

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

Case Title: KAUNAPAUA NDILULA N.O. 1 ST APPLICANT EVANGELINA NANGULA HAMUNYELA N.O. 2 ND APPLICANT JACOBUS DE LA RAY DU TOIT N.O. 3 RD APPLICANT ANDREW CAMPBELL N.O. 4 TH APPLICANT v LEONARD HOLO ELAGO RESPONDENT	Case No: HC-MD-CIV-MOT-GEN-2021/00433
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 4 July 2023 Delivered on: 25 July 2023
Neutral citation: <i>Ndilula N.O v Elago</i> (HC-MD-CIV-MOT-GEN-2021/00433) [2023] NAHCMD 433 (25 July 2023)	
Results on merits: Set out hereunder	
The order: 1. The provisional sequestration order against the respondent is confirmed with costs. 2. The matter is regarded as finalised and removed from the roll.	

Reasons for orders:Introduction

[1] The applicants in this matter are Kaunapaua Ndilula N.O., Evangelina Nangula Hamunyela N.O., Jacobus De La Ray Du Toit N.O., and Andrew Campbell N.O (the applicants). The applicants are trustees of the Namibia Procurement Fund Trust (the Trust). The respondents are Leonard Holo Elago and Penexuepifo Tungombili Lipuleni Elago, who were married in community of property but are now divorced.

Background

[2] On 10 November 2017, the applicants issued combined summons against Etemo Properties CC (Etemo), Johannes Mbambi, Haifo Shilongo, Leonard Elago (first respondent), the defendants in case HC-MD-CIV-CON-2017/04334, as a result of a performance guarantee totalling N\$1 200 000 in respect of a sectional title development that Etemo was engaged in. Written surety agreements were issued in favour of Etemo whereby Mbambi, Shilongo and the Elago's bound themselves jointly and severally with Etemo for the due and punctual performance on demand of all obligations of Etemo.

[3] Performance guarantees were issued for N\$1 200 000 on behalf of the defendants.

[4] Etemo breached the material terms of the agreement by failing to pay the total amount due. Judgment was granted against Etemo and Mr Elago on 1 September 2020 in the amount of N\$1 591 027.37 jointly and severally, plus interest and cost.

[5] As the amount remained unpaid, a writ of execution against the movable property of Mr Elago was issued by the office of the Registrar. On 28 May 2021, the Deputy Sheriff of Windhoek served the writ of execution on Mr Elago at his physical address. However, he could not locate any movable disposable assets to satisfy the judgment amount and issued a nulla bona return.

[6] At the time of this application, the total outstanding amount plus interest and cost due to

the Trust amounted to N\$3 466 764.76, which remains unpaid.

The application

[7] The applicants launched the following application on 4 November 2021:

‘TAKE NOTICE that KAUNAPUA NDILULA N.O., EVANGELINA NANGULA HAMUNYELA N.O., JACOBUS DE LA REY DU TOIT N.O., ANDREW CAMPBELL N.O. (hereinafter called the Applicants) intend to make application to this court for an order:

1. That the joint estate of the Respondents be provisionally sequestrated, and the assets be placed in the hands of the Master of the High Court.
2. That a rule nisi be issued calling upon all persons concerned to appear and show cause, if any, on a date to be determined by the above Honourable Court as to why:
 - 2.1 a final order of sequestration should not be granted;
 - 2.2 the costs of this application should not be ordered to be costs in the sequestration of the respondents.
3. Directing that service of the order be affected on the Respondents personally by the Sheriff.
4. Further and or alternative relief.’

[8] It should be noted that although the sequestration application was brought against both Mr and Ms Elago, the applicants did not pursue the application against Ms Elago. Ms Elago was not a party to the proceedings under case number HC-MD-CIV-ACT-CON-2017/04334. When this application was launched, the respondents were married in community of property, and the Trust had to launch the proceedings against the joint estate. During proceedings in July 2022, a decree of divorce was issued, and the parties' joint estate was dissolved as a result.

[9] Although the applicants hold authority for the proposition that debts incurred during a marriage, and which remain unpaid at the dissolution of the marriage, remain recoverable from the former parties to the marriage, they do not pursue the application in respect of the second respondent. The applicants, however, reserved the right to pursue the debt in respect of the second respondent should the need arise.

[10] Therefore, when I refer to the respondent, it should be understood to be Mr Elago only.

[11] In support of their application, the applicants made the following averments:

- a) The respondents committed an act of insolvency in terms of s 8(b) of the Insolvency Act 24 of 1936 (the Act).
- b) That it would be to the advantage of the respondents' creditors should the insolvent estate be sequestrated and that the estate be realised, which would yield a substantial dividend for the creditors. In this regard, a trustee would be able to ensure that the respondents' property is realised for its true value and that the proceeds be distributed to the respondent's creditors.
- c) That an impartial trustee will investigate the affairs of the respondents to ensure that the proceeds from the realisation of any asset will be made available to the respondents' creditors.
- d) The applicants filed a certificate in terms of s 9(3) of the Act issued on 2 February 2022 by the Master of the High Court confirming the sufficiency of the security given by the applicants.

Opposition by Mr Elago

[12] Although Mr Elago objected to the application, his failure to comply with court orders resulted in him having to request condonation from the court, which was refused. Consequently, Mr Elago could not submit answering papers, and the matter proceeded unopposed.¹

Rule nisi return date

[13] The applicants obtained a provisional sequestration order on 16 March 2023, and although the matter was regarded as unopposed, the court allowed Mr Elago nevertheless to partake in the proceedings, and he was invited to show cause why a final order should not be granted.

[14] On the rule nisi return date which was on 11 May 2023, the court raised several issues with the applicants' legal practitioner that, in my view, required further submissions by the parties. Some of these issues were as follows (I only refer to the major issues raised):

- a) the fact that the respondents were not served personally with the order and therefore had no opportunity to show cause why the order should not be made final;
- b) what advantage the creditors would derive from the sequestration;
- c) the nulla bona return is more than six months old and whether it has become stale.

¹ *Ndilula N.O. v Elago* (HC-MD-CIV-MOT-GEN-2021/00433) [2023] NAHCMD 76 (24 February 2023).

Submissions on behalf of the applicants

[15] Ms Kuzeeko, arguing on behalf of the applicants, commenced her argument by pointing out that Mr Elago admitted his act of insolvency on affidavit when he filed his application for condonation dated 23 September 2022.

[16] Ms Kuzeeko submitted that the applicants had complied with the requirements of s 9 of the Act, which provides that the creditor who brings the application must have established a claim against the debtor. In other words, the debtor must indeed owe the creditor money. A second requirement is that there must also be a benefit to creditors. Thirdly, the debtor must have committed an act of insolvency.

[17] In response to the issues raised by the court, Ms Kuzeeko submitted as follows:

a) On the issue of personal service: Section 11 of the Insolvency Act provides that if the Court sequestrates the estate of a debtor provisionally, it shall simultaneously grant a rule nisi calling upon the debtor upon a day mentioned in the rule to appear and to show cause why his estate should not be sequestrated finally. The fundamental purpose of service is to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. However, the respondent opposed the application and was part of the proceedings throughout. As a result, the respondent was well aware of the return date and was also present on the rule nisi return date. Therefore, personal service would not be required.

b) On the nulla bona return: the Deputy Sheriff executed the writ of execution on 28 May 2021 and issued a nulla bona return on 1 June 2021. The current application was launched on 3 November 2021. At the time of the application, the nulla bona was less than six months old and, therefore not stale, even though the application was heard only some 16 months later.

c) On the advantage for the creditors: The term advantage to creditors is not defined in the Insolvency Act. It is trite that there is no onus on the Trust to prove that it is to the advantage or benefit of the creditors and what dividend would be paid to the creditors if the estate of the respondent (debtor) is sequestrated. From the authorities, it is sufficient if the Trust reasonably believes that it will be to the advantage or benefit of the creditors that the estate of the respondent

is sequestrated. Ms Kuzeeko referred the court to *Hillhouse v Stott, Freban Investments (Pty) Ltd v Itzkin; Botha v Botha*,² wherein the court explained ‘reason to believe’ to mean “it is not required

to prove that sequestration will be advantageous to the creditors, only a reasonable belief that it will be so. However, the belief must be rational, and the court must be furnished with sufficient facts to support it.”

d) Currently, the Trust cannot investigate the affairs and or the assets of the respondent, and the appointment of a trustee is necessary. The respondent referred in his papers to construction and immovable property, which has been disposed of and should be investigated. Counsel further submitted that even if this court were to find that there is no pecuniary benefit to the creditors, which may only be established upon an investigation by a trustee, the estate of the respondent should be sequestrated as it would be in the benefit of his creditors. In this regard, Ms Kuzeeko drew the court’s attention to *Meskin & Co v Friedman*.³

Submissions on behalf of the respondent

[18] Mr Elago submitted that if the court granted the order as prayed, it would leave him financially destitute as he would not be able to do business which in turn would result in him being unable to satisfy the debt. Therefore, a sequestration order would not be to the advantage of his creditors.

[19] In addition to the inability to satisfy his debts, the respondent submitted that he would not be able to provide for his family.

[20] Mr Elago further submitted that the immovable property referred to in his application for condonation was sold in June 2023, and as a result, he no longer possesses any immovable property.

[21] The respondent further raised the issue that the application was limited to him and is not in respect of the remainder of the judgment debtors in case HC-MD-CIV-CON-2017/04334.

² *Hillhouse v Stott, Freban Investments (Pty) Ltd v Itzkin; Botha v Botha* 1990 4 SA 580 (W) 585 at 584 B-D.

³ *Meskin & Co v Friedman* 1948 2 SA 555 (W) 559.

Discussion

[22] In *Baard and Another v Serengetti Tourism (Pty) Ltd t/a Etosha Mountain Lodge*⁴ our Apex Court set out the requirements for sequestration as follows:

[52] The requirements of sequestration which must be met for a valid sequestration order, repeated here for convenience, are that the applicant creditor must have a liquidated claim against the debtor of an amount not less than N\$5000; the debtor must have committed an act of insolvency in terms of the Act and is in fact insolvent and the court, using its discretion based on the facts and circumstances of the particular case must be satisfied that sequestration would be to the advantage of the creditors. The court in *Braithwaite v Gilbert (Volkskas Bpk Intervening)* 1984 (4) SA 717 (W) confirmed that the onus rests entirely on the applicant creditor and not on the debtor to show that the above requirements have been met.'

The court's duty on the return day

[23] On the return day, when the court is approached to confirm the provisional sequestration order, the court has a duty to determine if the formalities have been met and would only grant the final order if satisfied that the applicant had established the requirements of s 12(1) of the Act.

Has an act of insolvency been established?

[24] Section 8(b) of the Act, which is relevant to the facts before this court, reads as follows:

'A debtor commits an act of insolvency-

- (a)
- (b) 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; ...'

⁴ *Baard and Another v Serengetti Tourism (Pty) Ltd t/a Etosha Mountain Lodge* 2021 (1) NR 17 (SC) at para [52].

[25] It is common cause that the respondent admitted to an act of insolvency and that he is factually insolvent. The Deputy Sheriff further declared in the nulla bona return that after diligent search he could not locate movable disposable assets to satisfy the writ of execution or a portion thereof and therefore returned a nulla bona.

Service on the respondent

[26] I raised the issue of personal service of the rule nisi on the respondent with Ms Kuzeeko. The rule nisi was served on a third party and not on the respondent personally.

[27] It is a fundamental principle of fairness in litigation that litigants be given proper notice of legal proceedings against them.⁵ This is indeed not a matter where the respondent came to know about the proceedings by some other means. The respondent was been personally served with the initiating process and has been part of the proceedings throughout. The fundamental purpose of service has been complied with, and the respondent not only opposed the application but was in attendance when the court issued the rule nisi. I am therefore satisfied that even though the rule nisi was not served on the respondent personally, the respondent was aware of the return date. As a result of the extension of the rule to enable the parties to address the issues raised, it also gave the respondent the opportunity to show cause why the final order should not be granted.

[28] The respondent attended court on the return date and made submissions in reply to those submissions made on behalf of the applicants.

Nulla bona return

[29] I raised the issue of the nulla bona return with Ms Kuzeeko and whether it was stale. Having considered the nulla bona return, it is clear that the writ of execution was executed on 28 May 2021, and a nulla bona return was filed on 1 June 2021. The current application was launched on 3 November 2021, which was within a period of six months.

⁵ *Standard Bank Namibia Ltd and Others v Maletzky and Others* (15 of 2013) [2015] NASC 12 (24 June 2015) at para 17.

[30] In *Seaways (Pty) Ltd t/a South African Express Line v Rubin*⁶ the court held that:

[8] A nulla bona return, whether recent or not, is sufficient to establish an act of insolvency in terms of s 8(b) of the Act. But where the nulla bona relied on is not a recent one, the failure to indicate that the debtor's circumstances have not improved in the interim may be a significant factor in the exercise of the Court's discretion to grant a sequestration order (see *First Rand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) paras 28-30).'

[31] I am accordingly satisfied that in the circumstances of the present matter, the applicant can rely on the nulla bona return of 28 May 2021.

Advantage to the creditors

[32] In *Hillhouse v Stott; Feban Investments (Pty) Limited v Itzkin; Botha v Botha*,⁷ Leveson J, following the approach set out in *Meskin*, said the following at 585 E-G.

'The degree of proof necessary to satisfy that requirement was considered by n a broad sense it seems proper to say, on the basis of the cases, that 'advantage to creditors' ought to have some bearing on the question as to whether the granting of the application would secure some useful purpose. I express it thus because, as Roper J has shown in the *Meskin* case, there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and inquiry under the relevant provisions of the Act might unearth assets, thereby benefiting creditors. But for cases such as the present where the only question is to what extent creditors can benefit from the moneys known to be available (there being no other assets), I think it proper to adopt the test of Seligson AJ in *Epstein v Epstein* 1987 (4) SA 606 (C) at 609:

"The correct test to be applied is whether the facts placed before the Court show that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some not negligible pecuniary benefit will result to creditors."

[33] Having heard the respondent's submissions, it would appear that an immovable property he owned was sold in June of this year. I am of the view that an investigation and enquiry in

⁶ *Seaways (Pty) Ltd t/a South African Express Line v Rubin* (31419/2010) [2013] ZAGPJHC 118 (24 May 2013).

⁷ *Supra* footnote 2 at 585 E-G.

terms

of the Act will reveal how it came about that the immovable property was sold whilst a provisional sequestration order was already in place.

[34] Sequestration serves the vital function of preventing debtors from unfairly disposing of their assets, which could disadvantage their creditors. As such, it is crucial to prioritize the respondent's interests and preserve any remaining assets in their estate to prevent further harm to their creditors.⁸

[35] Although the respondent has expressed concern that a final order may negatively impact his earning capacity and ability to settle his debt, the court recognizes the potential benefits that creditors could receive if the respondent's estate is sequestrated.

Conclusion

[36] Section 12 of the Act sets out the requirement for a final order of sequestration and provides that:

'12 Final sequestration or dismissal of petition for sequestration

- (1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that-
- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
 - (b) the debtor has committed an act of insolvency or is insolvent; and
 - (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may sequester the estate of the debtor.
- (2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die.'

[37] After considering all the evidence presented to the court, I have concluded that the requirements outlined in s 12(1) of the Act have been met. Therefore, it is fair and reasonable to

⁸ *Baard and Another v Serengetti Tourism (Pty) Ltd t/a Etosha Mountain Lodge* 2021 (1) NR 17 (SC) at para [59].

issue an order of sequestration against the respondent.

[38] Lastly, on the issue of cost, there is no reason why cost should not follow the result, and I order it accordingly.

Order:

[39] In the result, I make the order as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicants	Respondent
M KUZEEKO Of Weder, Hoveka & Kauta Inc., Windhoek	L ELAGO In person, Windhoek