REPUBLIC OF NAMIBIA

CASE NO. A 151/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HAW RETAILERS CC T/A ARK TRADING	**1ST APPLICANT**
COASTAL HIRE CC	**2ND APPLICANT**

and

TUYENIKALAO NIKANOR T/A NATUTUNGENI PAMWE CONSTRUCTION CC	**RESPONDENT**

CORAM: DAMASEB, JP

Heard: 29 September 2009

Delivered: 4 October 2010

JUDGMENT

DAMASEB, JP: [1] This is the extended return date of a provisional order of sequestration granted by this Court on 8 May 2008. On this extended return date I must grant a final order of sequestration if I am satisfied that the respondent is unable to pay her debts or has committed an act of insolvency and it is in the interest of the body of creditors to grant such an order.

[2] On 9 September 2007, the first applicant obtained a default judgment of N$ 174500.44 in the Windhoek Magistrate's Court against "Natutungeni Pamwe Construction CC" (as first defendant) and "T Nikanor" (as second defendant). T. Nikanor as sole member of the Natutungeni Pamwe Construction CC signed a cession and pledge accepting full responsibility for the debts of that CC. The second applicant in this matter similarly obtained default judgment against T. Nikanor t/a Natutungeni Construction in the High Court on 14 March 2008 for the amount of N$180 179.32 . [1] Both applicants hold no security for their judgment debts.

[3] Having obtained the default judgments, the applicants set in motion execution proceedings to satisfy their respective default judgments. It is common cause that they failed to execute against the judgment debtor(s) as the messenger of court's return shows that T Nikanor could not be traced. It is not in dispute that the respondent in January 2008 by fax requested the first applicant for extension of time to pay the debt owed to it. The first applicant proceeded to file an application in the Magistrates' court to attach claims due to the respondent from various Ministries of government. The respondent opposed that application and was represented in the Magistrates' court proceedings by Petrherbrigre Law Chambers. On the applicants' own version, the sequestration proceedings against the respondent were commenced because she opposed the relief sought

[1]Both applicants are therefore creditors of the respondent with a claim of more than N$100 as contemplated by s 9 the Insolvency Act, No. 24 of 1936 ("the Act''). They have the locus standi to bring this application on that basis.

in the Magistrates court despite her admission of liability to the first applicant in the amount of N$170 000.

[4] The two applicants thereafter approached this Court for the provisional sequestration of the judgment debtor, Tuyenikalao Nicanor t/a Nututungeni Pamwe Construction CC ("the respondent"). No notice was given to the respondent of this application personally. It was served on Petherbridge Law Chambers who were the legal practitioners that represented the respondent in the Magistrates' court proceedings brought against her by the first applicant. On 8 August 2008 Hoff J granted the provisional order of sequestration in the following terms:

> "1. That the Respondent be placed under provisional sequestration into the hands of the Master of the above Honourable Court.
> 2. That a Rule Nisi be issued calling upon the Respondent and all interested parties to show cause (if any) on a date and time to be determined by the Registrar of the above Honourable, why:
> (a) The Respondent should not be placed under final order of sequestration and;
> (b) The costs of this application should not be costs in the sequestration.
> 3. That service of the above Rule Nisi be effected upon the Respondent as follows:
> (a) By service of a copy thereof by the Deputy-Sheriff for the district of Windhoek upon the Respondent's residential address; and
> (b) By publishing same in one edition of each of the Government Gazette and The Namibian newspapers.

4. That the matter is hereby postponed to the 19th of September 2008.'' (My underlining for emphasis).

Points in limine

[5] In her answering papers in opposition to the final order being granted, the respondent raises two complainants *in limine*: the first is that she had not been given any notice of the application for her provisional sequestration while the second complaint relates to the manner of service (or rather lack of it) on her of the *rule nisi* which required personal service on her at her residential address. She maintains that the service of the rule nisi was in breach of the Court order as it was served on the respondent's legal practitioner of record who states, as confirmed by the respondent, that she did not have the mandate to accept it and never brought it to the respondent's attention. As the respondent states in her affidavit in support of the points *in limine*:

> "The prayers as per the Notice of Motion as well as the order of Court require that a copy of the application and the Rule Nisi be served upon my residential address. Such service was never effected. I am advised by my legal practitioner, which advise I readily belief to be true, that service of an application for sequestration must be served on the debtor personally, except under certain circumstances, such as exceptional urgency or when it is undesirable to notify the debtor. The Rule was served on my legal practitioner of record on 3 September 2008. Such service was not in accordance with the order of court. I was advised by my legal practitioner of record, which advice I readily believe that a copy of the application had been served on her office, for no apparent reason. This renders service of the application invalid. She did not have a power of attorney or a mandate from me to receive the application on my behalf. No

> reference is furthermore made to service upon her office. Should I have received this application timeously or at all, I would have opposed it."

[6] The respondent's counsel takes up both these complaints in his heads of argument. For now I will deal only with the first complaint. Mr. Geier for the respondent puts it thus:

> "It appears ex facie that the Notice of Motion filed of record that this application was filed with the Registrar and was issued on 12 June 2008. In the referred to Notice of Motion the Applicants gave notice that the application for the sought provisional sequestration order would be made on the 17*'' of j 2008. It appears from the record that the application was not brought on 11 July 2009, but that the matter was postponed on 11 July 2008 to 25 July 2008 on which occasion it was further postponed to 1 August 2008. On the 1st of August the matter was further postponed to the 8th of August 2008. On the 8th of August 2008 the above Honourable Court issued the order of the Respondent's provisional sequestration. The Respondent was not given notice of the postponements or that the application would finally be made on the 8*'' of August 2008. It is respectfully submitted that this modus operandi and the Applicants' the failure to inform the Respondent of the various postponements and the ultimate date on which the application would eventually be brought amounts to a material irregularity."

[7] That the factual basis for both complaints is not in dispute is apparent from the application for condonation filed by the applicants on 23 September 2009 just before the hearing[2] of the matter in the following terms:

[2] On 29 September 2009

> "That the method of service of both the application for sequestration and the rule nisi be condoned. And that the costs of this application be costs in the course." (My underlining)

[8] The first applicant's Arthur Preuss deposed in the founding affidavit on behalf of both applicants. He alleges that the application for the sequestration of the respondent was served on the legal practitioner[3] and had been published in the Government Gazette and *The Namibian* and *Republikein* newspapers. He also states that when the messenger of court and the Deputy Sheriff respectively attempted to serve the warrants of execution at the respondent's residential address in the past[4] that was not possible as the respondent could not be found at her residential address. The messenger of court reported that he always found the premises locked while the Deputy Sheriff reported "The residence at NO.8 Diehl Street, Windhoek is locked and appears vacant".

[9] Preuss deposed that because of this difficulty to serve legal documents on the respondent in the past, the first applicant's legal practitioner of record had requested the Deputy Sheriff that if he failed to effect service of the sequestration application and the rule nisi at the residential address of the respondent, he should inform them so they could seek leave of this Court to have the same served on Petherbridge Law Chambers, the present legal practitioners of record of the respondent. According to Preuss the Deputy Sheriff did not heed this

[3] Who is now on record for the respondent but had no mandate to accept the papers
[4] In Magistrates' court proceedings unrelated to the present sequestration proceedings.

request and instead proceeded to serve the sequestration application on Petherbridge Law Chambers without the leave of Court. The respondent's case is that the said legal practitioners did not bring the application to her attention. In any event the legal practitioner had no power of attorney or mandate to accept the papers. It is common cause that the respondent's Petherbridge Law Chambers had in the past represented the respondent in other legal proceedings in which the first applicant sought to enforce payment of the debts due to it by the respondent.

[10] Preus states that even if the application for sequestration was wrongly served on respondent's legal practitioner without leave of Court, that legal practitioner "*had a duty towards the respondent to bring it under her attention. This was apparently not done, despite the fact that they represented the Respondent."*

[11] The applicants maintain that the Court must condone both the failure to have served the application for the provisional order and the failure to effect personal service at the respondent's residential address as directed by the Court. They maintain that the respondent failed to show any prejudice she suffered as a result of the non-compliance aforesaid as she had in any event filed papers to oppose the grant of the final order. Preuss states that "*it will serve no purpose to again try to serve the papers on the respondent personally*"

The arguments

[12] Mr. Geier's argument is threefold: Firstly, relying on Rule 4(1) (b)[5] of the Rules of Court he argues that the only circumstance in which service on a legal practitioner is permissible as constituting valid service is if it is of an interlocutory process related to a main matter in which the party is already represented by that practitioner of record.[6] That submission is correct. The applicant's assertion that the legal practitioner who had no mandate to accept process on behalf of a party has a duty to bring it to the attention of a person he had represented in the past is not supported by any legal principle that I am aware of - and I reject it. In any event, even if a Court is minded to order that service of a process be effected on the erstwhile practitioner of a litigant, such a course should never be followed without giving the practitioner concerned the opportunity to be heard. The implications of imposing such an obligation on a legal practitioner without his or her agreement are unimaginable.

[13] Secondly, Mr. Geier submits that it is a settled practice of this Court that because of the serious implications it has for the status of a person, a sequestration application must always be brought on notice, unless there are exceptional circumstances such as that the circumstances justify that the

---

[5] "Where the person to be served with any document initiating application proceedings Is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings."

[6] *Herbstein and van Winsen*, "the *Civil Practice of the Supreme Court of South Africa*, 4t ed. At 295.

respondent not have notice of the application. It was held by the constitutional predecessor of this Court in *T& H Shapiro (Pty) Ltd t/a Victory Trading Co v Prins t/a Adele Promotions* 1982 (3) SA 41 (SWA) [7]that with the possible exception where the sequestrating creditor relies on a nulla bona return,[8] there must be proper service on the respondent of the application for provisional sequestration. Mr. Geier argues that no grounds have been advanced for departure from this rule. For that reason he urges me to discharge the *rule nisi* granted on 8 august 2008 on the ground it was highly irregular and should never have been given.

[14] Thirdly Mr. Geier relies on the improper service of the *rule nisi* on the legal practitioner when what the Court had ordered was personal service of the *rule nisi* at the respondent's residential address. Mr Geier argues that all the above three breaches render the provisional order granted a nullity and therefore this Court cannot grant a final order. He relies for this proposition on *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996(3) SA 1 AD at 9G-10B:

> "Since a final order can accordingly not be granted unless a provisional order and a rule have been obtained…the logical implication of the nullity of the proceedings and the orders granted at the first stage is that the final order must suffer the same fate".

---

[7]See also *Mackay v Cahi* 1962 (4) SA 193 (O) at 203 and *Walsh v Kruger* 1965 (2) SA 756 (E) at 760.

[8]The applicants here do not rely on a nulla bona return but on sec.8(e) and 8(g) of the Insolvency Act: i.e making or offering to make any arrangements with any creditor to released wholly or partially from a debt and giving notice in writing to a creditor that she is unable to pay a debt, respectively.

[15] It is argued on behalf of the applicants that the service of the sequestration application on Petherbridge Law Chambers was obvious from the return of service that served before the Court that granted the provisional order and that Hoff J accepted it as good service before granting the provisional order. In so doing, it is argued, Hoff J acted in accordance with sec. 157(1) of the Insolvency Act which states:

> ‘’Nothing done under the Act will be invalid by reason of a formal defect or irregularity, unless substantial injustice has been thereby done, which in the opinion of the Court cannot be remedied by any order of the Court.”

It was also argued on behalf of the applicants that in respect of the improper service of the *rule nisi*, the respondent has not suffered any demonstrable prejudice. The fact that the respondent filed opposing papers, so the argument goes, is proof that Petherbridge law Chambers brought the application to her attention and therefore she suffered no prejudice. It is argued that no “*substantial injustice”* was done to the respondent as she is in any event insolvent; had evaded service for quite some time and that it is in the interest of the body of creditors that the matter is finalised. Mr. Barnard urged me in argument that this Court has the power to condone the breaches aforesaid.

[16] Although Mr. Geier argued that counsel who moved the order had an obligation to inform the Court of the unusual nature of the service[9], I will assume to be correct for present purposes that the reason the Court on 8 May 2008

[9] *Knouwds v Nicholas Josea and Another* 2007 (2) NR 792 (HC) at [20].

granted the order in spite of it being clear that it had not been served personally on the respondent, was actuated by its reliance on sec. 157(1) of the Insolvency Act. That still leaves the question of the improper service of the *rule nisi* which the Court regardless required to be done by service at the residential address of the respondent[10] . In so doing the Court must be taken to have accepted that the respondent would suffer prejudice if she were not so served. It therefore does not avail the applicants to argue that the respondent suffered no prejudice. The Court (on the applicant's version that it was prepared to overlook the service of the application on Petherbridge Law Chambers) must have appreciated that before the order was made final, the respondent must receive proper service analogous to the settled practice of the Court established in the Shapiro matter, *supra*.

[17] The grant of an indulgence for failure to comply with Rules or Court directions is in the discretion of the Court – to be exercised judicially. Lack of prejudice to the opposing party is an important consideration in assessing whether or not to grant condonation – but in this day and age it cannot be the sole criterion. In my view, the proper management of the roll of the Court so as to afford as many litigants as possible the opportunity to have their matters heard by the Court is an important consideration to be placed in the scale in the Court's exercise of the discretion whether or not to grant an indulgence. The time taken up by wasteful litigation which could more productively and equitably have been deployed to entertain other matters must, in my view, be an equally important consideration in determining whether or not to condone the failure to comply with

[10] Fully aware that the applicants had difficulty tracing the respondent.

Rules of Court and orders of the Court. It is a notorious fact that the roll of the High Court is overcrowded. Many matters deserving of placement on the roll do not receive Court time because the roll is overcrowded. Litigants and their legal advisors must therefore realize that it is important to take every measure reasonably possible and expedient to curtail the costs and length of litigation and to bring them to finality in a way that is least burdensome to the Court.

[18] The judges of this Court are more and more being embroiled in wasteful satellite battles relating to condonation for practitioners' failure to comply with the most elementary requirements of the Rules of Court or the very orders that they obtain from the Court – even *ex parte*. This sort of thing is becoming all too common and needs arresting. In the interest of litigants and the public as a whole - not just the particular ones before Court at any given time- the time has come for tighter Court control of litigation and stricter adherence to timetables and Court directions.

[19] In this case a simple option was available to the applicant to approach Court and to obtain substituted service[11] of the *rule nisi* when they realized that the

[11]In terms of Rule 4 (2) a person unable to effect personal service may seek directions from the Court as to service and where a person's whereabouts cannot be ascertained seek substituted service in terms of Rule 5(2) as follows: "*Any person desiring to obtain such leave shall make application to the court setting forth concisely the nature and extent of his or her claim, the grounds upon which it is based and upon which the court is asked to authorize, and if such manner be other than personal service, the application shall further set forth the last-known whereabouts of the person to be served and the inquiries made to ascertain his or her present whereabouts, and upon such application the court may make such order as to the manner of service as to it seems meet …*''

Deputy Sheriff had not complied with the Court order.[12] (They could also already in the founding papers seeking provisional sequestration have sought the Court's permission to effect service on the respondent other than through personal service as, on their own version, they had for a considerable period experienced difficulty to serve "legal documents" on the respondent.) The option they chose was to persist with the matter being placed on the roll and to proceed to argument even in the face of the points *in limine*- and then to seek condonation just a few days before the date of hearing. Why the applicants did not simply withdraw the aborted proceeding and proceed to obtain substituted service is beyond me. The time has come for the judges of this Court to put a stop to this wasteful way of conducting litigation.

Conclusion

[20] I have decided to exercise my discretion against granting condonation as prayed. The provisional order was not served as directed by Hoff J in the very terms sought by the applicants. A simple process was available to the applicants to remedy the improper service of the rule nisi: to seek substituted service of the provisional order. They chose not to do that and rather opted for a costly and burdensome route.

The order

[12]Compare: *Eric Knouwds NO v Nicolas Hosea and Another* Case No. 5/2008 (SC) delivered on 14/92010 at [14].

[21] The respondent's point *in limine* that the rule nisi was improperly served contrary to the express order of the Court is upheld. The application for condonation in respect of the failure to serve the *rule nisi* at the residential address of the respondent is refused. As a result, the provisional order of sequestration against the respondent, granted by this Court on 8 August 2008, is discharged with costs. Such costs to include the costs of one instructing and one instructed counsel.

_____

DAMASEB, JP

ON BEHALF OF THE APPLICANT: Mr. P. Barnard

Instructed By: **Grobler & Co**

ON BEHALF OF THE RESPONDENT: Mr. H. Geier

Instructed By: **Petherbridge Law Chambers**