

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: A 276/2014

In the matter between:

SERENGETTI TOURISM (PTY) LTD
t/a ETOSHA MOUNTAIN LODGE

APPLICANT

and

STEPHEN GLENN BAARD
BRIGGITA BAARD

1ST RESPONDENT

2ND RESPONDENT

Neutral citation: *Serengetti Tourism (Pty) Ltd t/a Etosha Mountain Lodge v Baard* (A 276/2014) [2018] NAHCMD 148 (07 June 2018)

Coram: PARKER, AJ

Heard: 22 May 2018

Delivered: 07 June 2018

Fly note: Insolvency – When granted – A creditor having established its claim and an act of insolvency has an unfettered right to choose its form of execution, one of

which is sequestration of the debtor's estate – Respondents not raising any matter which would disentitle applicant to a final order – Consequently final order of sequestration granted.

Summary: Insolvency – When granted – A creditor having established its claim and an act of insolvency has an unfettered right to choose its form of execution, one of which is sequestration of the debtor's estate – Respondents not raising any matter which would disentitle applicant to a final order – Consequently final order of sequestration granted – On return date of provisional sequestration order – Court found that respondents alone bear the onus of showing cause why they should not be placed under final order of sequestration – Court found that none of the matters raised by respondents in their affidavit amounted to 'to show cause' – Consequently, court granted final order of sequestration of respondents' estates.

ORDER

The provisional order of sequestration granted on 16 April 2016 is hereby confirmed, and the estates of the respondents are placed under a final order of sequestration.

JUDGMENT

PARKER, AJ:

[1] This judgment is in respect of the hearing on the return date of the *rule nisi* that the court issued on 21 April 2016, three years ago.

[2] On the return date, the burden of the court is to consider whether respondents have placed sufficient reasons satisfactory to the court to persuade the court to decline to place them under final order of sequestration. That is what the order made on 21 April 2016 says: The order says what it means. In the instant proceedings it is therefore not the burden of the applicant to persuade the court to incline to grant a final

order of sequestration. To use a pedestrian analogy, the order of provisional sequestration is hanging on the heads of the respondents. If they want it removed by the court, it is they, and only they, who must persuade the court in the manner I have mentioned previously to remove it. Doubtless, that is what 'show cause' connotes. I repeat. It is the respondents, not the applicants, who must 'show cause'. See *Bank Windhoek Limited v Jacobs* (A 208/2013) [2014] NAHCMD 26 (29 January 2014). Any contrary view is, with respect, clearly self-serving and fallacious, and is firmly rejected.

[3] Accordingly, I do not find it persuasive at all the view put forth by '*De La Ray: Mars: The Law of Insolvency in South Africa*, p 135, para 5.31', referred to me by Mr Van Vuuren, inasmuch as it is relied on to establish that applicant bears the burden 'to show cause' why the respondents should be placed under final order of sequestration. Indeed, such a view can be reduced to an obvious absurdity thus. If I were to accept that submission, that textual authority, it would mean that if applicant were not to have appeared for the hearing in person or by counsel, then the court was entitled, without more, to hold that respondents have discharged the burden imposed on them by the 21 April 2016 order, that is, 'to show cause'. It follows irrefragably and reasonably that even if applicant had put in no appearance at all, respondents would still have to 'show cause' to the satisfaction of the court 'why the respondents should not be placed under final order of sequestration'. The applicant's failure to appear could never on its own have amounted to respondents' having shown cause why they should not be placed under final order of sequestration. Any contrary view would surely set the 21 April 2016 order at naught.

[4] I now proceed to consider what respondents have placed before the court 'to show cause ... why the respondents should not be placed under final order of sequestration', remembering that in considering whether to make a final order of sequestration, the court exercises discretion; judicially exercised no doubt, as Mr Van Vuuren reminded the court. In my opinion, it will be neat and productive to consider seriatim what is contained in the first respondent's affidavit ('the affidavit') that are put out as 'reasons', which according to the respondents, amount to 'to show cause'.

Ad para 4

[5] This paragraph does not constitute 'cause' within the meaning of the order dated 21 April 2016 ('the order').

Ad para 5

[6] Based on the analysis made and conclusions reached thereanent in paras 2, 3 and 4 above, I reject para 5 of the affidavit as not amounting to 'to show cause'.

Ad para 6

[7] All that first respondent says is that he and second respondents are married to each other 'out of community of property'. That may be so. In my view no cause is shown by reliance on the allegations in para 6 of the affidavit. As Mr Dicks submitted, the judgment obtained on 26 October 2012 ('the judgment') was against the respondents jointly and severally.

Ad paras 7 and 11

[8] What respondents allege, content and aver in this paragraph were in the 21 April 2016 judgment subjected to a great deal of careful consideration and analysis before coming to the conclusions thereanent, particularly about service of process on second respondent and the place of service on first respondent and about alleged invalidity of the *nulla bona* return. I have disabused my mind – as far as humanly possible – of the fact that in the provisional liquidation proceedings, I found that service of process was properly effected on the respondents and the *nulla bona* return was valid. Having done that and on the return date during the instant proceedings, having considered fairly all the evidence now before me, I do not find any basis upon which I could say I was wrong. That being the case, I hold that on the allegations of defective service of process and invalid *nulla bona* return, the respondents have not shown 'cause' in terms

of the 21 April 2016 order. No 'cause' has been shown on reliance on paras 7 and 11 of the affidavit, too. In sum, I did accept then and I do accept now, as Mr Dicks submitted, that the Deputy Sherriff was entitled to submit a *nulla bona* return, and an act of insolvency was therefore established.

Ad paras 8, 9, 14, 15, 16, and 17

[9] The contents of these paragraphs add no weight to support the pillars holding an already crumbling edifice erected by the respondents with paras 4, 5, 6, 7 and 11 of the affidavit (see paras 4-8 of this judgment). I have said in paras 2, 3 and 4 above that it is only the respondents who bear the burden 'to show cause' why the respondents should not be placed under final order of sequestration. It is they, who must, in order 'to show cause', if they so wish, to demonstrate to the court that their circumstances have not remained unchanged. Respondents have not so demonstrated; and that is not surprising, I dare say, for the following reasons.

[10] As Mr Dicks submitted, in their answering papers, the respondents under oath stated categorically; 'the second respondent and I are both working as qualified estate agents and we both earn healthy regular incomes from which we settle our debts without the necessity of being sequestrated in order for us to do so'. 'Despite all that', Mr Dicks concluded, 'the respondents have not paid one dime towards satisfying the judgment of this court of 26 October 2012'. It would seem theirs was, with respect, a mere idle boast; and it cannot assist them. In that regard, I repeat what I said in the 21 April 2016 judgment:

'The respondents did not see it fit to make any payment or enter into some acceptable repayment arrangement with the applicant. They waited to be served with summons. They waited for applicant to obtain judgment by default against them, as aforesaid. And they did not bother to appeal the judgment. They waited to be served with a Writ of Execution. I should say that it is fitting for one to pay one's debts or make acceptable repayment arrangement with one's creditor. And it is important for one to respect orders of courts of law; and more important, an order of the court must be obeyed unless it has been set aside by a competent court. I make these statements to reject any feeble and unlawful attempt by the respondents to deny their

indebtedness to the applicant. And yet again the respondents waited until the applicants brought the instant provisional sequestration application before waking up to resist the applicant's choice of sequestration as the form of execution of the judgment obtained as long ago as 26 October 2012'.

[11] Instead of making the statement in para 8 of the affidavit, I expected respondents in their attempt to show 'cause' to have placed before the court sufficient evidence that their circumstances have not remained 'unchanged' because they have satisfied the judgment debt of the court of 26 October 2012 or a greater part of it. They have not done that. I would say the funds mentioned in paras 14, 15, 16, and 17 of the affidavit are phantom funds. They are irrelevant in these proceedings. What is relevant, I will say again, is that the respondents have not satisfied the judgment obtained as long ago as 26 October 2012. As Mr Dicks submitted, respondents have not paid one dime towards satisfying the judgment of the court of 26 October 2012. They have not negotiated a repayment scheme with applicant.

[12] In that regard, I respectfully reject Mr Van Vuuren's intrepid submission that insolvency proceedings are not a debt collecting proceeding. Applicant has unfettered right to choose the form of execution of the 26 October 2012 judgment, and it has chosen sequestration of the respondents' estate. See *Bank Windhoek v Jacobs*. And, as I have said previously, respondents can only succeed to escape being placed under a final order of sequestration, if they showed cause why they should not.

Ad paras 10 and 12

[13] The contents of these paragraphs turn on nothing. I hold that they could not constitute 'cause' within the meaning of the 21 April 2016 order. As Mr Dicks submitted, on their own evidence the respondents admit that after the sale of the Henties Bay property and settlement of the mortgage bond there was a balance available, which they then used to settle overdraft and credit card facilities. This remarkable admission

clearly has the effect of preferring one creditor (Standard Bank) above other creditors to their prejudice, including the applicant. An act of insolvency has therefore also been established in terms of section 8 (c) and (d) of the Act.

Ad para 13

[14] In paras 26 to 30 of the 31 April 2016 judgment, the court dealt fully with the requisite of 'advantage to creditors' and concluded then that applicant had satisfied the requisite. As to the requisite 'advantage to creditors', the court did not have to be satisfied that the sequestration would benefit creditors financially; if there was reason to believe that it would, that was sufficient to satisfy the requisite. The court did hold that requisite was established.

[15] As I have intimated previously, the respondents say they have sufficient assets and healthy and steady incomes with which to settle their debts, yet they have refused to apply any such assets and income to satisfy such old judgment debt. In my opinion, there will be an advantage to creditors if the respondents are sequestrated. A trustee could investigate these assets and income of respondents. I note that the respondents have refused to take the court into their confidence and disclose what assets they have. It is not farfetched to hold that they wish to conceal their assets from the applicant and the court. Hence, their evasive and Delphic statement in paragraph 29.2 of the answering affidavit, which reads: 'The second respondent and I are married out of community of property and it is possible that moveable and or immovable property is in existence which the second respondent owns or could have identified in order to have satisfied the Writ or judgment'.

[16] In that regard, it was the view of the court that a trustee would be able to investigate what price was obtained for the Henties Bay property and how much of the amount was available to creditors once the mortgage had been settled. The residue was applied to other overdraft and credit card debts. The restaurant in Swakopmund, which was operated from 9 November 2009 to January 2010, would stand in the same boat. Consequently, I accepted Mr Dicks' submission that there was a reasonable

prospect that the trustee, by invoking the machinery of the Insolvency Act, will reveal or discover assets which will yield a pecuniary benefit for creditors (See *BP Southern Africa (Pty) Ltd v Furstenburg* 1966 (1) SA 717 (P).)

Conclusion

[17] Based on these reasons, I hold that respondents have not put forth any matter that would disentitle the applicant to a final order of sequestration. The requisites for a provisional order was established by the applicant; and respondents have not shown cause why a final order of sequestration should not be granted.

[18] I am satisfied that the applicant has on a preponderance of probabilities established its claim against the respondent, that the respondents have committed an act of insolvency and that there is reason to believe that it will be to the advantage of creditors if the respondents' estates were sequestrated. I have, as I should, given deep and careful thought to the fear that respondents say they have, if a final order was granted. But, I should say, if there was ever a case where the court should not have a misplaced sympathy towards respondents, it is this case. On all the facts, I feel no doubt that in the exercise of my discretion I should incline to grant a final order of sequestration.

[19] In the result, the provisional order granted on 16 April 2016 is confirmed; whereupon I make this order:

The provisional order of sequestration granted on 16 April 2016 is hereby confirmed, and the estates of the respondents are placed under a final order of sequestration.

C Parker

Acting Judge

APPEARANCE:

APPLICANT: Dicks
instructuted by Dr Weder, Kauta & Hoveka Inc., Windhoek

RESPONDENTS: Van Vuuren
instructed by Koep & Partners, Windhoek