HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

29/07/2016
DATE

SIGNATURE

29/7/16.

Case no. A912/2014

In the matter between:

KLEINFONTEIN BOEREBELANGE KOÖPERATIEF BEPERK **Appellant**

and

A. J. ZEEVAART **Respondent**

JUDGMENT

RABIE J

1. This is an appeal by the appellant against the judgement and order of this court on 27 October 2014 dismissing the appellant's application for the sequestration of the respondent.

2. The court a quo accepted that the appellant was a creditor of the respondent and had committed a deed of insolvency but nevertheless exercised its discretion to refuse to sequestrate the respondent. The appellant raised a number of grounds of appeal which mainly relate to the exercise of the aforesaid discretion and the grounds upon which it was based.

Background:

3. It is necessary to briefly refer to the background of the matter in order to appreciate the circumstances which led the court a quo to exercise its discretion in the manner which it did.

4. According to the appellant it is a duly registered co-operative society which established a settlement on two of its properties namely the farms Donkerhoek and Kleinfontein in which its members would reside. The persons living in this community are, as members of the appellant, contractually bound to it and subject to its statutes.

5. The respondent was a member of the appellant until 11 August 2007 when he was expelled as a member of the appellant. This decision was preceded by a suspension of his membership on 20 November 2008. The result of the termination of his membership was, inter alia, that he could no longer reside in the settlement.

6. The respondent objected to, inter alia, the autocratic manner in which the appellant's business was conducted by its management and the unjust manner in which he was treated and consequently did not accept the termination of his membership. On 8 November 2007 he consequently issued summons out of this

court against the appellant for an order reviewing and setting aside his suspension as well as the termination of his membership. The appellant instituted a counterclaim for the eviction of the respondent.

7. The matter went on trial and on 4 May 2011 this court, per Louw J, dismissed the respondent's claim with costs and granted the counterclaim with costs. The respondent's applications for leave to appeal to the trial court as well as the Supreme Court of Appeal were dismissed with costs.

8. Part of the order of Louw J was to the effect that an opportunity was granted to the respondent to sell the two fixed properties attached to his shareholding in the appellant. In the event of him being unsuccessful in doing so, the parties were granted an opportunity to come to an agreement on what a fair amount of compensation would be for the two properties which the appellant had to pay to the respondent. In the event of the parties being unable to agree on such an amount a mechanism was put in place to determine such an amount which would then be binding upon the parties. It was further ordered that the respondent had to leave the community within two months after the compensation amount had been paid to him and, should he refuse to do so, the appellant could execute the eviction order against him.

9. The value of the respondent's properties was established through the aforesaid process to be R820 000,00. It is common cause that this amount has not yet been paid by the appellant to the respondent.

10. The costs order made by Louw J against the respondent on 4 May 2011, reads as follows:

"10. Vir doeleindes van verhaling van enige kostebevel ten gunste van die eerste verweerder (appellant) van die eiser (respondent), sal die eerste verweerder nie geregtig wees om beslag te lê op enige woning wat die eiser aanskaf met die vergoedingsbedrag nie, of op daardie gedeelte van die vergoedingsbedrag wat die eiser benodig vir die aanskaf van so 'n woning nie."

11. It is common cause between the parties that the purpose and effect of the aforesaid cost order were to protect the compensation awarded to the respondent, at least to the value of alternative accommodation. It would seem that if this were not done, the appellant's actions would amount to an arbitrary expropriation without compensation. It was common cause that the protection extended not only to alternative accommodation once it was acquired but also in the interim to the amount of R820 000,00 itself.

12. It was stated on behalf of the appellant that the taxed costs in respect of the trial and the application for leave to appeal to the trial court, amounted to R328 349,26, and the costs in respect of the application for leave to appeal to the Supreme Court of Appeal to R17 750,85.

13. The appellant tried to execute the aforesaid first cost order against the respondent but the Sheriff's return was one of nulla bona.

14. This prompted the appellant to follow a different course of action, namely to sequestrate the respondent, in order to attempt to put its hands on the compensation amount of R820 000,00 which was otherwise protected against attachment by the aforesaid order of Louw J. The appellant itself stated in its application that in the event of sequestration, the respondent's compensation for

his shares in the appellant or in any property which he may purchase for such amount, would no longer be protected and would be available for distribution amongst the creditors of his insolvent estate.

The Application for Sequestration:

15. In its application for sequestration the appellant mainly relied on the nulla bona return of the Sheriff which constituted a deed of insolvency. The appellant also referred to affidavits by the respondent in which he stated that he had sold the contents of his house and outbuildings to his wife for R45 000,00. This, according to the appellant, constituted a transaction which may be set aside as preferring one creditor above another. There were also suggestions by the appellant that the respondent may have other creditors to whom he had paid amounts which could suffer the same consequences.

16. I agree with the remarks of the court are quo that the facts surrounding the two last mentioned aspect are quite vague and not sufficient to support an order for sequestration of the respondent. In an opposed affidavit filed by the respondent it is stated that he is 80 years old and that he was married to his wife out of community of property in Holland during 1971. I doubt very much whether all of the contents of the common home would be found to belong to the respondent alone. In fact, I doubt whether it would really be possible to establish which of the assets, the value of which totals R45 000,00, belongs to the respondent and which to his wife of 45 years. Whatever the result, it would hardly contribute anything in respect of an advantage to creditors.

17. The main ground upon which to the appellant could therefore rely for the sequestration of the respondent is the cost order in his favour which could not be satisfied.

18. It is important to note that although the cost order in favour of the appellant could not be satisfied, the court a quo, correctly in my view, found that on the papers before the court, the respondent is not factually insolvent. He has an undisputed claim of R820 000,00 against the appellant plus interest thereon from the date on which this amount was established. This far exceeds the cost orders, even on the appellant's version thereof, which I should add, is disputed by the respondent.

The Discretion:

19. In exercising its discretion the court are quo referred to the protection of the compensation amount which would be broken if the respondent were to be sequestrated. The court referred to the personal circumstances of the respondent and the fact that he and his wife, who have no pension income, would have very little left if the compensation amount were to be used to satisfy the cost orders against him. I agree with his statement that their ability to obtain alternative housing would be drastically curtailed in such event. The court also considered the interests of the appellant in the event of it not being able to recoup all its costs and the effect thereof on its remaining members. These are all relevant factors to be considered.

20. The main reason for exercising its discretion in the way it did, related to the reasons and purpose of protecting the compensation award by the trial court. I agree with the court a quo that if the main reason, or in fact the only reason, for

attempting to sequestrate the respondent, is to bypass the protection of the compensation order, such would constitute exceptional grounds for exercising the court's discretion against ordering the sequestration of the respondent.

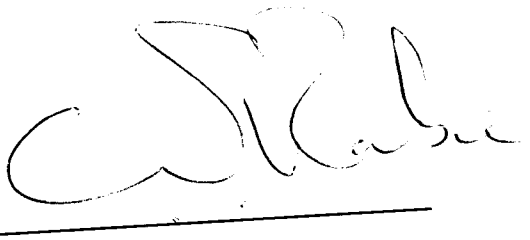
21. I agree with the court a quo that the trial court had already decided the respondent's right to housing and its right to compensation for its immovable property. The trial court considered those rights with reference to the appellant's right to be paid its costs of suit. I agree with the court a quo that the trial court's conclusions and decision in this regard weighs very heavily in favour of exercising a discretion against the sequestration of the respondent.

22. In my view the exercise of its discretion by the court a quo cannot be faulted. The decision by the appellant to sequestrate the respondent is nothing other than a deliberate ploy to avoid the consequences of an order of this court. That weighs heavily in favour of exercising a discretion against the granting of a sequestration order. I cannot but add that it leaves a bad taste in the mouth when considering that it is the appellant's own deliberate refusal to pay the amount of R820 000,00 due to the respondent by order of this court which resulted and still results in the respondent not being able to pay anything towards the cost orders against him. By refusing to pay what is due to the respondent, the appellant has manufactured the respondent's deed of insolvency, knowing full well that the respondent would not be able to pay anything towards the appellant's costs without such payment to him. The appellant was initially extremely keen to expell the respondent and his wife from the community on Kleinfontein but now, by its own refusal to comply with a court order, it is preventing the respondent from moving away, and all for its own financial reasons.

23. As far as costs are concerned there is no reason why the costs, if any, should not follow the outcome of this appeal.

24. Having regard to the aforesaid, the following order is made:

1. The appeal is dismissed with costs.



C.P. RABIE
JUDGE OF THE HIGH COURT

MOLOPA J and MABUSE J concurred.