IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 82430/2014

REPORTABLE: NO
OF INTEREST TO OTHERS JUDGES: NO
REVISED
10/06/2016
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DATE SIGNATURE

10/6/2016

In the matter between:

MAUSS EGON CARL WALTER **APPLICANT**

and

HOLIASMENOS THEODORA **RESPONDENT**

JUDGMENT

MPHAHLELE, J:

[1] This is the return day of a provisional order of sequestration granted against the respondent by Rabie J on 14 October 2015. The applicant seeks confirmation of the rule *nisi*.

[2] The applicant's claim is based on a judgment of the Gauteng Local Division granted by Victor J on 26 October 2011 in the sum of £130 000-00. The respondent admits that the applicant has a claim as contemplated in section 9(1) of Insolvency Act 24 of 1936 ("the Act"). The respondent further admits that he has committed an act of insolvency and that he is insolvent.

[3] By his own admission, the respondent's liabilities amount to R29 304 637-34, R19 534 972-00 of which is secured by way of bonds on his immovable properties. The respondent owns two immovable properties which are situated in Atholl, Sandton ("Atholl property") and Athens, Greece ("Athens property").

[4] The respondent bought the Atholl property on 11 July 1987 for an amount of R643 500-00. In order to secure the purchase price for the property and for additional business loans, ABSA bank advanced him the sum of R1 530 000-00, which was secured by way of a mortgage loan. The said bond was eventually cancelled and replaced with two bonds as security for advances of R5 000 000-00 and R2 000 000-00 registered in favor of South African Bank of Athens and Credit Smith respectively. The outstanding bond on the property is R3 138 454-00. The property is valued at approximately R5 000 000-00 and if sold at a forced sale the maximum which will be obtained is R3 138 454-00. The respondent has marketed the property for over two years and the maximum offer received is R4 800 000-00.

[5] The Athens property is valued at £250 000-00. A bond is registered on the property in favor of the National Bank of Greece in the sum of £2 200 000-00. The

respondent defaulted in his obligations with the National Bank of Greece and as a result judgment was granted in this regard in the sum of £802 579-43, which amount is said to be still outstanding.

[6] The respondent claims to own no further assets, movable or otherwise, other than his cellular phone and clothes.

[7] The respondent contends that, if not placed in sequestration, he will be able to generate an income of between R100 000-00 and R150 000-00 per month by rendering consultancy services in the restaurant industry which would enable him to substantially reduce his debt over a period of a few years, at appreciable sums per month.

[8] The respondent's son is apparently in a position to pay the South African Bank of Athens bond instalments on the Atholl property in exchange for the respondent allowing him to reside on the property. His son is apparently already covering all of the running costs and utilities.

[9] The respondent submits that this would be far more advantageous than the sale under sequestration which would benefit no creditor, other than the first bondholder, the South African Bank of Athens. The respondent maintains that this creditor could be paid by simple foreclosure proceedings, instead of sequestration, with no impact on other creditors.

[10] As a result, the respondent is opposing the confirmation of the rule *nisi* on the basis that the applicant has been unable to show an advantage to creditors as required by section 12 of the Act.

[11] In terms of section 12(1)(c) of the Act a court will only grant a final order if it is satisfied that advantage to creditors is shown in the application.

[12] In *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559 it is stated: *'in my opinion, 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 benefit 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 reasons 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'*.

[13] According to the records of the Companies and Intellectual Property Commission ('the CIPC"), the respondent is a member of the following entities:

- Theodore Holiasmenos Restaurants (Pty) Ltd;
- THR Development (Pty) Ltd;
- Char-Trade 171 cc;
- TH Restaurants (Pty) Ltd;
- Henry J Macbean Bar and Grill; and
- Ristorante Italiano Cape CC.

[14] The respondent contends that he has no interest, of any value, in any of the above-mentioned entities. The only entity which trades at all or has any asset is Char-Trade 171 CC, the other entities are in the process of deregistration which according to the respondent is proof that they are not trading. The respondent contends that he sold his members' interest in Char-Trade 171 CC to his son initially for R1,5 million which was later reduced to R640 000-00 due to the entity suffering a serious drop in value.

[15] In the application before Victor J on 26 October 2011, the respondent in his affidavit resisting summary judgment stated that he was the majority shareholder in, and director of TH Restaurants (Pty) Ltd. He further stated that this company operates as the franchisor of the Ciao Baby Cucina and Karoo Cattle and Land chain of franchised restaurants. According to the recent records of the CIPC, this entity, as well as the other entities mentioned in paragraph 13 above, were in the deregistration process due to non-submission of annual returns. The respondent failed to produce any proof that the entities are no longer trading.

[16] On 14 October 2015 Rabie J granted leave to intervene and oppose the main sequestration application to five persons alleging to be employees of the respondent. They are apparently employed in his sole proprietary business in different capacities, namely personal assistant, administrative manager, receptionist and two data capturers respectively. The respective contracts of employment, signed by the respondent in his capacity as employer, were submitted to court as proof of employment. The last appointment was made on 01 May 2015. The failure by the respondent to deal with the allegations of these intervening parties in his affidavit

filed on the return date as well as during the hearing of the application begs more questions.

[17] The applicant is adamant that the respondent's conduct points to questionable transactions which need to be investigated. These investigations could well establish that the respondent owns more assets than the ones put before the court.

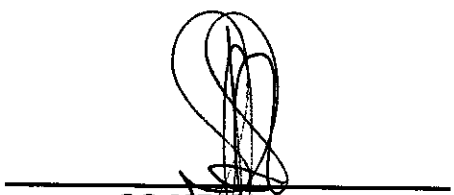
[18] What is outstanding in this matter is the failure of the respondent to fully deal with his various business interests in evidence before this court. His conduct begs questions. He failed to deal with the status of the various entities in which he has interest. He should have at least produced proof from his auditors that the companies are not in operation, or the last financial statements of the entities. There is nothing before me to support his reason for reducing the purchase price in the sale of his members' interest to his son. The alleged serious drop in value of the interest and the reasons therefor are therefore not accepted. Of most concern is the failure of the respondent to deal with allegations by the intervening parties who claim to be his current employees.

[19] The circumstances of this matter suggest that the respondent has something to hide and the investigations into his financial position as suggested by the applicant could bring more assets to light. This seems to be a proper case that falls squarely within the passage I quoted in paragraph 12 above in the matter of *Meskin & Co. v Friedman.*

[20] I am therefore satisfied that the advantage to creditors as envisaged in section 12(1)(c) of the Act has been proved.

[21] In the end I hereby confirm the rule granted by Rabie J on 14 October 2015.

[22] In addition to the entities mentioned in paragraph 13 above, the nature and status of the respondent's sole proprietary business needs to be investigated.



SS MPHAHLELE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Counsel for Respondent:	Mr. C Bollo
Instructed by:	Biccari Bollo mariano Inc , Pretoria
Date heard:	4 May 2016
Date of judgment:	10 June 2016