HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

22/04/2016
DATE

SIGNATURE

22/4/16

Case no. 35976/2015

In the matter between:

ABSA BANK LTD	Applicant
and	
A.H. VAN ZYL N.O.	First Respondent
N. M. KILIAN N.O.	Second Respondent

JUDGMENT

RABIE, J

1. The applicant applied for the provisional sequestration of the Doornbult Trust which conducts farming operations in the North West Province. The applicant bank instituted an action against the trust which resulted in an order during

November 2011 for payment of approximately R2,5 million to the applicant. All attempts to appeal the order were unsuccessful.

2. During August 2014 a writ for attachment of movable property was obtained and according to the applicant a Sheriff of the High Court was instructed to execute same. According to the applicant the return of the Sheriff was one of *nulla bona* and it was on the basis of this alleged deed of insolvency which the applicant based its application for sequestration. In the alternative it was submitted that the trust is factually insolvent.

3. I shall deal first with the issue of the alleged deed of insolvency. On behalf of the respondent it was submitted that the writ of execution relating to movables was not executed by a Sheriff of the High Court, that the applicant has consequently failed to prove a deed of insolvency on the part of the respondent with the result that the application should be refused.

4. It is necessary to say a little more about the execution process in this matter. On behalf of the applicant it was stated that the writ of execution was duly executed by the Sheriff, Mr B. Mosikili. According to the first respondent, who is one of the trustees of the trust, the writ was never executed by Mr Mosikile. He stated that on 3 February 2015 Mr H Barkhuizen of the office of the Sheriff of Schweizer Reneke came to the farm on which the farming operations are conducted. He was apparently armed with the writ of execution relating to the movables of the trust. It is not exactly clear what happened on that day. The first respondent stated in this regard the following in paragraph 14 of his answering affidavit:

"14.1 Ek bevestig dat ek deur Hannes Barkhuizen besoek was en is ook 'n persoon wat ek ken. Hannes het my meegedeel dat hy deur die bank gestuur is

en dat hy nadat hy hier was 'n dokument moet terug stuur gemeld die verslag nulla bona.

14.2 Hannes kon nie presies vir my se wat die beteken nie en het ek derhalwe ook nie betwis nie." (sic)

5. In the return, under the hand of Mr Barkhuizen, he stated, *inter alia*, that he served the document personally on the first respondent and also stated that after a proper investigation he could not find any assets for the outstanding amount. He then stated the following: "Hereby I submit a nulla bona fide." The reference to a "nulla bona fide" is, on the face of it, support for the statement of the first respondent that Mr Barkhuizen did not really know what he was supposed to do on the farm. He clearly also did not ask the first respondent to point out sufficient disposable property to satisfy the judgement. That much is evident from the return itself.

6. The second, and perhaps biggest problem relating to the execution of the judgement, is the fact that it appears that Mr Barkhuizen was not a duly appointed Sheriff or deputy sheriff of this court. In the answering affidavit the first respondent disputed the legality of the nulla bona return. He stated that Mr Barkhuizen had never lawfully been appointed as Sheriff or deputy sheriff of either the Magistrate's Court or the High Court. He could consequently not have lawfully executed the judgement against the trust. As such, the trust did not commit the deed of insolvency upon which the applicant relied to prove its entitlement to sequestrate the trust.

7. In response to the respondent's allegation that the writ was not executed lawfully by a sheriff or his deputy, the applicant, in its replying affidavit relied in paragraph 15.2.6 on the statement that "the applicant's attorneys of record were informed by

Mr Mosikile, Acting Sheriff of Schweizer Reneke, that he was accompanied by Mr Hannes Barkhuizen to the first respondent, as the first respondent only speaks Afrikaans and the Sheriff's Afrikaans is not that good and requested for a translator." Further according to the attorney Mr Mosikile informed them that the first respondent did not co-operate with the execution process and that the first respondent advised him to write down a nulla bona return of service. It was further stated that the first respondent did not point out any disposable movable goods. The clear inference of the aforesaid is that it is the applicant's case that it was indeed Mr Mosikile who executed the writ of execution and not Mr Barkhuizen who had simply acted as an interpreter.

8. Subsequent to the replying affidavit the respondents applied for leave to file further affidavits in response to the replying affidavit. That application was granted. The issue which the respondents responded to related to the validity of the execution process and more particularly the nulla bona return.

9. It was reiterated that Mr Barkhuizen performed the duties as if he were the duly appointed deputy sheriff but that he had in fact never been lawfully appointed and empowered to act as deputy sheriff. Furthermore that when he visited the farm on 3 February 2015, he was not accompanied by Mr Mosikile but went there on his own. One of the set of affidavits was in fact an affidavit by Mr Barkhuizen himself who was quite adamant that he had been responsible for the nulla bona return and that Mr Mosikile most definitely did not accompany him when he went out to the farm. He added that Mr Mosikile in any event did not deal with farms. He also stated that he remembers the incident very well and that he went to the farm with the vehicle of his colleague Me Leonie Engelbrecht.

10. An affidavit by Me Engelbrecht was also submitted wherein she confirmed the version of Mr Barkhuizen. She also denied that Mr Mosikile went out to the farm on the particular day and said that he had gone to Wesselsbron and Bloemhof. She also confirmed that during her time at the office of the sheriff Mr Mosikile never went to a farm to serve or execute documents.

11. Both Mr Barkhuizen and Me Engelbrecht stated that they were never appointed as deputies despite all their efforts to be so appointed. Eventually they realised that they were acting unlawfully and were no longer prepared to do so. Consequently, both of them resigned.

12. Section 8 of the Insolvency Act provides for acts of insolvency as follows:

"A debtor commits an act of insolvency-

(a) ...

(b) if a court has given judgment against him 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;"

13. From the evidence before this court it is clear that on the probabilities the judgement against the trust was not executed by an officer whose duty it is to execute that judgement. Firstly, it can hardly be correct that Mr Mosikile executed the writ of execution. If he did, he failed to file a return. The only return that was filed, was signed by Mr Barkhuizen. On Mr Barkhuizen's own version he was never duly appointed as a deputy sheriff and never had the authority to fulfil the duties of a deputy sheriff. Consequently the nulla bona return was invalid

and cannot be relied upon for purposes of the sequestration application launched by the applicant. In fact, the averment cannot be made that that the respondent failed to satisfy the judgment debt at the request of the Sheriff.

14. For the aforesaid reasons it is not necessary to refer to the fact that the return was hopelessly outdated and neither is it necessary to refer to the submissions on behalf of the respondent that the execution of the writ was invalid for the reason that the respondent was never requested to point out property to satisfy the judgement.

15. In the alternative to relying on the aforesaid alleged deed of insolvency, it was submitted by the applicant that the trust is factually insolvent and should for that reason be sequestrated. The submission that the trust is factually insolvent appears to be based on an inference drawn from, firstly, the fact that the trust had not paid the aforesaid judgement in favour of the applicant and, secondly, the fact that the trust had earlier failed to pay the deposit and/or purchase price of a property purchased at an auction.

16. The fact that the trust had not paid the order against it is not necessarily an indication that it is factually insolvent. That was in fact denied on behalf of the trust. As stated above, the attempt to execute in respect of the trust's movables, was invalid and cannot be relied upon.

17. In respect of the reference to the failure to purchase a property at an auction very little had been presented. It appears that an immovable property of the first respondent, in his personal capacity, had been put up for auction at the behest of a creditor of the first respondent. The trust purchased the property at the sale but

there after failed and/or refused to pay the purchase price and the agreement was cancelled. The first respondent's response was that there was a strong possibility that he would have sufficient capital to purchase the property but that it did not realise in time. He was, however, a bona fide purchaser at the sale and denies that the only reasonable inference to be made is that the trust was insolvent.

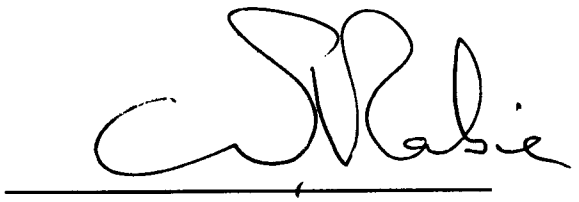
18. In my view the inference can indeed not be drawn from the aforementioned facts that the trust was insolvent or is insolvent at this time. The property in question belonged to the first respondent in his personal capacity. At the auction, the trust purchased the property because, according to the first respondent in his capacity as trustee of the trust, he was of the opinion that the trust would be able to obtain the required finance for the transaction. This turned out to be not the case and the trust did not proceed with the transaction. The only inference that can possibly be drawn from these facts is that the trust was not able to finance an additional obligation. It does not prove the factual insolvency of the trust.

19. The applicant did not present any other facts to prove the trust's alleged insolvency and the respondents were accordingly not called upon to address other issues than the two instances from which the applicant sought to draw the inference of insolvency. As already stated, the failure to pay the debt to the applicant and the failure to proceed with another transaction, do not allow for the inference that the trust is factually and commercially insolvent.

20. In the result the applicant has failed to make out a case for the sequestration of the trust.

21. Consequently, the following order is made:

1. The application is dismissed with costs.



C.P. RABIE

JUDGE OF THE HIGH COURT