Business Rescue, Restructuring & Insolvency

CDH INCORPORATED

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In this issue

SOUTH AFRICA

Ignore sequestration proceedings at your peril

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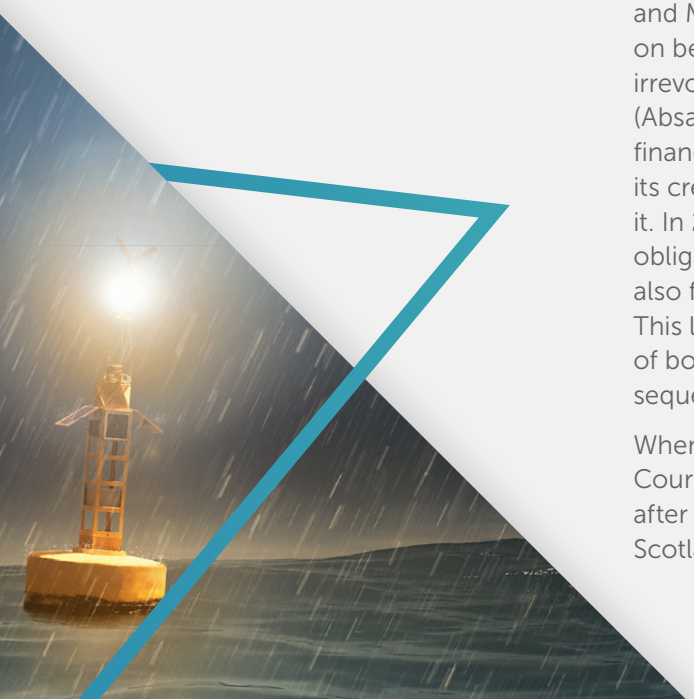

Parties who agree to be personally liable for a debt, for example by way of signing a suretyship or a guarantee, should take heed of the potentially dire consequences for them if they choose to ignore subsequent sequestration proceedings against them. In the recent case of *Eamon Courtney v Izak Johannes Boshoff NO and Others* (483/2023) [2024] ZASCA 104, the Supreme Court of Appeal (SCA) dealt with the consequences facing a party should it not defend sequestration proceedings, despite such proceedings being procedurally flawed.

Background

Eamon Courtney (Courtney) was the director of two companies, Salt House Investments (Pty) Ltd (SHI) and Allied Mobile Communications (Pty) Ltd (AMC). In November 2014 and May 2018 Courtney and his wife concluded guarantees on behalf of both companies in terms of which they were irrevocably and unconditionally bound to pay Absa Bank (Absa) upon default by the companies. AMC became financially distressed and was wound up in 2020 after its creditors instituted liquidation proceedings against it. In 2019, the companies failed to meet their payment obligations to Absa, and the Courtneys, as guarantors, also failed to make payment in terms of the guarantees. This led Absa to file for the sequestration of the estates of both Courtney and his wife, and it was Courtney's sequestration which formed the subject of the appeal.

When Absa instituted sequestration proceedings against Courtney and his wife, the pair left South Africa shortly after being served with the application and settled in Scotland. Both Courtney and his attorneys failed to appear before the court on the date of the hearing of the application and a final sequestration order was granted by the Johannesburg High Court on an unopposed basis on 4 May 2020 without a prior provisional order having been granted (which was irregular).

In the court *a quo*

In March 2022, the trustees who had been appointed by the Master of the High Court to administer the estate of Courtney approached the Court of Sessions in Scotland to enforce the sequestration order in respect of his assets in Scotland. It was only then that Courtney sought to challenge the final sequestration order on the basis that a rule nisi under section 11(1) of the Insolvency Act 24 of 1936 had not first been issued calling on him or interested parties to show cause as to why his estate should not be placed under final sequestration. He, therefore, launched an urgent application in the High Court, claiming that the final order, the appointment of the trustees by the Master and the actions taken by the trustees in administering his estate were all *"a nullity and void ab initio"* and asked for recission either in terms of Rule 42(1) of the Uniform Rules of Court, or alternatively, in terms of the common law. Absa opposed the application and sought the variation of the final order with the effect that it be made a provisional order instead. The High Court dismissed his application and varied the order of final sequestration to be a provisional one, effective from 4 May 2022. The High Court held that Moultrie AJ, who granted the final order, had made an error by not granting the provisional order first, but that in any event, it was not void *ab initio* and remained in effect until set aside. Despite that, Courtney was not entitled to have the order set aside and it was, instead, varied. Subsequently, Courtney took this order on appeal to the SCA.

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In the SCA

The SCA refused the appellant's relief, but on a different basis to the High Court. The appellant argued that the final order was void *ab initio* on the basis that a final order which is not preceded by a provisional one is *"not competent under the enabling legislation"*. In doing so, he relied on case law where the court had made orders that it lacked the authority to make. The SCA distinguished these judgments in that the High Court was the only body authorised to make the orders which it did and that the appellant's complaint was about the timing of the order, not the power to grant it.

To that end, the SCA held that the appellant was required to apply for recission of the final sequestration order under Rule 42(1)(a) of the Uniform Rules of Court, alternatively the common law. Rule 42(1)(a) provides that a court may rescind or vary any order or judgment erroneously sought or erroneously granted in the absence of any affected party. At common law, the requirements for recission are that the affected party is not in wilful default and that there is good cause for the granting of the recission.

It was held that recission was not available to Courtney because he elected not to participate in the proceedings where the final sequestration order was granted. Citing *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) , the SCA stated that Courtney was not entitled to use his absence as a ground for recission in terms of Rule 42(1)(a) as he choose not to appear before the court when the application for his sequestration was brought. Furthermore, the SCA cited *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; [2007] SCA 85 (RSA); 2007 (6) SA 87 (SCA) where it was held that a judgment granted in the absence of a party cannot be considered erroneously granted merely because there existed a defence in law which the litigant did not disclose to the court. Accordingly, because he chose not to participate in the proceedings, notwithstanding any defence he may have had, the SCA held that he was not entitled to recission under Rule 42(1)(a).

Considering the common law, the SCA stated that Courtney failed to raise any defences to his sequestration and did not satisfy either of the requirements for common law recission.

Therefore, on the basis of his non-participation in the sequestration proceedings and his avoidance of the order for two years after its issuance, the SCA held that his appeal was an attempt to disrupt the administration of his insolvent estate and fell to be dismissed.

Conclusion

In the case of insolvency proceedings, an election not to participate can be fatal to a litigant whose estate is the subject of proceedings as even a procedural error by the court issuing a sequestration order may be excused where a party had the opportunity to oppose their sequestration and elected not to.

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