**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**(1) REPORTABLE: ~~YES~~/NO**

**(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO**

**(3) REVISED: ~~YES~~/NO**

CASE NO: 39335/19

31/1/2020

In the matter between:

**JACOLIEN FRIEDA BARNARD N.O.** **FIRST APPLICANT**

**KGHASHANE CHRISTOPHER MONYELA N.O.** **SECOND APPLICANT**

(Acting in their joint capacities as the duly appointed Liquidators of JVSS HOLDINGS (Pty) Ltd (In Liquidation). Master reference T2684/14)

And

**MR VIKAH MATHURA** **FIRST RESPONDENT**

(Identity number [….])

(Married in community of property)

**MRS JAGRUTH JANTILAL MATHURA** **SECOND RESPONDENT**

(Identity number [….])

(Married in community of property)

**JUDGMENT**

*Coram,* Van der Schyff J

Introduction

[1] The joint estate of the respondents was provisionally sequestrated on 18 May 2019. The return date was extended, and the matter was enrolled for final determination on 27 January 2020.

[2] The applicants seek a final sequestration order whereas the respondents oppose the granting of a final order.

[3] The respondents raised two points *in limine.* The first being that according to the founding affidavit the applicants have not set security for payment of fees and charges necessary for the prosecution of the sequestration as contemplated in the Insolvency Act; the second that the application is rife with sharp material disputes of fact.

[4] It is evident from the documents filed electronically on caselines that the necessary security had been set for the payment of fees and charges prior to the application being heard on 18 May 2019 and the provisional order being granted.

[5] The second point cannot be decided *in limine* but can only be decided after the parties' respective affidavits and the facts set out therein have been considered in the context of the well-known Plascon-Evans principle. It is trite that not every professed dispute of fact will meet the bar of being regarded as a material dispute of fact that may lead to an application being dismissed or referred to oral evidence. Sight should also not be lost of the fact that section 9 of the Insolvency Act 24 of 1936 as amended, here after the Insolvency Act, prescribes the procedural route that is to be followed when a sequestration application is brought. As a result, sequestration applications must be brought on motion. Where material disputes of fact exist, a respondent must apply for *viva voce* evidence to be heard.[1] No such application was brought.

[1] *Wackrill v Sandton International Removals (Pty) Ltd and Others* 1984 (1) SA 282 (W) at 2858 -D,

Late filing of the answering affidavit

[6] It is common cause that the respondents failed to file their answering affidavit timeously which resulted in the Court granting a provisional sequestration order.

[7] The applicants contend that the late filing of the respondents ' answering affidavit should not be condoned. In light of the fact that the order granted on 18 September 2019 calls on the respondents to show cause on or before the return date of 16 October 2019 as to why the provisional sequestration order should not be made final, and in light of the fact that the subsequent order granted on 16 October 2019 provides for the applicants to file a replying affidavit, I am of the view that the issue of condonation became moot. The answering affidavit, which was filed before the return date stipulated in the order of 18 September 2019, embodies the respondents' case as to why the provisional order should not be made final. It was delivered within the stipulated time period and nothing remains to be condoned. By being afforded the opportunity to file a replying affidavit the applicants were not prejudiced at all.

Requirements to succeed with the application

[8] For the applicants to succeed with this application they have to (i) establish a claim which entitles them to apply for the sequestration of the respondents' estate, (ii) show that the respondents are either actually insolvent or have committed an act of insolvency, and (iii) show that there is reason to believe that the sequestration of the respondent's joint estate will be to the advantage of creditors.

(i) Did the applicants establish a claim which entitles them to apply for the sequestration of the respondents' estate?

---

referred to with approval by the Supreme Court of Appeal in *Kalil v Decotex (Pty) Ltd and Another* [1988] 2 All SA 159 (A).

[9] It is common cause that the applicants are the appointed liquidators of JVSS Holdings (Pty) Ltd (In Liquidation), hereafter referred to as JVSS. The first respondent was the Chief Executive Officer of JVSS, and he is married in community of property to the second respondent.

[10] The applicants essentially contend that the respondents are indebted to them in their capacity as liquidators of JVSS. They indicate that the cause of the indebtedness is twofold, namely (i) voidable payments made to entities wherein the respondents have an interest and payments made to the respondent personally after the provisional liquidation of JVSS, and (ii) and payments made to and on behalf of the first respondent and other entities wherein the respondents have an interest after the date of the liquidation of JVSS.

[11] I pause to note that it is evident from the papers filed of record, that the extent of the amount supposedly appropriated by the first respondent is disputed. In light of the fact that a creditor merely needs to establish the existence of a liquidated claim of not less than R100,00 I am of the view that this requirement will be met if, on the papers filed, it is evident that the respondents are indebted to the applicants in an amount exceeding R100,00.

[12] This view was vehemently contested by counsel acting for the respondents who argued that it is unfair for an applicant to state in the founding affidavit that a debtor owns R600 000,00, and to then argue that the requirement has been met if a claim of R100,00 is proven.

[13] However, it is trite that all creditors must still prove their claims against the insolvent estate once a final sequstration order is granted. The respondents were provided with the information of alleged payments made to and in the interest of the respondents. The respondents could answer to every allegation. The statutory requirement of the necessity to prove a liquidated claim of R100,00 is non- negotiable.[2]

[14] Due to the inherent difference between voidable and void dispositions

[2] Although two applicants are cited, they both act in their capacities as liquidators of JVSS, and thus represent one entity.

provided for in the Companies Act, No 61 of 1973, I will only consider the reference to void dispositions in determining whether the applicants succeeded to prove a claim against the respondents.

[15] The liquidated claim need not be due and payable at the date of instituting the proceedings. It is sufficient if the claim has accrued.

[16] Since the Court was approached on motion, I am bound to consider the facts as stated by the respondents together with the admitted facts in the applicant's affidavit in determining whether it can be found that the respondents' joint estate is indebted to the applicants in their capacity as liquidators of JVSS.[3]

[17] I pause to note that I am of the view that the applicants excessively inflated this application with information which, although it might be relevant to an inquiry in terms of section 417 of the Companies Act, were irrelevant for purposes of this application. The respondents likewise inflated the answering affidavit with a host of irrelevant information.

[18] It is common cause that the final liquidation order of JVSS was granted on 22 March 2018.

[19] It is likewise common cause that payments were made to different entities after JVSS was liquidated, amongst others:

a. Funds from JVSS's account were used to remunerate the first applicant's attorneys Wright Rose-Innes for the first respondent's legal costs. The applicants instituted legal proceedings against Wright Rose-Innes for repayment of these payments. It was surmised that as a result of proceedings being instituted against Wright Rose-Innes for these funds, that these payments cannot form part of any 'liquidated claim' that the applicants might have against the respondent. This contention cannot be correct. The funds were diverted to pay the first respondent's personal debts to his attorney, and as a result the first respondent is liable to repay those, regardless of whether the recipient is also obliged to repay or not.

[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E- 635D.

The only principle is that the amount cannot be recovered twice.

b. I am, however, of the view that payments that were made to other entities that are independent legal *personae* wherein the respondent holds direct interests, cannot be considered to constitute 'liquidated claims' of the applicants against the respondents in the absence of proof that the payments were made on behalf of or in the interest of the respondents.

c. The applicants surmise that payments have been made from JVSS's account to the first respondent personally after the date of liquidation. From the exposition of payments made to the first respondent after the final liquidation order of JVSS was granted, it appears that the following amounts were paid to the first respondent personally:

| | | |
|---|---|---|
| i. | 14.04.2018- | R1 250,00 |
| ii. | 28.04.2018- | R400,00 |
| iii. | 02.05.208 – | R80,00 |
| iv. | 03.05.2018 – | R155 000,00 |
| v. | 04.05.2018 – | R30 000,00 |
| vi. | 01.06.2018 - | R2000,00 |
| | | R188 730,00 |

[20] The first respondent does not deny that payments were made to him from the JVSS account after the company was placed in liquidation. He avers, however, that the amounts paid out to him represent money that although it was paid into JVSS's account, was paid into the account for his personal benefit and use. He states that he paid his own pension fund pay-out into JVSS's account and that he received financial assistance from another company, Undivista (Pty) Ltd. He stated in his answering affidavit that funds paid by Undvista (Pty) Ltd were earmarked for his personal use. He explains that JVSS acted as his agent and "was only a *solitionis causa adjectus* to receive such funds".

[21] The respondents' argument is essentially that the funds paid by Undivista (Pty) Ltd, and his pension funds were not the property of JVSS and thus not subject to appropriation by the applicants. However, the payments as reflected on the bank statements does not indicate a payment made by Undivista (Pty) Ltd but contains the reference "Jayeshkumar Patel". In addition, no confirmatory affidavit commissioned on behalf of Undivista (Pty) Ltd substantiates the averment that the money was paid into JVSS's account for the sole personal benefit of the first respondent. In the absence of a confirmatory affidavit it cannot be accepted that the bald statement made by the first respondent to this effect establishes a material and *bona fide* dispute of fact capable of being decided only after *viva voce* evidence has been heard.

[22] The first respondent had a claim for all the funds in JVSS's bank account when JVSS was liquidated. The facts before the Court do not indicate that funds had been placed into a separate trust account for the first respondent use. There is no evidence indicating that, if not for its liquidation, JVSS was in any manner restricted from utilising the funds deposited, or that it was paid into an account earmarked specifically to benefit the first respondent. All funds were commixed with the insolvent company's funds. As a result, JVSS's liquidators had a personal right *vis a vis* its bank to the corresponding credit in its account.[4]

[23] Once the company was liquidated it was for the liquidators to decide whether claims against the company should be accepted or not, and whether such claims were preferent or concurrent. Whatever the case, the insolvent company's directors had no right to meet any claims after liquidation, with the result that the payments were irregular and unauthorised.

[24] As far as the first respondent's payments into the JVSS account is concerned, it is evident that the first respondent advanced several loans to JVSS. These loans position the first respondent as a creditor of JVSS. The

[4] *Muller NO & Another v Community Medical Aid Scheme* (901/2010) [2011] ZASCA 228 (30 November 2011) par 15.

absence of a confirmatory affidavit commissioned on behalf of Wright-Innes Rose confirming that the payments made by JVSS was made in relation to personal legal expenses of the first respondent is glaring and likewise relegates the averment that the money paid into the JVSS account was for the first respondent's personal use, to a bald unsubstantiated statement.

[25] It is trite that the disposition of property after a company has been placed in liquidation is not voidable, but void. In the absence of a Court ordering otherwise, the disposition of property after liquidation is *ipso facto* void. A liquidator who is obliged to collect all the property of the company in liquidation, is obliged to recover void payments. Void payments are recoverable and thus due.

[26] I pause to note that it is significant that the respondents never approached a Court for a declaration that the payments are not void. The respondents answer to this is that they were not aware of the fact that JVSS was liquidated and as a result missed the "window period" within which such an application could be made. However, they did not dispute the fact that the payments were void, and thus recoverable, when the liquidators engaged in correspondence with them to reclaim the void payments. On the contrary, in the correspondence preceding the sequestration application, the first respondent indicated his willingness to settle the dispute amicably once he obtained sufficient funds.

[27] Based on the facts admitted in the answering affidavit the amount of R188 730,00 represents the amount that the liquidator attempted to recover from the first respondent as being void payments. The amount is established and easily determinable. The liquidator's obligation to recover the amount stems from statute, and the nature of their claims is thus not contractual but statutory. I am of the view that this defines the liquidators' claim against the first respondent as a liquidated claim for purposes of section 9 of the Insolvency Act.

(ii) Are the respondents factually insolvent or was an act of insolvency

committed?

[28] The facts before me do not substantiate a finding that the joint estate of the respondents is factually insolvent. I pause to note, however, that an averment to this effect was made in the founding affidavit.

[29] It is evident that the applicants do not have any knowledge of the respondents ' liquidity and was not able to substantiate factual insolvency. However, the respondents did not present the Court with financial statements or information regarding their immovable property or the value of their movable assets to rebut the averment. Their bald denial in this regard leaves a question mark regarding their ability to meet the applicants' demand and lends weight to the contention that an act of insolvency was committed.

[30] It remains to be determined whether an act of insolvency was committed:

a. It is common cause that the liquidators of JVSS delivered a letter of demand, dated 30 October 2018, to the first respondent. In this letter of demand, they explained that they became aware of the fact that the first respondent received payments from JVSS (In Liquidation) after the date of liquidation. In this letter they claim back 4 payments made to the first respondent totalling an amount of R187 400,00.

b. A second letter of demand, dated 23 November 2018, was sent by e-mail.

c. The first respondent answered on 28 November 2018 and stated *" Please note that I am still engaging with third parties to arrange for funds. Those funds could be imminent. As soon* as *those funds are available, I will contact Barn Trust and Tintingers to discuss and amicable settlement".*

d. On 29 November 2018, in response to an e-mail wherein the first applicant indicated that a sequestration application is imminent, the first respondent stated: *"As advised in my email dated 28 November 2018, I am still engaging with third parties to arrange for funds. The*

*amount does not constitute a meagre sum. As soon as those funds are available, I will contact Barn Trust and Tintingers to discuss and amicable settlement. This will be in the interest of creditors".*

[31] The undisputed content of the emails referred to above indicates an acknowledgement that the first respondent owes the amount, that payment is due and most importantly, that he is not able to pay the debt. The emails convey a message of inability to pay rather than an unwillingness to pay. This meets the requirements of section 8(g) of the Insolvency Act.

(iii) Is there reason to believe that the sequestration will be to the advantage of creditors?

[32] The applicants contend that the advantage that might be obtained in an insolvency inquiry and the subsequent investigation constitute a sufficient benefit to substantiate the granting of the final sequestration order.

[33] The respondents contested the averment that the sequestration would be to the advantage of creditors. They averred that since the applicants were not able to indicate the extent of dividends which would be available to creditors, that the Court cannot find that there is reason to believe that the sequestration will be to the advantage of creditors.

[34] In *Amod v Khan* 1947 (2) SA 432 (N) 438, Hathorn JP stated that *"it* is *not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that,* as a *result of an enquiry under the Act, some assets may be revealed or recovered for the benefit of creditors, that is sufficient."* Sequestration can thus afford indirect advantages to creditors,[5] and an applicant need not always show an immediate financial benefit when the interests of creditors are determined.[6]

---

[5] LC Kanamugire " The Requirement of Advantage to Creditors in South African Insolvency Law - a Critical Appraisal"
*MJSS* 2013, 4(13), 19-36, 25.

[6] *Meskin v Friedman* 1948 (2) SA 555 (W) 559; *Dunlop (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W).

[35] It is instructive to take cognisance of a remark by Van Blerk:[7] *" In practical terms, however, if* a *respondent has* assets [that] *are* so *insignificant in value that after the discharge of the costs associated with the sequestration, there would be no dividend to pay to the general body of creditors, then it* is *unlikely, in the extreme, that he or she would be wasting the time, money and effort to oppose the application."*

[36] I also consider that the provisional sequestration was advertised as prescribed and no creditor came forth to object to the sequestration of the respondents.

[37] Once a provisional order has been granted, the onus rests upon the respondents to persuade the court that they are not insolvent and that it is not to the advantage of creditors to issue a final sequestration order. When the provisional sequestration order was granted the Court found that a *prima facie* case has been made out that in the circumstances of this case, there is reason to believe that the sequestration will be to the advantage of creditors. The respondent's bare denial on this important aspect, in the context created by the first respondents irregular dealings with the company's funds to the prejudice of the corporate entity's creditors and an explanation unsubstantiated by supporting facts or affidavits, provide sufficient cause for the strong suspicion that assets and/or voidable transactions may be discovered. This in turn establishes reason to believe that the sequestration will be to the advantage of creditors.

ORDER

As a result, the following order is made:

1. The *rule nisi* issued on 18 September 2019 is confirmed and the joint estate of the respondents, Vikash Mathura and Jagruthi Jantilal Mathura, is hereby finally sequestrated and placed in the hands of the Master;
2. The applicants ' costs of this application shall be costs in the

[7] P van Blerk *Precedents for applications in civil proceedings,* 2018, JUTA, 582.

sequestration.

Elmarie van der Schyff

Judge of the High Court, Pretoria

| | |
|---|---|
| Counsel for the applicants: | Adv SJ van Rensburg SC |
| Instructed by: | Tintingers Incorporated |
| Counsel for the respondent: | Adv JC Viljoen |
| Instructed by: | JJR Botha Attorneys |
| Date of the hearing: | 27 January 2020 |
| Delivered: | 31 January 2020 |