

BLUEMARK DISTRIBUTORS (PVT) LTD
t/a BLUEMARK TYRES
and
FORTUNATE MANYIMO
versus
HAMID SIRDAR

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 30 January 2017 & 15 November 2017

Opposed Matter

T I Gumbo, for the 1st applicant
T R Tanyanyiwa, for the defendant

FOROMA J: This is an opposed application in terms of which first applicant made an application for the sequestration of respondent's estate and for the appointment of a Provisional Trustee in terms of s 12 of the Insolvency Act [*Chapter 6:04*].

In support of the application the applicant in its founding affidavit avers that it obtained a default judgment against respondent in the sum of \$81 310.45 together with interest at the prescribed rate and costs in this honourable court under Case No. HC 9141/13.

On the 25 February 2016 applicant had a writ of execution issued against the respondent. The writ was taken against respondent's movable assets only. The return of service which the Deputy Sheriff returned after serving the writ was a *nulla bona*. The return did not indicate as to the person on whom the writ was served save to say *nulla bona*. As a result of the *nulla bona* return applicant decided to sue respondent for an order for the sequestration of his estate pleading that the respondent had committed an act of insolvency by failure to satisfy a writ of execution.

Respondent opposed the application for the sequestration of his estate arguing that the writ of execution was not served on him and he thus could not be considered as having failed to point to enough assets to satisfy the value of the writ.

Besides respondent also disputed that he had committed an act of insolvency on account of the *nulla bona* return since there was no attempt to execute against respondent's immovable assets as the writ of execution was taken against the respondent's movable property only. Respondent's main bone of contention was that the application was pre-mature and ill conceived. Respondent's further contention was that the judgment debt was subject of an application for rescission.

A perusal of the writ of execution and the Deputy Sheriff's return there on reveals that applicant has not established an act of insolvency in contravention of s 11 (b) of the Insolvency Act [Chapter 6:04] against respondent.

According to *Hockly's Insolvency Law* 6 ed at p 27 disposable property is described as follows: The term disposable property means any property which may be attached and sold in execution, even if it is situated in some other locality (*Lower v Otiher* 1953 (2) SA 437 T. It includes both movable and immovable property and also incorporeal assets such as book debts (*Mostert N.O v van Hirscherg* 1661 (1) SA 146. It does not include immovable property which has been mortgaged---

The author further goes on to remark that if the Sheriff's *nulla bona* return of service merely refers to movable property it does not establish an act of insolvency - See *Amalgamated Hardware & Timber (Pty) Ltd v Wimmers* 1964 (2) SA 542 t 544. To avail as an act of insolvency the return should refer to all disposable property of whatever description.

Applicant argues that the debtor has a duty to indicate to the officer disposable property sufficient to satisfy the debt. He further argues that respondent did not indicate any property to the Deputy Sheriff. This argument begs the legal position namely that to avail as an act of insolvency the return should refer to all disposable property of whatever description. In the matter of *NMB v Selemani* 2004 (1) ZLR 279 UCHENA J at p 283 A had the following to say:

“If the deputy sheriff had made the demand on someone other than the debtor 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.”

In *casu* the return of service which reflects a *nulla bona* return does not indicate as to who the deputy sheriff's demand was addressed. The applicant does not seem to dispute that the demand for disposable property was not addressed to the debtor (respondent).

It follows that as ruled by UCHENA J respondent's failure to satisfy the debt can only be proved by exhausting the execution procedures which applicant has not done in this matter.

Applicant seeks to argue that s 11 (b) of the Insolvency Act deems a debtor to have committed an act of insolvency if

- 1) A court has given judgment against him and
- 2) He upon demand of the Deputy Sheriff fails to satisfy that debt or
- 3) To indicate to the Deputy Sheriff executing that judgment sufficient property to satisfy it or
- 4) If the Deputy Sheriff's return indicates he could not find sufficient disposable property to satisfy the debt. Contrary to applicant's contention conditions (10 is the only one that applicant has proved.

On the strength of case authority referred to herein above the other 3 conditions have not been met *in casu*.

Clearly therefore the applicant has not established an act of insolvency justifying the grant of a provisional order for the sequestration of respondent's estate.

In the circumstance the applicant's application fails. It is therefore ordered that

1. The applicant's application be and is hereby dismissed.
2. Applicant is to pay the cost of suit.

Atherstone & Cook, 1st applicant's legal practitioners
Manase & Manase, respondent's legal practitioners