REPUBLIC OF SOUTH AFRICA

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

CASE NO: **2020/38729**

REPORTABLE: NO / ~~YES~~
OF INTEREST TO OTHER JUDGES: NO / ~~YES~~
REVISED.
11/2/2022

In the matter between:

SHACKLETON CREDIT MANAGEMENT (PTY) LTD Applicant

and

KAGISO AUBREY NGAKATAU
(IDENTIY NUMBER: [....]) First Respondent

INGRID SHAUNETTE NGAKATAU
(IDENTITY NUMBER: [....]) Second Respondent
Married in of community of property to each other

JUDGMENT

ABRAHAMS AJ

Introduction

[1] The Applicant seeks an order in terms of which the Respondents are provisionally sequestrated.

[2] The Applicant further seeks condonation for the late filing of its replying affidavit.

[3] The Applicant is Shackelton Credit Management (PTY) LTD a private company duly registered and incorporated according to the company laws of the Republic of South Africa and the First and Second Respondents are married to each other in community of property.

Background

[4] On 4 February 2010, at Northcliff Johannesburg the First Respondent and BMW duly represented by an authorised employee, concluded a written instalment sale agreement. The First Respondent failed to comply with its obligations in terms of the agreement in that he failed to pay the required monthly instalment, as a result BMW terminated the agreement and repossessed the vehicle.

[5] Following the realization of the vehicle a shortfall remained due by the First Respondent to BMW, and BMW instituted legal action against the First Respondent under case number 42166/2011.

[6] On 28 January 2013 default judgment was granted in favour of BMW against the First Respondent. In terms of the Court Order, the first Respondent was ordered to make payment to BMW as follows:

> Payment of the sum of R306 509,66;
>
> Interest thereon at the rate of 15,50% per annum from 5 October 2011 to date of final payment;
>
> Costs of suit on the attorney and client scale to be taxed as provided for in the agreement.

[7] On 9 October 2013 at Midrand BMW, duly represented and the Applicant, duly represented, concluded a written deed of cession. BMW unconditionally and irrevocably ceded and made over to the Applicant with effect from 1 July 2013, all of BMW's right, title and interest in and to the book debts of which the First Respondent debt' which was R452 151, 45 at the time, was included.

[8] The Applicant attempted to collect the debt from the First Respondent and between 10 October 2014 to 2 May 2018 the First Respondent commenced paying an amount of R200.00 (two hundred rand) per month to the Applicant in settlement of the debt. After 2 May 2018 no payments was received.

Application for condonation for the late filing of the Applicant's Replying affidavit

[9] The Applicant brought an application for condonation for the late filing of the replying affidavit. The Applicant argues that the reason for the delay is that they wanted to include a valuation in the Replying Affidavit, On the 4th of February 2021 the Applicant informed the Respondents that it has appointed a professional valuer, Brian Feilim Morgan ("Morgan") to attend to the Weltevreden Park property to provide a certificate of valuation of the property.

[10] The Respondents were also provided a Curriculum Vitae of Morgan and on 8 February 2021 the Respondents insisted that more information be provided in relation to Morgan before they agreed that the property can be valued on 16th February 2021. Morgan provided the Applicant with a valuation report of 21 February.

[11] The Respondents are not opposing the application for condonation, and they allege no prejudice because of the late filing of the replying affidavit. Since obtaining the valuation is important to ascertain if there is *prima facie* an advantage to creditors, I condone the late filing of the replying affidavit.

Application to file a supplementary affidavit by the Respondents

[12] The Respondents apply for leave to file a supplementary affidavit in order to also file an affidavit by a valuator (Marius De Lange) and to deal with some of the allegations raised by the Applicant in its replying affidavit. This application was not opposed, and I deem the valuation important to determine if there is reason to believe that there may be an advantage to creditors when considering the value of the property. In the premises I condoned the filing the supplementary affidavit.

Point in *Limine*

[13] The Respondents raises a point *in Limine*, in that the Applicant has failed to comply with the provisions of Rule **46A** of the **Uniform Rules**.

[14] **Section 25** of the **Constitution of the Republic of South Africa**, guarantees the protection of property and outlaws' arbitrary deprivation of property unless it is permitted by law of general application.

[15] The Respondents contend that **Rule 46A** is specifically enacted so as to deal with the deprivation of property and deals with specific procedures to be followed and conditions which have to be met before a court will declare a residential property specially executable. The Respondents further argue that the effect of the sequestration of the estate of the Respondents, will result in the arbitrary deprivation of the Respondents' property.

[16] **Rule 46A** is applicable to the execution upon a judgment debt. Sequestration proceedings are not akin to execution or the recovery of debt but to bring about the *concursus creditorum* for the benefit of all creditors and not just one.

[17] In terms of **section 20(1)(a)** of the **Insolvency Act 24 of 1936**, ("the Act") the effect of the sequestration of the estate of an insolvent shall be:
"to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;"

[18] I agree with counsel for the Applicant that the procedures and mechanism are prescribed by the Insolvency Act and absent a challenge to the constitutional

invalidity of **section 20(1)** of the Act, the vesting of an insolvent's estate in the Master, and then in the trustee, is statutorily permitted.
In the premise I dismiss the point in *limine.*

The relevant legal provisions relating to provisional sequestration orders
[19] In terms of section 10 of the Act the court may grant a provisional sequestration order if it is satisfied that *prima facie:*
19.1 The applicant has established a claim which entitles it, in terms of section 9(1) of the Act to apply for the sequestration of the debtor's estate; and
19.2 The debtor has committed an act of insolvency or is factually insolvent; and
19.3 There is reason to believe that it would be to the advantage of creditors of the debtor if his/her estate is sequestrated (section 12 (1) of the Act).

[20] The onus of satisfying the court of the three requirements rests on the sequestrating creditor.

[21] The test where a provisional order is being sought, as is the case here, is not whether the sequestrating creditor has established the requirements on a balance of probabilities (i.e., the standard of proof to obtain a final order). In this regard, the provisional sequestration stage is designed to afford the creditor a simple and speedy remedy for preserving the debtor's estate and enforcing its claim. *(Provincial Building Society of South Africa v Dubois* **1966 (3) SA 76** 0N) at 80.)

[22] Section 8 of the Act defines acts of insolvency. Section 8(b) of the Act creates two separate acts of insolvency, namely, firstly, where the debtor, upon demand of the Sheriff, fails to satisfy the judgment debt or to indicate disposable property sufficient to satisfy it and, secondly, where the Sheriff, without presenting the writ to the debtor, fails to find sufficient disposable property to satisfy the judgment debt and states this fact in his return.

[23] In terms of the provisions of section 12(1)(c) of the Act, before the court will grant the sequestration order, it must be satisfied that there is reason to believe that it would be to the advantage of creditors if the debtor's estate is sequestrated.

'Creditors' means all or at least the general body of creditors. *(Lotzof v Raubenheimer* **1959 (1) SA 90** (0) at 94.)

[24] The question is whether a 'substantial portion' of the creditors, determined according to the value of the claims, will derive advantage from sequestration. *(Fesi v* ABSA *Bank Ltd* **2000 (1) SA 499** (C).)

[25] For a sequestration to be to the advantage of creditors it must 'yield at the least, a not negligible dividend'. *(Trust Wholesalers and Woollens (Pty) Ltd v Mackan* **1954 (2) SA 109** (N) at 111.)

[26] It is not necessary to prove that the debtor has any assets, provided it is shown either that the debtor is in receipt of an income of which portions are likely to become available to creditors in terms of section 23(5) of the Act, (*Ressel v Levin* **1964 (1) SA 128** (C) or that there is a reasonable prospect that the trustee, by invoking the machinery of the Act, will reveal or recover assets which will yield a pecuniary benefit for creditors. (BP *Southern Africa (Pty) Ltd v Furstenberg* **1966 (1) SA 717** (0) at 720; and *Dunlop Tyres (Pty) Ltd v Brewitt* **1999 (2) SA 580** (W) at 583.)

[27] In *Meskin & Co v Friedman* **1948 2 SA 555 (W) 558**, Roper J said:
"The phrase "reason to believe", used as it is in both these sections (sections 10 and 12 of the Insolvency Act), indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the courts 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."

[28] The Constitutional Court in *Stratford & Others v Investec Bank Ltd and Others* **2015 (3) SA 1 (CC)** stated that specifying the cents in the rand or a 'not negligible' benefit to creditors is unhelpful. The court made it clear that the meaning of the term 'advantage to creditors' is broad and should not be approached rigidly. 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 the creditors. The court need only be satisfied that there was reason to believe, not even a likelihood but a prospect not too remote, that as a result of investigation and enquiry, assets might be uncovered that will benefit creditors.

Act of Insolvency

[29] The Applicant relies on Section 8*(b)* of the Act. An act of insolvency is committed if, as provided for in s 8*(b)* of the Act, the court has given judgment against the debtor and he fails 'upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment'.

[30] On 20 July 2020 the Applicant caused a warrant of execution to be issued against the First Respondent. On 19 September 2020, the Sheriff of the High Court, Roodepoort provided the Applicant with a *nulla bona* return in respect of the First Respondent, which recorded that:

> Payment of the judgment debt was demanded from the First Respondent to satisfy the warrant of execution;
>
> The First Respondent declared that he has no money or disposable property wherewith to satisfy the warrant
>
> No disposable assets were pointed out to the Sheriff, and the Sheriff could not, despite a diligent search and enquiry, find any movable assets

Advantage to creditors

[31] The Respondents contend that the Applicant has failed to demonstrate that the sequestration would be to the advantage of creditors. The Respondents allege that there is no advantage to the creditors. Against this backdrop I deal with the assets of the Respondents.

The immovable properties

[32] The Respondents are the registered owners of the following immovable properties described as:
Erf [....], Homes Haven Extension 13, Mogale City Local Municipality held by Title Deed: T 32689/2008 (*"the Homes Haven Property"*); and Erf [....] Weltevredenpark also known as 67 Bergkaree Avenue Weltevredenpark (*"the Weltevredenpark Property"*).

[33] In relation to the Homes Haven Property, the Respondents allege that a mortgage bond was registered over the property in favour of Nedbank Limited. The amount owing to Nedbank as of 1 August 2020 was an amount of R563 712.20. The expected selling value of the property is between R600 000.00 and R740 000.00 according to a valuation they obtained from an estate agent. There are municipal charges outstanding in the amount of R230 026.67, and rates due to the Homeowners Association in the sum of R820 211.29. The property has already been sold and is subject to pending legal action.

[34] The property is registered in the names of the Respondents. The Applicant alleges that the pending legal action relates to a judgment taken by the Homeowners Association, and proceedings to declare the property specially executable on 9 December 2015. Although the Respondents sought to rescind the judgment this was not proceeded with.

[35] The Applicant, contends that according to an automated valuation report obtained by the Applicant, the Homes Haven property has an expected low value of R1 870 000.00, and an expected value of R2 150 000.00.

[36] If the estimated low score is used, the property will realise approximately R256 049.84 (estimated low value less amounts owing to Nedbank, Homeowners Association, and municipality) for the distribution to creditors.

[37] In respect of the Weltevreden Property, Marius De Lange for the Respondent values the property at R1 450 000.00, and Morgan for the Applicant values the property at R1650 000.00.

[38] The amount owing to Nedbank in respect of the mortgage bond registered over the property is an amount of R1 187 301.56. and the outstanding municipal rates on the property is R317 253,27.

[39] The Respondents argue that Morgan's valuation of the property is incorrect and that De Lange's valuation is correct.

[40] De Lange for the Respondent in his valuation compared the Weltevreden Property to three properties sold in the same area, The first property was sold for R1 470 000 on 3 March 2020. This property according to his own findings is smaller than the Weltevreden Property and it is unclear why he used this property in his comparison as apart from the location it is not comparable. The next two properties that De Lange compares is more or less the same size of the Weltevreden Property and was sold for R1 625 000,00 and R 1 650 00,00 respectively. De Lange does not explain why he concludes that the Weltevreden Property is valued at R1 450 000,00. This is less than the municipal value of the property. According to the municipal bill attached the municipal value of the property in R1 500 000,00.

[41] From the documentation attached to the Answering Affidavit it is clear that the Respondents have money available to service the mortgage bond payments on the Weltevreden Property as payments thereon are reflected. On the sale of the property this amount will be freed up.

[42] The appointed trustee would be able to investigate the true state of affairs in relation to both the Properties, the sale of the Homes Haven Property and the amounts owing.

[43] I find that there is reason to believe that there is an advantage to creditors to be achieved from the sale of the properties.

The Companies and/or Close Corporations

[44] The First and Second Respondents combinedly holds directorship and membership in 18 companies and/or close corporation.

[45] The Respondents contends that the companies and/or close corporations are all dormant and never operated except:
Minatlou Trading 252 CC ("*Minatlou Trading*") which has a bank account but in respect of which the First Respondent is no longer a member; and Sho-Ing Trading Enterprise (Pty) Ltd, owned and controlled by the Second Respondent which company is allegedly worth nothing and only recently *"start[ed] actively trading and is just breaking even".*

[46] First Respondent was up and until 7 October 2020 an active member of Minatlou Trading. First Respondent resigned on 7 October 2020 and was replaced as the sole member by a person named Katlego Keauno Ngakatau. The First Respondent does not disclose if he received value for the disposal of his membership interest.

[47] The Respondents' bank statements attached to the Applicant's Founding Affidavit as "JB35" which covers the period December 2019 to June 2020 indicate various payments were made with the description *"Minatlou"* indicating that payments were made to the CC. These payments, if it were funds belonging to the First Respondent and advanced to the CC, could possibly be recoverable on loan account.

[48] Sho-Ing Trading Enterprise (Pty) Ltd on the Respondents own version is an actively trading company. Although this is a company owned by the Second Respondent, the Second Respondent's interest in this company is an interest of the joint estate.

[49] Accordingly, I find that an investigation into the Respondents affairs could uncover further assets that could be used to the advantage of creditors.

[50] Various deposits and/or payments made by the First Respondent into the Second Respondent's bank account. The source of these funds is not explained at all, and the absence of a proper explanation is compounded by the First Respondent's suggestion that he is unemployed.

Conclusion

[51] I am satisfied that the Applicant has made out a proper case for the provisional sequestration order of the Respondents' joint estate.

I thus make the following order:

1. The First and Second Respondents' estate be placed under provisional sequestration.

2. The First and Second Respondents and any other party who wishes to avoid such an order being made final, are called upon to advance reasons, if any, why the court should not grant a final order of sequestration of the First and Second Respondents' estate on 11 April 2022 at 10:00 or so soon thereafter as the matter may be heard.

3. That a copy of the provisional order be served on:

3.1. the First and Second Respondents personally;

3.2. the employees of the First and Second Respondents, if any;

3.3. on all trade union of which the employees of the respondent are members, if any;

3.4. on the Master of the High Court; and

3.5. on the South African Revenue Service.

4. The costs of this application to be costs in the sequestration of the First and Second Respondents' estate.

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L C ABRAHAMS

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

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