**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO : **38751/2019**

REPORTABLE NO

OF INTEREST TO OTHER JUDGES NO

REVISED

In the matter between:

**PRASANTH SEEVNARAYAN** Applicant

and

**KUVESH RAMJATHAN** Respondent

**JUDGMENT**

**FRANCK AJ:**

[1] The estate of the Respondent was placed under provisional sequestration on the 16th of April 2021 by order of the Honourable Mr Justice Meyer.

[2] The Applicant seeks an order that the estate of the Respondent be finally sequestrated pursuant to the abovementioned provisional sequestration.

[3] In terms of Section 12 of the Insolvency Act 24 of 1936 ("the Insolvency Act") :

*"(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 sequestrate 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."*

[4] All the formal and statutory requirements have been met and service took place in accordance with the provisional sequestration order.

[5] The only issue in dispute, to be decided by this court is whether or not the court is satisfied that there is reason to believe that it will be to the advantage of creditors of the debtor, if his estate is sequestrated.

[6] The Applicant issued summons out of the Gauteng Local Division of the High Court under case number 13710/2012 on 17 April 2012 to recover an amount of R4 million in respect of a loan which he advanced to the Respondent in terms of a written loan agreement.

[7] On 18 August 2015, judgment was granted in the Applicant's favour and the Respondent was ordered to make payment to the Applicant in the amount of R4 000 000,00 together with interest at the rate of 11% per annum as well as costs of the action.

[8] The Respondent sought leave to appeal the judgment to the Supreme Court of Appeal, which application was dismissed on 21 January 2021. The Respondent made application in terms of Section 17(2)(f) of the Superior Courts Act No. 10 of 2013, which application was dismissed with costs by the Supreme Court of Appeal. The Respondent thereafter approached the Constitutional Court for leave to appeal, which application was also dismissed with costs on 29 July 2019.

[9] The Applicant caused a warrant of execution to be issued against the Respondent. On 21 August 2019, the sheriff of the High Court rendered a return of service with an inventory reflecting goods attached. The attached goods became the subject of interpleader proceedings, with a Mukesh Bhavan and the Respondent's spouse claiming that they were the lawful owners of the movable assets that formed the subject matter of the judicial attachment by the sheriff.

[10] On 12 August 2012, the Applicant issued a warrant of execution to attach the Respondent's bank accounts. As a result of this attachment, the Applicant received payment of R149 809,57 from FNB on 30 September 2019.

[11] Several other warrants of execution were issued by the Applicant against the Respondent against different banking institutions, with no result.

[12] The remainder of the judgment together with interest remains due and payable to the Applicant by the Respondent.

[13] When another attempt was made by the Applicant to serve the warrant of execution upon the Respondent in an attempt to attach movable property, the Applicant was provided with a *nulla bona* return by the sheriff of the High Court on 3 September 2019. The *nulla bona* return amounts to an act of insolvency in terms of Section 8(b) of the Insolvency Act.

[14] It has accordingly been established and the court is satisfied that, the Applicant has established a liquidated claim against the debtor that exceeds R100,00 in terms of Section 9(1) of the Insolvency Act and that the Respondent has committed an act of insolvency as contemplated in Section 8(b) of the Insolvency

Act.

[15] Regarding the requirement of *"advantage to creditors"* in terms of Section 12(1)(c) of the Act, in **Lotzof v Raubenheimer**[1] it was found that, the expression *"to the advantage of creditors"* in Section 12(1)(c) means the advantage of all the creditors or at least the general body of creditors. The fact that the debtor has no assets or not sufficient assets to pay the costs of administration is generally sufficient proof that sequestration would not benefit creditors. That, however, is not always the case, especially where a reasonable case has been made out on the papers for an inquiry into the debtor's affairs which may be beneficial to the creditors' interests.

[16] In **Meskin & Co v Friedman**[2], Roper J stated:

> *"The right of investigation is given, as it seems to me, not as an advantage in itself, but as a possible means of securing ultimate material benefit for the creditors in the form, for example, of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collusive claims. 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."*

[17] The approach in **Friedman**[3] has been endorsed by the Constitutional Court in the case of **Stratford and Others v Investec Bank Limited and Others**[4]. In **Stratford**[5] the following was found:

> *"[44] 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 that —*

> *'the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an 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 but 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."*

[18] The Respondent opposes the relief sought as he avers that his sequestration will not be to the benefit of his creditors.

[19] The Respondent owns one immovable property described as Portion 2 of Erf [....] Kelvin, City of Johannesburg ("the immovable property") registered under title deed T165190/2004. There is a mortgage bond registered in respect of this property which, on the Respondent's version has an outstanding balance in an amount of R1 788 340,80.

[20] The Applicant avers that the estimated value of the immovable property is R1 850 000,00 and relies on an automated valuation attached to the founding affidavit. The WinDeed Automated Valuation report, a LexisNexis product, reflects

that the Respondent purchased the immovable property for R700 000,00 on 25 November 2004 and that a bond in an amount of R2 million was registered over the property by SA Home Loans on 2 April 2019.

[21] It reflects the estimated value of the property as R1 850 000,00 and states that this estimated value is calculated:

> *"from a sophisticated statistical calculation of values from various sources including the Surveyor General office, Deeds Office (recent sales in the area), banks and estate agents. It is a GUIDE and should be used with other available information – such as known improvements or deterioration of the property/dwelling since the last date of sale. The Safety Score is the percentage of probability that the Estimated Value is reasonable and not over-inflated. This is especially useful to a lender (i.e. a bank) to make sure that the amount of the bond is reasonable for the property. A score over 70% is considered "high".*
>
> *The Accuracy Score is another statistical feature that determines the probability that the Estimated Value will be within 20% of the selling price. This is especially useful for buyers and sellers of property. A score over 60% is considered "high".*
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> | | | |
> |---|---|---|
> | *Expected High* | *R2 060 000,00* | *Safety Score 85%* |
> | *Estimated value* | *R1 850 000,00* | *Accuracy Score 87%* |
> | *Expected low* | *R1 560 000,00* | *Confidential level – high".* [6] |

[22] The valuation report sets out a comparative sales table which tabulates and shows the details of the most relevant comparative sales, a comparative sales map, which shows where these comparable sales are in relation to the subject property, amenities, which list shows the places of interest and convenience closest to the property and suburb trends, which graphs show the average price and total volume of sales in the suburb by freehold and sectional properties.

[23] The municipal valuation is reflected as R1 465 000,00, valued in 2018. On the second page, 20 comparative sales in the area are recorded from which the information is derived.

[24] The Respondent states that he registered the bond for R2 million in April 2019 on the property and utilised the fees to pay off the substantial legal fees which he had incurred in defending the action brought by the Applicant against him. According to the Respondent, he no longer has the funds from registering a R2 million bond over the immovable property.

[25] According to the Respondent, a forced sale of the immovable property will result in it being sold for less than its value and the Respondent relies on the municipal value.

[26] In reply, the Applicant points out that no attempt has been made by the Respondent to show the court how the R2 million home loan amount was spent and in particular, what his legal fees amounted to. The Applicant avers that it is highly unlikely that the entire home loan amount was utilised for payment of legal fees especially in circumstances where judgment was granted in the Applicant's favour after a trial in August 2015, with only the applications for leave to appeal being launched thereafter.

[27] The Respondent is married out of community of property.

[28] The Applicant avers that the Respondent is a member of Machaba Technology Solutions CC. The Respondent states that this close corporation is dormant.

[29] The Respondent is the owner of two motor vehicles, being :

[29.1] a 2017 Mitsubishi Pajero Sport 2.5 DA/T which is subject to an instalment sale agreement with MFC (a division of Nedbank Limited); and

[29.2] a Jaguar XF 2.2 D Premium Luxury which is subject to an

instalment sale agreement with Nissan Finance.

[30] The Respondent states that in respect of the Mitsubishi Pajero Sport, an amount of R426 419,58 is outstanding to MFC and in respect of the Jaguar XF, an amount of R349 948,04 is outstanding to Nissan Finance. The Respondent avers that, there is no equity in the vehicles if they are sold at a forced sale.

[31] The Respondent earns a substantial salary. One that was substantial enough in order for the Respondent to not only qualify for a R2 million home loan but also to purchase luxury vehicles. The Applicant avers in reply that the Respondent's wife is employed as a legal adviser with the IDC and earns a substantial salary in her own right. There is no reason why the Respondent should contribute to his wife's expenses.

[32] On the Respondent's version, his monthly salary is R136 154,39. He, however, also states that his income is *"structured in such a way that I get a salary to which is split into a basic (R140 000,00 before tax, and a commission R105 056,53 before tax). The commission is premised on the basis that I meet my sales targets. At the end of every six months, if my targets are not met, the commission gets clawed back. Therefore my commission is variable."* The Respondent attached one payslip for the month of November 2019.

[33] The Respondent further alleges that his monthly expenses amount to R136 900,19[7]. In a breakdown attached to this affidavit, the Respondent states that he makes payment of R15 000,00 in respect of his wife's monthly expenses and there is also an expense annotated as *"Discovery Invest"* in an amount of R6 259,54 that is paid on a monthly basis, which expense is not explained on the papers.

[34] Regarding the Respondent's income, the Applicant states the following in reply[8]:

> [34.1] The Applicant only attached old, outdated bank statements for the months of July and August 2019 to his affidavit.

[34.2] The Respondent does not appear to receive his salary into his FNB accounts according to the bank statements provided.

[34.3] The Respondent's closing balances in respect of the bank statements provided do not fall below R140 000,00. This is inconsistent and contradictory to the Respondent's averments relating to his expenses as he clearly has no deficit at the end of each month but rather a surplus of R140 000,00 each month.

[34.4] The Respondent received payments from Citibank totalling an amount of R132 893,70 in June 2019 and R153 415,15 in July 2019.

[34.5] It is likely that the Respondent has other bank accounts that he has not disclosed, alternatively another source of income.

[34.6] The Respondent has not taken the court into his confidence.

[35] In the Applicant's heads of argument, the point is made that the Respondent's salary slip provided reflects an undisclosed bank account with account number [....] and that there is therefore a bank account that the Respondent did not disclose in his answering affidavit.

[36] It was argued on behalf of the Applicant that an investigation will reveal assets as well as other sources of the Respondent's income which will be to an advantage of the general body of creditors.

[37] The Respondent further claims that none of the movable assets in the immovable property, is owned by him. In **Kilburn v Estate Kilburn**[9] the following was stated in respect of property claimed by spouses:

> *"Now the Insolvency Act provides that when one spouse becomes insolvent, the estates of both spouses vest in the Master, and then in the trustee when appointed, but there is a proviso that the trustee must release such property of the solvent spouse as is shown to have been acquired during the marriage with the insolvent by a title valid as against the creditors of the*

*insolvent spouse. In other words if property has been acquired by the spouse who is not insolvent by means of her own money or from a source other than her husband, then she holds it by title valid as against the creditors of her insolvent husband. But if she obtains it from him during marriage as a donation, or if the insolvent gives money to his wife to buy property and have it registered in her name, or if she buys property with money provided by the husband ostensibly for herself but in reality for her husband's estate or even for the benefit of both the spouses, then it is his property and forms part of his estate; and the property, though registered in her name, is not acquired by the non-insolvent spouse by a title valid as against the creditors of the insolvent."*

[38] Relying on **Nel v Lubbe**[10], the Respondent argues that the valuation report on which the Applicant relies does not comply with the requirements and practice of this court to establish the value of an immovable property in insolvency proceedings. In the matter of **Nel v Lubbe**[11], Levinson J said the following:[12]

*"The purpose of furnishing a sworn valuation is therefore to establish the price that is likely to be realised from the sale of the property on what is called a forced sale so that it can be determined that there will be a free residue available for creditors and advantage to creditors is thereby established. A practice has therefore grown up in this Division (I cannot speak for others) whereby a sworn valuation is furnished by an expert witness, usually, as in the present case, an estate agent. He expresses an opinion with respect to the price that the property will fetch. Normally the opinion of a witness is not receivable in evidence. But the opinion of an expert witness is admissible whenever, by virtue of the special skill and knowledge he possesses in his particular sphere of activity, he is better qualified to draw inferences from the proved facts than the Judge himself. A Court will look to the guidance of an expert when it is satisfied that it is incapable of forming an opinion without it. But the Court is not a rubber stamp for acceptance of the expert's opinion. Testimony must be placed*

*before the Court of the facts relied upon by the expert for his opinion as well as the reasons upon which it is based. S v Gouws 1967 (4) SA 527 (E); S v Govender and Another 1968 (3) SA 14 (N). The Court will not blindly accept the assertion of the expert without full explanation. If it does so its function will have been usurped.*

*In the present case, as already mentioned, the expert is an estate agent and nothing of evidential value is said in relation to the price that will be fetched on a forced sale. In his affidavit he states that he has inspected the property. He then notes the address, the erf number and the measurements. He details the municipal valuation of the land and the improvements. Thereafter the following appears in the document:*

*'General: The property is situated in a well-established suburb of Johannesburg. The property is supplied with all municipal services and is fully reticulated. The property has easy access to main roads, schools and shopping centres. Improvement: The property is improved with a single storey dwelling, brick under iron with carpeted and tiled floors and steel framed windows. The improvements comprise of a TV lounge, separate lounge, dining room, study cum bedroom, three bedrooms, open plan kitchen, two full bathrooms, double garage, swimming pool and outdoor thatch entertainment area, servant's quarter plus toilet and shower. The property is fully walled with a well-maintained garden. Conclusion: I believe a forced sale value of the property would be R290 000.'*

*Not a single reason is set out in the valuation as to why the sum of R290 000 is the value. In fact, the document is a* ***bald assertion of value****. The procedure adopted, in my opinion, is hopelessly inadequate. The proper approach is for the expert to furnish in evidence the detailed facts upon which the opinion is based and the reasons for forming the opinion expressed. Upon hearing the evidence the Court will come to its own conclusion, no doubt guided by the evidence.*

*It is not for me to lay down every facet of the evidence which must necessarily be adduced. Always relevant will be the prices paid for comparable properties in the same area at similar forced sales held at or about the same time.*

*Also material is the fact that the valuator has attended such sales and has personal knowledge of the prices fetched. If not able to do that, he should at least be in a position to depose to the fact that he has made an inspection of relevant title deeds in the Deeds Office and has recorded therefrom the prices fetched for similar properties under similar circumstances. Naturally, appropriate descriptions of the improvements will have to be furnished so that the value can be assessed on a comparable basis. All that material should be recorded in the affidavit. In the present application the evidence falls far short of that." (emphasis added)*

[39] With reference to the WinDeed Automated Valuation Report referred to hereinabove, it constitutes a report which is not simply a bald assertion of value. The valuation report supplied by the Applicant cannot be said to be hopelessly inadequate. The expected high, estimated and expected low values of the properties are derived from a sophisticated statistical calculation of values from various sources including the Surveyor General's Office, Deeds Office, banks and estate agents. It tabulates the details of the most relevant comparative sales and where those sales are situated in relation to the property with graphs showing the average price and total volume of sales in the suburb by freehold and sectional properties. From the valuation report, it appears that there is a high probability of the immovable property being sold at the valuation amount.

[40] The Respondent has not provided the court with any detail relating to the state of the immovable property and improvements thereon even though this information is within his knowledge.

[41] During argument, counsel appearing for the Respondent made application from the bar for leave to supplement the Respondent's answering affidavit. The

Respondent's counsel indicated that a supplementary affidavit would be filed dealing with the valuation of the property, the impact of Corona virus, market value, who the creditors of the Respondents are and to provide the court with the Respondent's own valuation in respect of the immovable property. The Respondent's counsel then withdrew his application for leave to supplement and requested the court to exercise its discretion to request further documentation in terms of Section 12(2) of the Insolvency Act. According to the Respondent, the invocation of Section 12(2) relating to further documentation would assist the court to exercise its discretion.

[42] The application was issued on 4 November 2019. The Respondent filed his answering affidavit on the 5th of December 2019 whereafter a replying affidavit was filed on or about 14 January 2020. The application for the provisional sequestration of the Respondent was heard on the 27th of November 2020 with judgment handed down by the Honourable Mr Justice Meyer on 16 April 2021. The Respondent has had ample opportunity to place any additional facts before the court, prior than the date of hearing of this application. It is not necessary for this court to request further documentation and to postpone the hearing in terms of Section 12(2) of the Insolvency Act.

[43] I am satisfied that there is reason to believe that it will be to the advantage of creditors if the Respondent's estate is finally sequestrated. In this regard, there is a reasonable prospect, that is not too remote, that some pecuniary benefit will result to creditors upon the Respondent's sequestration.

[44] I am satisfied that an investigation into the financial affairs of the Respondent may result in a pecuniary benefit for the Respondent's general body of creditors. An investigation can be done upon sequestration of the Respondent's assets, the Respondent's investments, the Respondent's alleged expenses, the funds that the Respondent received in respect of the bond that was registered over the immovable property, the Respondent's spouse's assets and the Respondent's sources of income and other bank accounts that have not been disclosed to this court. There is in my view, a prospect that is not too remote, that concealed assets will be found and recovered upon an investigation into the Respondent's financial affairs.

[45] The creditors may resolve to sell the immovable property by way of a public auction or a private treaty as opposed to a forced sale. In **Swart v Starbuck and Others**[13] the court found that:

> *"The creditors of an insolvent estate are in law the masters of realisation of the assets of the estate."*

[46] In terms of Section 80 *bis* of the Insolvency Act, a trustee shall, at any time before the second meeting of creditors if satisfied that any movable or immovable property of the estate ought to forthwith be sold, recommend to the Master in writing accordingly, stating his/her reasons for such recommendation. The Master may thereupon authorise the sale of such property on such conditions and in such manner as he/she may direct. In terms of Section 82(1) the trustee of an insolvent estate shall, as soon as he/she is authorised to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct. However, if the creditors have not, prior to the final closing of the second meeting of creditors, given any directions, the trustee shall sell the property by public auction or public tender.

[47] If the immovable property is sold, and the sale leaves no free residue, the secured creditor, being SA Home Loans would at least be paid and the Respondent would then be in a position to utilise his bond instalment of R19 436,14 per month towards payment of his creditors.

[48] The Applicant argued that the Respondent's costs of opposition should not be included in the taxed costs of sequestration. This argument was made, with reference to the approach that the Respondent has taken throughout the course of litigation and that the Respondent has not taken the court into his confidence and has not disclosed his full financial details, including assets, and income to the above Honourable Court. The Respondent in argument stated that there has been no conduct that is unlawful or *mala fide* that would result in the Respondent not recovering his costs. In my view, the Respondent's costs, should not be a claim in the sequestration. Accordingly, I make the following order:

[48.1] The estate of the Respondent is placed under final sequestration.

[48.2] The Respondent's costs of opposition are not to be included in the taxed costs of sequestration.

**FRANCK, A J**

Date of hearing : 23 July 2021
Date of judgment : 22 October 2021

Legal representation :
For Applicant : Advocate A Vorster
Instructed by : Padayachee Attorneys Inc
For Respondent : Advocate O Mokgotho
Instructed by: Sangham Inc Pietermaritzburg

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1 1959 (1) SA 90 (O) at 94
2 1948 (2) SA 555 (W) at 599
3 **Meskin & Co v Friedman** 1948 (2) SA 555 (W)
4 2015 (3) SA 1 (CC) at [43] to [46]
5 **Stratford and Others v Investec Bank Limited and Others** 2015 (3) SA 1 (CC)
6 CaseLines 001-47
7 CaseLines 009-19
8 CaseLines 010-22 to 010-23
9 1931 AD 501 at 507-8
10 1999 (3) SA 109 (W)
11 1999 (3) SA 109 (W)
12 at 112 D – 112 E
13 2016 (5) SA 372 (SCA) at para 21