

SOUTH AFRICA / JUDGMENT

Stanger N.O v Liebman (24227/2021) [2024] ZAGPPHC 872 (14 August 2024)

[2024] ZAGPPHC 872

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

24227/2021

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO.: 24227/2021

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date: 14 August

2024

E van der Schyff

In

the matter between:

Aaron
Stanger N.O.
Applicant
and
Bradley
Brett Liebman
Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] In May 2021, Mr. Atholl David Victor Liebman, now deceased, issued a sequestration application wherein he sought that a provisional sequestration order be granted against the respondent, Mr. Brett Bradley Liebman, his son. Due to a family feud, no love was lost between the two parties. Mr. Stanger is the executor of the applicant's deceased estate. To avoid confusion due to the shared surname, the parties will be referred to as the applicant and respondent.
- [2] The hearing of this application was preceded by an application for security of costs, which was coincidentally adjudicated by me in December 2022. The remaining issue regarding the security for costs was settled when this hearing commenced.
- [3] The main averments made by the applicant in support of a provisional sequestration order being granted are the following:
- i. He is a creditor of the respondent with a liquidated claim of not less than R100.00;
 - ii. The respondent is factually insolvent;
 - iii. The respondent has committed an act of insolvency as defined in sections 8(b) and 8 (c) of the Insolvency Act 24 of 1936 (the Act); and
 - iv. There is reason to believe that the sequestration will be to the advantage of creditors.
- [4] The primary facts the applicant relies upon are the following:
- i. The respondent owes a total amount of R752 955.85 for taxed legal costs, which costs are due and owing as a result of a court order granted on 6 December 2019;
 - ii. Warrants of execution were issued for each bill of costs taxed. The sheriff attached a Chrysler Grand Voyager, valued at R20 000.00, but received a third claim for the vehicle. The respondent was the registered owner of the vehicle prior to February 2020 but sold the vehicle to a juristic person of which he is the sole director;
 - iii. The vehicle was sold at a time when the respondent knew of the cost orders in the applicant's favour;
 - iv. The applicant holds no security for his claim against the respondent;
 - v. The respondent is also liable to his attorney, JHS Attorneys, in excess of R1.4 million in respect of unpaid legal fees;

vi. On 18 February 2021 the respondent addressed correspondence to the applicant's attorney of record, the executor of the deceased estate, informing him, among others, that –

‘There is absolutely nothing which belongs to me left at Villa Rivage of any value to attach, so you will be wasting your time and incurring sheriff's fees for nothing. You are well aware of this, so I hope that you are not sending the sheriff merely to harass me. That is not to say that I do not have other assets elsewhere sufficient to satisfy your writs.’

- [5] The applicant submits that the indirect, non-pecuniary advantages of sequestrating the respondent's estate when utilising the mechanisms afforded to a trustee in terms of the Act in the proper investigation of the respondent's financial affairs, include the possible discovery of assets for disposal for the benefit of creditors, the certainty that the estate cannot further be diminished, the assurance that creditors will be accorded the treatment prescribed by law, and the interrogation of the respondent. These measures underpin the reason to believe that there would be advantages to creditors if the respondent's estate were to be sequestrated.
- [6] In answer to the application, the respondent raised, in addition to the issue regarding security of costs, a point in limine, contending that the document signed by the applicant, purporting to be the founding affidavit, is not commissioned correctly. The respondent essentially complained that the formalities laid down in the regulations prescribed for South African commissioners of oaths must be adhered to and weren't, even if the document was ostensibly sworn to before a notary public in the United States of America.
- [7] The respondent elaborated on the parties' acrimonious history. He claims that he expects capital and income distributions from a number of property-owning trusts of which he is a beneficiary, and stated that he is entitled to dividends from his interests in a number of companies. He provided a list of the trusts and companies. The funds due to him exceed the value of the applicant's claim against him. He claims that it is just a question of time, and he will be able to settle the applicant's claim in full. In the alternative, he indicated that he is willing to unconditionally cede his claims from the trusts and companies to the applicant, limited to the value of the bills of costs plus interest thereon.
- [8] The respondent claims that the sequestration application is being used for ulterior motives, among others, to hide a number of illegal activities perpetrated by the applicant, to cause his financial destruction, and terrorise him and his wife. He denies being insolvent as he holds the claims referred to above against certain trusts and companies that he listed. He claims that the winding up of the trusts and companies is being delayed by Mr. Stanger and the applicant and avers that the late Mr. Liebman and his attorney have already written to the liquidators of the companies in liquidation informing them that they intend to attach the right, title, and interest of his claims against the companies. He informs that all the movable assets in his home were attached and sold in October 2019 after they were removed by Mr. Stanger, who used the search and seizure provisions of the Insolvency Act.

- [10] The respondent denies that the sheriff's returns amount to nulla bona returns. He claims that he sold the vehicle a year before the applicant executed the writ. The vehicle is valued at R20 000.00 and was basically a heap of scrap metal.
- [11] In reply, the applicant pointed out that the respondent's rights in the trusts are contingent rights and not vested rights. They cannot be regarded as assets in his estate. The applicant confirmed that it was common cause that the respondent owns 50% of the member's interest in O V H Unit 12 CC and 100% of the issued shareholding in Emerald Haven (Pty) Ltd.
- [12] Mr. Stanger, who was substituted as the applicant in his capacity as executor of the applicant's deceased estate, sought leave to file a supplementary affidavit. He contends that the respondent committed subsequent acts of insolvency since the sequestration application was issued.
- [13] Mr. Stanger claims that the respondent concluded an agreement with his former attorney in terms of which he ceded his right, title, and interest in respect of certain cost orders he obtained against the applicant to the attorney. He also ceded to Mr. Stevens in securitatem debiti his right, title, and interest in his member's interest in OVH Unit 12 CC. As a result, Mr Stevens, the attorney is preferred above other creditors.
- [14] The respondent objected to the filing of a supplementary affidavit, but answered to the averments therein. I allowed the supplementary affidavit since the respondent answered to the allegations made therein, and because of the lapse of time since the founding papers were filed. No party is prejudiced.
- [15] The respondent denies that he is preferring Mr. Stevens above other creditors as the agreement was reached in settling litigation between them. In addition, he points out that the cession is not an out-and-out cession but in securitatem debiti.

Discussion

- [16] It is trite that to succeed with a sequestration application, a creditor must establish a claim against the debtor, that the respondent is insolvent or committed an act of insolvency, that there is reason to believe that the sequestration will be to the advantage of creditors if the debtor's estate is sequestrated.[1]
- [17] The court is cloaked with a discretionary power to grant a provisional winding-up order, irrespective of the grounds upon which it is sought, and the discretion must be exercised on judicial grounds.
- [18] In casu, the applicant avers without any substantiation that the respondent is factually insolvent. The respondent answers and denies being insolvent. He indicates that he holds interests in companies that are sufficient to satisfy the judgment debt. The applicant acknowledges

that the applicant holds, at minimum, 50% of the member's interest in O V H Unit 12 CC and 100% of the issued shareholding in Emerald Haven (Pty) Ltd. The applicant does not elaborate on why he decided, for instance, not to attach the respondent's

shareholding in Emerald Haven (Pty) Ltd.

[19] Despite the fact that the respondent offers to cede his interests in the trusts in which he is a beneficiary and the companies wherein he holds an interest to the limited value of the bills of costs plus interests thereon, the applicant proceeded with the sequestration

application. While it makes business sense to negotiate the setting off of the parties' respective claim for amounts due and owned for legal costs against each other and cede the respondent's interests in liquidated companies for the remainder of amounts owed plus interest, the applicant is determined to obtain the respondent's provisional sequestration at all costs. This court has emphasized in *Waterkloof Boulevard Homeowners Association (Association Incorporated under Section 21) v Yusuf and Another*[2] the principle stated by *Didcott J* in *Gardee v Dhanmanta Holdings and Others*:^[3]

'While there may be no reason in principle why a debtor with only one creditor should not have his estate sequestrated, the potential

advantages in that situation are inherently fewer, and the case for it is correspondingly weaker. Then it is really no more than an elaborate means of execution, and because of its costs, an expensive one too. That the applicant himself is convinced of its benefits to him is not decisive, even when he is the only creditor. It is for the court to decide the question.... What is more, he must demonstrate some reasonable expectation that it will exceed the likely proceeds of ordinary execution. Unless he does that, the laborious and substantially more expensive remedy of sequestration can hardly be thought advantageous.'

[20] The applicant relies on indirect, non-pecuniary advantages that the respondent's sequestration might have. The allegations boil down to unsubstantiated generalised statements. Having regard to the proximity between the applicant and the respondent, despite their animosity towards each other, one expects primary facts being averred to substantiate a finding that assets will be recovered that are currently stowed away in obscurity. No case is made out for this court to find that it will be beneficial to the respondent's body of creditors if a provisional sequestration order is granted.

[21] The sale of a vehicle valued at R20 000 can, in the circumstances, hardly be seen as the dissipating of assets, particularly if regard is had to the fact that no allegations are made that the respondent alienated the vehicle because he caught a whiff of the applicant's intention to attach the vehicle. As for the cession in *securitatem debiti*, the cession is conditional.

[22] The parties have been embroiled in acrimonious litigation for a very long time. The distrust runs deep. One result of this sad reality is that people lose perspective. Sequestration proceedings have their place in law, but should not be abused to settle family scores. This is not to say that an application for a family member's sequestration will not be considered. It

will be considered but only granted if it is evident that the purpose of sequestration to provide a collective debt-collecting process that will ensure an orderly and fair distribution of the debtor's assets to the advantage of the whole body of creditors in circumstances where these assets are insufficient to satisfy all the creditor's claims,[4] will be achieved.

[23] Having carefully considered the allegations contained in the respective affidavits, the application stands to be dismissed.

Miscellaneous

[24] The respondent took issue with the founding affidavit and alleged that it was not commissioned correctly because the notary public in the United States of America did not comply with the regulations prescribed for South African commissioners of oaths. There is no merit in this contention. Ramsbottom J held in *McLeod v Gesade Holdings (Pty) Ltd*[5] that:

'There is nothing in the Union Oaths Act or in the regulations which affects the validity of an affidavit made in accordance with the law of a foreign country.'

[25] There is no averment that the document was not commissioned in accordance with the law in the United States of America. The founding affidavit is regarded as an affidavit.

[26] At the onset of the proceedings, the respondent sought an order to stay the proceedings because the security of costs had not been provided as ordered previously. The issue was resolved, although a costs order should follow. The respondent was successful to the extent that the parties reached an agreement regarding an acceptable method of providing security for costs. It is just that

each party carries its own costs occasioned by the application. Both parties' legal representatives neglected to follow up on the issue timeously, and if there had been proper and timely communication, the application could have been prevented.

Costs

[27] The general rule is that costs follow success. Having regard to the complexity of issues in dispute, it is fair to all parties if counsel's costs are determined on Scale B.

ORDER

In the result, the following order is granted:

1. The application is dismissed, with costs, counsel's costs on Scale B.

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant: JL Kaplan With: E Dreyer Instructed by: Aaron Stanger & Associates For the respondent: MD Silver Instructed by: David Kotzen Attorneys Date of the hearing: 30 July 2024 Date of judgment: 14 August 2024

- [1] Bertelsman, E et al. Mars: The Law of Insolvency in South Africa, JUTA, 9th ed,
134. In *Meskin & Co v Friedman* 1948 (2) SA 555 (W), the Court described it at 559: ‘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 the creditors.’
- [2] (028945/2022)
- [2023] ZAGPPHC 737 (28 August 2023).
- [3] 1978
- (1) SA 1066 (N) 1067.
- [4] J J Pepler Advantage for creditors in South African insolvency law – a comparative investigation Unpublished LLM-Thesis University of Pretoria 2014.
- [5] 1958
- (3) SA 672 (W).

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