IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 10271/09

In the matter between:

ZARINA SALI-AMEEN **APPLLICANT**

and

G I SMIT NO **1ST RESPONDENT**

MONICA COWIN NO **2ND RESPONDENT**

JUDGMENT

MATHOPO J:

[1] Applicant seeks an order directing the first respondent and T Ndebele (in their capacity as co-trustees) of the insolvent, Ismail Sali-Ameen

to release to her erf […..] Houghton being the family home situated at [….] Street Houghton, Johannesburg.

[2] This application is brought in terms of section 21(4) of the Insolvency Act 24 of 1936 (the Act).

[3] The applicant is the wife, married out of community of property, of Ismail Sali Ameen (the Insolvent) whose estate was placed under final sequestration on the 28th October 2008 by order of this court. The applicant and the insolvent were married on the 20 March 1980.

[4] In terms of section 21(2) of the Act the property of the applicant vests in the trustee, the first respondent in this proceedings. The trustees have refused to release this property claiming that it belongs to the insolvent.

[5] The applicant has based her application for the relief on the following basis, namely that the property was bought from an independent third party at a proper market related price during December 1997. The property was paid for by her husband as her nominee and that the bond instalments were also paid by him although the bonds were registered in the name of the applicant. The property was acquired in an arms length transaction, intended by the applicant and her husband that she would acquire ownership of the property because she had not acquired any assets during the marriage and was about to stop working in order to concentrate on the bringing up of their minor children. This property was to be her recompense.

[6] Applicant avers that she is the title holder registered in the Deeds office as owner of the property and disputes that she holds the property merely as nominee for the insolvent and avers that both the attorney responsible for the transfer of the property and the estate agent involved in the transaction have deposed to confirmatory affidavits to the effect that the applicant was envisaged as being the owner of the property a decade ago when the transaction was concluded. The nub of the applicant's case is that the property was acquired during the marriage by a title as valid against the creditors of the insolvent and further that this was not a simulated transaction.

[7] Furthermore the applicant avers that since there was no indication or link that her husband (the insolvent) was on a brink of insolvency during December 1997, the decade long interval between the transfer of the property and the sequestration of the insolvent militates against the respondent's challenge

[8] The first respondent has sought to challenge the applicant's title on the following basis

(i) The insolvent and not the applicant signed the agreement and the addenda in his own name, without qualifying his signature on agreement of sale.

(ii) The insolvent purchased the property for himself and that it was registered in the applicant's name as nominee for the insolvent.

(iii) The applicant contradicts herself in her founding affidavit because she alleges that "the property was purchased for me" and furthermore in extremely vague and bald and sketchy terms states that the insolvent donated money to her to purchase the house without setting out the specific facts or circumstances under which the said donation of money was made to her.

[9] Mr Both who appeared on behalf of the respondent correctly submitted that the applicant bears the onus of proving that in terms of section 21(2) of the Act, the trustees are obliged to release any property of the insolvent which is proved

a)…
b)…
c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against the creditors of the insolvent.

[10] Relying on the dicta in **Beddy NO v Van der Westhuizen 1999 (3) SA 913 (SCA) at 915F-G,** submitted that the applicant's onus requires *inter alia* of her to provide a proper explanation as to the genuine nature and character of the transaction i.e. of her (alleged) acquisition of the property.

[11] In Beddy, Schutz JA set out the test for dealing with disputes such as the present in the following terms:

"Under the common law if the disposition has the effect of preferring the alianee above other creditors and the disposition had been agreed upon in order toe defraud creditors, the disposition may be set aside. The sense in which the expression "in order to defraud creditors" is used is explained by Solomon JA in Trustees, Estate Chin v National Bank of South Africa Ltd 1915 AD 353 at 363: if the object of the transaction were to give one creditor an unfair advantage over other creditors in the case of insolvency, that would not necessarily be a fraud in the criminal sense of the word, but it would certainly constitute a fraud upon the creditors within the ordinary meaning of that expression.

A disposition, having that purpose and that effect, cannot confer a title valid against creditors. A person facing insolvency and the person whom he wishes to advantage may act overtly, if bold or merely naïve, but it is more usual that the attempt will be made to conceal the true purpose… In those cases it was correctly held that, after putting any simulation aside, it is the validity of the true transaction that must be examined in order to ascertain whether a title valid against creditors has been established for the purpose of s21(2) (c). This conclusion is reached without any resort to s31 of the statute (conclusive dealing)…

As far as onus is concerned s21(2) expressly places onus on the solvent spouse, and I do not think that that onus is discharged

> *simply by pointing to the ostensible transaction (in this case a sale) and saying to the trustee: "it is not your turn to do your worst with it". The onus is on he solvent spouse to prove the true validity and that it is a valid one such as may confer a valid title. Validity is usually closely related to the party's knowledge of the alienor's actual or imminent insolvency. In a case such as the present there are several theoretical transaction was not a sale at all but a collusive donation, that it was a sale but the price was collusively diminished or again that there was a sale but with the price collusively agreed not to be paid by the wife (which latter is really a donation)."*

[12] On this basis, Mr Both submitted that the applicant has failed to give a satisfactory explanation of the circumstances or the nature of her alleged acquisition of the property and that a greater burden was placed on her to show that such acquisition is one by a title valid as against the insolvent's creditors.

[13] To dispel the notion that the applicant has discharged the onus, a reliance was placed on her alleged contradiction in her founding affidavit regarding the words "this property was purchased for me" this according to the respondent, suggest that she was not the purchaser. Again the respondent's counsel sought to rely on the passage in her founding affidavit wherein she stated as follows "my husband donated me the portion of the purchase price" that I needed in cash to buy the house. He also paid the bond repayment on my behalf each month.

[14] Accordingly counsel submitted that the aforegoing paragraphs demonstrate a material contradiction between two versions which are mutually destructive and thus argued that the applicant failed to discharge the onus resting on her in terms of section 21(2)(c) of the Act, because such evidence was not only vague, bald, unspecific but also contradictory and not constituting a proper explanation as to the genuine nature and character of the acquisition. **See: Rens v Gutman NO & Others 2003 (1) SA 93 (C).** This alleged contradiction is in my view a distinction without difference and overlook the other crucial aspects of the applicant's evidence.

[15] Mr Belger who appeared on behalf of the applicant submitted that the respondent's challenge is misplaced because reliance seems to be placed on the fact that the insolvent signed the deed of sale and is reflected on page I of the deed as purchaser and addenda whereas on the signature page of the sale agreement, the applicant is reflected as purchaser of the property. He argued that looking at the document as a whole, the inescapable inference to be drawn from analysis of all the documents is that the applicant is a purchaser and the insolvent his nominee.

[16] It was rightly submitted for applicant, that the attorney responsible for the transfer reflected the applicant as purchaser in all the documents lodged with the Deeds office for the transfer of the property and bond registration. The estate agent involved in the transaction also addressed and reflected the applicant as the purchaser and they all

signed confirmatory affidavits to that effect, thus it was contended that it cannot be said they colluded with the applicant or the insolvent or misinterpreted the facts.

[17] It was correctly submitted on behalf of the applicant that the transaction took place a decade ago before the sequestration of the insolvent and there was no suggestion that the insolvent's financial position was vulnerable during the period in which he donated the money this wife to purchase the property because at that time the insolvent was financially well of and his financial woes only developed during 2005 and 2006 when he developed a gambling problem which led to his sequestration.

[18] Finally, it was submitted that the fact that the applicant would become owner of the property is corroborated by the evidence of the attorney and the estate agent who have confirmed that the applicant was to be registered as owner, thus confirming or supporting the applicant's assertion that the acquisition of this property was to recompense her for foregoing her career at the expense of devoting her time to homemaking and looking after the children.

[19] On these basis it was argued that the trustees suspicion regarding the signature of the insolvent on the agreement and addenda is unsustainable because the applicant has fully explained or dealt with this issue in her papers which were independently supported by documents prepared by the attorney and estate agent, which documents were prepared a decade ago.

CONCLUSION

[20] The transaction took place during December 2007 when the insolvent was still financially well and not on the brink of insolvency. The explanation by the applicant that the property was purchased to recompense her for leaving her work and devoting her attention to bringing up he kids and looking after the household is plausible and has not been challenged by the respondent and I am compelled to accept it.

[21] Her uncontroverted evidence that the insolvent donated money to her to purchase the property is supported by the evidence of the attorney dealing with the transfer and bond registration, as well as the estate agent. If one looks at the period between the acquisition of the property and the insolvency of her husband, there is in my view no reason to suggest that the acquisition was done for any other reason than to recompense her.

[22] The transaction took place during December 1997 and the husband was sequestrated on the 28 October 2008, exactly a decade ago. Quite clearly there cannot be any suggestion of a simulated transaction or collusive dealings between all the stakeholders involved in the

transaction. The respondent is clearly an "adventurous trustee" who seeks to lay a claim on a property without any legal basis thereof.

[23] I accept as hearing merit the submission that according to the deed of sale, the applicant's name appears as purchaser and this was the position, which was understood by the estate agent who during December 1997 wrote a letter to the applicant addressing her as a purchaser. If the estate agent knew or was aware that the insolvent was the purchaser, then the letter dated 12 December 1997 which forms part of the record would have been written to the insolvent. I can see no reason why the estate agent would address her as a purchaser when this was not the true state of affairs.

[24] This evidence is supported by the transfer and bond documents lodged with the deed office for the transfer and registration of the property in her name, as well as the utility statement of account dated 11 December 1997 which also reflect the applicant as purchaser.

[25] The respondent obliquely wants me to believe that as far back as December 1997, the estate agent, attorneys, applicant and the insolvent must have anticipated the possible insolvency of the husband at the time when he was financially well off and connived to have the property registered in the name of the applicant. This submission is in my view not only illogical but unsustainable when objectively viewed and weighed against the body of evidence supporting the applicant.

[26] Accordingly, the Respondent's submission that the information supplied by the applicant is vague, bald, sketchy, unspecific or mutually contradictory is unsustainable on the comparison of the unchallenged evidence of the applicant, the attorney and the estate agent that the transaction constituted a bona fide donation to her by the insolvent a decade prior to the sequestration and acquisition of the property was genuinely intended to create for her an asset of her own.

I conclude that the applicant has made out a proper case for the relief

I therefore make the following order:

1. The first respondent and co-trustee are directed to release to the applicant erf [….] Houghton being house situated at [….] Street Houghton

2. The first respondent and co-trustee are ordered to pay the costs of this application

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R MATHOPO

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant : ADV P BELGER

instructed by	:	Ayoob Kaka Attorneys
For the Respondent	:	ADV J BOTH SC
instructed by	:	Harvey Nossel Attorneys
Date of hearing	:	25 November 2009
Date of Judgment	:	30 November 2009