REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

CASE NO: 2012/5210

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

DATE SIGNATURE

In the matter between:

NEDBANK LIMITED Appellant

and

JOHAN HENDRIK POTGIETER Respondent

JUDGMENT

MUDAU, AJ:

[1] On 12 December 2012 Jacobs AJ dismissed an application brought by the appellant, Nedbank Limited, for the provisional sequestration of the estate of the respondent, Mr Johan Hendrik Potgieter (Potgieter) in terms of the

relevant provisions of the Insolvency Act, 24 of 1936. This is an appeal against that decision with the leave of the court *a quo*.

[2] The respondent appeared in person and requested a postponement of this appeal to enable him to get legal representation since his attorneys of record withdrew two days prior the hearing of the matter. The application was refused for the following reasons:

2.1 appellant had already incurred costs for which the respondent would be liable;

2.2 the was no certainty that the respondent would be in a position to raise the fees required for purposes of opposing this appeal; and

2.3 the interests of justice demanded that the appeal be proceeded with.

[3] The respondent represented himself and addressed the court at length in respect of the appeal itself.

[4] The primary issue that falls to be determined in this appeal, is whether the appellant had established *prima facie*, that there was reason(s) to believe that it would be to the advantage of the creditors of the respondent if his estate was sequestrated in accordance with section 10(1)(c) of the Act.

[5] Section 9(1) of the Insolvency Act (in so far as is relevant to this matter) provides that a creditor who has a liquid claim for not less than R100/R200 against a debtor who has committed an act of insolvency or is insolvent may petition the court for the sequestration of the estate of the debtor. Section 10 of the Insolvency Act, 24 of 1936 provides as follows:

> "*(1) If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie* ...
>
> *(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.*"

[6] On 7 December 2010, the JRL Family Trust (duly represented by the trustees) and the respondent entered into a written agreement of settlement ("the Agreement") with the appellant in respect of the indebtedness to the appellant. In terms of the agreement the Trust and the respondent *inter alia* acknowledged their indebtedness to the appellant and undertook to make certain payments to the appellant in settlement of their indebtedness to the appellant. They furthermore signed consents to Judgment in terms of the provisions of Rule 31(1) of the Uniform Rules of Court in the event of them being in default of their obligations to the appellant in terms of the agreement.

[7] After being in default and upon application by the appellant judgment was judgment was granted by Boruchowitz J on 13 May 2013, against the

Trust and the respondent jointly and severally, the one paying the other to be absolved, for:

1. *"Payment of the amount of R3 716 345,97;*

2. *Interest on the amount of R3 703 358,85 at the appellant's prime overdraft lending rate of interest from time to time (currently 9% per annum) less 1%, calculated on a daily basis and capitalised monthly in arrear from 16 March 2011, both days inclusive;*

3. *Costs on the attorney and client scale."*

[8] It is common cause that the respondent's estate was actively insolvent and that the sheriff of the High Court Krugersdorp's return of service was a *Nulla Bona.*

[9] It was the appellant's case that there was a reasonable prospect that if a trustee was appointed, by invoking the relevant provisions of the Insolvency Act, that the trustee would be able to unearth or recover other assets which could yield a benefit to the creditors in the estate.

[10] Appellant submitted as follows:

10.1 the respondent was registered as a director or member of a number of entities;[1] and yet failed to declare his correct income and dividends;

10.2 during 2007 the respondent had provided the appellant with a balance sheet reflecting his assets and liabilities;[2]

[1] Founding affidavit: Vol 1, para 16.1, p 17

10.3 the primary asset reflected in the balance sheet was the respondent's 15,6% shareholding in Specialised Freight Services (Pty) Ltd ("Specialised Freight Services"), having an estimated value of R6 240 000,00 as at June 2007;[3]

10.4 during 2007, the respondent provided the appellant with a letter reflecting that he was receiving a monthly remuneration of R106 207,00 from Specialised Freight Services;[4]

10.5 on 14 July 2010, the respondent addressed a letter to the appellant wherein he indicated that:

10.5.1 he had disposed of his shareholding in Tommy Martin Rentals (Pty) Ltd for an amount of R225 000,00; and

10.5.2 he was in the process of finalising the sale of 70% of his shareholding in Specialised Freight Services for the sum of R8 357 142,00;[5]

10.5.3 "*I expect access to the above in the next 2 – 3 months whereupon all arrears to BOE Private Bank will*

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[2] Founding affidavit: Vol 1, para 16.5.8, p 21; Annexure MGC22; Vol 2 p 109.
[3] Annexure MGC22: Vol 2 p 109.
[4] **Annexure MGC23: Vol 2 p 110.**
[5] Founding Affidavit: Vol 1 para 16.5.2 p 19; Annexure MGC20; Vol 2 p 107

be attended to and I will revert to being a client of good standing"

[11] The submissions made in this regard are not without merit for reasons that I shall deal with below.

11.1 In terms of "the sale of shares agreement" the respondent's entire shareholding in Specialised Freight Services was surprisingly sold to his co-shareholders for a total purchase price of only R1 846 593,87. However, no money was paid to the respondent as the proceeds of this sale were allegedly set-off against "debts" purportedly due by the respondent to his fellow shareholders.[6]

11.2 The respondent therefore disposed of his shareholding in Specialised Freight Services in November 2010 for a fraction of the price which had purportedly been offered during July 2010.

11.3 In addition, the sale of shares agreement was entered into at a time when the respondent was insolvent and indebted to the appellant in a substantial sum of money. [The appellant had launched an application seeking payment of the amount of R3 716 345,97 on 6 October 2010, a month prior to the sale of shares agreement.]

[6] Answering Affidavit: Vol 2 p 176, para 18.3; Annexure JP6: Vol 3 p 223, clause 6.2.

11.4 In a divorce settlement agreement that was made an order of court, the respondent agreed to the following terms:

11.4.1 to contribute "towards the maintenance" of his three (3) children, the sum of R4000.00 per month per child; which maintenance shall escalate at 10% annually on 1 April of each year;

11.4.2 to be liable for the children's educational costs (at an agreed private school) and extra-curricular and extra mural costs;

11.4.3 to provide his former wife with a motor vehicle to the value of R250 000.00;

11.4.4 to purchase a property to the value of R1 000 000.00 (One Million Rand) by no later than 31 December 2014 for the benefit of his former wife and children.

[12] It is abundantly clear from the above undisputed facts that the respondent has access to financial resources other than he was willing to admit in his papers.

[13] It was submitted on behalf of the appellant that the "The sale of shares agreement" constituted a preference of creditors over and above other

creditors, as envisaged in section 30 of the Act. In terms of s 30(1) "If *a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition*". The value of the respondent's shares at a total purchase price of R1 846 593,87 is a considerable amount and of significant material advantage to creditors in general.

[14] In dismissing the appellant's application for the sequestration of the respondent's estate, the court *a quo* held that "*respondent in 2010 was in reasonable financial position, which deteriorated and there is no indication that any enquiry may show the contrary*".

[15] A court has a discretion in terms of s 10 of the Act whether or not to grant a provisional order of sequestration. The discretion that the court enjoys in this regard is not unlimited. It has to be excised judiciously. An appeal court may only interfere if the discretion by a court is plainly wrong. By way of analogy, the procedure for winding up is still regulated by the provisions of the Companies Act, 1973. Section 344 is the sole source of authority that vests a court with power to liquidate a company. (See *Ex Parte Muller NO: In Re: P. L. Myburgh (Edms) Bpk*[7]). This authority is discretionary.[8] As Caney J said in *Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd*[9]:

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[7] *Re: P.L Myburgh (Edms) Bpk* 1979 (2) SA (N) 339 AT 340D.
[8] ***SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk* 1973** (3) SA 371 (C) at 373C.
[9] *Rosenbach & Co (Pty) Ltd v Singh's Bazzar (Pty) Ltd* 1962 (4) SA 593 (D) at 597 E-F

> *"The Court has a discretion to refuse a winding-up order ...but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, ex debito justitiae, to a winding-up order."*

See also *Absa Bank Ltd v Newcity Group Limited*[10] and *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others*[11]. The approach to be adopted in an application for the sequestration is exactly the same as an application for a winding-up order.

[16] In this matter, the conclusions arrived at by the court *a quo* overlook some important considerations in this matter. Firstly, on the papers filed the appellant had *prima facie* established a liquidated claim that justified an application for the sequestration of the respondent's estate. Secondly, the respondent's letter dated 14 July 2010 as well his sworn affidavit in that regard undoubtedly constitute acts of insolvency in terms of s 8(g) of the Insolvency Act. It is the third requirement, namely whether on the factual matrix set out above there is reason to believe that it will be to the advantage of the creditors if the respondent's estate is sequestrated, which is the *crux* of this dispute.

[17] Apart from the requirements of the provisions of s 8 (b) referred to, the requirements of s 8(g) of the Insolvency Act are satisfied when the notice given by the debtor to the creditor conveys that the debtor is at present unable to pay his or her debts. The debtor's willingness to attempt to pay the debts in

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[10] *Absa Bank Ltd v Newcity Group Limited* 2012 JDR 1413 (GSJ).
[11] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ).

the future is generally considered irrelevant. As Scott J pointed out in *Standard Bank of SA Limited v Court,* [12]

> *"... a debtor who gives notice that he will only be able to pay his debt in the future gives notice in effect that he 'is unable' to pay. A request for time to pay a debt which is due and payable will, therefore, ordinarily give rise to an inference that the debtor is unable to pay a debt and such a request contained in writing will accordingly constitute an act of insolvency in terms of s 8(g)."*

[18] In *Meskin & Co v Friedman*[13] Roper J observed as follows:

> *"The phrase 'reason to believe', used as it is in both these sections (ss 10 and 12 of the Insolvency Act) 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."*

[19] If the debtor is to persuade the court to exercise its discretion in his or her favour, he or she must place evidence before the court that clearly establishes that the debts will be paid if a sequestration order is not granted. If that contention is based on a claim that the debtor is in fact solvent then that should be shown by acceptable evidence. In this regard the often quoted words of Innes CJ in *De Waard v Andrew & Thienhaus Limited*[14] are pertinent:

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[12] *Standard Bank of SA Limited v Court* 286 at 293 B-C.
[13] *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 558.
[14] *De Waard v Andrew & Thienhaus Limited* 1907 TS 727

> *"Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him ... Of course; the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities'. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."*

[20] In *R v Meer and Others*[15] Holmes J observed as follows:

> *"I have stressed that the Insolvency Act was passed for the benefit of creditors and not for the relief of harassed debtors."*

This statement remains apposite today as it was then. In *Hill House v Scott* [16] Leveson J stated as follows:

> *"In attempting to gauge the degree of proof required, in my opinion it is important to look at the differences in the language used by the Legislature in ss 6 and 10 of the Act. Section 6 deals with the surrender of his estate by the debtor. In this instance the Court must actually be satisfied that sequestration will be to the advantage of creditors. In terms of s 10 the Court must only have reason to believe that there is advantage to creditors. The reason for the difference is not far to seek. A debtor knows his own business and can adduce facts to show advantage to creditors. A creditor, on the other hand, is seldom in the happy position of being in possession of sufficient facts relating to the debtor's assets as to be able to furnish details to the Court."*

(See also *Amod v Khan*[17]) It accordingly follows that less proof is required in the case of sequestration by a creditor than in voluntary surrender

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[15] *R v Meer and Others 1957* (3) SA 641 (N) at 619A.
[16] *Hill House v Scott* 1990 (4) SA 580 (W) at 584.
[17] *Amod v Khan* 1947 (2) SA 432 (N).

[21] The facts in this case are distinguishable from what is usually referred to as "friendly sequestration". The submissions raised by the appellant in this matter have merit. The respondent is not only gainfully employed as a sales director for an international company by his own admission, but the sale of his shares to his own partners to whom he was allegedly indebted raises eyebrows as this occurred shortly in the midst of judgments obtained by the appellant against him. The suspicion that the respondent has wilfully disposed of his goods, in this case his shareholding, in order to defeat or delay payment of the judgment debt and costs is fully justified.

[22] In my respectful view the court *a quo* erred in refusing to exercise its discretion in favour of the appellant. I am satisfied that all the requirements as envisaged by s 10(a), (b) and (c) of the Insolvency Act 24 of 1936 have been met.

[23] In the result, I make the following order:

1. The appeal is upheld, with costs.

2. The order of Jacobs AJ made on 12 December 2012 is set aside and substituted with the following order:

   (a) *The estate of Johan Hendrik Potgieter (ID No. 660228 5027 089) is placed under provisional sequestration in the hands of the Master of the High Court;*

   (b) *The respondent is called upon to advance reasons, if any, why the Court should not order a final sequestration*

of his estate on Tuesday 19 November 2013 at 10:00 or so soon thereafter as the matter may be heard;

(c) *The costs of the application are costs in the sequestration.*

(d) *A copy of this order must be served on Specialised Freight Services (Pty) Ltd at their business address.*

T P MUDAU
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

K M SATCHWELL
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

H J DE VOS
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

DATE OF HEARING: 2nd OCTOBER 2013

DATE OF JUDGMENT: 03rd October 2013

For the Appellant: **Adv. N P G REDMAN**

Instructed by: **LOWNDES DLAMINI ATTORNEYS**

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For the Respondent: In person.