



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 112040/2023

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|-----------|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |
| 8/12/2023 | |
| DATE | NAUDE AJ |

In the matter between:

PLUS 94 RESEARCH (PTY) LTD

Plaintiff

and

TEBOGO MAMPHOKA KGATLA

Respondent

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020, and 11 May 2020. The judgment and order are accordingly published and distributed electronically.

JUDGEMENT

NAUDE AJ:

1. In this urgent sequestration application, the respondent filed her opposing affidavit on Monday the 13th of November 2023 after the roll had closed on Thursday 9 November 2023 at 12:00. A replying affidavit was delivered on the day of the hearing of 14th November 2023. The matter stood down to 15:00 to afford the respondents legal team to consider the reply and take instructions. At 15:00 it was indicated that the respondent was ready to argue the matter.
2. The applicant handed the court the certificate of evidencing that security had be set and proof of service at the Master and Receiver of revenue.
3. The respondent proceeded to argue two points *in limine* being lack of urgency and lack of *locus standi*. The *locus standi* challenge was on the basis of the applicant not being a creditor or having a liquidated claim.
4. I found the continuous risk of dissipation of assets to the detriment of a body of creditors was sufficient for the matter to be dealt with on an urgent basis. The applicants evidence that an investigation into cash flow problems revealed that the applicant was conducting a lifestyle that did not accord with her income. The inability to repay amounts received was confirmed in writing. This was indicative of the dissipation of assets.
5. The applicant during its investigation had brought a court application for the bank statements of the respondent at Standard Bank. A cost order was granted against the respondent in favour of the applicant. It was confirmed during argument that these were the respondent's statements. The respondent was in an administrative position employed by the applicant. Her salary was paid into a different account than this Standard Bank account.

6. The applicant, in its founding papers tendered the bank statements of the respondent and those of a Director of the applicant a Ms. Nompumelelo Udemba. The tender of the bank statements was not utilized by the respondent or her legal advisors.
7. These bank statements were analyzed. An amount of R 1 203 320.00 had been paid into this Standard Bank account from the account of Ms. Udemba during the period covered by the initial investigation. This period ran from March 2022 to June 2023.
8. The dates of these payments into this Standard Bank account followed payments to service providers of the applicant. The one service provider was Mr. Oswell Fana of VL Logistics or Ventured Logistics. It was not disputed that Mr. Fana is the partner of Mrs Udemba's daughter, Ms. Pinky Nlega. The other service provider was a Mr. Reginald Ayanda Mtshali of Reginalds Services and Sizabantu Brothers (Pty) Ltd. The applicant determined that he was the partner of Ms. Udemba. These facts were not dealt with by the respondent and are deemed to be admitted.
9. The analysis of the bank statements of Ms. Udemba (director) and the respondent (administrator of the applicant) was set out in an annexure. Ms. Udemba's bank statements had also been obtained. The analysis showed that Ms. Udemba had received in excess of R 8 million rand from the service providers and Ms. Pinky Nlega. Ms. Udemba in turn paid the respondent. There were further substantial amounts received by the respondent into her Standard Bank account from other sources linked to fraudulent transactions, which are unnecessary to deal with.
10. The analysis of the transactions linked to the bank statements was denied. The previously tendered bank statements were attached to the replying papers.

11. During argument I asked for an example of such an alleged fraudulent flow of money to the respondent with reference to the documents before court.
12. I was referred to an invoice dated the 10th of October 2022 in the amount of R 110 000. The invoice was from Ventured Logistics. The account holder mentioned in the invoice was Mr. O. Fana with a current account at Standard Bank.
13. The invoice was for three purported trips to Johannesburg. The amounts for each trip was R 20 000. (from Mpumalanga), R 45 000 (from Upington) and R 45 000 (from Bloemfontein).
14. There was a signature of Director N. Nlego on the invoice. The applicant contends that the FOE (Field Operation Executive) who also signed the invoice was the respondent. The respondent admits that she signed the invoices as part of her work obligations.
15. The contradicted evidence is that these invoices were then processed and paid by the applicant to the account indicated on the invoice.
16. On the same day (10 October 2022) Ms. Nompumelelo Udemba received payment into her Standard Bank account of R 110 000 with the reference on the bank statement "Oswell". It was submitted that this referred to Mr. Oswald Fana.
17. I was then referred to various substantial payments following this payment into the respondents account with a payment reference of "Mpumi". It was submitted that investigation showed these payments came from Nompumelolo Udemba's account.
18. During the argument it was correctly conceded that the respondent had not dealt with the analysis made with reference to her bank statements. No submissions in

response to the example of the flow of funds presented in court was made on behalf of the respondent.

19. A total of R 1 477 000.00 worth of deposits in to her account, were identified which the respondent did not respond to. This larger amount included payments from other service providers. The submission was made that the bank statements were only received by the legal team attached to the replying affidavit. These were admitted as being the statements of the respondent. The statements were tendered in the founding papers. When this was pointed out the objection was not persisted with.

20. The respondent's counsel tried to argue that the applicant was not a creditor because the transactions between the applicant and service providers or family members were lawful. The argument was developed that such service providers were allowed to do what they wish with their lawfully earned money.

21. The applicant referred the court to the standard rate of remuneration for transport of R 700 – R1 800 per person per trip that Ms. Udemba and the Respondent were supposed to use.

22. The applicant went on to show that the respondent in email correspondence without authority increased these amounts to above R 1800. Further invoices such as the one referred to above inflated such transport expenses to between R 20 000 and R 45 000 per trip per day. In the opposing affidavit there was no meaningful response to these emails and the extremely high invoices.

23. It was further conceded that the opposing papers did not explain the substantial amounts that had been paid in to the respondent's bank account flowing from these

inflated invoices. Transactions based on inflated invoices involving suppliers that are not at arm's length do not qualify to be labelled as lawful transactions.

24. I am satisfied that the applicant has shown that it has a claim for a loss in a liquidated amount more than the statutory amount referred to in Section 9 of the Insolvency Act. The applicant therefore has *locus standi* to bring the application.

25. On behalf of the respondent it was also contended that the fraud need to be proven in separate criminal or civil proceedings where the liquidation of the claim would take place. It was submitted that a separate action should have been instituted before the fraud had been proven.

26. In the matter of *Ganes and Another v Telecom Namibia Ltd.* [2004] all SA 609 (SCA) at P616 the court dealt with similar claims against an employee as follows:

[25] As an employee of the respondent and in the absence of an agreement to the contrary the first appellant owed the respondent a duty of good faith. This duty entailed that he was obliged not to work against the respondent's interests; not to place himself in a position where his interests conflicted with that of the respondent; not to make a secret profit at the expense of the respondent; and not to receive from a third party a bribe, secret profit or commission in the course of or by means of his position as employee of the respondent.³

[26] The employer may claim from an employee any bribe, secret profit or commission received by him from a third party without the consent of the employer in the course of his employment or by means of his position as employee.⁴ The English law is to the same effect. In *Chitty on Contracts* 28th ed vol 1 para 30-172 the English Law is stated thus:

'Where an agent receives from a third party a bribe, secret profit or commission in connection with his principal's affairs his principal is entitled to claim it; the same principle holds in regard to the relationship of employer and employee.'

27. The respondent in her opposing papers emphasized that the investigation was not complete. It is clear that the applicant stated that a limited period of time had been investigated. This has had shown that R 1 477 000 had been deposited into the Respondent's Standard bank account. The Applicants evidence was that this number might increase if access was obtained to accounts held at Capitec.

28. The applicant after obtaining the cost order and showing that at least R 1 477 000 had flowed to the Respondent, wrote a letter dated the 17th of October 2023. In the letter a proposal was made that a reduced amount be repaid to settle the claim.

29. The Respondent instructed her attorneys to respond to this settlement proposal as follows:

"2 Our instructions are that our client is currently unemployed after her unfair dismissal from her employment and does not have the financial means to pay the quantum proposed by your client, nor can she afford to compensate their legal fees"

30. The Respondent contended that as this response was written without prejudice the court was not permitted to accept this as evidence of an act of insolvency. In dealing specifically with Section 8 (g) of the Insolvency Act the Respondent admitted her instruction to write the letter but stated that the subject matter did not relate to a debt but rather a settlement offer.

31. The Applicant referred the court to *ABSA Bank Limited v Hammerle Group (Pty) Ltd* 2015 (5) SA 215 (SCA) where the appellate court in Par 13 stated:

[13] It is true that as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion.

32. The liability for the cost order was not disputed. The full extent of the cost order was still subject to taxation. The Respondent had specifically stated that she could not compensate the legal fees.

33. The denial of the analysis of the money that flowed into the Respondent's bank account was not meaningful where the bank statements relied upon were not requested. The unchallenged flow of funds from the Applicant to the Respondent required an explanation.

34. In the absence of any explanation of these substantial amounts flowing into her account, I can conclude that the Applicant has a liquidated claim for the repayment of these amounts.

35. The written statement that she does not have the financial means to pay a reduced portion of a debt is an act of insolvency.

I make the following order.

- 1) That the estate of the Respondent be placed under provisional sequestration.
- 2) That the Respondent be called upon to advance the reasons, if any, why the Court should not order a final sequestration of the estate of the Respondent, on the return date of 18 March 2024 at 10:00 or/as soon thereafter as the matter may be heard.



NAUDÉ AJ