## SUMMARY

Insolvency – act of insolvency – s 8(b) of the Insolvency Act, 24 of 1936 – approach to be followed where nulla bona return is not a recent one – such return sufficient to establish act of insolvency – failure to show that in the interim the debtor's circumstances have not improved may affect exercise of court's discretion – advantage to creditors – that investigation may probably reveal grounds to set aside a voidable disposition(s) constitutes advantage to creditors

**REPUBLIC OF SOUTH AFRICA**

**SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

**CASE NO: 31419/2010**
**APPEAL CASE NO: A5034/2011**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

24-5-2013
DATE

SIGNATURE

In the matter between -

SEAWAYS (PTY) LIMITED t/a
SOUTH AFRICAN EXPRESS LINE — APPLICANT

and

RUBIN, BERNARD PATRICK — RESPONDENT

and

INVESTEC BANK LIMITED — INTERVENING PARTY

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**JUDGMENT**

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**BORUCHOWITZ J:**

[1] This is an appeal against the refusal of a final sequestration order. The appellant, Seaways (Pty) Limited, applied for the sequestration of the estate of the first respondent, Mr Bernard Patrick Rubin (Rubin) on the grounds that

he had committed an act of insolvency in terms of s 8(b) of the Insolvency Act, 24 of 1936 (the Act). Reliance was placed on a *nulla bona* return arising from the failure by Rubin to satisfy an order for summary judgment granted against him on 26 November 2008.

[2] The proceedings, both in this Court and in the court below, were opposed by the second respondent, Investec Bank Limited (Investec). Investec applied at the hearing of the application for provisional sequestration for leave to intervene but such application was dismissed and an order for the provisional sequestration of Rubin's estate was granted on 3 November 2010. On the extended return date of the order, 30 April 2011, Investec again sought leave to intervene. On this occasion its intervention and opposition to the final order were successful and the court below (Beasley AJ) discharged the provisional order of sequestration and ordered that the appellant pay the costs of the intervening party, Investec. This appeal is with leave of the court *a quo*.

[3] It is as well, at the outset, to dispose of a number of preliminary issues. This is the second occasion that the instant appeal has been set down for hearing before the Full Court. At the first hearing of this appeal on 12 April 2012, it came to the attention of the Court that Rubin had noted an appeal against the judgment upon which the application for sequestration is based. The appeal was therefore postponed to determine, among other things, whether the appeal noted by Rubin was still pending and whether the

appellant was properly entitled to have issued a warrant of execution based upon the judgment. These investigations have revealed that Rubin's appeal was neither properly noted nor prosecuted.

[4] Rubin was required, in terms of Rules 51(3) and (4) of the Magistrates' Courts' Rules to deliver a notice of appeal and to furnish security for the respondent's costs of the appeal within a stipulated period. It is common cause that he timeously served the notice of appeal but failed to furnish the required security within the time parameters laid down by the rule. Accordingly, the appeal was not properly noted.

[5] Even if one were to assume that the appeal was properly noted, it is apparent from the record that it had lapsed for want of proper prosecution. Rule 50(1) of the High Court provides that an appeal to the High Court against the decision of a magistrate in a civil matter shall be prosecuted within sixty days after the noting of such appeal and unless so prosecuted it shall be deemed to have lapsed. Rubin did nothing to advance the appeal process during the sixty-day period and it is clear that he pre-empted the appeal by acquiescing in the judgment taken against him.

[6] In the circumstances it was permissible for the appellant to have issued a warrant of execution based on the judgment.

[7] There was some debate as to whether the *nulla bona* relied on by the appellant had lost its efficacy by the efluxion of time. It is common cause that there was a substantial lapse of time of approximately a year between its issue and the launch of the application for sequestration. It is a long-standing practice in this Division that an applicant who is armed with a recent *nulla bona* return is entitled to approach the Court without notice to the respondent (*Simross Vintners (Pty) Limited v Vermeulen; VRG Africa (Pty) Limited v Walters t/a Trend Litho; Consolidated Credit Corporation (Pty) Limited v Van der Westhuizen* 1978 (1) SA 779 (T). In cases where a *nulla bona* return is not a recent one there must be allegations supported by facts that the debtor's position is unchanged (see *Abell v Strauss* 1973 (2) SA 611 (W) at 613B-C; *Wilken & Others NNO v Reichenberg* 1999 (1) SA 852 (W) at 860A-C).

[8] A *nulla bona* return, whether recent or not, is sufficient to establish an act of insolvency in terms of s 8(b) of the Act. But where the *nulla bona* relied on is not a recent one, the failure to indicate that the debtor's circumstances have not improved in the interim may be a significant factor in the exercise of the Court's discretion to grant a sequestration order (see *First Rand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) paras 28-30). Rubin has not opposed the sequestration application and there is no reason to suppose that his financial position has improved since the issue of the *nulla bona* return. Accordingly, the lapse of time between the issue of the return and the launch of the application for sequestration is not a factor that would affect the exercise of the Court's discretion.

[9] The pivotal question in the appeal is whether the court *a quo* should have found that the appellant had provided sufficient evidence to satisfy the requirements of s 12(1)(c) of the Act. The section provides that when a final sequestration order is sought, the court must be satisfied that there is –

> "... reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated."

[10] The degree of proof necessary to satisfy that requirement was considered by Roper J, as he then was, in *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 558, where the following was stated:

> "Under s 12, which deals with the position when the rule *nisi* comes up for confirmation, the Court may make a final order of sequestration if it 'is satisfied' that there is such reason to believe. The phrase 'reason to believe', used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the Court must be 'satisfied', it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so.'"

Later, at 559, the learned Judge said:

> "In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has

any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient."

[11] In *Hillhouse v Stott; Feban Investments (Pty) Limited v Itzkin; Botha v Botha* 1990 (4) SA 580 (W), Leveson J, following the approach set out in *Meskin*, said the following at 585C-G:

"To return to the proposition made by Roper J in the *Meskin* case *supra*, the Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that that will be so. That in turn, in my opinion, leads to the conclusion that the expression 'reason to believe' means 'good reason to believe'. The belief itself must be rational or reasonable and, in my opinion, to come to such a belief, the Court must be furnished with sufficient facts to support it. Cf *London Estates (Pty) Limited v Nair* 1957 (3) SA 591 (D) at 592-3; *United Democratic Front and Another v Acting Chief Magistrate, Johannesburg* 1987 (1) SA 413 (W) at 421; *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A). In a broad sense it seems proper to say, on the basis of the cases, that 'advantage to creditors' ought to have some bearing on the question as to whether the granting of the application would secure some useful purpose. I express it thus because, as Roper J has shown in the *Meskin* case, there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and inquiry under the relevant provisions of the Act might unearth assets, thereby benefiting creditors. But for cases such as the present where the only question is to what extent creditors can benefit from the moneys known to be available (there

being no other assets), I think it proper to adopt the test of Seligson AJ in *Epstein v Epstein* 1987 (4) SA 606 (C) at 609:

> 'The correct test to be applied is whether the facts placed before the Court show that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some not negligible pecuniary benefit will result to creditors.'"

[12] The relevant facts are either common cause or incapable of dispute. Rubin is the sole director and shareholder of Rubin Beverages (Pty) Limited (Rubin Beverages). In terms of a loan agreement entered into in about 2006, Investec lent and advanced certain moneys to Rubin Beverages. The precise amount and terms of the loan are unclear as the loan agreement does not form part of the papers.

[13] Rubin and his wife are co-owners of an immovable property, Erf 658 Witkoppen Extension 6. On 28 November 2006, a covering mortgage bond was registered over the property in favour of Investec which it contends was intended to serve as security for the indebtedness of Rubin Beverages. This contention is, however, not borne out by the express wording of the bond, which provides that it is to operate as security for the indebtedness of the mortgagors (Rubin and his wife) to Investec from whatsoever cause arising. There is no indication that Rubin had at that stage executed a suretyship in favour of Investec. Investec contended that the mortgage bond registered in 2006 must have been accompanied by a suretyship executed by Rubin and his wife, at the time, securing the indebtedness of Rubin

Beverages. Although a copy of the mortgage bond was furnished in the papers, no deed of suretyship was attached.

[14] During April 2009, the then existing indebtedness under the loan agreement was restructured in terms of a new loan agreement dated 6 April 2009. The new loan agreement served to restructure the existing indebtedness under the first loan agreement and provide new payment terms. In terms of the new loan agreement, Rubin and his wife were required, among other things, to execute a joint and several continuing unlimited suretyship in favour of Investec. Rubin was further required to execute a cession and pledge of the shares held by him in Rubin Beverages. In addition, the first covering mortgage bond registered over Erf 658 Witkoppen Extension 6 was to be retained in favour of Investec.

[15] Rubin executed the deed of suretyship in favour of Investec, as envisaged in the new loan agreement, on 2 April 2009. Investec was unable to explain why such suretyship was executed in April 2009, if one already existed which covered the same indebtedness.

[16] Rubin's present financial position is broadly as follows. His major asset is his half-share interest in the immovable property, which is encumbered to Investec. His other assets comprise his shares in Rubin Beverages and other companies and close corporations. A companies search has revealed that Rubin is currently a member of Beverage Magic CC; a member of Mix 2

GO CC; a director of Northern Spark Trading 163 (Pty) Limited; a director of Rubev Holdings (Pty) Limited and a director of the Beverage Worx (Pty) Limited.

[17] Rubin's liabilities are said to amount to at least R6 500 000. This is comprised of his indebtedness to Investec amounting to R4 908 059.69; the appellant's claim under the judgment in the sum of R613 296.44, and other sundry creditors.

[18] It was submitted on behalf of the appellant that the execution of the suretyship constituted a "disposition", as envisaged in the Act.[1] And, furthermore, that an investigation might probably reveal that when Rubin executed the deed of suretyship he was insolvent or that its execution had the effect of rendering him factually insolvent. In these circumstances the suretyship could probably be set aside as a voidable disposition.[2] If set aside, Investec would have no claim to Rubin's share of the mortgaged property and a sum of some R850 000 would probably become available for distribution among his concurrent creditors. This was a considerable material advantage to creditors.

[19] Investec argues that Rubin's half-share in the immovable property is essentially the sole asset in his estate. It contends that in the event of a

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1 See *Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Co Limited* 1965 (2) SA 597 (A) 602B-603B; *Swanee's Boerdery (Edms) Bpk (In Liquidation) v Trust Bank of Africa Limited* 1986 (2) SA 850 (A) 859C.

2 Under sections 26, 30 and 31 of the Insolvency Act, 24 of 1936.

sequestration the costs and charges of the administration of the insolvent estate would serve only to dilute the amount which will be due to it as secured creditor and, given the absence of any other assets, would serve no benefit for the general body of creditors. At best, Rubin's undivided half-share of the immovable property would only realise approximately R850 000. A valuation placed before the Court reflects that as at 15 July 2010 the market value of the property was between R1.7 and R1.8 million, and that on a forced sale it would realise approximately R1.1 million. Investec also contends that Rubin's shares in Rubin Beverages have no value as the company is insolvent and not trading and that in any event Investec has a pledge over these shares. Investec proposes that it would be more advantageous to creditors if Rubin be permitted to carry on his present employment and rehabilitate himself.

[20] The court *a quo* (Beasley AJ) held that the appellant had not proved that it was to the advantage of the creditors that Rubin's estate be sequestrated since the only asset appeared to be his half-share in the immovable property which was secured by a mortgage bond in favour of Investec. He concluded that it was unlikely that the creditors would sanction an action to set aside the suretyship as a voidable disposition. To do so was expensive and time-consuming, and creditors would probably only undertake such action if there were substantial prospect of success. In the circumstances, the learned judge held that there would be no free residue for distribution amongst the remaining creditors, excluding Investec, which was a secured creditor.

[21] The learned judge should have found that there was indeed a prospect which was not too remote, that an investigation and enquiry by the trustee in terms of the Act could reveal that at the time of the execution of the suretyship Rubin was insolvent or that the execution thereof had the effect of rendering him factually insolvent. The fact that a *nulla bona* return was issued by the Sheriff on 7 October 2009, some six months after the execution of the deed of suretyship, strongly suggests that Rubin was in fact insolvent at the relevant time.

[22] There is also a likelihood that an investigation may reveal that Rubin and Investec colluded with the intention of securing additional security for Investec to the prejudice and preference over the remaining creditors in Rubin's estate. Such disposition of assets and furnishing of security by Rubin may well be set aside as voidable dispositions or preferences in terms of ss 26, 30 and/or 31 of the Act.

[23] A trustee may also investigate the status of Rubin Beverages and whether in turn there is any value in Rubin's shareholding and loan accounts in Rubin Beverages which were pledged and/or ceded as security to Investec.

[24] The learned judge erred in placing too much emphasis on the costs of litigation in finding that it was unlikely that a trustee would institute action to set aside the suretyship. A creditor such as the appellant is likely to pursue such action and would probably indemnify a trustee in respect of any

unnecessary costs that may be incurred. Should such action be successful, a sum of approximately R850 000 would be available, after payment of the costs of administration, for distribution to the general body of creditors.

[25] The aforegoing are, in my view, substantial advantages that may accrue to creditors of Rubin if his estate was sequestrated.

[26] For these reasons I would allow the appeal. So far as the costs of the application are concerned, I would direct that the costs of both the appellant and of Investec be in the sequestration. There is nothing to suggest that Investec's intervention was unreasonable.

[27] The following order is granted:

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside and the following order substituted for it:

   (a) The first respondent's estate is placed under final sequestration in the hands of the Master of the High Court.

   (b) The costs of the application, including the costs of the intervening party are to be in the sequestration.

**P BORUCHOWITZ**
JUDGE OF THE HIGH COURT

I agree:

**S E WEINER**
JUDGE OF THE HIGH COURT

I agree:

**S A M BAQWA**
JUDGE OF THE HIGH COURT

DATE OF HEARING : 6 May 2013
DATE OF JUDGMENT : 24 May 2013

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