REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
5/12/2014 Keightley
DATE SIGNATURE

CASE NO: 14/29338

In the matter between:

WING DAI TRADING COMPANY Applicant

And

LEONG; SIO PEONG Respondent

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. On 23 September 2014 this court granted a provisional order sequestrating the respondent's (Ms Leong's) estate. What comes before me, despite the delay of a number of years, is the application for the order to be made final. Ms Leong opposes this relief.

2. The application was originally opposed on numerous grounds, including, among others, the absence of *locus standi* on the part of the applicant; the application of

the Badenhorst rule on the basis of Ms Leong disputing the debt claimed by the applicant; and set-off. As I explain below, subsequent events led to a narrowing of the disputed issues.

3. The opposed application for a final order of sequestration first came before Coppin J on 31 January 2018. After argument in the matter had been advanced and judgment reserved, the parties asked the learned Judge to stand the matter down as there had been an approach from the respondent, Ms Leong's, legal representatives to open settlement negotiations. Coppin J acceded to this request. Thereafter, the parties reached an oral agreement in terms of which Ms Leong acknowledged her indebtedness to the applicant in the sum of R32 500 000. Further terms regarding how payment of this amount was to be made by her were also agreed. The applicant's attorney made notes of what had been agreed, and these were furnished to Ms Leong's attorney, and were signed by Ms Leong. The parties agreed that a written memorial of the points of agreement would follow, but it is common cause that this did not eventuate. Ms Leong did make certain payments to the applicant in accordance with the oral terms of agreement, although she subsequently ceased making payment, despite demands from the applicant.

4. Ultimately, in light of Ms Leong's failure to make further payments as per the oral agreement, the matter was set down for re-hearing before me. In addition to what was before my learned brother Coppin J at the first hearing of the matter, I have the additional evidence before me of the oral agreement reached between the parties.

5. As regards the original point in limine advanced by Ms Leong that the applicant lacked locus standi, this was not pursued in oral argument before me. Ms Leong's complaint was that the applicant is not, as was first contended in the founding affidavit, a company registered in Hong Kong. Ms Lam, the deponent to the

founding affidavit subsequently rectified the initial description of the the entity: she stated that it was in fact a firm (not a company) registered in accordance with the laws of Hong Kong, and that she is the proprietor of the firm. Ms Lam resides in South Africa, but the firm has its principle place of business in Hong Kong.

6. In my view, there was never any substance in Ms Leong's point in limine. I fail to see how Ms Lam's initial misdescription of the applicant was accompanied by mala fides on her part, as Ms Leong suggested. It seems to me to have been no more than a misdescription of the exact legal nature of the entity in question, rather than an attempt to mislead the court. It has always been clear that Ms Lam controls Wing Dai Trading, whatever the nature of the entity. Rule 14 of the Uniform Rules of the High Court provides that a firm, being a business undertaken by a sole proprietor in a name other than her own, may sue in the firm's own name. This is clearly the situation here. Whether or not Wing Dai Trading has separate legal personality from that of the proprietor, Ms Lam, is neither here nor there: the firm is entitled to institute proceedings in its own name, as it has done.

REQUIREMENTS FOR A FINAL ORDER OF SEQUESTRATION

7. Under the Insolvency Act, 24 of 1956, an applicant must satisfy the court of the following requirements in order to obtain a final order of sequestration:

7.1. She must establish against the respondent a claim of not less than "fifty pounds";

7.2. She must show that the respondent has committed an act of insolvency or is insolvent; and

7.3. Finally, there must be reason to believe that it will be to the advantage of creditors of the respondent if her estate is sequestrated.

Indebtedness

8. As to the first requirement, this was initially subject to much dispute. The applicant averred in the founding affidavit that it advanced monies to Ms Leong over the period May to October 2011 in United States Dollars ("USD") and Chinese Yuan ("CNY"), which monies were to be repaid on or before 31 December 2013. While certain repayments had been made, the applicant averred that Ms Leong remained indebted to the applicant in sums amounting in South African currency to being in excess of R25 million.

9. Ms Leong did not dispute that the monies had been advanced by the applicant. Nor did she dispute that repayment had not been made in full. However, she contended that repayment was not due because the advancement was not in the nature of a loan, but rather in the nature of an investment by Ms Leong in a joint venture with Ms Leong in China. Further, the monies had not been advanced to Ms Leong personally, but to the joint venure. On Ms Leong's version, the joint venture was currently on hold, and the applicant was not entitled to withdraw her investment from the joint venture without complying with her obligations thereunder, and without putting the joint venture at risk.

10. Further, Ms Leong contended that as security for the investment, she had transferred ownership to another entity associated with Ms Lam, viz. Impac Properties CC, of a number of immovable properties in a sectional title development. In exchange, Ms Leong held a mortgage bond over the properties valued at R19

million in total. She contended that she is entitled to call on the bond in the event that Ms Leong withdraws her investment from the joint venture.

11. It was on the basis of the disputed nature of the advancement of monies that Ms Leong submitted in her written heads of argument initially relied on in the hearing before Coppin J that, in terms of the Badenhorst rule, it would be inappropriate for a court in this case to grant sequestration because she disputed the debt on bona fide grounds.

12. The applicant disputed the existence of a joint venture agreement, although Ms Lam confirmed that it had been discussed. She was adamant, however, that no joint venture had been concluded; that she had advanced the monies via the applicant to Ms Leong as a loan with a view to a possible investment in a joint venture; if she did not proceed with investing in the joint venture, the monies were repayable by Ms Leong by a specific date. Ms Leong also contended that the transaction involving the sectional title units was entirely separate from the loan and discussions involving a joint venture.

13. I should add that it is common cause that Ms Leong and Ms Lam used to be good friends, and it seems they had done business together in the past. In my experience, it is often in situations like this, that when the friendship and business relationship break down, they do so with the type of messy consequences we see here.

14. Were it not for certain factors that I discuss shortly, it might have been necessary to refer this dispute to oral argument in order to get to the bottom of the real state of affairs between the parties, rather than simply accepting the respondent's version (which, I should add, is open to question in many respects, as the applicant's replying and subsequent affidavits show). However, that is not necessary here.

15. In the first place, it is common cause that as far back as 30 March 2014, the parties entered into an agreement in terms of which Ms Leong undertook to repay the amounts due to the applicant. Thereafter, she in fact repaid substantial sums. Ms Leong defends her conduct on the basis that she entered into the agreement under duress put on her by Ms Lam and her husband. There is little to sustain the averment of duress: Ms Leong says that Ms Lam's husband shouted at her and that she "realised (her) li(fe) was in danger". Ms Leong does not explain what led to her reaching this rather startling conclusion. Placing further doubt on her plea of duress is the fact that she proceeded to make a number of payments under the agreement. She does nor aver that she was further threatened into doing so. The 30 March agreement demonstrates that despite Ms Leong's contestation of the nature of the debt, she in fact acknowledged that she was obliged to repay the monies advanced, and acted on such acknowledgment.

16. The 30 March agreement was not the only time that Ms Leong acknowledged her indebtedness and agreed to terms of repayment: as I have already indicated, on 1 February 2018, when the matter served before Coppin J, Ms Leong again acknowledged her indebtedness, and again she followed up by acting on it and making payments in terms of thereof. Ms Leong does not dispute the oral agreement reached between the parties on 1 February 2018, nor does she dispute that she signed the written notes setting out the in principle terms agreed upon. She did not depose to an affidavit explaining her conduct. Instead, her then-counsel, acting under her power of attorney, deposed to an affidavit in which he alleged that the agreement was nothing more than "an effort to make the case go away". The applicant points out that the deponent was not present when the settlement

negotiations were conducted, and that he was in no position to make a statement of this nature on behalf of Ms Leong.

17. The fact of the matter is that on two separate occasions Ms Leong has accepted that she is indebted to the applicant to repay the monies advanced to her. Not only has she accepted her indebtedness, but she has also acted on it: each time making some repayments on the agreed terms, before ceasing to make further repayments. In these circumstances it is not surprising that when the matter came before me, counsel for Ms Leong did not press Ms Leong's original case to the effect that the debt was not a loan but an investment, and for this reason it was not repayable by her. In my view, this change of tactic was correctly adopted by Ms Leong's current counsel, Mr Steyn. In light of all the facts, it would have been very difficult for Ms Leong to sustain her original defence to the debt.

18. In oral argument, Mr Steyn pressed only one defence on the issue of indebtedness. The defence relates to the property transaction in terms of which Ms Lam sold various sectional title units to Impac Properties CC (in respect of which entity Ms Lam is the sole member). Mr Steyn submitted that his client had a right of set-off against the applicant flowing from this property transaction: Impac Properties had only paid a portion of the purchase price for the properties - indeed, an amount of over R8million in respect of the deposit alone was outstanding; in addition, Impac Properties had granted to Ms Lam a lien over the rentals relating to the properties, and monies were outstanding in this regard; finally, there was substantial interest accruing in respect of the amounts owing. Mr Steyn submitted that until the amounts due to Ms Lam had been calculated, and set-off applied, I could not reach the conclusion that Ms Leong was indebted to the applicant. For this reason, he submitted that I should refuse to grant a final order of sequestration.

19. Along with the 30 March 2014 agreement relating to the monies advanced to Ms Leong by the applicant, Ms Lam and Ms Leon entered into a second agreement specifically relating to their dealings in respect of the sectional title properties. In terms of the first clause of this agreement, the financial losses made in respect of the sale of the properties to Impac were to be borne equally by both parties. In the second clause, the parties agreed that the 28 units were to be sold as soon as possible, and that the proceeds of these sales would first be applied against the purchase price owed by Impac in the amount of R8,4 million.

20. For set-off to apply as between mutual debts between parties, both debts must be due and payable. It is common cause in this case that the properties have not yet been sold. In terms of the agreement reached between the parties, it is only once the properties are sold that any calculations can be made as to what the losses are that are to be shared, and what will remain once the R8.4 million is applied against the profit accrued. Thus, at this stage, the property transaction does not give rise to a mutual debt that is due and payable to Ms Leong and that can be set off against what she owes to the applicant. It would not be permissible for me to speculate as to what might happen in the future in this regard for purposes of determining at this stage whether the applicant has established that Ms Leong is indebted to it for purposes of confirming the provisional order of sequestration.

21. For the above reasons I conclude that Ms Leong is so indebted: she has twice agreed to her indebtedness to the applicant and has acted on those agreements by making payment of some amounts owed by her before defaulting on the agreed terms. I find that the applicant has satisfied the first of the requirements for confirming the provisional order of sequestration.

Insolvency or act of insolvency

22. An applicant for a final order of sequestration must show that the respondent is insolvent or has committed an act of insolvency. In terms of section 8A of the Insolvency Act, an act of insolvency includes the situation where a debtor absents herself from, or remains outside South Africa, or where she departs or absents herself from her dwelling, with the intent by doing so of evading or delaying the payment of debts.

23. The applicant avers that Ms Leong has given at least seven contradictory versions of her residence and domicile. These include different addresses both in South Africa and in Hong Kong/China. In addition, while Ms Leong historically divided her time between Hong Kong/China and South Africa, she left South Africa in May 2016 and has not returned since then. All efforts by the applicant to ensure that Ms Leong attend a section 152 inquiry have failed to bear fruit. Ms Leong sought a stay of the inquiry pending the finalisation of the sequestration proceedings in July 2015. When the Master refused her request, she instituted proceedings to review the Master's decision, but failed to file a replying affidavit in those proceedings or to take them any further.

24. Ms Leong contends that her physical absence from South Africa is of no consequence in view of the fact that she has always ensured that she has legal representatives on hand to deal with her legal affairs. While this may be so, the fact of the matter is that she has been evasive about where she resides, and she has absented herself from South Africa for an extended period of time while the present application (as well as various interlocutory proceedings between the parties) has played itself out in court. It is difficult to avoid the conclusion that her absence from the country is directly related to an attempt to obstruct the proceedings, and hence

to evade or delay the ultimate payment of her debt. This is particularly so in light of the acceptance by her, on two occasions, of her indebtedness, and her subsequent failure to comply with her repayment undertakings.

25. In the circumstances of this case, I am satisfied that the applicant has established that Ms Leong has committed an act of insolvency.

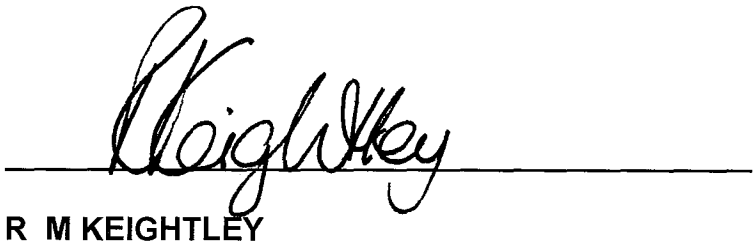
Advantage to creditors

26. The final requirement that the applicant must meet is to demonstrate that Ms Leong's sequestration would be to the advantage of creditors. It is common cause that Ms Leong has assets, in the form of various immovable properties, in South Africa, although the valuations thereof obtained by the applicant are in some respects substantially lower than the values asserted (and not substantiated) by Ms Leong. It is not known whether Ms Leong has any other creditors in addition to the applicant. This is something that the trustee of her estate can ascertain once the provisional order is made final. I am satisfied that that this will be to the advantage of creditors.

CONCLUSION AND ORDER

27. For the reasons advanced above, I find that the applicant has satisfied the requirements necessary for confirmation of the provisional sequestration order. In the circumstances, I make the following order:

1. The estate of the respondent is placed under final sequestration.
2. The costs of the application, including the costs of two counsel for the applicant, shall be costs in the sequestration.



R M KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard	: 07& 8 October 2019
Date of Judgment	: 05 December 2019
Counsels for the Applicant	: JW Steyn
Instructed by	: B Xulu & Partners Incorporated
Counsel for the Respondent	: G Farber (SC)
	JL Kaplan
Instructed by	: Ian Levitt Attorneys