IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: M 188/2018

In the matter between:

THE LAND AND AGRICULTAL DEVELOPMENT BANK OF SOUTH AFRICA Applicant

And

LENNOX ANTONIE LOUW Respondent

DATE OF HEARING : 14 FEBRUARY 2019

DATE OF JUDGMENT : 21 FEBRUARY 2019

FOR THE APPLICANT : ADV. BADENHORST SC

FOR THE RESPONDENT : ADV. KLOPPER

JUDGMENT

HENDRICKS J

Introduction

[1] The applicant launched this application for the sequestration of the estate of the respondent pursuant to a judgment debt in the amount of R25 313 913.78 obtained on 17th October 2017. This is common cause. The Sheriff in execution of the judgment debt attempted to execute a writ of execution. The realizable assets to satisfy the writ of execution and issued a *nulla bona* return of service. It is contended by the applicant that the respondent is factual insolvent and his estate should be sequestrated. This application is opposed on the basis that the *nulla bona* return is fatally defective; the estate of the respondent is solvent and the lack of proving that it will be to the advantage of the group of creditors if the estate of the respondent is to be sequestrated. I will first deal with the *nulla bona* return.

[2] The applicant relies on the *nulla bona* return in support of the contention that the respondent committed an act of insolvency in terms of the provisions of Section 8 (b) of the Insolvency Act 24 of 1936. The contents of the *nulla bona* return reads thus:

> *"It is hereby certified that on the **23rd day of April 2018** at **09h06** at the **farm Wilina**, Vryburg, North West being the place of residence of the first judgment debtor Lennox Antonie Louw, I duly presented the annexed writ of execution to Mr Lennox Antonie Louw and demanded from him the amount of R25 480 222.56 plus interest, costs in satisfaction of thie (sic)" writ. Mr LA Louw informed me that he has **no money/disposable property or assts** (sic) inter alia where with to satisfy the said writ or any portion thereof. **No movable/disposable property were either pointed out or could be found by me**, after a diligent search and an enquiry at the given address. My return is one of nulla bona."*
>
> *[own emphasis]*

[3] The facts and surrounding circumstances about the service of the writ of execution must be taken into account. The applicant states that Mr. Van Zyl, the deputy sheriff, met with the respondent on the farm Wilina on Friday. 20th April 2018. According to Mr. Van Zyl the writ of execution was served on the respondent and his son on Friday, the 20th April 2018. This is in contrast to the date mentioned in the *nulla bona* return namely 23rd April 2018. Apparently Van Zyl met with the respondent on the 20th April and they arranged to meet each other again in Monday, 23rd April 2018 on which occasion the respondent were to hand a detailed list of assets as discussed. According to the applicant, the respondent did not honour their appointment on Milina farm on the 23rd April. Mr. Van Zyl then decided to leave. He met the respondent along the road and they had a discussion during which the list of assets was handed to him by the respondent. He informed the respondent that he will issue a *nulla bona* return.

[4] Mr. Klopper, on behalf of the respondent, contended that there are discrepancies between the affidavits deposed to on behalf of the applicant regarding the *nulla bona* return and the *nulla bona* return itself. These discrepancies relate to the date, time and place where the execution of the writ occurred. Was it on the 20th or the 23rd that the writ was executed? Was it on the farm Wilina or along the road? Was it on the farm at the specified time of 09H06? These discrepancies, so it was submitted, are vitally important and demonstrate that the *nulla bona* return is fatally defective to such an extent that no reliance can be placed on it. It is incumbent on the applicant to place sufficient evidence before this Court relating to the events which resulted in the issuing of the *nulla bona* return. There are material factual disputes to the extent that the *nulla bona* return cannot be relied upon. Seeing that the *nulla bona* return is the only real documentary evidence on which the applicant rely in support of the act of insolvency on the part of the respondent, it should be free from serious and fatal discrepancies. The applicant's application should stand or fall on the validity or not of the *nulla bona* return, so it was contended.

[5] In **Mars**: **The Law of Insolvency in South Africa 9th edition**, the following is stated on page 86:

> *"An execution officer's return to a warrant which is unsatisfied and in respect of which no attachment has been possible, should state inter alia (a) that he explained the nature and exigency of the warrant; (b) the person to whom he explained it; (c) that he demanded payment; (d) that the defendant failed to satisfy the judgment; (e) that the defendant failed, upon being asked to do so, to indicate sufficient disposable property to satisfy it; (f) that the execution officer has not found sufficient disposable property to satisfy it, despite diligent search and enquiry."*

Mr. Klopper contended that the applicant failed to prove an act of insolvency based on the *nulla bona* return which is fundamentally flawed and/or fatally defective and consequently invalid.

[6] This Court must look at the evidence holistically and should not be over technical about the evidence of the *nulla bona* return. It is not in dispute that Mr. Van Zyl met with the respondent on the 20th April 2018. The purpose for their meeting is also not in dispute namely the execution of the writ. There was an agreement to meet on the 23rd April 2018 at the farm Wilima. It was also agreed that the respondent would compile a list of realizable assets. The fact that Mr. Van Zyl was on the farm Wilina on the 23rd April 2018 stands uncontested. Similarly, the time is not disputed. It is furthermore common cause that Mr. Van Zyl and the respondent met on the 23rd April 2018 along the road leading to Wilina farm after Mr. Van Zyl left the farm because the respondent did not honour their appointment. The respondent presented Mr. Van Zyl with a list of the assets in an attempt to honour the writ of execution. The assets listed fall short of the amount of judgment debt of more than R25 million that needed to be satisfied. Based on

these facts, it was well permitted that a *nulla bona* return be issued by the Sheriff. Form should not triumph over substance.

[7] Section 8 of the Insolvency Act 24 of 1936 deals with the acts if insolvency. Section 8 (b) states that a debtor commits an act of insolvency if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment.

See: **Agricultural & Industrial Mechanisation (Vereeniging) (Pty) Ltd vs Lombard** 1974 (1) SA 291 (O) at page 293

De Villiers v Maursen Properties (Pty) Ltd 1983 (4) SA 670 (T) at page 676.

[8] For an applicant to successfully obtain an insolvency order against his debtor, the applicant must prove the following:

(i) the debtor owes the applicant a determinable amount of money in terms of the Insolvency Act;

(ii) the debtor is either factually insolvent and/or has committed a deed/act of insolvency;

(iii) an insolvency order will be to the benefit of all the creditors.

In the absence of obtaining access to the debtor's financial statement, it can be difficult for an applicant to prove *prima facie* that the debtor is in fact insolvent. Because of this, the Legislature had identified eight deeds of insolvency as alternatives to the requirements for factual insolvency in terms of Section 8 of the Insolvency Act 24 of 1936. A debtor is deemed to be insolvent if he commits any

of these acts of insolvency. After it is proven that the debtor has committed an act of insolvency, this act carries the same probative value as factual insolvency. Acts of insolvency relate directly to the way in which the debtor acts towards his creditor and from which it can be inferred that the debtor is not going to meet his financial obligations towards his creditors.

[9] The *nulla bona* return as a deed of insolvency encompass two actions, namely:

(i) the sheriff serves the writ of execution on the debtor in person and the debtor fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it;

or

(ii) that the sheriff could not serve the writ of execution on the debtor and it appears from the return made by the officer that he has not found sufficient disposable property to satisfy the judgment.

The second action can only take place in the absence of the first action. The onus is on the debtor to prove that he does have sufficient assets which the sheriff can attach. In the absence of any assets to satisfy the judgment, it is clear that an act of insolvency has been committed.

[10] In **Beira v Raphaely-Weiner and Others** 1997 (4) SA 332 (SCA) the following is stated: on page 337 J - 338 D and F-G as well as J – 339 A:

> *"The second ground of appeal relates to the correctness and validity of the nulla bona returns relied upon by Raphaely-Weiner as reflecting an act of insolvency. According to s 8(b) of the Insolvency Act, a debtor commits an act of insolvency if a court has given judgment against him and the debtor is served with the*

writ of execution, and he fails upon demand to satisfy the judgment or fails to indicate to the officer disposable property sufficient for that purpose. (The other ground in s 8(b) is of no concern in this case.)

According to the returns of service (both are in identical terms) the Sheriff attempted a service at 10 Fifth Street, Melville. Then, at 125 Smit Street, the writs of execution were executed personally against the petitioner. Payment was demanded and the petitioner stated that he had no funds to make payment. He was then requested whether he had any disposable assets anywhere to satisfy the judgments and he stated that he did not have any. On the face of it the returns established an act of insolvency and it was then for the petitioner to show by clear and satisfactory evidence that the returns are impeachable (for example Van Vuuren v Jansen 1977 (3) SA 1062 (T) at 1063C).

and

In a supplementary affidavit filed in petition No 1 after the answering affidavits had been lodged, the petitioner denies that the Sheriff had asked him the questions reflected in the returns. Had they been posed, he now says, he would have pointed out disposable property with a value of about R670 000. Since the one warrant related to a judgment in excess of R1 million, the R670 000 would have been insufficient.

and also

I shall assume in the petitioner's favour that non-compliance with Rule 45(3) may affect the validity of an attachment, but that does

not mean that it affects a nulla bona return. In any event, the Rule is subject to the provision in parenthesis, namely that the creditor may give different instructions. Since the issue was not canvassed, it is not known whether or not such instructions were given."

[11] In **Wilken and Others NNO v Reichenberg** 1999 (1) SA 852 (WLD) the following is stated on page 858 – C:

"There is in my respectful view nothing in s 8(b) to justify the statement that the execution officer must enquire from the debtor what property he has and where it is situate. What he has to do is to ask the debtor to indicate sufficient property to satisfy the writ. The latter then has to point out the property or indicate its whereabouts and describe it in order to demonstrate its sufficiency."

[12] Insofar as the time of service is concerned, much has been made of the time 09H06 and that it does not accord with the facts. If Mr. Van Zyl was on the farm at 09H00 to honour the appointment with the respondent and he drove off after the respondent failed to show up, he could not have been on the farm at 09H06 and serve the writ of execution as stated in the *nulla bona* return. Time of service is not a requirement that would render the *nulla bona* return invalid. If there is a difference in time between the *nulla bona* return and the affidavit of the deputy sheriff, it is insignificant. Not much turns on this point.

[13] So too, does it not matter most when the writ as served. Was it on the 20th or the 23rd? Did the process start on the 20th and end on the 23rd? The fact of the matter is that it is common cause that Mr. Van Zyl and the respondent met on the 20th and the 23rd and the purpose for their meeting is not in dispute. Personal service of the writ of execution was effected on the respondent. On the respondent's own

version he compiled a list of his realizable assets and handed it to Mr. Van Zyl. This was done on the 23rd April 2018. It behoves no argument that the value of the assets fell short of the amount in the judgment debt. The *nulla bona* return states that the respondent informed Mr. Van Zyl that he has *"no money / disposable property or assets inter alia wherewith to satisfy the said writ or any portion thereof."*

[14] Objectively viewed, the respondent did not have enough money to satisfy the judgment debt of R25 313 913.78 nor did he pointed out or identified disposable or realizable property sufficient to cover this amount. The items on the list of movable assets that the respondent provided to Mr. Van Zyl was insufficient to cover the amount of the judgment debt. He also failed to point out the locality of any other assets. The mere mentioning of other property at a house in Vryburg is insufficient.

[15] By no means can it be argued with conviction that the *nulla bona* return is perfect. The question is whether the imperfection of the *nulla bona* return is of such a nature that it is defective to the extent that it is impeachable. The onus is on the respondent to prove that it is impeachable. On the version of the respondent, he and Mr. Van Zyl met on the 20th and 23rd April 2018. The purpose was to serve the writ or execution. The assets listed by the respondent is insufficient to satisfy the judgment debt in terms of the warrant of execution. The Sheriff, quite correctly in my view, issued the *nulla bona* return. This is an act of insolvency in terms of section 8 (b) of the Insolvency Act referred to *supra*, which will entitle the applicant to an order of sequestration albeit provisionally, of the respondent's estate. The respondent is factually insolvent.

[16] Another aspect raised by Mr. Klopper on behalf of the respondent is that the signature on the *nulla bona* return is not that of Mr. Van Zyl. There is no evidence to sustain this allegation. This Court cannot *mero moto* take cognizance of such

an allegation. It was not proven. Therefore, not much need to be said about it, suffice to say that I am unconvinced about this argument.

[17] Mr. Klopper also contended that the applicant failed to prove that it will be to the advantage of the body of creditors if the estate of the respondent is sequestrated. There is no financial information and/or valuation of assets to show that it will be to the advantage of the creditors if the respondent's estate is sequestrated. Furthermore, the applicant failed to submit any details of the updated projected costs of sequestration and other relevant financial information for consideration and for this Court to decide as to whether the sequestration of the respondent's estate would yield anything better than a negligible dividend. Especially not 20 cents in the rand. The applicant failed to discharge this onus, so it was contended.

[18] In **Meskin & Co v Friedman** 1948 (2) SA 555 (W) the following is stated on page 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 creditors. 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 enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient (see e.g., Pelunsky & Co v Beiles and Others (1908, T.S. 370); Wilkins v Pieterse (1937 CPD 165 at p. 170); Awerbuch, Brown & Co v Le Grange (supra); Estate Salzmann v van Rooyen (1944 OPD 1); Miller v Janks (1944 TPD 127))."*

[19] In the unreported judgment of **Investec Bank Limited v Le Roux**, **Casper Johannes**, case No 575/2014, in the Gauteng High Court, Local Division, Johannesburg, Van Der Linde J states:

> *"[43] First, the threshold for advantage to creditors is relatively low in arms-length sequestrations. Cameron JA (as he then was) said in Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd, 2006 (4) SA 292 (SCA) at [29], that the court need only be satisfied that there was reason to believe, not even a likelihood but a prospect not too remote, that as a result of investigation and enquiry assets might be uncovered that will benefit creditors.*
>
> *[45] Third, in exercising a discretion I weigh up the unenviable position of the applicant who cannot without a provisional order scale the stone wall put up by the respondent, against the inconvenience caused to the respondent by a provisional sequestration order. If he has assets that can be availed, they will out. In the meantime, he will be able to practice as an attorney, and he will be able to build up a new estate, and so start with a clean slate."*

[20] In **Lotzof v Raubenheimer** 1959 (1) SA 90 (O) the following is stated on page 94 – D:-

> *"From the papers before me it appears that the respondent was a farmer in the Ficksburg District, and that as a result of severe farming losses he and his wife decided to give up farming and to return to Johannesburg to seek employment to enable them to pay off their debts. It is almost inconceivable that the respondent could*

have carried on farming operations, albeit unsuccessfully, without any assets. The prospect that an enquiry may reveal assets which may be recovered for the benefit of creditors, is therefore not too remote. "

[21] The respondent presented a list of assets to Mr. Van Zyl. On his own version, the value of the goods listed amounts to R3 242 000.00. Reference were also made to claims he had against NWK Boerdery (Pty) Ltd in the amount of R24 000 000.00 of which he is entitled to 50%, as well as a claim against Harvey Cattle Rangers (Pty) Ltd. The possibility is a reasonable prospect which is not remote, that some pecuniary benefit will result to creditors. Mr. Badenhorst on behalf of the applicant, submitted that there is a reasonable prospect that more assets will be unearth and recovered which will yield some pecuniary benefit for the body of creditors. I am in full agreement with this submission. I am of the view that the sequestration of the estate of the respondent would be to the advantage of creditors.

[22] Mr. Klopper contended that the Notice of Motion does not indicate that a provisional sequestration order be granted but rather a final sequestration order. This Court has a discretion in this regard. In my view, a provisional sequestration order should be granted. The Notice of Motion states: *"That the Respondent's estate be sequestrated into the hands of the Master of the High Court."* The word **"final"** does not appear in the Notice of Motion.

Order:

[23] Consequently, the following order is made:

(i) The estate of the respondent is provisionally sequestrated and placed in the hands of the Master of the High Court.

(ii) The costs of this application shall be costs in the sequestration.

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R D HENDRICKS
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG