REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA) 5/9/14

CASE NO: 12811/2013

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

04/09/2014 DATE

L. Webster SIGNATURE

In the matter between:

THE BODY CORPORATE OF COSTANDO **APPLICANT**

V

NAMUKASA FLORANCE KIGGUNDU **1ST RESPONDENT**

MUSASIZI DAVID KIGGUNDU **2ND RESPONDENT**

And

NEDBANK LIMITED **INTERVENING PARTY**

JUDGMENT

WEBSTER J

1. This is the return date of an extended *rule nisi* granted to the applicants for the sequestration of the two respondents who are the registered owners of Unit No. 42, a sectional title unit as described in the Act, which forms part of

the building known as Costando, situate at 607 Costando, 17 Bourke Street, Sunnyside, Pretoria.

2. It is undisputed that the respondents, over a period of time, failed to pay their monthly contributions to the "*...administrative fund which is administered by the Applicant for the payment of the expenses of the Body Corporate of Costando*".

3. It has not been disputed that the applicant obtained judgment by default against both respondents in the Magistrate's Court, Pretoria on 12 April, 2012, for R5 382.47 with interest thereon at 15.5% per annum from 24 February, 2012. A warrant of execution was issued in due course and executed: there was a *nulla bona* return in respect of both respondents. This was the precursor to the sequestration proceedings which were initially undefended.

4. Nedbank Ltd filed a notice to intervene and a founding affidavit in that regard. It seeks an order "*...(2) Declaring that the Intervening Party's affidavit in support of intervention stand as the Intervening Party's opposing affidavit. (3) That the applicant's application be dismissed with costs on an attorney and client scale, alternatively, party and party costs against the applicant*".

   (i) The deponent to the intervening party's opposing affidavit, JACQUES PIENAAR (Pienaar), who claims *i.a.* to manage the intervening party's insolvency department and to be duly authorised to do so, avers *i.a.*, that "*...it will not be in the best interests of the respondents that their estate be sequestrated*".

   (ii) In support of his assertion above Pienaar avers that:

   (1) during 2004, the intervening party granted a loan to the first and second respondents for R450 000 together with an additional amount of R112 500 as security for the payment of the capital amount interest and costs duly secured by a mortgage bond number B39594/2004.

   (2) during the year 2006, the intervening party granted the respondents a further loan which was likewise secured by a second mortgage bond number B124674/2006 in the amount of R270 000 (together with an additional amount of R67 500 as security for the

payment of the capital amount, interest and costs). As security for the said loans the property put up as security was Erf 481, Kilnerpark Ext 1 Township held by the respondents under Deed of Transfer T48284/2004.

(iii) Jacques Pienaar avers further that during June, 2008 Standard Bank of South Africa Limited granted the respondents a loan secured by a mortgage bond number SB55393/2008 for R450 000 (together with an additional amount of R112 500 as security for payment of the capital amount, interest and costs). As security for the said loan the respondents had a bond registered over "A unit consisting of (a) Section No. 42 as shown and more fully described on Sectional Plan No SS42/1961 in the Scheme known as COSTANDO in respect of the land and building or buildings situate at SUNNYSIDE (PTA) TOWNSHIP, LOCAL AUTHORITY CITY OF TSHWANE METROPOLITAN MUNICIPALITY of which section the floor area according to the said sectional plan is 82 (eighty two) square metres in extent, and (b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota endorsed on the said sectional plan, held by the respondents under Title Deed number ST52883 (hereinafter referred to as "*the second immovable property*").

5. One of the material and express terms of the mortgage bonds herein was that the first immovable property would secure the respondents' indebtedness to Nedbank, the Intervening Party, under the mortgage bonds, for which the Intervening Party would be secured up to R900 000.

6. Pienaar further alleges that the "*...outstanding balance due to the Intervening Party in respect of the mortgage bonds as at 1 October, 2013 amount to R775 037.77 together with interest thereon at 7.25% per annum...*".

7. It is admitted that "*...the Respondents have maintained their monthly instalments to the Intervening Party and consequently there is no arrear status regarding the bond account*".

8. Pienaar further alleges that "*...the Intervening Party has reason to believe that a sequestration of the Respondents' estate will not be in the best interests of the Respondents' creditors (including the Intervening Party)...*" and that "*...it is doubtful that there will be sufficient of a residue from which to discharge the costs of winding up the Respondents' estate...*" and that there is "*...a real danger of a contribution...*" eventuating.

9. In Part II of the affidavit which is in answer to the applicant's founding affidavit Pienaar raises the following points *in limine viz.*, that the applicant has failed to "*23.1....establish that the sequestration of the Respondents' estate will be to the advantage of the Respondents' creditors; 23.2 provide a valuation by a professional valuer of the true value of the first and second immovable properties; 23.3 substantiate that any tangible advantage to the Respondents' creditors will arise upon the sequestration of the Respondents' estate.*".

10. It has been submitted that (i) the applicants have not made out a case on why the sequestration of the respondents' estate will place the creditors in a better financial stead as opposed to section 65 proceedings in the Magistrate's Court; (ii) the "*...less intrusive avenues would in the result, avert the dire consequence of the...respondents...losing their entire estate for a trifling indebtedness...*"; (iii) the applicant is moreover well aware that the respondents reside at the first immovable property and that "*...the second immovable property would therefore be tenanted...*"; (iv) the judgment debt would have been satisfied were the applicant to have "*...executed against the rental income from the leased property*".

11. In the applicant's replying affidavit, deposed to by Pearl Daphne Scheltema who is duly authorised to represent the applicant by virtue of the terms of the Management Agreement entered into between the applicant and her employer, Fitzanne Estates (Pty) LTD, the following appears: "*...7.3 Accordingly, on the information disclosed by the Intervening Creditor itself, it appears that the Respondents are unable to make payment of their monthly bond loan instalments.*"

12. It is stated that "*...I take note of the Intervening Creditor's opinions concerning advantage to creditors. This is an issue that will be argued when the application is adjudicated. The stance of the Applicant is that the only way to ensure that all the creditors in the Respondent's estate share in the proceeds of the immovable properties will be if their joint estate is sequestrated...*"

13. She goes further to state that "*...I submit that the Applicant has made out a proper case for the Respondents' sequestration...*" and "*...Applicant is advised that motions and subjective opinions do not belong in affidavits. It is the stance of the Applicant that this application is presented to a Court and should be adjudicated against the backdrop of the requirements appearing in Section 10 of the Insolvency Act. The facts of the matter are relevant and the subjective opinion of the Intervening Creditor is irrelevant...*"

14. Ms Scheltema goes further to state in paragraph 21 at page 116 of the applicant's replying affidavit that "*21.1 It is not my intention to deal with the allegations concerning the alleged computation of advantage to creditors. Firstly, I wish to point out that the Intervening Creditor's computation, based on its regular valuator's opinion, is not relevant to Applicant's application. 21.2 The Applicant's allegation is not that it is currently able to show an exact financial benefit in a form of a dividend. The application is a compulsory application for the Respondents' sequestration and obviously the Applicant would not have complete knowledge of the Respondents financial position. The contention is that it will be to the advantage of the Respondents' general body of creditors to sequestrate the estate of the Respondents*".

15. This, however, is a speculative allegation but it does not detract from what the Intervening Creditor says. This court cannot gamble on which of the two versions is correct: will it be in the creditors' interests to sequestrate the respondents' joint estate or will the creditors end up making a contribution? If the answer depended on the tossing of a coin this court would be entitled to shut its eyes and "toss the coin". The applicant has the duty to demonstrate the benefit to creditors which will tip the scales in favour of the applicant. Nothing in this regard has been advanced – no effort, even of a speculative

nature has been made to illustrate what the benefit to creditors will be, if the Intervening Creditor's version is accepted.

16. Meskin on Insolvency Law at page 2-20 states the following:

> "*2.1.4 Advantage to creditors*
> *The court may not grant a compulsory sequestration order, whether provisionally or finally, unless it is established that "there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated"*
> *The applicant bears the onus of establishing that there is reason to believe that sequestration will be to the advantage of creditors, and although there is some difference of judicial opinion on the point, it is respectfully submitted that this is the case even where reliance is placed on an act of insolvency by the respondents...That there is reason to believe that sequestration will be to creditor's advantage is established if there are facts proved which indicate 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"...The concept of "advantage" to creditors is a broad one (demonstrated by, example, a not negligible pecuniary benefit to creditors, or that advantage is to be gained through an enquiry into the debtor's financial affairs), but in essence there must be some useful purpose.*"

(See also Ex Parte Arntzen (Nedbank Ltd Intervening) 2013(1) SA 49 (KZP) at para 1; Abrahams v Abrahams (Nedbank Ltd Intervening) 2013 JDR 0327 (ECP) at paras 17-18; Paarl Wine and Brandy Co Ltd v Van As 1955(3) SA 558 (O) at 559-560; Ex parte Shmukler-Tshiko and thirteen other cases [2013] JOL 29999 (GSJ) at paras 34 and 59)

17. It is the court's considered view that on a balance of probabilities the applicant did not discharge "*...the onus of establishing that there is reason to believe that sequestration will be to the advantage of creditors...*".

18. **It is accordingly ordered:**

18.1 THAT leave is granted to the Intervening Creditor to intervene in the application for sequestration of the Respondents' estate;

18.2 THAT the Intervening Creditor's affidavit in support of the Application for Leave to Intervene stand as the Intervening Creditor's opposing affidavit;

18.3 THAT the application for sequestration of the Respondents' estate be and is hereby dismissed with costs and the *rule nisi* discharged;

18.4 THAT the applicant pays the costs of the Intervening Creditor.

Ls. Webster.

G. WEBSTER
JUDGE IN THE HIGH COURT

Date of Hearing : 12 March 2014