REPUBLIC OF SOUTH AFRICA

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

CASE NO: 39412/2013

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

6.10.2015
DATE

SIGNATURE

In the matter between:

BODY CORPORATE BEDFORD PLACE Applicant

and

JOAO PAULO DA COSTA ANDRADE MESQUITA Respondent

J U D G M E N T

WINDELL, J:

[1] This is an application for a final sequestration order. A provisional order was granted against the respondent on 18 February 2015. The

respondent opposes the granting of a final order on the basis that a sequestration order will not be to the advantage of his creditors.

[2] It is common cause that the applicant has a claim against the respondent and that the respondent has committed an act of insolvency. It is clear from the facts that the respondent is hopelessly insolvent. The only question left for determination is whether the applicant had provided sufficient evidence to satisfy the requirements of s 12 (1)(c) of the Insolvency Act , 24 of 1936. *(hereinafter referred to as "the Act").* Section 12 (1)(c) of the Act provides that when a final sequestration order is sought, a 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"

[3] In *Meskin & Co v Friedman* 1948 (2) SA 555 (W) the degree of proof necessary to satisfy this requirement was considered. Roper J, (as he then was), stated the following at 558-559.

> "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, indicated that it is not necessary, either at the first or 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. In my opinion , the facts put before the

> Court must satisfy 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 the creditors, that is sufficient"

[4] The following facts are either common cause or incapable of being disputed: The respondent is a member of the applicant by virtue of his ownership of property at Bedford Place *(hereinafter referred to as the "Bedford Property").* He failed to pay his monthly levies and related charges and was indebted to the applicant in an amount of R 158 765. The applicant instituted action against the respondent in March 2011 and judgment was granted against the respondent. A warrant of execution was issued and the Sheriff rendered a *nulla bona* return in respect of the respondent who personally told the Sheriff that he had no money or attachable assets to satisfy the debt. It is common cause that the debt remains unsatisfied and is increasing as the respondent fails to effect payment of his monthly levies.

[5] The respondent is a director of Gojo Cargo (Pty) Ltd *(hereinafter referred to as "Gojo")* and he owns 52% of its shares. His co-director and co-shareholder is his father, Mr Jose Mesquita. Gojo was established 28 years ago and its business is the provider of clearance and forwarding services to importers and exporters.

[6] The respondent has one other immovable property registered in his name in Norwood *(hereinafter referred to as the "Norwood property")*. The respondent's father and mother reside with him at the Norwood property. They are both in their eighties and need full time care and attention.

[7] The applicant submitted that a trustee would be able to realise the respondent's assets for their true value and ensure that no creditors are preferred above others. A trustee would be able to investigate whether the respondent is possessed of any other assets and can also exercise proper control over the respondent's income and expenses. The parties agree that a forced sale conducted by the Sheriff in execution would likely realise a lower sale price than if the properties were sold privately by a liquidator.

[8] The application for a provisional order was launched in November 2013. The respondent initially filed an answering affidavit in December 2013 wherein he admitted that the applicant obtained judgment against him. He also admitted his failure to satisfy the debt, but disputed the amount claimed. He averred that the Bedford property had been sold and that he would therefore be able to settle all his outstanding debts. He averred that he attempted on several occasions to meet with the applicant to make an offer, without any success.

[9] The provisional sequestration order was granted in February 2015. Respondent subsequently filed a second answering affidavit in July 2015 to show cause why his estate should not be finally sequestrated. In this affidavit

the respondent again averred that the Bedford property had been sold and attached an agreement of sale entered into on **7 July 2015** (my emphasis). In terms of this agreement the property was sold for R 850 000. He indicated that the purchaser had obtained a loan of R 765 000 from SA Home Loans. The respondent confirmed that there are four bonds registered against the Bedford property. Two of the bonds are in favour of First Rand Bank in the amount of R 620 000 and two are in favour of "sister" financial institutions namely Merchant Factors & Trade Finance (Pty) Ltd and Merchant Commercial Finance (Pty) Ltd *(hereinafter referred to as Merchant Factors)* in the amount of R 450 000. These are surety mortgage bonds securing the liability of Gojo to the said institutions.

[10] There are also four interdicts registered against the Bedford property. One of the interdicts is in favour of Merchant Factors. Merchant Factors obtained judgment against the respondent as surety for Gojo in the sum of R 1 065 000. The respondent averred that Merchant Factors had agreed to cancel its encumbrances in its favour against payment of the sum of R 60 000. Two of the interdicts are in favour of Diversified Properties (Pty) Ltd. Diversified Properties obtained judgment against the respondent as surety for Gojo in the sum of R 1 015 000. Diversified Properties had agreed to release the attachment against the property for payment of the sum of R 50 000. The respondent attached letters in confirmation of these arrangements. The last interdict is in favour of FNB. The respondent averred that it would therefore be possible to procure the cancellation of all encumbrances registered in favour of FNB, Merchant Factors and Diversified Properties against payment to them

of approximately R 730 000. Accordingly on transfer of the property to the purchaser there would remain approximately R 87 000. The respondent submits that he is prepared to cede his right to receive this sum to the applicant.

[11] The respondent further alleged that he would be able to obtain monies in the near future from Gojo with which he will be able to pay any shortfall of his debt to the applicant. Gojo will receive an amount of R 55 263.16 during the week of the 3rd of August 2015 and R 161 088.23 early September 2015. Gojo will also realise a profit of approximately 20% in relation to two invoices from a certain Mr Monteiro amounting to R 4 635 581. The said amounts will exceed the amounts which Gojo will be obliged to pay in respect of debts which will become due in the ordinary course of its business and a portion will be available to be advances to him as drawings. He does not anticipate any impediment to this being done, and the directors and shareholders of Gojo will resolve that this be done. Incidentally, during an application for postponement on 4 May 2015, the respondent also undertook to pay the applicant from proceeds of monies forthcoming from Mozambique, allegedly due to Gojo.

[12] The respondent averred that he will be disqualified from being a director of Gojo if he is sequestrated. Although his father attends from time to time at Gojo's office, Gojo's business is operated entirely by him. He does not know of anyone who would be willing to take up directorship of Gojo. Gojo is the sole source of income for him and his parents. Gojo's liabilities to Merchant Factors and other creditors amount to approximately R 2 355 000. If

Gojo cease to carry on business, then it is likely that such creditors will require immediate payment of Gojo's outstanding indebtedness, and Gojo will be liquidated.

[13] In addition to the Bedford property the respondent has the following liabilities:

- Nedbank Limited – Norwood property: R 2,3 million
- American Express: R 40 000
- FNB personal loan : R 188 000
- Nedbank credit card : R 60 000
- Mercedes Benz : R 150 000

  Total: 2 738 000.

[14] The respondent claims that he has the following assets:

- Bedford Place: R 850 000 (mortgage bonds : R 1 190 000)
- Norwood property: R 3 million.
- Shares in Gojo: Nil
- Personal effects : R 250 000

[15] The respondent averred that if his estate is sequestrated the Norwood property will be sold by the trustee. This would be catastrophic for his parents as they have nowhere to go. The respondent further contended that there will be no dividend to concurrent creditors if his estate is sequestrated.

[16] After the hearing on 17 August 2015 it was brought to the Court's attention that First National Bank had obtained judgment against the respondent on 21 October 2009 in the sum of R 767 694.56 and had foreclosed on the respondent's Bedford Place property. A date for a sale in execution had been advertised and set for 16 September 2015. It was also discovered that Nedbank had instituted legal proceedings against the respondent relating to the Norwood Property.

[17] The Court must be furnished with sufficient facts to come to the "rational or reasonable believe" that sequestration will be to the advantage of creditors. See *Hillhouse v Stott; Feban Investments (Pty) Ltd v Itzkin; Botha v Botha* 1990 (4) SA 580 (W). A Court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. This requirement will be met if there is a reason to believe, not necessarily a likelihood , but a prospect not too remote, that as a result of investigation and inquiry, assets might be unearthed that will benefit creditors.

[18] The respondent contended that the founding papers did not set out sufficient facts to show that the sequestration of the respondent's estate will be to the advantage of his creditors. 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."

The only party in a position to adequately and properly detail the respondent's financial position is the respondent himself. It was only after the respondent filed a further affidavit in July 2015 that the applicant was made aware of certain facts. Under these circumstances the applicant is allowed to file a replying affidavit to elaborate on and address the issues raised in opposition to the final order.

[19] An advantage to creditors need not be a specific dividend in the Rand calculated on the assets and liabilities of the debtor. In *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC) the Court held at par [44]-[45].

> "The meaning of the term advantage is broad and should not be rigidified. This includes the nebulous ' not –negligible' pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or 'not-negligible benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin et al state –
>
> > 'the relevant reason to believe exists where, after making allowance for the anticipated cost of sequestration, there is a reasonable prospect of actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment. Postulating a test which

> is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order. "
>
> [45] The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in Friedman. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment, except through sequestration, or that some pecuniary benefit will redound to the creditors."

[20] In determining the reasonableness of the prospects of there being a benefit to creditors in sequestration, it is proper to have regard to the significance itself of the very fact of the administration in insolvency. See *Chenille Industries v Vorster* 1953 (2) SA 691 (O) where Horwitz J observed the following at 699F-H :

> "[There are] ... the superior legal machinery which creditors acquire by sequestration, the right to control the collection, custody and disposal of all the assets through their nominee, the trustee, the right to control similarly the sale of the assets, the certainty that the insolvent cannot contract further debts and diminish the estate, and the assurance that all creditors will be accorded the treatment prescribed by law in the division of the proceeds."

[21] The respondent is not *bona fide* in the disclosure of his personal and financial position and that of Gojo. In December 2013 he averred that the Bedford property had been sold and offered to pay the applicant with the proceeds of the sale. In May 2015 he made an undertaking to pay the applicant an amount of R 345 410 less the sum of R 50 577 from proceeds of monies due to Gojo. In August 2015 he deposed of an affidavit wherein he stated that the Bedford property had (again) been sold and he offered the applicant an amount of R 87 000. It was however discovered that default judgment relating to the Bedford property had already been obtained against the respondent in 2009 and the sale in execution has been set down for September 2015. The respondent had therefore entered into a sale agreement well knowing that judgment had been obtained and that a provisional order for sequestration had been granted against him. The purported sale constitutes a breach of s 24 (1) of the Act and an attempted disposition of property would have the effect of prejudicing the applicant and other creditors.

[22] The respondent has continuously tailored his version in order to suit the circumstances. In light of the various tenders and promises made by the respondent to pay the applicant and the different versions on how payment will be effected, this is one of the very reasons justifying the appointment of a trustee. A trustee can investigate whether the respondent owns any other assets and an appointment of a trustee will put to an end to the type of conduct exhibited by the respondent which is prejudicial to his creditors. The

respondent has no regard for the repayment of his debts to creditors and continues to burden his estate and that of Gojo with further liabilities.

[23] On the respondent's own version he has personal assets to the value of R 250 000. The respondent further stated that the outstanding bond over the Norwood property is R 2 300 00 and the market price is estimated at R 3 000 000, leaving a possible R 700 00 if sold privately. Unless sequestration is granted the estate is in danger of being unfairly distributed by the issue of writs of execution.

[24] It also appears as if the respondent prefers other creditors over the applicant. The respondent has offered Merchant Factors an amount of R 60 000 per month and had also made an offer to Diversified Properties of R 50 000. It is unclear how the respondent would be able to afford any monthly payments as he did not disclose his monthly income.

[25] The respondent contended with reliance on *Amod v Khan* 1947 (2) SA 432 (N), that Courts frown upon the use of a sequestration application as a means of debt collection. The facts *in casu* are clearly distinguishable from the facts in *Amod supra*. The salient facts in *Amod* were the following: The applicant was the first respondent's sole creditor. **The court observed that the proceedings therefore lacked resemblance to the typical sort, in which the debtor has a variety of creditors but insufficient assets to meet all there competing claims, and sequestration seems likely to**

benefit them as a group by ending the danger that some may be preferred to others and ensuring instead that that the proceeds are shared fairly (my emphasis). The Court held that there was no reason in principle why a debtor with only one creditor should not have its estate sequestrated, but the potential advantages of sequestration in that situation are inherently fewer, and the case for it is correspondingly weaker. Then it is really no more than an elaborate means of execution and because of it costs an expensive one.

[26] In *Industrial Development Corporation of South Africa Ltd v Burger and Another* case no 10679 and 10680 of 2013 [2014] ZAWCHC [2014] at par 20, the Court held that the prospect of a not insubstantial monetary dividend (albeit small) coupled with a not too remote prospect of the recovery of further assets through the process of inquiry into the insolvent estate was sufficient to establish that there was reason to believe that sequestration would be to the benefit of creditors.

[27] The facts in *casu* are similar to the facts in the matter of *Seaways (Pty) Ltd t/a South African Express Line v Rubin* (31419/2010) [2013] ZAGPJHC 118 (24 May 2013) the full court had to consider the correctness of the court *a quo's* decision not to grant a final sequestration order. The salient facts were the following: The respondent was the sole director and shareholder of a company, Rubin Beverages. His main asset was his half share in an immovable property, which was encumbered to Investec. His other assets comprised of his shares in Rubin Beverages and other companies and close

corporations. It was contended that in the event of a 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 to the general body of creditors. It was also contended that the respondent's shares in Rubin Beverages had no value as the company was insolvent and not trading and that in any event Investec had a pledge over these shares. Boruchowitz J held that the court *a quo* should have found that there was indeed a prospect which was not too remote, that a trustee may inter alia investigate the status of Rubin Beverages and whether in turn there is any value in the respondent's shareholding and loan accounts in Rubin beverages which were pledged and/or ceded as security to Investec.

[28] There is no reason why Gojo will cease in the event of respondent's sequestration. An order for sequestration will not affect the respondent's shareholding in Gojo and will not preclude the respondent from running his day to day operations in Gojo by virtue of s 23(3) and (9) of the Act. The respondent stated that the value of his shares in Gojo is nil. This value is in material contradiction to the remainder of the respondent's allegations set out in his further affidavit. In addition to all the other reasons above and in light of all the circumstances surrounding Gojo, I have reason to believe that an enquiry into the value of the respondent's share in Gojo might result in some benefit to the general body of creditors.

[29] In the event the following order is made:

28.1 The estate of the Respondent is hereby placed under final sequestration in the hands of the Master of the High Court.

28.2. The costs of the application are to be in the sequestration.

L. WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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