N.M.B. BANK LIMITED
Versus
CHARLES SELEMANI

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 27th October and 10 November, 2004

Mr *Makono*, for the applicant
Mr *Uriri*, for the respondent

UCHENA J: The applicant issued summons against the respondent claiming payment of $50 000 000.00, plus interest and collection commission. The respondent entered appearance to defend but did not file his plea timeously. The applicant who was then the plaintiff issued and served on the respondent then the defendant a Notice to plead and intention to bar. The respondent again failed to plead within the stipulated time. He was barred. The applicant then applied for default judgment which was granted by this court on the 17th of August 2004.

The respondent failed to pay. On the 27th of May 2004 the applicant was granted a Writ of Execution against respondent's movable property.

On the 16th June 2004 the Deputy Sheriff Harare served the Writ of Execution on the respondent at his offices. The Deputy Sheriff recorded the following under remarks:-

> "Served personally on defendant who advised that he has no assets. The computer is for HDB Management, office desks are for Chitepo Law Chambers (*nulla bona*)."

When the *nulla bona* return was returned to the applicant's attorneys they applied for a provisional order placing the respondent under provisional sequestration pending the granting of the final order or the discharge of the provisional order.

The return day for the provisional sequestration was the 22nd of September 2004. Despite the advertisement of the provisional sequestration

and invitation for objections the respondent took no steps to oppose the sequestration of his estate. On the 22nd of September 2004 the rule *nisi* was extended and the case was postponed to the 27th of October 2004.

On the 27th October 2004 the respondent and his counsel appeared before me. The applicant applied for a further extension of the rule nisi to the 3rd of November 2004 to give the applicant time to calculate their costs. The applicant disclosed that the capital debt had been paid. The respondent had on the 26th October 2004 deposited $54 000 000.00 with the applicant's legal practitioners. The capital debt is for $50 000 000.00. The extra $4 000 000.00 is to cover applicant's costs. The applicant needs time to calculate their costs and determine whether the $4 000 000.00 deposited with the applicant's legal practitioners is sufficient to cover their costs.

Mr *Uriri* for the respondent submitted that the provisional order for respondent's provisional sequestration was improperly applied for and was improperly granted because the warrant of execution was for movables only. He submitted that section 11(b) of the Insolvency Act [*Chapter 6:04*] was not complied with as no inquiry was made on respondents immovable property. He relied on Hockly's Insolvency Law Sixth Edition's comments on "disposable property" on page 27 where the learned authors say:-

> "The term "disposable property" means any property which may be attached and sold in execution, even if it is situated in some other locality (*Laver v Otiner* 1953 (2)SA 437 ((T). It included both movable and immovable property and also incorporal assets, such as book debts (*Mostert NO v Van Hirschberg* 1961(1) SA 146(0). It does not include immovable property which has been mortgaged, even, it seems, where the value of the property considerably exceeds the amount owing under the mortgage bond (*Jewari v Secura Investments* 1960 (3) SA 432(N)) But if the applicant himself is the mortgagee of the immovable property, it is regarded as disposable (*Western Bank LTd v ELS* 1976 SA (2) SA 797(T))
>
> If the sheriff's return of service merely refers to movable property, it does not establish an act of insolvency (*Amalgamated Hardware & Timber (PTY) Ltd v Wimme*rs 1964(2) SA 542(T) 544). To avail as an act of insolvency the return should refer to all disposable property of whatever discreption (*Saber Proters (Pty) Ltd v Marophane* 1961(1) SA 759/W)."

I respectfully agree with the authors and the authorities they refer to but in this case one has to consider the Deputy Sheriffs remarks leading to the (*nulla bona*) return and the provisions of Section II (b) the Insolvency Act [Chapter 6:04] hereinafter referred to as the Act.

Section 11(b) provides as follows:-

"A debtor shall be deemed to have committed an act of insolvency if –

(a) …….

(b) 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." (emphasis added)

In terms of section 11(b) a debtor is deemed to have committed an act of insolvency if:-

(1) A court has given judgment against him and

(2) He upon the demand of the deputy sheriff fails to satisfy that debt or

(3) To indicate to the deputy sheriff executing that judgment sufficient disposable property to satisfy it or

(4) If the deputy sheriff's return indicates he could not find sufficient disposable property to satisfy the debt.

The deputy sheriff's return in this case clearly indicates the warrant of execution was personally served on the respondent who advised he had no assets.

In terms of section 11(b) the debtor has a duty to satisfy the debt upon the deputy sheriff's demand. The respondent in this case failed to satisfy the debt. The debtor also has a duty to indicate to the officer disposable property sufficient to satisfy the debt. In this case the respondent did not indicate any property to the deputy sheriff.

Disposable property means any property of the debtor which can be disposed of for the purpose of satisfying the judgment debt. This includes any movable, immovable and incorporal assets the debtor may own.

According to the deputy sheriffs return referred to above the respondent advised the deputy sheriff that he had no assets. It is my view that by advising the deputy sheriff that he had no assets which could be used to satisfy the debt the respondent placed himself within the provisions of section 11(b) even though the writ of execution was for movables. I take that view because section 11(b) places the duty to satisfy the judgment debt on the debtor on the deputy sheriff's demand. When the demand was made he said he had no assets and abstained from indicating any other assets which could be used to satisfy the debt.

If the deputy sheriff had made the demand on someone other than the debtor then the *nulla bona* return could have been confined to the deputy sheriff's failure to find any movable assets. In such a case the respondent's failure to satisfy the debt can only be proved by exhausting the execution procedures. It cannot be argued that the respondent did not fail to satisfy the debt on the deputy sheriff's demand. He failed to satisfy the debt when he told the deputy sheriff that he had no assets. The respondent who is a legal practitioner should have known that by telling the deputy sheriff that he had no disposable assets he was declaring himself insolvent. The fact that the respondent had no assets which could be disposed to satisfy the debt is supported by the events which followed the granting of the provisional sequestration on the 25th August 2004. In spite of the effect of the provisional sequestration on his profession, respondent took no action until the 26th October 2004. He did not defend himself until he paid on the 26th October. This means if the rule nisi had not been extend on the 22nd September at applicant's request it could have been confirmed without opposition. This to me means the respondent had no assets and could not defend the action until he was able to pay.

All the applicant for a provisional order of sequestration needs to prove in terms of section 11(b) of the Act is that:-

(a) There is a judgment against the debtor;

(b) That the debtor has failed to satisfy the judgment on demand by an officer whose duty it is to execute the judgment or

(c) That he failed to indicate to the officer sufficient disposable property to satisfy the debt or.

(d) In the case where the writ of execution is not saved on the debtor that the deputy sheriff has failed to find sufficient disposable property to satisfy the debt.

As indicated earlier the respondent failed to satisfy (b) and (c) above. The provisional order granting the provisional sequestration of the respondent was therefore properly granted. The respondent was given an opportunity to satisfy the debt or indicate property to satisfy it but he failed to do so.

In Hockly's Insolvency Law Sixth Edition at page 27 the author's say:-

> "The demand to satisfy the judgment debt must be made of the debtor or his duly authorized, agent, a demand made to some other party e.g. the debtor's wife does not suffice (*Rodrow (Pty) Ltd v Rosson* 1975 (3) SA 137 (0)). To indicate property, the debtor should tell the sheriff what the property is and where it is with enough particularly to enable him to attach and sell it (*Nathan & Co v Sheanandam* 1963(1) SA 179(N). For example a debtor does not indicate immovable property sufficiently if he merely states that he has properly in a particular area or street (*R v Tewari* 1960(2) SA 465(D)." (emphasis added)

In the present case the warrant of execution was served personally on the respondent the debtor who simply said he had no assets. He does not deny saying that to the deputy sheriff. He simply explained that the property that was in his office did not belong to him. He did not indicate he had other means to satisfy the debt nor did he indicate any disposable property.

Section 11(b) of the Act provides that a debtor who fails to satisfy the debt or indicate disposable property sufficient to satisfy the debt is deemed

to have committed an act of insolvency. It does not state that this only follows after a *nulla bona* return on movables is followed by a *nulla bona* return on immovables. This however would follow from the provision relating to the deputy sheriff's failing to find sufficient disposable property to satisfy the debt. The deputy sheriff can only get to that conclusion after failing to find both movables and immovables. If, however the debtor tells the deputy sheriff that he has no assets and explains the ownership of the assets in his possession the deputy sheriff can as happened in this case file a null bona return and the creditor can properly act on it as happened in the case.

I now must determine whether in spite of the respondent paying $54 000 000.00 to the applicant's legal practitioners there is need to postpone the case to the 3rd of November 2004 before the provisional order for sequestration is confirmed as submitted by the applicant's counsel or to have the order discharged as submitted by the respondents counsel.

This court has a discretion on whether or not to confirm a sequestration order even if the requirements for the confirmation of a sequestration order have been satisfied. In the case of *Croc Ostrich Breeders of Zimbabwe (Pvt) Ltd v Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR410 (H). GILLESPIE J at p 414 E-F SAID:-

> "Mr Girach for Best of Zimbabwe urged upon me the discretion inherent in the court to refuse to order liquidation notwithstanding the existence of the grounds for liquidation. Such a discretion is deliberately provided for by the use of the permissive "may" in the enactment providing for the grounds of winding up by the court[3]. Even without this the court would, in the proper case have the discretion flowing from its inherent jurisdiction to prevent the abuse of its process[4]. These two sources together provide a judicial discretion based on all the relevant circumstances of any case, to withhold an order of winding up even if grounds have technically been established."

> The learned judge pointed out that the discretion is a narrow one as a judgment creditor is entitled to the winding up save in exceptional circumstances and that the discretion is a "judicial value judgment to be made on the relevant factors."

At page 415 the learned Judge said:-

> "The factors which influenced me in this case, assuming the inability to pay its debts had been proven against Best of Zimbabwe, are the following. The inability was temporary. There is no reason to suppose that the safari hotel operation is not a profitable business nor that any liquidity problem is a symptom of serious financial embarrassment within either the holding or the operating company."

Though this case does not depend on the discretion based on section 206 of the Companies Act [*Chapter 24:03*] as it does not involve a company but the sequestration of an individual's estate under the Insolvency Act, a similar discretion is granted by section 15(1) of the Insolvency Act which provides that:

> "On the return day if the High Court is satisfied that:-
>
> (a) .....
> (b) .....
> (c) .....
>
> The High Court <u>may</u> grant an order placing the estate of the debtor under sequestration." (emphasis added)

In the present case the debtor has since paid the capital debt for which the sequestration order was applied for. He has also deposited $4 000 000.00 with the applicant's legal practitioners to cover the applicant's costs. The applicant needs time to calculate its costs then it would not insist on the final order, as indicated in its replying affidavit to the respondent's belated opposing affidavit. It suggested an alternative to the confirmation of the provisional order.

In my view the applicant could not have expeditiously calculated its costs as the respondent paid the applicant's legal practitioners on the 26th October 2004 and took the applicant by surprise by opposing the application on the 27th October. I used my discretion and heard the respondent though he had been barred. The indulgence was granted because of the effect of the confirmation of the provisional sequestration on respondent's profession. In view of the indulgence granted to the respondent I have to consider the applicant's replying affidavit to do justice between the parties. The

applicant's costs are for HC 2031/04 and HC 9336/04. In view of the belated payment and opposition to what was an unopposed application until the morning of the 27th October the applicant's request for a postponement for a week is reasonable. The respondent's liability to the applicant has not been cleared. However his depositing $4 000 000.00 towards costs is an indication of his belated ability to pay. He must be given a chance to avoid the confirmation of the provisional sequestration. As indicated earlier in view of the respondent's payment of the capital debt and depositing against costs, I am inclined to use my discretion in his favour but in a manner which does not prejudice the applicant. There is no allegation of the existence of any other creditor who still needs to be protected by the sequestration order. The circumstances of this case justify the postponement of this case to give the applicant time to calculate its costs and to give the respondent an opportunity to clear his indebtedness to the applicant in which case the provisional order can be discharged.

The respondent's counsel had urged this court to grant it costs *de bonis propriis* on the basis that the applicant's legal practitioners improperly applied for the provisional sequestration order. In view of my findings based on my interpretation of section 11(b) of the Insolvency Act and the respondent's failure to pay until the 26th October 2004 there is no justification for such an order of costs as the respondent by failing to pay and declaring that he had no assets placed himself within the provisions of section 11(b) of the Act.

In the result the provisional order placing the respondent under provisional sequestration is extended to the 17th of November 2004 to enable the respondent to pay the applicant's costs under HC 2031/04 and HC 9336/04.

The case is postponed to the 17th of November 2004.

The respondent shall pay the applicants costs.

Honey & Blanckenberg, the respondent's legal practitioners
Gill, Godlonton & Gerrans, the applicant's legal practitioners