed with cost. The judgment accordingly remains extant.

THE LAW

- [17] A court hearing an application for a provisional winding-up should refuse such an application where the debt is disputed on bona fide and reasonable grounds.[1] The winding-up process is not meant to decide doubtful debts.

- [18] In *Kalil v Decotex (Pty) Ltd and Another*[2] the court reasoned that the Badenhorst rule is not inflexible. The departure of the Badenhorst rule is called for even though it might not be said that Decotex's indebtedness to the appellant is disputed on bona fide and reasonable grounds since the creditor did not resort to winding-up proceedings to enforce the disputed debt.

- [19] In *Helderberg Laboratories CC*[3] the court dealing with the evidential burden on a respondent stated as follows: -

"[23] I am in respectful agreement with the aforesaid dictum of Milne J which has been approved by the Appellate Division in Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 980E. It therefore appears to me that it would be preferable to refer to this duty of respondent to show that the alleged debt is disputed on bona fide and reasonable grounds as an evidential burden and not an onus. Be that as it may, it should be borne in mind, as explained by Thring J in the Hülse-Reutter case [Hülse-Reutter and Another v Hey Consulting Enterprises (Pty) Ltd (Lane and Fey NNO intervening) 1988

- (2) SA 208 (C)] at 219F-G, that the respondent merely has to satisfy the court that the grounds which are advanced for disputing the debt are not unreasonable. The learned judge further emphasized that it is not necessary for the respondent to adduce on affidavit,

or otherwise, the actual evidence on which it would rely at trial. It is sufficient that the respondent bona fide alleges facts which, if proved at a trial, would constitute a good defence to the claim made against it."

- [20] The only question therefore here in the present proceedings is whether the respondent has disputed the applicant's claim on reasonable and bona fide grounds. The examination of the respondent's answering papers as well as the dismissal of the rescission application provides an answer to this question.

- [21] The respondent based her entire opposition on the fact that the judgment debt was incorrect and that a rescission application was pending. Another court has already found in the rescission proceedings that the respondent has failed to disclose a bona fide defence.

- [22] Accordingly I find that the respondent has not discharged the evidentiary burden to show that the provisional order is resisted on bona fide and reasonable grounds.

- [23] Accordingly there is no reason to discharge the provisional order.

ORDER

I accordingly grant an order in the following terms:-

1. The estate of the respondent is placed under final sequestration.
2. The costs of this application are costs in the insolvent estate.

F BEZUIDENHOUT

ACTING JUDGE OF

THE HIGH COURT

DATE OF HEARING: 5 February 2024 DATE OF JUDGMENT: 16 July 2024 APPEARANCES: On behalf of applicant: Adv R Stevenson ross@counsel.co.za Instructed by: Lynn & Main Incorporated markp@lmb.co.za. On behalf of respondent: Adv M Mzamane adv.mzamanem.123@gmail.com Instructed by: Khumalo Attorneys 073-423-9232 Lawfirmkhumalo8@gmail.com

- [1] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T).
- [2] 1988 (1) SA 943 (A).
- [3] Helderberg Laboratories CC and Others v Sola Technologies (Pty) Ltd 2008 (2) SA 627 (C).

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