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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE:
CASE NO: 37636/2012
37623/12
37637/12

12/11/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

2014/11/12

DATE SIGNATURE

In the matter between:

ABSA BANK LIMITED 1ST APPLICANT

UNIVERSAL GUARANTEE SPV (PTY) LTD 2ND APPLICANT

And

DIMETRYS THEODOSIOU AND TWO OTHERS RESPONDENTS

JUDGMENT

LEGODI, J

[1] This is an application for provisional sequestration of the three Theodosiou's brothers. They are referred to in this judgment as the respondents. They became indebted to ABSA Bank Ltd and Universal Guarantee SPV (Pty) Ltd (hereinafter referred to as the applicants) in the amount of R130 000 000.00 and R948 071 628.00 respectively by virtue of suretyship and guarantee wherein they accepted liability as co- principal debtors for the indebtedness of *inter alia, Immobili* Retail Investments (Pty) Ltd now finally wound up. In total the cross- collateralisation

of this indebtedness involved some sixteen entities and various trusts most of which have been brought under winding up applications initiated by the applicants.

[2] Initially, the applicants applied for the final sequestration of the respondents. However, the applicants later in these proceedings decided to seek for provisional sequestration order against the respondents. Therefore whatever I see in this judgment regarding the merits of the sequestration should not be seen as a final determination of the matter on merits.

[3] The test for determination of provisional sequestration is founded on the provisions of section 10. It provides as follows:

> *"10.* ***Provisional sequestration*** *– If the court to which the petition for the sequestration of the estate of a debtor has been presented, is of the opinion that prima facie –*
>
> *(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 make an order sequestrating the estate of the debtor provisionally."*

[4] Section 11 deals with service of a rule nisi upon the granting of a provisional sequestration order. On the other hand the test for final sequestration upon provisional sequestration is regulated in section 12. It provides as follows:

> *"12. **Final sequestration or dismissal of petition for sequestration** – (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 the creditors of the debtor if his estate is sequestrated,*
>
> *it may sequestrate the estate of the debtor."*

The question as to what degree of proof is necessary to satisfy the court of the requirement of the section 10 (c), has been considered in a number of cases. In *Meskin & Co v Friedman*[1] *Roper* J said:

> *"Sections 10 and 12 of the Insolvency Act 24 of 1936, cast upon a petitioning creditor the onus of showing, not merely that the debtor has committed an act of insolvency or is insolvent, but also that there is 'reason to believe' that sequestration will be to the advantage of creditors. Under s 10, which sets out the powers of the Court to which the petition for sequestration is first presented, it is only necessary that the Court shall be of the opinion that prima facie there is such 'reason to believe'. Under s 12, which deals with the position when the rule nisi comes up for confirmation, the Court may make a final order of sequestration if it 'is satisfied' that there is such reason to believe. The phrase 'reason to believe', used as it is in both these sections, 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 Court a 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."*

[1] 1948 2 SA 555 (W) at 558

[5] Further Roper J stated:

> *"... 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 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 seasons 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.*[2]"

The underlining is my emphasis.

[6] Similarly, LEVESON J in *Hillhouse v Scott; Freban Investments (Pty) Ltd v Itztin; Botha v Botha*[3] LEVESON J stated:

> *"The question for consideration is whether the requirement of s 10(c) of the Act, namely sequestration must be shown to be to the advantage of creditors, is satisfied merely by proof that the value of the debtor's assets exceeds the minimum of R5000 apparently considered necessary to cover the costs of sequestration and of administration of the insolvent estate."*

[7] It is common course in the present matter that the two requirements in paragraphs (a) and (b) of section 10 have been met. It is also not in dispute that none of the respondents has any assets. However, the applicants' contention is that there are reasons to think that as a result of an enquiry under the Act, some assets may be revealed or recovered for the benefit of creditors and that that is sufficient for provisional sequestration order to be granted.

[8] As regards investigation, in *BP Southern Africa (Pty) Ltd v Frustenburg*[4] ERASMUS J stated:

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[2] See at 558
[3] 1990 4 SA 580 (W) at 582
[4] 1966 1 SA 717 (O) at 720

> *"Even where reliance is placed on the right of investigation, the applicant in my view ought to place such facts before the court as would show reasonable prospect that some pecunary benefit to creditors would result from the investigation although it is not necessary for him to prove that the estate would pay a dividend."*

The underlining is my emphasis.

[9] In *Trust Wholesalers and Wollens (Pty) Ltd v Mackan*[5] it was stated:

> "It seems clear that it is for a petitioner to satisfy the court that there is reason to believe that creditors will derive advantage from the sequestration. What the petitioner has to show is that on the facts before the court there is a reasonable likelihood that sequestration will yield at least, a not negligible dividend."

[10] The applicants' contention is that there are reasons for thinking that the result of enquiry under the Act, some interests or assets may be recovered or revealed for the benefit of creditors. Secondly the contention is that on the facts of the case, although it is not necessary to prove that the estate would pay dividend, there is a reasonable likelihood that sequestration will yield at least, a not negligible dividend.

[11] However, the contention by the respondents is that the applicants provided no evidence whatsoever that there are assets that could potentially be found to render a benefit to creditors. In fact the only evidence advanced on the applicants' behalf are bald accusations to which the respondents have adduced evidence demonstrating that there is no merit in such claims, so the respondents contended.

[12] Due to the nature of the relief sought being provisional sequestration of the respondents' estates, I do not find it necessary to go into the details upon which the applicants' application is based. This is so, because all what is required is proof of

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[5] 1954 2 SA 109 at 111G-H

facts giving rise to belief, not to the degree of conviction the belief engenders. The facts must show that there is a reasonable prospect, not necessarily likelihood, but a prospect which is not too remote, that some pecuniary benefit will result to creditors. In the case of provisional sequestration particularly, there need only be *prima facie* proof of those facts. This is unlike in the case of a final sequestration where the court must be satisfied that these facts exist, presumably on a balance of probabilities. It does not matter whether the application is opposed or not. The onus is on the applicant and in general he must allege and prove his facts. A bald allegation in the petition that sequestration will be to the benefit of creditors is not sufficient[6]. The standard of proof differs in respect of provisional and final order[7].

[13] It is the applicants' case that the respondents are directors of various companies and trustees in various trusts and are beneficiaries of or have interest in those trusts not indebted to the applicants and which or some of which have not been liquidated. The trusts acting as nominees on the respondents' behalf are shareholders of these companies. To this the applicants are relying on the respondents' answering affidavit in the winding up application against Hyde Park 103 (Pty) Ltd, one of the companies in question, wherein it was stated:

> "22.1.1 I admit that the respondent is one of the companies that fell under the control of the three Theodosiou brothers and more accurately under control of Sotyris Theodosiou and me, as the directors of the respondent.
>
> 22.1.2 I admit that the DT Shares 4 Trust, the AT Share 4 Trust and the ST Share 6 Trust were the shareholders of the respondents, each one being the nominee of one of the three Theodosiou brothers in terms of section 226 of the Companies Act."

[14] It is the applicants' contention that the trustee or trustees of the insolvent estate of the respondents would be able to realise any assets held by any of the trusts in a nominee capacity on behalf of the respondents as the beneficiaries. The applicants

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[6] *Meikles (Gwelo) (pty) Ltd v Potgieter* 1957 2 SA 20 (SR)
[7] *Sacks Morris(Pty) Ltd v Smith* 1951 3 SA 167 at 170 (O)

in their founding affidavit deal with various entities and or trusts to which the respondents have interest and which could be the subjects of investigation by a trustee of the respondents' estates

[15] It is further the applicants' contention that it would be to the benefit of the creditors as a whole, should the respondents' estates be sequestrated and placed in the hands of a trustee, who would be able to find assets and where hidden, lift the corporate veil, where necessary to collect monies and assets due to the insolvent estates of the respondents and to generally find and preserve assets to the benefit of the body of creditors.

[16] The respondents upon service of the present application, mandated independent firm of accountants and auditors by the name of BDO Risk Advisory Services (Pty) Ltd. They were mandated on 14 August 2012 to investigate *inter alia* the net asset value, that is, assets less liabilities of the respondents in their personal capacities as well as the net asset values of the entities including trusts in which the respondents hold shares, membership or whether listed as beneficiaries; the business affairs of the respondents for the purpose of determining the net value of any company in which the respondents are directors and lastly, the possibility of any potential dividend which would be received by the applicants consequent upon the sequestration of the respondents' assets.

[17] On or about 9 January 2013 a report by the accountants was provided to the respondents. By the way, the report was compiled to enable the respondents to file their answering affidavit which was deposed to by one of the respondents, Mr Dimetrys Theodosiou on behalf of all the respondents. Of relevance the respondents in the answering affidavit state:

> *"26. Du Preez concludes that in the event that my brothers and I are sequestrated, the potential benefit to creditors would be no more than R4 133 196.00 (Four Million One Hundred and Thirty Three Thousand One Hundred and Ninety Six Rand) out of total claims of R2 084 756 294.95 (Two Billion Eighty Four Million Seven Hundred and Fifty Six Thousand Two*

Hundred and Ninety Four Thousand Rand and Ninety Five Cents) which results in a dividend of 0.2 Cents in the Rand.

27. *Du Preez further concludes that in the event that the companies in which my brothers and I do not hold shares but are listed as directors are liquidated, the potential benefit to creditors would be no more than R76 503 770.00 (Seventy Six Million Five Hundred and Three Thousand Seven Hundred and Seventy Rand) out of R2 084 756 294.95 (Two Billion Eighty Four Million Seven Hundred and Fifty Six Thousand Two Hundred and Ninety Four Rand and Ninety Five Cents) or 3.67 Cents in the Rand.*

28. *Therefore, based on the independent report of BDO, there is no prospect of any advantage to creditors in the event of my or my brothers' sequestration."*

[18] The respondents sought to suggest that the amounts mentioned in paragraphs 26 and 27 of their answering affidavit are negligible amounts and therefore of no benefit to creditors as required by the Act. In coming to this conclusion, the respondents moved from the premise that the first applicant is owed R130 000 000.00 and the second applicant R948 071 628.00. Then in paragraphs 12.3 and 12.4, of the answering affidavit they state:

"12.3 The claim of the second applicant, in an amount close to **R1 billion** against us, is an unsecured claim and the second applicant, accordingly, would rank among the concurrent creditors in a sequestration;

12.4 If one were therefore to assume that the second applicant was the only concurrent creditor (which it is not) and further to assume a yardstick of 10 cents in the rand being a reasonable dividend which constitutes a benefit to creditors, the applicants would need to demonstrate a likely dividend payable to the second applicant in an amount in excess of approximately R95 million in order to be entitled to the relief sought;"

[19] That is a wrong approach to the test of advantage to creditors, particularly in unfriendly sequestrations. The test is stated clearly with regards to section 10(c) as quoted in paragraphs 5 to 7 of this judgment.

[20] The statement quoted in paragraph 17 of this judgment should be seen as *prima facie* constituting reason to believe that it will be to the advantage of creditors if the respondents' estates are sequestrated provisionally. Such other factors arise from the need to launch investigation into the affairs of the respondents and possible interest or assets that might have been concealed. For example, R76 503 770 is a lot of money and cannot be construed as negligible. Transfers and or cessions of some of the respondents' interests and or shares in entities to the respondents' sisters should also be seen *prima facie* to constitute reason to believe that it will be to the benefit of creditors to provisionally sequestrate the respondents.

[21] Many trusts were established by one or more of the respondents. These trusts became shareholders in many of the entities to which the respondents were directors or in charge of such entities. The trust were acting as nominees on behalf of the respondents effectively therefore making them directly or indirectly to be beneficiaries of such trusts.

[22] Such transfers and or cessions are seen as disposition without value subject to be set aside. For example: On the 30 June 2006 The DT Share 32 Trust was a shareholder in Sunset Boy Trading 363 (Pty) Ltd. On 20 November 2009 the Trust ceased to be a member and on the same date the respondents' became a shareholder in Sunset Boy Trading 363 (Pty) Ltd. On 6 March 2011 shares held by Corbett Share 2 Trust in Universal Cape Construction (Pty) Ltd were transferred to the respondents' sister. On 3 March 2008 shares held by DT Share 6 Trust were transferred to the respondents' sister.

[23] I do not have to go into the other details of benefit to creditors and the need to launch an enquiry to pierce the veil in search for possible assets of the respondents. I leave it to the court that has to deal with the final order in terms of section 12 of the Act. It

is that court that has to determine whether the applicants have sufficiently alleged and proved facts justifying the granting of a final order on the balance of probabilities.

[24] Inasmuch as the respondents rely heavily on the accountant's report, such a report has to be considered in context. Firstly, the accountants were instructed solely to enable the respondents to answer to the applicants' case. Secondly, unlike a trustee with legislative powers in terms of the provisions of the Act, the accountants had no legislative powers to demand on information and or documents and also to summon any person for the purpose of an enquiry.

[25] A trustee of an insolvent estate has enormous powers. For example, the powers to hold an enquiry, to summon any person for interrogation and powers to apply for the setting aside of disposition under section 26 read with section 32 and also to exercise powers in terms of section 25(4) of the Act. Therefore the report by the accountants cannot be seen as achieving the same purpose and thus making the one by trustee of the estates of the respondents unnecessary.

[26] Consequently, an order is hereby made as follows:

26.1 The estates of the respondents are provisionally sequestrated.

26.2 A rule nisi is hereby granted in terms of section 11 of the Act calling upon the respondents to appear before this court on 28 November 2014 at 09:00 and show cause why their estate should not be sequestrated finally.

26.3 The sheriff is hereby directed to serve a copy of the rule nisi in terms of subsection (2A) read with subsection (4) of section 11 wherever applicable.

26.4 The respondents to pay the costs of the application jointly and severally, the one paying the other to be absolved.

M F LEGODI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:		27 OCTOBER 2014
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Date of Judgment	:	12 NOVEMBER 2014