
NULLA BONA AS AN ACT OF INSOLVENCY

In addition to our first article in which we referred to the verdict that was given in *Tayfin Financial Accountant (Pty) Ltd v Aniza Noormahomed N.O.* we had a look at the application of a sheriff's *Nulla Bona* return as an act of insolvency¹.

For an applicant to successfully obtain an insolvency order against his debtor, the applicant must prove the following:

1. The debtor owes the applicant a determinable amount of money in terms of the *Insolvency Act*;
2. The debtor:
 - 2.1. Is either factually insolvent;
 - 2.2. Either committed a **deed of insolvency**. AND
3. An insolvency order will be for the benefit of all the creditors.

Deeds of insolvency

In the absence of obtaining access to the debtor's financial statements, it can be difficult for an applicant to prove *prima facie* that the debtor is in fact insolvent. Because of this, the Legislature has identified eight deeds of insolvency as alternatives to the requirements for factual insolvency². A debtor is deemed to be insolvent if he commits any of these acts of insolvency. After it is proven that the debtor has committed an act of insolvency, this act carries the same probative value as factual insolvency³.

Acts of insolvency relate directly to the way in which the debtor acts towards his creditor and from which it can be inferred that the debtor is not going to meet his financial obligations towards his creditors.

Nulla Bona Return as a deed of insolvency

This specific deed of insolvency defines two actions⁴:

¹ Section 8(b): A debtor commits an act of insolvency ... 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 the judgment."

² Section 8, *Insolvency Act*, 24 van 1936

³ *Agricultural & Industrial Mechanisation (Vereeniging (Pty) Ltd Lombard* 1974 1 SA 291 (O) 293;
De Villiers v Maursen Properties (Pty) Ltd 1983 4 SA 670 (T) 676

⁴ *Insolvency Law and its operation in Winding-up*, Meskin 2-6(5)

The sheriff serves the writ of execution on the debtor in person and “(the debtor) 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”.

The sheriff could not serve the writ of execution on the debtor and “it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment”.

The second action can only take place in the absence of the first act.

In the absence of the sheriff's attempt to serve the writ of execution on the debtor, he cannot simply give a return of Nulla Bona - he must first search the property for assets to be attached. Only after the sheriff's attempt to search the premises for assets to be attached and it still appears that there are no assets to be attached, can a Nulla Bona return be issued. If the sheriff's return shows that he was unable to attach any assets it must be clear that the provisions of section 8(b) of the *Insolvency Act* has been complied with, otherwise there can be no claim to the existence of an act of insolvency. In this case, the *onus* is on the debtor to prove that he does have sufficient assets which the sheriff can attach.

In the aforementioned judgment it was determined that although the sheriff could not serve the writ of execution on the defendants personally, he did unsuccessfully attempt to find assets on the premises to attach. In the absence of any assets to satisfy the judgment, it was clear that an act of insolvency has been committed. In light of this the Court was successfully approach for a liquidation order.

Article by
Jana Buys
Attorney: KMG & Associates Inc.
LLB (NWU) DIP AIPSA(UP)