IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

20/3/14

CASE NO: 36244/2012

In the matter between:

BODY CORPORATE OF GRAAF REINET OORD	Applicant
ADRIAN SYDOW NO	Intervening Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

19/03/14
DATE

SIGNATURE

NORMAN MANDLA MASANABO	First Respondent
LORAINE THOBILE MASANABO	Second Respondent
ABSA BANK	Intervening Creditor

JUDGMENT

Tuchten J:

1 The applicant is under administration. Its administrator, the intervening applicant, seeks leave to intervene. That intervention is not opposed The intervening creditor, ("Absa") similarly applies for leave to intervene.

2 This is the much extended return day of a provisional sequestration order in relation to the estate of the respondents, who are married in community of property. A provisional sequestration order was granted by this court on 21 November 2012. The respondents have withdrawn their opposition to the confirmation of the rule. Only Absa opposes. The only issue to be decided is whether there is, as contemplated ins 12(1)(c) of the Insolvency Act, 24 of 1936, reason to believe that it will be to the advantage of creditors of the respondents to sequestrate their estate.

3 The respondents own two units within the complex under the jurisdiction of the applicant. They paid levies during a few months in 2011 and 2012 but have not paid levies since October 2012 although their monthly levy obligation in respect of the two units was as at May 2013, over R4 800 per month. They do not occupy either of the units. They have put tenants into them. The tenants do not pay levies either. Absa is the bondholder in respect of the units. The amounts owed to Absa and which are probably preferent because they are owed under the security of mortgage bonds exceed the probable proceeds of the units on a forced sale. The respondents do not on the face of it appear to have any other assets which might be realised for the benefit of creditors. Counsel for the applicants argued the case on the

footing that there will probably be, on the facts presently known to the applicants, no dividend at all to concurrent creditors.

4 Although the applicant took judgment against the respondents for its levies, its attempts at execution were met by a return of nulla bona. But in their answering affidavit, the respondents claim that they owned household furniture and a motor vehicle to the total value of over R100 000. In addition, the respondents themselves say that sold certain properties registered in their names after the application for sequestration had been launched. They were unable to settle the bondholder, Nedbank, in full upon the sale of these properties. Nedbank consented to the transfer and took acknowledgements of debt for the unpaid balance which the respondents say they started repaying in September 2012. There is reason to believe that the respondents have regularly been paying amounts to Nedbank, on the figures provided by the respondents themselves in excess of R3 000 per month, even after the advent of the *concursus*.

5 In addition, and importantly having regard to the position of ABSA in this litigation, there is good reason to believe that the respondents have been preferring Absa and that Absa has continued to receive payments even after the provisional sequestration order was granted.

6 The respondents reside, or did in May 2013, in Vosloorust where they conduct a restaurant and butchery business. There were at that stage numerous assets on these premises. There is good reason to believe that the respondents are or were receiving income from this business or elsewhere because in some months they paid the applicant sums totalling as much as R7 000 while in other months they paid nothing.

7 There is reason to believe that the respondents, or the second respondent owned a member's interest in a close corporation called Black Diamond Properties CC which she sold shortly after the sequestration application was served on her.

8 This is not the usual case. Even though it unlikely that any dividend will accrue to concurrent creditors, there is ample reason to believe that investigations by a trustee will show that the respondents have concealed assets and routinely preferred creditors. In this regard, the applicant specifically alleged in its answer to Absa's affidavit justifying its intervention and opposition to the confirmation of the rule that Absa would not consent to any sale in execution which fetched less than the full amount owed to it by the respondents and that Absa has routinely been in receipt of preferent payments. Absa did not deny these allegations. There is reason to believe that Absa is opposing the confirmation of the rule because it is presently in receipt of an income

stream from the respondents which would cease on final sequestration of their estates and that Absa, at a commercial level, wishes to perpetuate the present regime rather than have the units over which they hold bonds sold at a loss to Absa. Furthermore, even if the trustee were to be entirely unable to recover preferent payments, the scale of the contraventions alleged suggest that there is reason to believe that criminal prosecutions against the respondents and those who accepted their preferent payments would be justified. On these considerations, I conclude that there is reason to believe that confirmation of the rule will be to the advantage of the general body of the respondents' creditors.

9 I find additional reason to believe that confirmation of the rule would be to the advantage of creditors in the fact that sequestration will terminate the respondents' liability for levies. In the case of *Die Regspersoon van Solitaire v JC Neeuwfan*, a judgment of this court delivered on 7 August 2002 under case no. 22118/2001, the court found that in a case where it was not suggested that there was reason to believe that investigation of the respondent's dealings might disclose further assets, the *sui generis* position of a body corporate was a factor which should weigh heavily in the present analysis.

10 I have accordingly come to the conclusion that the rule must be confirmed. Costs of the sequestration proceedings as such are catered for in the Insolvency Act themselves. No order in that regard need be made. There remains for consideration the intervention of Absa. It has failed in the object of its intervention. It contributed nothing of value in the consideration of the issue I have identified. It is entitled to intervene in the application by virtue of its interest but must pay the costs of the application for leave to intervene as between itself and the applicants. I do not, for the same reason, intend to direct that Absa's costs be costs in the sequestration.

11 I make the following order:

1 Leave is hereby granted to Absa Bank Limited ("Absa") to intervene in and oppose the application launched by the applicant against the respondents;

2 Leave is granted to Adrian Sydow NO to intervene as intervening applicant;

3 The provisional order of sequestration granted on 21 November 2012 and extended from time to time is hereby confirmed and made final;

4 As between ("Absa") and the applicant, Absa must pay the applicant's costs arising from Absa's application for leave to intervene;

5 Absa's costs of opposition to the applicant's application for the sequestration of the respondents' estate, including the costs of Absa's application for leave to intervene shall not be costs in the sequestration or administration of the respondents' estate.

NB Tuchten
Judge of the High Court
19 March 2014

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