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REPUBLIC OF SOUTH AFRICA



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

CASE NO. 29586/2019

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

Date

HW SIBUYI

In the application for leave to intervene of:

KATIJA BIBI ABDOOLA

Applicant

AND

In the sequestration application of:

ABSA BANK LIMITED

Applicant

and

PATEL: JACINTA LUCY

Respondent

(Identity No. [...])

(Married out of community of property)

JUDGMENT

Sibuyi, AJ:

INTRODUCTION

1. In this matter Absa Bank Limited (“Absa Bank”) brought an application to sequestrate the respondent, Jacinta Lucy Patel (“Patel”). On 16 April 2019 Joubert AJ granted an order placing the estate of Patel under provisional sequestration and directed any other respondent or party who wished to avoid such order to advance reasons why the court should not grant a final sequestration order on 23 May 2019. The *rule nisi* was extended a few times until the 12th of September 2019 when the application finally came before me. At this stage Katija Bibi Abdoola (“Abdoola”) had brought an application for leave to intervene and oppose the sequestration application.
2. Though a number of factual disputes are raised on the papers, at the commencement of argument the parties agreed that the court has to determine and rule on two main issues: (a) whether or not leave to intervene should be granted on the basis that Abdoola is a creditor to Patel, and (b) whether or not there is advantage to creditors justifying the granting of a final sequestration order. I must mention that the attorney for Patel, without having filed papers to oppose the final sequestration, to everybody’s surprise, attended the court hearing and insisted that he must be allowed to oppose the sequestration application on behalf of Patel. I allowed him to participate on condition that whatever argument he was going to make must strictly be confined to the papers filed after the granting of the provisional sequestration order. The attorney made short submissions after all the parties has concluded their arguments. I gave

counsel for the other parties an opportunity to respond to any submission made by the attorney. Only Counsel for Absa Bank used the opportunity.

CONDONATION

3. Abdoola seeks condonation for the late filing of her replying affidavit. The application for condonation was not opposed. The replying affidavit is about 5 weeks late. The delay is not very excessive. I am of the view that it will be in the interest of justice to grant condonation to allow full ventilation of issues between the parties. The condonation application must therefore succeed.

APPLICATION FOR LEAVE TO INTERVENE

4. The application for leave to intervene by Abdoola is based on the submission that Abdoola is an unsecured creditor of Patel. In the application to intervene Abdoola also opposes the granting of the final sequestration order only on the basis that there is no advantage to creditors.
5. The first issue I had to determine is whether Abdoola is a creditor to Patel. Abdoola alleges that she is a creditor to Patel because in 2004 she co-owned a property known as ERF [...] Parkhurst Township ("the Parkhurst property") with Patel. Patel and herself were co-mortgagees of a bond on the Parkhurst property. The bond on the Parkhurst property was

registered with Absa bank. Later during 2007 Abdoola sold her 50% share of the Parkhurst property for R850 000-00 to Patel. Since 2007 Patel periodically paid towards the R850 000-00 and the outstanding amount is currently standing at R750 000-00. Abdoola alleges that she is using Patel's property (the property being the subject matter of this sequestration application) as her primary residence. In summary, Abdoola's direct and substantial interest in the matter is alleged to be arising from the above facts.

6. On the balance of probabilities, I find that Abdoola failed to prove that she is a creditor to Patel. I now give reasons for this finding.
7. Firstly, Abdoola failed to attach and or prove any 50% share sale agreement between herself and Patel.
8. Secondly, though she alleges that Patel made periodic payments towards the 50% share debt, there is no proof of such payments on the papers before me. The payments relied upon by Abdoola were paid by Ebrahim to Abdoola's account. Although it is not clear on the papers, Abdoola and Ebrahim are somehow related. On scrutiny, the payments seem to be maintenance monies paid during the period between August 2017 and May 2019. They were paid for Dstv, Cellular phone, Vodacom, etc. The other haphazard payments with the reference "std" and amounting to about R14000-00 in total, could be for any other maintenance expense/s

but not payment of the 50% share debt. The payments randomly range between R1000-00 to R3000-00. However, none of these payments are referred to as payment towards the 50% share debt. Nor could they be mathematically linked to the acknowledgment of debt agreed monthly payment of R3500-00.

9. Thirdly, Abdoola alleges that after selling her 50% share on the Parkhurst property to Patel, the original bond was cancelled, and a new bond was registered in the name of Patel without Patel paying the purchase price for the 50% share. This is highly improbable. On the papers and during argument Abdoola could not explain why the property was registered and transferred into the name of Patel without Patel paying the 50% share purchase price to Abdoola.
10. Lastly, I agree with submissions on behalf of Absa Bank that Abdoola's story shows that she is dishonest, not *bona fide*, and that she is bringing the leave to intervene application solely to delay the sequestration of her daughter, Patel. In addition to what is stated herein above, Abdoola seems to be oblivious of the fact that Patel is highly indebted to Absa Bank, and the sequestration application against Patel. She alleges that she believed that the 50% share purchase price would be paid to her by the attorneys of Absa Bank. This allegation is beyond any comprehension. Further, in the light of the facts already dealt with above, it is not correct that Patel periodically made payments to her and or that her livelihood is

dependent on the full amount owed to her by Patel. These are desperate untruths.

TEST FOR INTERVENTION

11. Generally, a party seeking to intervene in court proceedings can either do so in terms of Rule 12 of the Uniform Rules of Court, or in terms of the common law. A party seeking leave to intervene must prove that:
 - (a) He or she has a direct and substantial interest in the subject-matter of the litigation which could be prejudiced by the judgment of the court; and
 - (b) the application is made seriously and is not frivolous, and that the allegations made by the applicants constitute a *prima facie* defence to the relief sought in the main application. A 'direct and substantial interest' means a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court (*my emphasis*). A mere financial interest is only an indirect interest in such litigation and is insufficient.
12. The practice in insolvencies is unique as it is neither a pure intervention nor a substitution and is *sui generis* from a procedural point of view¹. It is trite that an intervening creditor may be given leave to intervene at any stage, either to oppose a sequestration or to have a *rule nisi* discharged².

¹ See *Fullard v Fullard* 1979(1) SA (T), at 372B.

² See *Uys and Another v Du Plessis (Ferreira Intervening)* [2001 \(3\) SA 250 \(C\)](#) at 252; *Fullard v Fullard* [1979 \(1\) SA 368 \(T\)](#) at 371F – 372G. See also *Maritz t/a Maritz & Kie Rekenmeester v Walters and Others* [2002 \(1\) SA](#)

A creditor may also intervene when an applicant for a sequestration order does not proceed with his application or does not succeed therein. The court takes a practical view in these matters and also bears in mind the interests of the general body of creditors³.

13. In this matter Abdoola failed to prove that she is creditor and her application for leave to intervene ought to be dismissed. Counsel for Abdoola, correctly so, never persisted with the argument that she is entitled to intervene because she considers Patel's property to be her primary residence. Such argument was bound to fail because that does not establish her legal interest in the subject matter of the sequestration application. Such legal interest could only arise during eviction proceedings.
14. Even if I were to find that Abdoola is a creditor, for reasons stated herein below, the circumstances of this matter are such that a final sequestration order will still be justified.

ADVANTAGE TO CREDITORS

15. It is contended on behalf of Absa Bank that should Abdoola be refused leave to intervene, there is no opposition to the grant of a final order of sequestration and the court must grant the final sequestration order

[689 \(C\)](#) where it was accepted that the intervening party would have locus standi to oppose the sequestration if it could be found that he was a creditor.

³ See Fullard, at 372B

sought. Counsel for Abdoola argued that Absa Bank failed to allege and prove benefit to creditors and hence I must dismiss the petition for sequestration and set aside the order of provisional sequestration.

16. Section 12 of the Insolvency Act, 24 of 1936 (“the Act”), entitled “Final sequestration or dismissal of petition for sequestration”, provides:

“(1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that —

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(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 sequester the estate of the debtor.

(2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die.”

17. The parties argued the matter on the basis that the first two requirements under subsections 12(1)(a) and 12(1)(b) of the Act are met. The point of contention was whether there is reason to believe that final sequestration will be to the advantage of creditors. Absa Bank bears the onus of

demonstrating that there is reason to believe that final sequestration will be to the advantage of creditors⁴. In *Meskin & Co v Friedman* 1948(2) SA 555 (W) the court held: *“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 [Insolvency] Act some may be revealed or recovered for the benefit of creditors, that is sufficient”*⁵.

18. In *Stratford And Others V Investec Bank Ltd And Others* 2015 (3) SA 1 (CC), the Constitutional Court endorsed the Friedman test and stated the following: *“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”*⁶.

19. It was contended on behalf of Absa Bank that given that Patel owned a high-end residential immovable property situated in Parkhurst, it is highly

⁴ See *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* [1954 \(2\) SA 109 \(N\)](#) at 112C – D.

⁵ See *Friedman*, at 559.

⁶ See para 45

unlikely that she is not possessed of any further assets which could be unearthed during the enquiry under the Act and realized for the benefit of her creditors. Counsel for Abdoola baldly contended that this alone is not enough to prove that there will be any advantage to creditors. At this stage of the hearing, though I must be “satisfied”, I need not be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so⁷ (*my emphasis*). A bald allegation in the papers that sequestration will be to the advantage of creditors of the debtor does not suffice. Absa Bank’s belief is based on the existence of the high-end valuable property belonging to Patel and not on bald allegations. Such belief is not unreasonable, and the prospects are not too remote. Therefore, I am satisfied that Absa Bank, as per the reasoning in Friedman case, has established *prima facie* proof of facts giving rise to a reasonable belief.

20. Further, in this matter, as per the Stratford Constitutional Court decision quoted above, “*there is a substantial estate from which the creditors cannot get payment, except through sequestration*” (*my emphasis*). And, this also justify a final sequestration order.

21. In the light of the above, I am satisfied that —

- (a) Absa Bank, as the petitioning creditor, has established against Patel a claim under subsection (1) of section 9 of the Act;
- (b) Patel has committed an act of insolvency and or is insolvent; and

⁷ See Friedman, at 558.

- (c) there is reason to believe that it will be to the advantage of creditors of Patel's estate is sequestrated.

22. Hence, the sequestration application must succeed.

COSTS

23. The parties agreed that the costs in the application for leave to intervene should follow the results.

THE ORDER

24. I make the following order:

- a) The late filing of the replying affidavit in the application for leave to intervene is condoned;
- b) The application for leave to intervene by KATIJA BIBI ABDOOLA in the application for sequestration of JACINTA LUCY PATEL brought by ABSA BANK LIMITED is dismissed with costs.
- c) The estate of the respondent (JACINTA LUCY PATEL) is placed under final sequestration.

HW Sibuyi
Acting Judge, High Court
Johannesburg

For the applicant: Adv. R. Scholtz

Instructed by: Lowndes Dlamini Attorneys

For the respondent: Yusuf Bhamjee Attorneys

For the Intervening Applicant: Adv. MZF Suleman

Instructed by: Sulemans Attorneys

Matter argued: Thursday, 12 September 2019.

Judgment delivered on: Wednesday, 18 September 2019