REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/11125

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

....
DATE SIGNATURE

In the matter between:

MAN FINANCIAL SERVICES (SA) (PTY) LTD Applicant

and

BUYS, PIETER BAREND
(Identity Number: 4……..) Respondent

J U D G M E N T

MASHILE, J:

[1] This is an application for the provisional sequestration of the Respondent occasioned by his failure to honour payment of an amount of R16 844 120.32. The amount owed by the Respondent was the result of a judgment obtained by the Applicant against him on 8 February 2012. The Respondent admitted that he is financially embarrassed and that he cannot satisfy the judgment debt.

[2] Prior to embarking on the judgment itself, I intend to clear the way by dealing with the preliminary matters. The Respondent has without the permission of the court filed a further affidavit. This is unprecedented. I say so because it is generally prohibited to do so without the leave of the court. However, a party would be allowed to file a further affidavit where a replying affidavit contains new matters which should otherwise have been raised in the founding affidavit.

[3] I have perused the replying affidavit with the objective of deciphering new matters raised therein. I am struggling to spot any matter that can be said to be new and unfortunately the Respondent alludes thereto but then sets out matters that are not new at all. In the circumstances the court sees no reason to depart from the general rule stated above.

[4] The Respondent refers to the following as new matters raised in the replying affidavit which prompted him to file the further affidavit:

4.1 The Respondent has constantly manipulated his financial affairs to frustrate his creditors and in particular the applicant;

4.2 The Respondent's version that the proceeds of the sale of his assets were used to sustain himself cannot be believed;

4.3 It is inconceivable that the Respondent could not earn a rental income from the properties;

4.4 That the Respondent was attempting to hide assets.

[5] The only matter that appears to be new is the allegation that the Respondent must have earned rental from the properties. This is not new as it was raised in rebuttal to the Respondent's allegation that he utilised all the proceeds of the sales of the properties to fund his living expenses. The Applicant was entitled to show that the Respondent's averments in that regard could not conceivably be true.

[6] In this regard it is appropriate to make reference to the following passage of Hiemstra J in *Registrar of Insurance v Johannesburg Insurance Co Ltd* (1) 1962 (4) SA 546 (W):

> "*The rules of procedure are made to facilitate litigation; they are always subject to the over-riding discretion of the Court. The Court will take into account whether any of the parties is prejudiced if the rules are not strictly observed. ..... I am not prepared to allow the rules of procedure to tyrannise the Court where an important matter has to be thrashed out fully and all the facts have to be put before the Court. In*

> *this particular case, because the case is complex and it cannot be fairly expected from the petitioner to have all the facts at his disposal before he launches his petition, which was in fact launched in the public interest, I will overlook the fact that an important part of the petitioner's case was put in after his original petition*."

[7] I am mindful that the Applicant's approach is somewhat indifferent in that it has left it to the court to decide whether or not to allow the further affidavit. The general rule is clear and the purpose that it serves is to avoid prolixity of papers, which of course inexorably culminates in a waste of crucial time. Accordingly, I decline to accept the further affidavit.

[8] Similarly, the Applicant served and filed its replying affidavit out of time. The Respondent did not bar it and the Applicant itself did not bring an application to condone such late filing. While the Respondent did not object to the late filing, he appears to be using it as a justification for the filing of the further affidavit. This is unacceptable and accordingly I reject it.

[9] The conclusion of the introductory matters clears the path for this court to turn to the judgment itself. The background facts to this matter are that in 1986 the Respondent started a transport business known as Coal Trans (Pty) Ltd, which he operated until its demise in 2006. As the main shareholder in the company the Respondent stood surety for Coal Trans. In 2005 the business changed its name to Sawina Logistics (Pty) Ltd. Coal Trans was a conglomerate of two companies and these were Coal Trans itself and G & L Parkin (Pty) Ltd.

[10] The transport business as operated by the Respondent thrived and in 2003 he purchased a dormant company whose name he changed to Rhino Logistics (Pty) Ltd. The Respondent alleges that he purchased the company for his then 17 year old son, Pieter Barend Buys. The Respondent was the sole director of Rhino Logistics until his son attained majority and took over from him.

[11] In late 2004 the business of Coal Trans took a dip. For some unknown reason his financiers, ABSA BANK, nudged him to resign as a managing director. He however, remained as a director and shareholder of the company. At that stage Coal Trans underwent a name change and became Sawina, which was subsequently liquidated on 22 February 2006. The Respondent, probably at the instance of the liquidators, stayed in the employ of Sawina until October 2006.

[12] Rhino Logistics then run by Pieter Barend Buys junior, continued to conduct business until 6 March 2006, shortly after the winding-up of Sawina, when it became a quiescent entity albeit that it still ran business through Zingaro Trade 85 (Pty) Ltd, a company created and run by the Respondent's former wife. From the time the Respondent left the employ of the liquidators of Sawina in October 2006, he was from time to time employed by Rhino and/or Zingaro until at least October 2007.

[13] Shortly before Sawina was liquidated on 22 February 2006, the Respondent sold and registered transfer of 6 of his immovable properties.

Again, in July 2009 he sold and registered transfer of the last of his immovable properties into the name of his son, Pieter Barend Buys, for an amount of R800 000.00. This sale happened to have occurred approximately 9 months after the Applicant had instituted proceedings to claim the judgment debt amount, R16 844 120.32.

[14] Section 10 of the Insolvency Act No 24 of 1936 (the Insolvency Act) is the applicable section dealing with provisional sequestration and it stipulates:

> "*If the court to which the petition for the sequestration of the estate of the debtor has been presented is of the opinion that prima facie -*
>
> *The petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and*
>
> *The debtor has committed an act of insolvency or is insolvent; and*
>
> *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*."

[15] It is common cause that the Applicant obtained a judgment in the sum of R16 844 120.32 against the Respondent and that the latter has committed an act of insolvency as envisaged in Section 10(b) of the Insolvency Act. In view of that, the only pertinent issue that falls for determination is establishing whether there is reason to believe that it will be to the advantage of creditors of the Respondent to sequestrate his estate.

[16] It is apt to begin by quoting Roper J in *Meskin & Co v Friedman* 1948 (2) SA 555 (W):

> "*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 .....*"

See also: *Lynn & Main Inc v Naidoo And Another* 2006 (1) SA 59 (N) *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W).

[17] The Applicant is persistent in its assertion that there is reason to believe that it will be to the advantage of creditors of the Respondent that his estate be sequestrated. One cannot but view the actions of the Respondent with suspicion. I refer in this regard to the fact that he sold six of his immovable properties just in time to avoid their foreclosure by the liquidators of Sawina in February 2006. None of the funds realised from the sale went towards the part payment of the creditors.

[18] In July 2007 the Respondent sold his only remaining immovable property to his son, Pieter Barend Buys for an amount of R800 000.00. A question that one cannot avoid to ask is, was it a happenstance that the 6 immovable properties were sold shortly before Sawina was liquidated and that the last immovable property also happened to have been sold on the face of the institution of the action?

[19] It is common cause that Sawina faced financial quandaries in late 2004 and that the Respondent was consequent thereupon prodded to resign as the

managing director of Sawina. It should therefore make perfect sense that he had to redeem some of his properties in order to survive his likely bleak financial future. One can simply regard as coincidence that the sale of his immovable properties took place months before the winding-up of Sawina, the company for which he stood surety for some of the debts.

[20] It becomes somewhat disquieting when the sale of his last property comes shortly after the institution of an action against him. The Respondent has argued that judgment was granted in favour of the Applicant only in 2012 and that the sale could not therefore have been impelled by the judgment. That is not the point, the Respondent in all probabilities knowing of the institution of proceedings against him in October 2008 knew that he would not have a defence to withstand the action saw it wise to dispose of his last property to his son.

[21] Even more disconcerting is the Respondent's failure to give a full account of the proceeds of the sale of all the properties. The Respondent only dealt with this aspect as an afterthought in his further affidavit whose admission into evidence I have rejected. Even if this court were to assume that the proceeds were expended in the manner delineated in the further affidavit, one can hardly state that all the amounts went towards his living expenses.

[22] Like any experienced business man, the Respondent must have known the significance of keeping records of his finances especially as it was

obvious that his financial woes were not about to culminate in the months and years that ensued. The question is why did he not do so when he clearly should have. It is rather convenient to state that he has lost documents pertaining to how he dealt with the funds. How is the court supposed to believe that his reconstruction of how he utilised the funds is correct without records?

[23] It is exceedingly improbable that a business person like the Respondent, living in this modern day technologically advanced world, would have opted to keep cash of that amount at home than at the bank. If that is correct, was it so difficult to request such records from his bankers to eliminate any seeds of doubt being planted in the mind of any person and indeed this court? The answer should be in the negative. The Respondent does not want such information exposed to the Applicant because it will show exactly what happened to the funds.

[24] Another aspect of the sale of the last immovable property that should not escape this court's scrutiny is the amount for which it was sold to his son. The Respondent argued that the highest valuation that he could obtain from four estates agents involved in the sale of properties in his area is an amount of R800 000.00. Barely a year later, Tyco International (Pty) Ltd registered a continued covering mortgage bond over the property for an amount of R1 500 000.00.

[25] The Respondent has passionately contended that Tyco International

(Pty) Ltd registered a covering mortgage bond and not a mortgage bond and that the amount of the covering mortgage bond bears no relation to the value of the property itself. This argument is preposterous. Does this mean that Tyco International (Pty) Ltd could have elected to register a covering mortgage bond of any amount? Of course not, the fact that it chose to register a covering mortgage bond of that amount gives an indication of the value of the property. A covering mortgage bond is supposed to serve as security because its purpose is to protect the financial interest of the party registering it.

[26] The Respondent has decided to leave the salvage of his Mercedes Benz at a panel beater. It is rather aberrant that he has to date, his financial woes notwithstanding, chosen not to retrieve it from the panel beaters. Who does something of the kind? Could it be a person who is facing a bleak financial future like the Respondent? Certainly not.

[27] The doubling of the value of the immovable property at 54 Charterland Street, a year after it was sold, warrants that the business relationship between the Respondent and his son be investigated. This will include Rhino Logistics (Pty) Ltd and Zingaro (Pty) Ltd. Was he paid a salary or not. If he was, what happened to the money.

[28] The following remain obscure to this court:

28.1 The unavailability of records of how much each of the 6

immovable properties was sold;

28.2 No banking records indicating how the funds were expended;

28.3 The Respondent's earnings during the period, October 2006 to October 2007;

28.4 The non-existence of any records dealing with the Respondent's earnings both as an employee and as shareholder of Coal Trans prior to 2004.

[29] It is precisely in circumstances such as the present where the Respondent has furnished very little information to enable the court to properly assess whether or not it will be to the advantage of creditors to sequestrate him that the engagement of trustees and/or liquidators become extremely critical. They will be well disposed to employ the provisions of the Insolvency Act to bring to surface assets that could be distributed to the creditors. The Respondent's allegation that it will not be to the advantage of creditors that he be sequestrated cannot stand in view of the evidence presented by the Applicant.

[30] Accordingly, I conclude by referring to the statement of Levisohn J in *Dunlop Tyres (Pty) Ltd v Brewitt supra*:

"*In the present case, in my view, the Court has good reason to believe, on the basis of the facts relied upon in this judgment, that assets are*

likely to come to light when a proper interrogation is conducted under the provisions of the Act. I consider therefore that for present purposes advantage to creditors under s 12(1)(c) of the Act has been shown …"

[31] In the result I make the following order:

1. Placing the estate of the Respondent in sequestration in the hands of the Master of the Honourable Court;

2. Costs of the application.

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B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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COUNSEL FOR THE APPLICANT : Adv. C Humphries

INTRUCTED BY : Uys Matyeka Schwartz Attorneys

COUNSEL FOR THE RESPONDENT: Adv. JW Steyn

INTRUCTED BY : Brooks & Brand Inc.