IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE **SIGNATURE**

CASE NO: 72201/2012

DATE: 25/2/2014

IN THE MATTER BETWEEN

K[…] S[…] N.O. APPLICANT

AND

B[…] M[…] N.O. 1ST RESPONDENT

G[…] D[…] M[…] N.O. 2ND RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This matter came before me as an opposed application for a final sequestration order of the *P[...] F[...]* trust, IT[…] ("the trust").

[2] This court, also after hearing argument on an opposed basis, granted the provisional order on 5 June 2013. The return date was then extended on a couple of occasions until the matter came before me in the opposed motion court for the week 10 to 14 February. I heard the application on 11 February 2014 and extended the return date until this judgment is delivered.

[3] It is common cause that the trust is registered under the provisions of the Trust Property Control Act, 1988 and that the first and second respondents are the joint trustees of the trust.

[4] It is common cause that the applicant is a judgment creditor of the trust.

[5] The events leading to the applicant procuring a judgment against the trust can be briefly summarised as follows: on 21 September 2006 the applicant's late husband and the trust entered into a written agreement of sale in terms whereof the applicant's husband sold to the trust an immovable property known as Erf […] W[…] R[…] Extension 6, better known as 43 R[…] E[…] W[…] 101, 107 J[...] R[…] Drive, W[…] Pretoria ("the property").

The terms of the sale agreement included provision for a purchase price of R4 million, that the sale would be subject to a condition that a loan be secured, that the sale was subject to the successful sale and transfer of another immovable property owned by the trust and that occupation of the property would be given to the trust on 1 November 2006 and from that date the trust was to become liable for occupational rental.

[6] 0n 27 February 2007 the trust and the applicant's late husband entered into a written addendum agreement. This amended the terms relating to how the purchase price for the property would be paid by the trust in the sense that the addendum allowed for transfer of the property to the trust without the payment of the full purchase price. R3 million would be paid in the form of a banker's guarantee issued in favour of the seller upon signature of the addendum and the balance of R1 million would be paid by no later than forty five days from date of transfer. Transfer was registered in the name of the trust on 6 March 2009.

[7] It is common cause that the trust never paid the outstanding balance.

[8] When the husband passed away on 1 November 2009, the applicant was appointed executrix.

[9] In 2010 the trust instituted an action against the applicant and claimed the amount of R1 972 500,00 based on an alleged breach of contract. The applicant, as

defendant, instituted a counter-claim for the outstanding balance on the purchase price.

0n 20 March 2012 this court handed down a written judgment dismissing the claim and upholding the counter-claim which had been reduced, by agreement, to R850 000,00 to set off an alleged liability towards the trust to secure a proper electrical system for the property. The *quantum* of this electrical expense was agreed to amount to R150 000,00. The judgment granted in favour of the applicant was therefore in an amount of R850 000,00 plus interest at the rate of 15,9% per annum calculated from 21 April 2009 to date of payment. In an affidavit dated 0ctober 2013, the applicant alleges that the judgment debt, with interest, by then would have amounted to some R1,5 million. This is in line with superficial calculations I made myself.

[10] The trust was not happy with the judgment, and asked for leave to appeal which was refused. A petition to the Supreme Court of Appeal met with the same fate. 0n each occasion costs were granted against the trust. The applicant now has three costs orders against the trust, in respect of the trial, and the two abortive efforts to obtain leave to appeal and, according to advice obtained by the applicant as stated in an affidavit, these costs, although the bills have not yet been taxed, could amount to something in the order of R500 000,00.

[11] In July 2012 the applicant attempted to levy execution against the movable property of the trust in an effort to obtain payment of her claim. The deputy sheriff issued a return of *nulla bona* but the respondents, as trustees, declared that the trust does own immovable property which is executable and worth R7 million.

[12] 0n the strength of the *nulla bona* return, and also alleging factual insolvency on the part of the trust, the applicant lodged the sequestration application. The learned judge held that the applicant had failed to prove that an act of insolvency had been committed in terms of section 8(b) of the Insolvency Act, 24 of 1936, because the reference to the immovable property could also be regarded as disposable property for purposes of attachment. Nevertheless, the learned judge held that a *prima facie* case had been made out for the factual insolvency of the trust, and, as I have mentioned, the provisional sequestration order was granted on 5 June 2013.

[13] Attached to the trust's opposing affidavit, was what purported to be a valuation of the property for an amount of R7 500 000,00 which was unsigned and not accepted by the learned judge as representing proper evidence in rebuttal of the applicant's case that the trust was factually insolvent.

[14] After the provisional order had been granted, the first respondent, in his representative capacity, deposed to an affidavit to which a more comprehensive sworn valuation was attached indicating that the reasonable market value of the

property was R7 900 000,00. The first respondent, in his affidavit, also recorded that it was "common cause between the parties, at the initial hearing of this application, that the outstanding bond and indebtedness to Absa Bank Limited by the trust is R4 million". The applicant relied on the perceived valuation of the property of R4 million, based on the sale that was concluded, and, given the admitted debt of R4 million to the bank, argued that this illustrated factual insolvency because the trust was clearly unable to pay its other debts, including the claim of the applicant.

[15] The applicant then proceeded to file a report by the provisionally appointed trustees in the insolvent estate, Joachim Hendrik Botha and Nomvuyo Yvonne Seriti. The report was in the form of an affidavit by trustee Botha. He pointed out that as provisionally appointed trustees, they felt obliged to bring certain facts to the attention of the court with the view to assisting the court in deciding this application. The trustee, in his affidavit, also referred to the case of *Smith & Walton (SA) (Pty) Ltd v Holt* [1961] 4 All SA 115 (D) in which it was held that if a provisional trustee obtains information that has a bearing upon the various matters arising for determination on the return date of a sequestration, there can be no objection to that information being placed before the court.

[16] In his affidavit, trustee Botha states that after their appointment, the trustees requested Mr Cloete Murray, co-director of Mr Botha in Sehaba Trust (Pty) Ltd to assist them with certain administrative acts in the administration of the estate.

Mr Murray, as an experienced administrator of both insolvent and deceased estates, also assisted the applicant in the administration of the estate of her deceased husband although the applicant was at all relevant stages the appointed executrix.

Mr Murray arranged a meeting with the first respondent at the property for 28 June 2013. Murray arrived there accompanied by the sheriff whom he requested to take a full inventory of whatever movable property could be found at the address. This would be done in terms of section 19 of the Insolvency Act, 1936. Immediately after the meeting was arranged, the first respondent was also asked, in terms of a letter dated 25 June 2013, to provide the trustees with a list of documents including the financial statements of the trust for the past two financial years.

[17] During the meeting with the first respondent, the following issues were discussed:

1. Apart from a claim for occupational rent, the first respondent confirmed that the trust has no other assets than the property.

   The issue of the alleged occupational rent is, to put it mildly, a vague affair: the first respondent told Murray that the trust had entered into a lease agreement with a company known as Trac Props for occupational rent, which was not paid though, but debited to a loan account in favour of the trust. It is common cause that the trustees have been occupying the

property at all relevant times and still do so, without paying any occupational rental to the trustees or anyone else.

The occupational rental was for a meagre R10 000,00 whereas the parties already agreed, at the time of the trial, that a market related rental for the property would be some R25 000,00.

This also inspired the applicant to rely on the provisions of section 8(c) of the Insolvency Act as a further ground in support of the sequestration application. This is another act of insolvency which could not be relied upon initially, let alone mentioned in the founding affidavit, because the existence of this alleged agreement in respect of occupational rental only came to the knowledge of the trustees long after the event. Section 8(c) reads as follows:

> "A debtor commits an act of insolvency (c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another."

The applicant argues that this action of the trustees of the trust, to ostensibly let the property for an amount far below the agreed market related rental and, to boot, not collecting the rental, amounts to an unlawful disposition of the property and to prejudicing the creditors by preferring one creditor above the others. During the meeting, Mr Murray

also explained to the first respondent that whatever arrangement existed earlier concerning the payment of occupational rental is no longer of force and effect and for as long as the trust occupies the property, the trust will have to pay the trustees, in terms of the Insolvency Act, occupational rental. In spite of demand afterwards in writing, the trust has failed to make any payment in respect of occupational rental to the provisional trustees.

Mr Murray also requested the first respondent to provide him with a copy of the lease agreement between the company Trac Props and the trust in respect of the alleged occupational rental as well as a full reconciliation of all rentals received for the previous twenty four months. The first respondent undertook to provide this information but has failed to do so.

2. As far as debts are concerned, the first respondent disclosed the existence of at least three creditors of the trust to Murray:

2.1 Absa Bank Ltd for an amount of approximately R6,5 million plus further interest thereon from March 2012 to date of final payment.

It is common cause that Absa Bank already issued summons against the trust in March 2012 for payment of an amount of R4 650 260,84 being the outstanding balance on the bond plus interest at the rate of 9% per annum from 3 March 2012 to date of

payment. The arrears at the time when the trust was sent a demand in terms of section 129 of the National Credit Act, 34 of 2005, already came to some R460 044,30. I was informed from the Bar that this action was presumably being held in obeyance pending the outcome of the sequestration application.

The first respondent, in an affidavit commenting on the provisional trustees' report, offered a strange "denial" to the trustees' allegation about this debt by saying that "I deny that I disclosed the identity of at least three creditors to Murray. I did disclose to Murray that the respondents are involved in defended actions, in this honourable court." The other two creditors referred to, are the applicant and the Home 0wners Association levies imposed by the Home 0wners Association of which the trust is a member, by virtue of its ownership of the property. I will revert to these two debts.

As far as the Absa claim is concerned the first respondent states in his affidavit that litigation is pending between the trust and Absa and "it is denied that Absa has a claim against the respondents". I find this so far-fetched that I am of the view that the allegation can safely be rejected on the papers. The first respondent offers no details of the merits of his purported defence against the claim of

Absa. If the debt, already in March 2012, amounted to more than R4,6 million, it can now, with interest, according to a basic calculation which I made, amount to at least R5,5 million.

2.2 The unassailable judgment debt which the trust owes the applicant. As I pointed out, where the learned judge granted interest on the amount of R850 000,00 at 15,5% per annum from 21 April 2009 (almost five years ago) to date of payment, the applicant calculates the present liability to be in excess of R1,5 million. My superficial calculations reveal an amount of approximately R1,7 million. If the estimated costs to flow from the three costs orders, when taxed, of some R500 000,00 is added, the liability of the trust would be well in excess of R2 million.

2.3 According to a statement sent by Pretor Trust, on behalf of the Home 0wners Association, to the trust, dated 7 August 2013, and copied to the provisional trustees following the provisional sequestration, the outstanding levies, as at August 2013, amounted to R158 082,42. Further outstanding levies, debt collection commission and interest for the next six months, to the present, would probably extend the debt to beyond R200 000,00.

In his affidavit, *supra*, commenting on the report of the trustee, the first respondent also states rather bluntly "it is denied that the Home 0wners Association has a valid claim". He states that he is involved in a defended action against the Home 0wners Association. He chooses not to state on what basis the claim is being defended. As is the case with the Absa claim, I find this denial also utterly unconvincing.

[18] The trustees of the trust, have also, on their own admission, failed to compile any financial records of the trust as they were supposed to do in terms of clause 8 of the deed of trust.

[19] Provisional trustee Botha then says the following when concluding his affidavit:

"10. The trustees can therefore report to the honourable court on the liabilities of the Trust as follows:

10.1 the Trust is clearly in no position to make monthly payments in respect of the bond or current levies as and when these payments are due and has not been making any such payments for a considerable period of time, to the extent that:

1.10.1 the outstanding levies have increased monthly since December 2009;

1.10.2 the bond instalments have been outstanding since, according to the Absa documents, 6 March 2012;

1.10.3 the judgment debt of the applicant remains unsatisfied to date.

10.2 The trust has no current income.

10.3 The only attachable asset that we could find, was the immovable property belonging to the trust. Mr M[….] could not point out any other assets and he mentioned that the assets inventoried in terms of section 19, of which the inventory is attached as annexure A, belongs to his spouse, the second respondent, This will be investigated in due course."

(I add that in his later affidavit, the second respondent states that the movables belong to the company with which the alleged agreement as to occupational rental has been entered into.)

[20] The provisional trustee Botha also says the following in his affidavit:

"11. **0ther issues**

11.1 Mr M[…] could not provide the Insolvency Act trustees with any financial book-keeping of whatever nature in respect of the trust and we were furthermore not provided

with any lease agreement between the trust and the above company, as alleged by Mr M[…] and as requested by us;

11.2 Mr M[…] could not provide us with any flow of funds proving that the trustees are presently receiving any rental from any party;

11.3 But for the Absa Bank bond account, the trust has no current bank account."

[21] Mr Raubenheimer, for the trust, argued that part of provisional trustee Botha's affidavit amounts to hearsay evidence because his partner, Murray, attended the meeting with Mr M[…] and not Botha himself. I reject this argument. Most of what Murray reported about the meeting with Mouton is supported by the documentation referred to, *inter alia* the Absa Bank documentation and the Home 0wners Association documentation. The claim of the applicant is undisputed. Murray is Botha's partner and a respectable insolvency practitioner. 0n the overwhelming probabilities, there is no reason whatsoever why Murray would have fabricated his report to his partner Botha about what transpired at the meeting. The sheriff's inventory is also part of the papers. Inasmuch as it may be necessary, I allow the evidence of Murray, to the extent that it may amount to hearsay evidence, in terms of the discretion vested in me by, *inter alia*, the provisions of Act 45 of 1988.

[22] I add that, in response to the later valuation of the property offered by the respondents, namely that the market value amounts to some R7,9 million, the applicant obtained a valuation and confirmatory affidavit from Mr Grant McIntosh, a professional valuator, who criticised the valuation submitted by the trust, by one Mr Janse van Rensburg, and stated that it is "highly unlikely that the market value of this particular property is currently anything more than R5 500 000,00". Mr McIntosh offers comprehensive comments in criticising the valuation of Mr Janse van Rensburg. Later on, Mr Janse van Rensburg responded with a further affidavit standing by his original valuation.

During his argument before me, Mr Raubenheimer suggested that it may be appropriate to refer this issue to evidence. I see no merit in this proposal. 0n the facts of this case, as I have attempted to illustrate them, it is clear, on the overwhelming probabilities, that the trust is factually insolvent and unable to pay its debts. Even on the proposed valuation of R7,9 million, the debts of the trust, as I have outlined them, cumulatively probably amount to a figure comparable therewith.

In this regard, Mr Van der Merwe SC, for the applicant, referred me to the well-known case of *De Waard v Andrew & Thienhaus, Ltd* 1907 TS 727 where the learned Chief Justice INNES, CJ, says the following on p733:

> "Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that

> I cannot pay my creditor, but my assets far exceed my liabilities.' To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

In this case, Mr and Ms M[…] have not made any effort whatsoever to reduce their admitted debt towards the applicant over a number of years. They stay on the property without paying any rental.

[23] As provisional trustee Botha pointed out in his affidavit, it is clear, on the overwhelming probabilities, that the trust is unable to pay its debts and is factually insolvent. There is an evidentiary burden on the trust to show that its assets have a value exceeding the sum total of its liabilities. See *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and 0thers* 1993 4 SA 436 (CPD) at 443D-G. In my view, the respondents have failed dismally to discharge this evidentiary burden.

[24] I am also of the view that there is much to be said for the argument offered by Mr Van der Merwe that the trust committed an act of insolvency as intended by the provisions of section 8(c) of the Insolvency Act, *supra*, for the reasons mentioned.

[25] Moreover, I am satisfied, as this court also found when the provisional sequestration order was granted, that a proper case has been made out to the effect

that a sequestration will be to the advantage of the creditors of the trust. Mr Van der Merwe argued that the property is the only asset of the trust (this is common cause) and therefore the only source of money for the creditors. Mr Mouton stated, although ambiguously, that the movable assets attached belong either to his wife or to the company with which the alleged contract (as yet unseen) with regard to occupational rental has been entered into. The creditors therefore have the option to either proceed with an execution process or with the sequestration. If there were to be a sale in execution of the property, the sheriff will be obliged to accept the highest offer and will also not, in practice, be in a position to properly market the property for sale. 0n the other hand, the trustees will be in a position to launch a proper marketing exercise and will not be obliged to accept the highest offer but will be able to negotiate a market related purchase price. 0n all the evidence, I am satisfied that a sequestration of the trust will be to the advantage of the creditors.

[26] I make the following order:

1. A final sequestration order is granted in respect of the *P[…] F[…]* trust, IT[…]
2. The costs, which will include the costs of senior counsel acting for the applicant, will be costs in the sequestration.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

72201-2012

HEARD ON: 11 FEBRUARY 2014
FOR THE APPLICANT: M P VAN DER MERWE SC
INSTRUCTED BY: ADAMS & ADAMS
FOR THE RESPONDENTS: R RAUBENHEIMER
INSTRUCTED BY: KMG & ASSOCIATES INC