REPUBLIC OF SOUTH AFRICA

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

CASE NO: 14056/2013

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

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DATE SIGNATURE

In the matter between:

SEKHUKHUNE NGWATO SEKGOTHE N.O. Applicant

And

WESBANK LTD Respondent

J U D G M E N T

MAKUME, J:

[1] In this application the Applicant who is a duly appointed trustee in the insolvent estate of one Phillipus C J Loots (the insolvent) seeks the following final relief:

1.1 Declaring that two motor vehicles being a Chev Lumina 6.0 VS SS bearing registration number [HFX…….] NW and a BMW M3 bearing registration number and letter [FZD…….] NW (the motor vehicles) form part of the estate of the insolvent.

1.2 Setting aside the surrender of the two motor vehicles to the Respondent as improper dispositions in terms of sections 29 and 30 as well as 31 of the Insolvency Act No 24 of 1936 (the Act).

1.3 Compelling the Respondent to return and/or restore the two motor vehicles to the Applicant/insolvent alternatively the value thereof being R328 000,00.

1.4 Directing the Respondent to pay to the Applicant the amount of R328 000,00.

1.5 Declaring that the Respondent forfeits any claim which it might have against the insolvent estate.

[2] Prayer 1.3 was abandoned during the course of the hearing in view of the evidence that the two motor vehicles are now in the possession of third

parties who are not a party to these proceedings.

[3] In issue in this application is the following:

3.1 Who was the owner of the two motor vehicles on the day the insolvent surrendered them to the Respondent?

3.2 Does the surrender of the two motor vehicles as it happened on the 14th April 2009 constitute a disposition in terms of sections 29, 30 and 31 of the Act?

3.3 Was the surrender an act within the ordinary course of business of the Respondent?

3.4 What is the effect of sections 83 and 84 of the Insolvency Act in this transaction?

FACTUAL BACKGROUND

[4] It is necessary to set out a brief narrative of certain facts and circumstances giving rise to this litigation which bear on the questions to be decided in this application as they emerge from the papers.

[5] It is common cause that between the year 2006 and 2008 the insolvent concluded two instalment sale agreements in which he acquired the motor vehicles from a car dealership. The Respondent financed the transaction, the

insolvent took possession of the two motor vehicles. It is significant to record that clause 4.2 of both instalment sale agreements state that the Respondent will remain the legal owners and title holder of the goods until all amounts due under the instalment sale agreement shall have been paid in full.

[6] In his application for voluntary surrender of his estate the insolvent states that from about the year 2008 he started experiencing financial problems, his business was not doing well and most creditors started phoning him and threatening to take action. He attempted debt counselling but could not proceed with it as some of his creditors had already commenced legal steps.

[7] On the 14th April 2009 the insolvent with the assistance of his attorney Mr Johan Stoltz surrendered the two motor vehicles to the Respondent. At that stage the insolvent was still indebted to the Respondent in terms of the two instalment sale agreement as follows:

7.1 Motor vehicle with registration number [HFX……..] NW – R352 824,15.

7.2 Motor vehicle with registration number [FZD……] NW – R386 638,14.

[8] Motor vehicle [HFX……] NW was sold on the 30th March 2010 for the amount of R170 000,00 and motor vehicle [FZD…….] NW was sold for an

amount of R158 000,00. The total amount of the proceeds of the sales of the two motor vehicles in the sum of R328 000,00 is in the possession of the Respondent. It is this amount that the Applicant claims in prayer 4 of his notice of motion.

[9] It is common cause that shortly after surrendering the two motor vehicles the insolvent voluntarily surrendered his estate to the Master in terms of the Insolvency Act and on the 11th June 2009 the High Court granted an order placing the estate of Mr Loots under sequestration. The Applicant was subsequently appointed trustee of the insolvent estate.

[10] The Applicant claims payment of the amount as stated in prayer 4 on the basis that when the insolvent surrendered the motor vehicles to the Respondent this amounted to an impeachable disposition as described in sections 29, 30 and 31 of the Act.

[11] The Respondent opposes the application on the basis that the surrender was not an impeachable disposition but that the two motor vehicles never at any stage were the property of the insolvent and secondly that when the insolvent surrendered the two motor vehicles it was done in the ordinary course of business and not with the intention to prefer any creditor above another.

THE LEGAL PRINCIPLES

SECTION 84 OF THE ACT – HYPOTHEC

[12] Section 1 of the National Credit Act 34 of 2005 states that an instalment agreement means a sale of movable property in terms of which:

12.1 all or part of the price is deferred and is to be paid by period payments;

12.2 possession and use of the property is transferred to the debtor; and

12.3 ownership of the property passes to the debtor only when the agreement is fully complied with.

[13] Section 84(1) and (2) of the Act reads as follows:

"*(1) If any property was delivered to a person (hereinafter referred to as the debtor) under a transaction that is an instalment agreement contemplated in paragraphs (a), (b) and (c) of the definition of instalment agreement set out in section 1 of the National Credit Act 2005 (Act 34 of 2005) such a transaction shall be regarded on the sequestration of the debtor estate as creating in favour of the other party to the transaction (hereinafter referred to as the creditor) a hypothec over that property whereby the amount still due to him under the transaction is secured. The trustee of the debtor's insolvent estate shall if required by the creditor, deliver the property to him and thereupon the creditor shall be deemed to be holding that property as security for his claim and the provisions of section 83 shall apply.*

(2) If the debtor returned the property to the creditor within a period of one month prior to the sequestration of the debtor's estate the trustee may demand that the creditor deliver to him that property or the value thereof at the date when it was so returned to the creditor subject to payment to the creditor by the trustee or to deducting from the value (as the case may be) of the difference between the total amount payable under the said transaction and the total amount actually paid thereunder. If the property is delivered to the trustee the provisions of subsection (1) shall apply."

[14] As I understand it section 84(2) will not apply in this instance because the two motor vehicles were surrendered to the Respondent more than one month prior to the sequestration. This therefore leaves only section 84(1). This section is very clear it creates a hypothec in favour of the Respondent. The procedural aspects of subsection (1) envisage a position where at sequestration the property is in the possession of the debtor or the trustee which is not the case in the present matter. The property was at the stage of sequestration already in the possession of the Respondent and the question to be answered is was the Respondent obliged under the circumstances to hand over the motor vehicles to the Applicant and then follow the procedure as envisaged in section 83(3). In my view this section also finds no operation because as at the stage of instituting the application the two motor vehicles had already been sold and transferred to third parties.

[15] In the matter of *Williams Hunt (Vereeniging) Ltd v Slomowitz and Another* 1960 (1) TPD 499 at page 501F Ludorf J said the following:

> "*In my view the terms of section 84(1) are clear and peremptory. Prior to the sequestration the applicant was the owner of the motor vehicle and the effect of the sequestration was that the applicant lost its ownership in the car and became a secured creditor and the means of perfecting the pledge is the machinery in section 84 whereby possession is to be restored to the applicant. There is no means whereby a trustee can resist such a claim and the section is clear that only after delivery does the provisions of section 83 become of application.*"

[16] What now remains is the Applicant's claim based on sections 29, 30 and 31 of the Act. It is significant to note that in respect of all three sections the Applicant must prove that the insolvent disposed of his assets.

[17] The word disposition or dispose is defined as follows in section 2 of the Act:

> "*Disposition means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract thereof, but does not include a disposition in compliance with an order of the Court.*"

[18] The right that the insolvent held over the two motor vehicles is not that of ownership. He held a right in terms of the instalment sale agreement and accordingly that right stands to be defined subject to the provisions of the National Credit Act.

[19] When the insolvent surrendered the motor vehicles to the Respondent he was doing so on the basis of the contractual relationship he and the Respondent created. That agreement read with section 1 of the National Credit Act did not transfer ownership of the two vehicles to the insolvent it granted the insolvent possession and the use of the two motor vehicles.

[20] In clause 4.2 of the agreement it was specifically agreed between the Respondent and the insolvent that the Respondent would remain the legal owner and title holder of the vehicles until the insolvent had paid all amounts due under the said instalment sale agreement. The Respondent raised this

defence in paragraph 10.4 of its answering affidavit. The Applicant in reply avoided this aspect despite a lengthy reply consisting of some seven (7) pages in which he dealt mostly with the question whether the disposition took place in the ordinary course of business and other peripheral issues. At no stage did the applicant deny the veracity and existence as well as the meaning of clause 4.2.

[21] In my view it is section 29 and the interpretation thereof in relation to the facts of this matter that is dispositive of the issues herein.

[22] Section 29 places the *onus* to prove disposition of the property by the insolvent to any person including the Respondent and if the Applicant succeeds in proving that, then the only way in which the Respondent will succeed in avoiding such disposition being impeached is if he proves that the disposition was done in the ordinary course of the business and was not intended to prefer one creditor above another.

[23] In prayer 1 the Applicant seeks an order declaring that the two motor vehicles form part of the insolvent estate of Phillipus C J Loots. I have difficulty in understanding the basis on which such claim is made. The instalment sale agreement is clear. No ownership of the motor vehicles shall pass until the full purchase of the instalments shall have been paid in full. This portion of the agreement mirrors the definition of instalment sale agreement in terms of the National Credit Act. Curlewis JA in the matter of *Estate Shaw v Young* 1936 AD said the following at page 239 in a judgment in which he

concurred with De Villiers JA:

> "*I was at first inclined to the view that this appeal ought to succeed. But there can be no doubt that plaintiff by the various claims in his declaration seeks to recover the ownership of the assets which were the subject of the hire purchase agreement between Sham and Illings (Pty) Ltd and of the subsequent agreement between Sham the company and the defendant. It is clear as is pointed out in the judgment of by brother De Villiers, that the disposition which Shaw made by this tripartite agreement was a disposition not of the assets because they did not belong to him, but of his interests in those assets under the hire purchase agreement. Such interests consisting of the right of possession of the assets on payment of the monthly rent together with the right to acquire the ownership of the assets on payment to the Illings company of the balance due of £9 7s 2d.*"

[24] Section 127 of the National Credit Act gives the consumer the right to unilaterally rid himself of the agreement by returning the goods purchased to the credit provider and when that happens the credit receiver not only loses possession of the goods but he/she brings to an end the right that he/she held over the property. In this instance when the insolvent surrendered the goods he did so guided by not only the National Credit Act but also by clause 4.2 of the instalment sale agreement. That act was a transaction within the ordinary course of business of the Respondent and could not have been a disposition.

[25] De Villiers JP in the matter of *Fourie's Trustees v Van Rhijn* 1922 OPD 1 at page 6 said the following:

> "*The payment of disposition is in accordance with the common and well known principles and practice of business to that payment would be recognised as a common place business transaction by a businessman*

and cause him no surprise."

[26] In the present matter the insolvent when he surrendered the two motor vehicles had the intention to stave off being sued by the Respondent and because a mechanism had been created not only by the National Credit Act but in the instalment sale agreement itself he disposed of the motor vehicles within the course of the ordinary business of the Respondent.

[27] In my view Respondent has successfully discharged the *onus* resting upon him of showing that the disposition was not made with the intent to prefer one creditor above another. It follows that the application must on that basis alone fail. In the view that I take I find it unnecessary to discuss the factors which the Applicant must establish under sections 30 and 31.

[28] I accordingly make the following order:

The application is dismissed with costs.

DATED at JOHANNESBURG on this the 21st day of OCTOBER 2015.

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M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	6th October 2015
DATE OF JUDGMENT	21st October 2015
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