

REPORTABLE

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: (A) 201/2008

In the matter between:

THE MUNICIPAL COUNCIL OF WINDHOEK

APPLICANT

and

ERNST ENGELHARDT AWASEB

RESPONDENT

Neutral citation: *The Municipal Council of Windhoek v Awaseb* (A 201/2008) [2012]
NAHCMD 60 (12 November 2012)

CORAM: NDAUENDAPO J

Heard: 2011

Delivered: 12 November 2012

Flynote: Insolvency law—Application for provisional sequestration of respondent—Acts of insolvency relied upon—Failure to satisfy judgment—Issuance of writ of execution—Return of service defective—No demand made to satisfy writ or indicate disposable property—No indication that deputy sheriff did not find sufficient disposable property—Acts of insolvency not proven—Application dismissed.

Summary: Applicant launched an application for the provisional sequestration of the respondent. The acts of insolvency relied upon are that a default judgment was granted in favour of applicant and respondent failed to satisfy judgment and on the ground that a writ of execution was issued against the respondent.

Respondent argued that the return of service was defective because it did not indicate that demand was made to satisfy the judgment nor did it indicate disposable property. Further the return of service did not indicate that the Deputy Sheriff did not find sufficient disposable assets to satisfy judgment. Acts of insolvency not proven. Application dismissed.

ORDER

The application for the provisional sequestration of the respondent is dismissed with costs.

JUDGMENT

NDAUENDAPO J

[1] The applicant launched an application for the provisional sequestration of the respondents' estate in terms of the Insolvency Act 24 of 1936 (as amended).

[2] The parties

The Applicant is the Municipal Council of Windhoek, a juristic person duly established in terms of the provisions of section 6 (2) of the Local Authorities Act, 1992 (Act 23 of 1992) with its principle place of business situated at independence Avenue, Windhoek Republic of Namibia.

The Respondent is Ernst Engelhardt Awaseb, a major male with full legal capacity residing at number Erf 51 situated at no 81 Hercules Street, Dorado Park, Windhoek Republic of Namibia.

[3] Background

Ms De Kock, the corporate legal Advisor of the applicant, deposed to the founding affidavit. She avers 'that on 12 August 2004 the above honourable Court granted default judgment in favour of the applicant against the respondent for:

- '1. *Payment of the amount of N\$203 9440.88*
2. *Interest at the rate of 20% per annum as from the date after service of summons to date of final payment and*
3. *Costs of suit'*

[4] As at 30 may 2007 the outstanding balance owed to applicant was N\$90 796.75 that amount constitutes a liquidated claim as contemplated by section 9 (1) of the Insolvency Act 24 of 1936 (as amended by Act 12 of 2005) because applicants has no security for its claim. A warrant of execution against the respondent was issued. On the 9 November 2004 the Deputy- Sheriff for the district of Windhoek duly executed the warrant and attached certain movable property.

No sale in execution was held in that it was discovered that the respondent also had a vehicle, which was not attached'. Another writ was executed. On 3 March 2005 the Deputy-sheriff issued a return of service in which he certified that:

'you are hereby informed that the motor vehicle is no longer in possession of the Defendant. The Defendant informed me that he sold the vehicle during October 2004.'

[5] Ms De kock further avers that the disposition came after the applicant obtained judgment against the respondent and after execution proceedings were initiated against the respondent and according to her the respondent is in the process of disposing of his assets to the prejudice of his creditors as contemplated by section 8 (c) of the Insolvency Act 1936.

She avers that a deed search was conducted and it was established that the respondent does not own any immovable property.

Based on the aforesaid, she concludes that the respondent is not only in the process of disposing of his assets to the prejudice of his creditors but his liabilities also exceeds his assets and he is unable to pay his debts, hence the application for his sequestration. The respondent opposed the application and filed an answering affidavit. He was not legally represented when he drafted and filed the answering affidavit and the issues addressed in his answering affidavit are not relevant to the inquiry whether he must be provisionally sequestrated or not and therefore I will not consider his answering affidavit.

[6] The issues

In order for the applicant to be successful with its application for sequestration, it must prove that the respondent committed one or more acts of insolvency. That is what this court has to consider.

[7] Applicant's submissions

Mr Pickering on behalf of the applicant submitted that the respondent committed acts of insolvency. The acts of insolvency relied upon by the applicant is that the respondent

failed to satisfy a judgment granted in favour of the applicant and the fact that a writ of attachment had been issued against the respondent.

In his supplementary heads, Mr Pickering submitted, that the Deputy Sheriff's return of services is not defective to establish an act of insolvency and that an Act of Insolvency has been established by the mere issuance of a writ and or attachment of the respondent's assets, that the mere fact that judgment had been obtained against the respondent is an act of insolvency and that the fact that the respondent sold his vehicle is also an act of insolvency. Applicant relies on sections 8 (b) and (c) of the Insolvency Act.

He further submitted that there is reason to believe that it will be to the advantage of creditors if the estate is sequestrated.

[8] Respondent's submissions

Mr Tjombe on behalf of the respondent, submitted that it was not proven that the respondent committed an act of insolvency. He further submitted that the return of service of the Deputy Sheriff is defective in that it does not comply with section 8 (b) of the Insolvency Act.

[9] The Legal Principles applicable

Section 8 (b) provides that:

'8 Failure to satisfy judgment

(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 judgment.'

The section creates two separate acts of insolvency. One where the debtor, upon demand of the sheriff, fails to satisfy the judgment or to indicate disposable property

sufficient to satisfy it, two, where the sheriff himself fails to find sufficient disposable property to satisfy judgment and states this fact in his return. Although the subsection creates two acts of insolvency, they are not independent of each other, the second act only applies and can only be committed where the first cannot be established.

[10] The return of service of Deputy Sheriff annexed to the founding affidavit states as follows:

*'I, the undersigned, **MARTHINUS GERHARDUS FOURIE**, do hereby certify that I have on the 09th day of November, 2004 at 10:35, at **ERF 51, Hercules Street, Dorado Park, Windhoek**, seized and laid under judicial attachment the goods describe in the undermentioned Inventory in pursuance of a writ of Execution issued out of the High Court of Namibia, bearing date 28 September 2004, directing me to attached the movable goods of the abovenamed Defendant, **ERNST ENGELHARDT AWASEB**, and of the same cause to be realized by public auction the sum of N\$103 940.88 together with interest thereon at the rate of 20% per annum as from June 2004 plus costs plus 15% VAT to be the duly taxed costs and charges in respect of the writ of execution, and also all other costs and charges of the Plaintiff in the said case to be hereafter duly taxed according to law, besides Deputy Sheriff's costs'.*

The Writ of Execution was duly served on the Defendant by exhibiting the original document to him, at the same time handing to him personally a true copy thereof and explaining to him the nature and the contents thereof.

DATE at **WINDHOEK** the 9th day of **NOVEMBER, 2004**.

INVENTORY:

1x Defy refrigerator
 1x Defy Tumble Dryer
 1x Television cabinet
 1x Lounge suite"

[11] In casu, the return of service does not state that there was a demand from the respondent to satisfy the judgment and the respondent failed to do that or to indicate disposable property sufficient to satisfy the judgment or it does also not indicate that the sheriff failed to find disposable property to satisfy the judgment.

In *Nedbank Ltd v Norton* 1987 (3) SA 619 at 621 the Court held that:

'If it is possible for the execution officer to make the demand he should do so and he is not entitled to omit to do so and simply to make a return to the effect that he has not found sufficient disposable property to satisfy the judgment. The debtor is the person best situated to know what property he has and the whereabouts thereof and if the execution officer where to fail to enquire from the debtor, when it is possible to make such enquiry, what property he has and where it can be found, then he could hardly be said to have taken all the appropriate steps to ascertain what property the debtor has'

The learned author *Sharrock et al* Insolvency Law 6 ed 26 state that:

'if the sheriff, due to oversight, neglects to demand satisfaction of the writ by the debtor and simply states in his return he was unable to find sufficient disposable property, no act of insolvency is committed'.

[12] The return of service only refers to movable property which was attached. There is no mention of immovable property. In *Amalgamated Hardware & Timber (Pty) v Wimmers* 1964 (2) SA 542 (T) at 544 it was held that 'if the deputy Sheriff's return only refers to movable property, it does not establish an act of insolvency'. At 544 D-E the Court further held that: 'I should add that there is no reason why, after having made enquiries in regard to movables, with the result indicated in the return, the Deputy sheriff should also not make the further enquiry whether the debtor is possessed of immovable property capable of attachment'.

The writ of execution does also not state that the attached assets are insufficient to satisfy the judgment.

Accordingly, I agree with the submission by Mr Tjombe that the writ of execution is defective and does not comply with the requirements of section 8 (b) of the Insolvency Act. Consequently, no act of insolvency has been established.

In respect of the requirements of section 8 (c), the section states that: *'Disposition prejudicing creditors or preferring one creditor if he makes, or attempts to make, any disposition of any of his property which has, or would have, the effect of prejudicing his creditors or of preferring one creditor above another'*. This section envisages two sets of circumstances: an actual disposition of property. In this case there is actual disposition. The applicant avers that *'the disposition comes after the applicant obtained judgment against the respondent and after execution proceedings were initiated against the respondent. I respectfully submit that it is apparent that the respondent is in the process of disposing of his assets to the prejudice of his creditors'*.

Sharrok et al Insolvency Law 6 ed of 28 state that:

'It is not sufficient for the applicant to state baldly that the disposition in question has had the effect of prejudicing creditors: he must explain how it has had this effect'. In this case that has not been done by the applicant nor does the applicant state that the effect of the disposition is such that a reasonable person would infer that it is prejudicial to creditors.

In the result,

I make the following order

The application for the provisional sequestration of the respondent is dismissed with costs.

GN Ndauendapo
Judge

APPEARANCE

ON BEHALF OF APPLICANTS:

DE KOCK
FOR SHIKONGO LAW CHAMBERS

ON BEHALF OF THE 1ST RESPONDENT:

N TJOMBE
FOR NORMAN TJOMBE LP