IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 16604/2019

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Intervening Applicant
And	
DEON MARUIS BOTHA N.O.	First Applicant
GERT LOURENS STEYN DE WET N.O.	Second Applicant
BOITUMELO MOTUMISENG NGUTSHANE N.O.	Third Applicant
MUSTAFA MOHAMMED N.O.	Fourth Applicant
(In their capacity as joint liquidators of Greenbridge Group (Pty) Ltd (in Provincial Liquidation)	
And	
LOUIS DANIEL VAN ZYL	Respondent

JUDGMENT HANDED DOWN ELECTRONICALLY ON FRIDAY, 11 SEPTEMBER 2020

KUSEVITSKY, J

[1] This matter concerns two applications. The first, an interlocutory application for discovery in terms of Rule 35 of the Uniform Rules of Court and the second, a return day to confirm an interim order of sequestration against the Respondent ("Mr Van Zyl").

[2] This matter has a long history. The file comprises over a thousand documents. I do not intend to set out the history of the matter in great detail. This exercise was done by Dolamo J in his very comprehensive judgment in the opposed application for Mr Van Zyl's provisional sequestration, which order was granted on 2 July 2020. Suffice to say, that prior to the return day of the extended rule *nisi*, Mr Van Zyl filed an application on Friday, 7 August 2020, requesting *inter alia* that the rules of discovery as they relate to actions is declared *mutatis mutandis* applicable to the application in terms of Rule 35(13) and that the Intervening Applicant, ("SARS") be ordered to comply therewith in terms of the rules relating to discovery. Mr van Zyl also requested that the main application be postponed and the provisional order extended pending the return of the requested documents.

[3] Prior to the hearing of this matter, Mr Van Zyl's attorneys of record filed a notice of withdrawal as attorneys of record, two days before the matter was due to

be heard. However, they had already prepared concise heads of argument in respect of both applications. On the day of the hearing, Mr Van Zyl represented himself. I advised him that I would adjudicate both the applications on the papers, together with whatever additional submissions he wished to make.

Rule 35 application

[4] I will first deal with the application under rule 35 (13). The sub-rule reads as follows:

> "(13) The provisions of this rule relating to discovery shall mutatis mutatis apply, in so far as the court may direct, to applications."

[5] It is well established that a Court would ordinarily only direct that the provisions of rule 35 relating to discovery be applicable in applications in *exceptional* circumstances.[1] In the Respondent's heads of argument, reliance was placed on *Saunders Valve Co Ltd v Insamcor (Pty) Ltd*[2] where it was held that the fact that a permanent interdict was being sought on motion, constituted exceptional circumstances justifying an order obliging the applicant to make discovery prior to the filing of relying affidavits by the respondent. It was submitted that the notion of exceptional circumstances does not exist in a vacuum as it is to be gauged within the broader context of values of fairness equity, openness and transparency.

[1] See Fargo Industries (Pty) Ltd v Niemcor Africa (Pty) Ltd and Others (44140/18 [2019] ZAGPPHC 417 (6 September 2019) at para 13

[2] 1985 (1) SA 146 (T)

[6] SARS relying on *Fargo*, which held that strong grounds would have to be advanced to persuade a court to act outside the powers provided for specifically in the rules,[3] contend that the Respondent has not demonstrated any circumstances, let alone exceptional circumstances, which would justify this court issuing a directive in terms of rule 35(13) in the exercise of its discretion.

[7] In *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd*[4] , Plasket AJ (as he then was) outlined the factors which are to be taken into account when a court has to determine whether exceptional circumstances exist for the exercise of its discretion in terms of rule 35. I will deal with each requirement in turn.

Value of the claim and Nature of the defences

[8] It not in dispute that the amount of the claim is substantial. The basis of the SARS claim against Mr Zyl was that he was held personally liable for the debts of Greenbridge Future Trading ("Greenbridge") and Cheetah Trading ("Cheetah") in that he was the director of Greenbridge and the financial manager or person in charge of the overall affairs of Cheetah. According to SARS, both of these companies amassed enormous tax debts which it was not able to satisfy. SARS filed certified statements in terms of section 172 of the Tax Administration Act, 28 of 2011 ("the TAA") against Mr Van Zyl to the value of R 18 436 584.60 in respect of Greenbridge and R 12 167 016.93 in respect of Cheetah. On 6 May 2019, the Gauteng High Court issued a judgment against Mr Van Zyl in the amount of R 126

[3] At 462H-463B

[4] 2003 (6) SA 190 (SE) at para 15 -22

529 098.50. According to the judgment of Dolamo J who granted the interim order, the claims against the Respondent are sound.

[9] Mr Van Zyl filed an application to rescind the Gauteng High Court judgment. SARS argues that in terms of section 100 of the TAA, the assessments on which the section 172 statements were based, are final and not rescindable.[5] SARS also contends that apart from their reliance on the judgment, there are also other acts of insolvency purportedly committed by the Respondent, which they rely on. The Respondent in the heads of argument, simply disputes his indebtedness, and in argument, Mr Van Zyl reiterated that the matter should be postponed pending the adjudication of the rescission application.

The relevance of the documentation sought

[10] In the application, the Respondent seeks the return of 23 remaining boxes of documents of the 181 boxes that were handed over to SARS during the course of their investigations, as well as the so-called 'fictitious invoices' that SARS relied upon to obtain their judgment against the Respondent. The Respondent contends that once he has access to and possession of these boxes, he will be in a better position to substantiate his case and defend these proceedings.

[11] SARS on the other hand contends that the fictitious invoices are not relevant to these proceedings in light of the fact that the audits and assessments raised for

[5] Barnard Labuschagne Inc. v South African Revenue Service and Another, Case No. 23141/2017 dated 15 May 2020. This follows a recent judgment handed down by this court by Mantame,J

the periods in respect of which the fictitious invoices were submitted by the Respondent, are final in terms of section 100 of the TAA. SARS also rely on the fact that the Respondent admitted that SARS was entitled to raise the assessments. They further contend pursuant to SARS acquiring the 181 boxes in 2018, that the return thereof was tendered to Mr Van Zyl in October 2019, but were only collected on 4 February 2020. They argue that this is the first time since being placed in possession of the boxes, that the Respondent alleges that the crucial information are contained in the alleged missing 23 boxes, given that in two separate affidavits[6], two conflicting versions arise regarding these documents. In any event, they say that the documents that are sought are the Respondent's own documents, and that he should in any event be able to retrieve them.

[12] The other considerations to take into account, is the timing of the application, whether it is well directed and whether the documents sought will be dispositive of the whole application.

[13] If one purely has regard to the provisions of the TAA and the law as it stands with regard to the status of judgments issued pursuant to the filing of certified statements in terms of section 172, that should be dispositive of the question as to whether this matter should be postponed until the finalization of the rescission application, as it is clear that those types of judgments are not rescindable. But even if I am wrong in that respect, there are other factors which weigh heavily against the Respondent.

[6] In the sequestration proceedings, it was stated that the Respondent submitted that he was working through the boxes, but in the rescission application (which post-dates the sequestration application) he stated that he accepted the return of the boxes but left them in the storage facility.

[14] There is no dispute that Mr Van Zyl was placed in possession of the boxes in February 2020. This was pursuant to an application to compel which was withdrawn by the Respondent in March 2020 after the return of the boxes. There is no clear explanation as to why, on the eve of the return day, he deemed it imperative that these documents are required. These are his own documents belonging to his companies – he does not explain why it is impossible for him to retrieve it from its source. Mr Van Zyl argued that these documents are not only from his computer but also from external sources, yet the documents that are supposedly available from his computer he has failed to attach to the application. The timing is therefore suspicious. Furthermore, it is apparent that the production of these documents will not be dispositive of the matter, as it is clear that the Applicants, including SARS, rely on more that one act of insolvency committed by him.

[15] Having considered all of the factors and reasons advanced, I can find no justification in departing from the general practice in this application. I am of the view that this interlocutory application is purely a mechanism to delay the matter, and that on the conspectus, no exceptional circumstances exist for me to exercise my discretion in favour of the Respondent.

[16] Accordingly the application must fail.

[17] Now turning to the requisites as to whether there has been compliance in terms section 12 of the Insolvency Act[7]. I do not intend to revisit the evidence which was advanced in the opposed application for the interim sequestration application.

[18] In opposing the final order of sequestration, Mr Van Zyl *inter alia* argued that his admission of unlawful conduct to SARS related to only nine invoices and that SARS has now used that admission against him in totality. He also laid the blame of the indebtedness to SARS at the feet of his partner, Mr Grobler. I was informed that the estate of Mr Grobler has already been sequestrated. However, this complaint and his written admission of unlawful conduct to SARS, as well as his other complaints regarding the disputed authority of the agents of SARS was fully dealt with in Dolamo, J's judgment and there is no need for me to revisit this.

[19] As stated before, it is common cause that the voluntary liquidation of Greenbridge, which was converted into a court liquidation, followed upon a transaction between Greenbridge and one Mr Johan Steele which led to the insolvency enquiry being conducted. It was stated that in terms of the evidence collected at the enquiry, that Greenbridge sold more than 16 000 tons of maize of Mr Steele during 2016. In February 2017 when Greenbridge was called upon to repay the proceeds of R52 million to Mr Steele for the sold tonnage of maize, Greenbridge had no trading capital left to pay the amount of the claim to Mr Steele. SARS maintained that Mr Van Zyl failed to record such a large creditor in its financial records and that this transaction was fraudulently hidden. Mr Van Zyl however explained there were two types of creditors, and that Mr Steele's transaction or

[7] Act 24 of 1936

liability fell into the category of an ‘extended price creditor’, this by virtue of the fact that this transaction, because it was the sale of maize, was zero rated for tax. This argument however does not make sense. It is inconceivable that such a transaction which constituted a large liability would not have been recorded in any company’s ledgers. The fact of the matter is, that Greenbridge could not pay this debt, hence their application for voluntary liquidation and following the enquiry pursuant to this transaction, Mr van Zyl was held to be personally liable for the debts in terms of section 424(1) of the Insolvency Act.

[20] The Applicants further submitted that, notwithstanding the rescission application, they also rely on independent grounds for sequestration, in the form of a *nulla bona* return of service and a cost order, taxed in the amount of R 2 611 428.91, awarded against Mr Van Zyl. This was pursuant to a three week trial in which his legal representatives withdrew, much like in this matter, on the eve of the hearing, and the Respondent failed to appear in court. Mr Van Zyl explained that he was of the view that that matter would be summarily postponed, given the fact that his legal representatives withdrew as attorneys of record. Whatever the explanation, the costs order stands and it is a valid claim against the Respondent.

[21] With regard to the *nulla bona* return, Mr Van Zyl submitted that when the sheriff arrived at his premises, the sheriff had asked him whether he had property to the value of R 126 million in order to satisfy the warrant of execution. He stated ‘*absolutely not’*, which is the reason why he says there is the *nulla bona* return. The Applicants on the other hand argued that the sheriff’s return state that the sheriff could not find *any* property to satisfy the debt, which is the basis of the *nulla bona*

return[8]. I am of the view that had the sheriff found property worthy of attachment – he or she would have done so. I say so because if one has regard to another warrant of execution which was served on Mr Van Zyl on 1 November 2019[9] at his residence in Hartenbos in order to satisfy a judgment debt of R 12 167 016.93, goods to the value of R 95 000.00 were pointed out to the sheriff and subsequently attached. In contrast, the warrant of execution served on Mr Van Zyl on 17 May 2019, indicated that '*despite a diligent search and enquiry I could not find sufficient disposable property*…'. Accordingly, the explanation by the Respondent is rejected and the *nulla bona* return constitutes an act of insolvency in terms of section 8(b) of the Insolvency Act.

[22] The Applicants finally argued that it would be an advantage to creditors for a final order of sequestration to be granted. This is in order for the liquidators to do the necessary investigations; to secure Mr Van Zyl's assets and to prevent a further dissipation of those assets to the prejudice of his creditors.

[23] It was claimed that the Respondent disposed of a property in circumstances where he was barred from doing so. Mr Van Zyl explained that the property which he had bought and subsequently sold for a profit – was done subsequent to an anti-dissipation order which listed three separate properties and that the purchase and sale of the property concerned *ante* dated the court order. His explanation was that he did not know that he was barred from entering into any transaction. I do not accept this explanation. Mr Van Zyl is not a lay person. He is financially qualified and

[8] Annexure "DMB19"

[9] Annexure "MR10"

holds a B-Comm honours Degree as well as an MBA of an international institution. He would have known the consequences of an anti-dissipation order. So too the complaint that he disposed of his share in a company, worth an estimated R6 million, for a value of R100.00 to his then wife.

[24] It is trite that an applicant has only to prove it has a claim of not less than R 100.00. In this instance, the Applicants and SARS have proved that they have valid claims against the Respondent. I am also satisfied that Mr van Zyl has made himself guilty of acts of insolvency over and above that which he claims entitles him to a defence in the form of the rescission of judgment application. On his own admission, in another instance, he signed off on financials statements and declared them as having been audited, despite not being qualified to do so by virtue of section 37(3)(b) of the Auditing Profession Act[10] and having made himself guilty of contravening section 41 of that Act.

[25] It is also trite that on the return day of a provisional sequestration, a court needs to satisfy itself that it will be to the advantage of creditors to issue a final order of sequestration. On the cumulative evidence before me, I am satisfied that the requirements have been met in order for a final order or sequestration to be granted.

[26] In the circumstances, I make the following order:

1. The application in terms of R 35(13) of the Uniform Rules of Court is dismissed with costs.

[10] No.26 of 2005

2. The rule *nis*i issued on 2 July 2020 and extended to 8 September 2020 and 11 September 2020 respectively, is hereby confirmed.

3. The Respondent's estate is placed under final sequestration.

4. The cost of the sequestration application, together with the costs of the Intervening Applicant, which includes the costs attendant upon the employment of two counsel, is to be paid by the Insolvent estate.

_____

D S KUSEVITSKY

JUDGE OF THE HIGH COURT

Counsel for Applicant: Advocate MA BADENHORST SC

Correspondence: Rochelle De Beer

Counsel for the Intervening Applicant: Advocate RT WILLIAMS SC

Advocate K KOLLAPEN

VDT ATTORNEYS

Defendant: SELF REPRESENTED (LOUIS DANIEL VAN ZYL)