THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 47609 / 2015

DATE OF HEARING: 12 OCTOBER 2016

DATE OF JUDGMENT: 28 OCTOBER 2016

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

28-10-2016
DATE

SIGNATURE

In the matter between:

SUSARA JOHANNA GOUWS Applicant

and

HEIKO DRAHT N.O First Respondent

JUANITO MARITN DAMONS N.O

(In their capacity as trustees of the

insolvent estate of Susara Johanna Gouws) Second Respondent

THE MASTER OF THE HIGH COURT Third Respondent

ABSA BANK LTD Fourth Respondent

JUDGMENT

AVVAKOUMIDES, AJ

[1] This is an application for rescission of default judgment brought by the applicant in terms of rule 42(1)(a) of the Uniform Rules of Court. The judgment sought to be rescinded is a voluntary surrender of the applicant's estate.

[2] Rule 42(1)(a) of the Uniform Rules of Court provides the following:

> "(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

[3] It is not possible for a voluntary surrender application to be brought in the absence of the applicant, i.e. without the knowledge of the applicant. So much must be obvious. This case however raises some interesting points for consideration. The applicant alleged that at the time of the voluntary surrender she was under the mistaken belief that she did not own enough assets to cover her liabilities. She explained that on 10 October 1987 she was married

in community of property. She was divorced on 10 April 2000 after which she lost contact with her ex-husband. She and he ex-husband entered into a settlement agreement during the finalisation of the divorce proceedings. On 31 May 2012 her ex-husband passed away.

[4] The applicant submitted that during 2014 she became aware of a Windeed search following a search and investigation by her attorneys of record, showing that she was the owner of more immovable property than she was aware of. She says that after going through her records she also found out that there was a settlement agreement which she forgot about. She also obtained a copy of her ex-husband's will and the fact that she was the owner of more properties only came to her attention when the trustees were appointed. Had she known about the properties she would not have applied for her voluntary surrender. This is the gist of the application.

[5] I find it most unlikely that a person would go through divorce proceedings during which she acquired immovable property, sign a settled agreement in consequence thereof and then simply forget about the immovable property. The immovable property must have had some impact on the applicant's life over some 9 years following her divorce to the date of the voluntary surrender order. Rates and taxes and other levies must have been payable in respect of such immovable property. She could not simply have been oblivious to the existence of the property in her name. The applicant does not allege anything whatsoever in this regard, save that she had no idea that she was the owner of such additional property.

[6] The Windeed searches show 4 farms of which the applicant was joint owner by virtue of the marriage in community of property. An additional property in the name of a close corporation in which the applicant and her ex-husband each held 50% of the members' interest is mentioned in the settlement agreement. The applicant failed to tender the wasted costs of the administration of her insolvent estate in her founding affidavit.

[7] I enquired from counsel for the applicant whether the applicant had the necessary *locus standi* to bring the application without the assistance of the trustees, particularly in the light of the trustees' opposition. Both counsel submitted that the applicant had the necessary *locus standi* but could not furnish any authority for such submission.

[8] I will deal with the issue of *locus standi* further hereunder. A court is given specific authority to rescind, vary or amend any order made by it under the provisions of Section 149(2) or the Insolvency Act, 24 of 1936 ("the Act"). No grounds on which a court may do so are stated, thus the court must exercise its discretion in the light of the circumstances disclosed to it. (See: Hoffenberg & Co v Pearl 1952 SR 298 and Ex Parte Van der Merwe 1962 (4) SA 71 (O)). Any order would include a sequestration order and in terms of section 2 of the Act, and sequestration order includes a provisional order. The fact that a sequestration order has been granted does not affect the insolvent's competence to apply for a rescission since such application does not amount to litigation with regard to the assets of the estate. (See: Malebo and Another v Schoonraad & Others 2005 JOL 13609 (T).

[9] The main guidelines for rescission of such order were set out in Storti v Nugent and others 2001 (3) SA 783 (W) in which Gautschi AJ stated as follows:

"The principles to be gleaned from the authorities, often not harmonious, are in my view the following:

(1) The Court's discretionary power conferred by this section is not limited to rescission on common-law grounds.

(2) Unusual or special or exceptional circumstances must exist to justify such relief.

(3) The section cannot be invoked to obtain a rehearing of the merits of the sequestration proceedings.

(4) Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for common-law rescission.

(5) Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship tot be confined to the ordinary rehabilitation machinery, or the circumstances should be very exceptional.

(6) A Court will not exercise its discretion in favour of such an application if undesirable consequence would follow."

[10] The court held further at 807 A that:

"On either basis, the applicant must bring itself within a rescission under the common law. That involves establishing "sufficient cause", which in turn involves two essential elements -

(a) the party seeking relief must present a reasonable and acceptable explanation for his default, and

(b) on the merits such party must have a bona fide defence which, prima facie, carries some prospect of success."

[11] The trustees submitted that the application could not succeed for the following reasons:

[11.1] the applicant failed to join the creditors in her insolvent estate. She had knowledge of the details of her creditors and referred to them in her application for the surrender of her estate. These creditors include the relevant local Municipality, Oosthuizen & Roeland, Dynamic Auctioneers and certain of her family members. Furthermore, the applicant's attention was drawn to her failure to join the creditors in the answering affidavits and this notwithstanding she persisted in her failure to join all of her creditors or to take any steps to alert the creditors to this application.

[11.2] the applicant bears the *onus* to prove that she is solvent. The applicant did not give any information for consideration of the

submission that the undisclosed property would render her solvent, save for mere allegations to this effect. In the founding papers the following appears:

"The factual position was that I owned more than enough immovable assets to cover all of my liabilities, and should I, or any other relevant party have known the true state of affairs, the application would never have been brought and/or the order would not have been granted."

[11.3] the applicant failed to provide an independent valuation of the undisclosed property but only attached a Windeed search which was conducted some eight months prior to the launching of this application. In paragraph 6.1 of the founding affidavit the applicant referred to the trustees' report dated 24 June 2014 in which the shortfall in her estate is given as R1 825 661.64 at that stage.

[11.4] the trustees' report was issued during 2014. In the answering it is stated that family members of the applicant have a claim of approximately R2 000 000.00 against the insolvent estate. This brings the shortfall to R3 825 661.64. The applicant's submission that, given the undisclosed property, she now has enough assets to cover her debts is not supported by the facts. In annexure "SJG05" to the founding papers the properties held under title deed numbers T5332/926, T358/942 and T212/953 reflect a joint purchase price R591 000.00. According to annexure "SJG05" the properties have certain bonds registered over them. The applicant has also not

joined the bondholders. Moreover, the outstanding debt in terms of these bonds has not been disclosed.

[11.5] the prejudice to creditors is an essential consideration. The trustees have submitted that there are not enough assets in the estate to pay the secured creditor. The costs wasted in the administration would be enormous and to to restore the estate would entail astronomical amounts of money.

[11.6] provisional dividends have already been paid to creditors and to undo the *concursus creditorum* would be practically impossible. The undisclosed properties are not liquid and there is no proof of their value.

[11.7] the applicant failed to show that she is solvent and is clearly insolvent, alternatively commercially insolvent. She has failed to show that the immovable property could be readily sold to provide funds to the insolvent estate.

[12] The trustees submitted that, based on the objective facts provided by the trustees themselves, an inference may be drawn that the real reasons for applicant's application is to avoid an insolvency enquiry wherein she and her family may be questioned further about various assets. The submission is based on the following facts and chronology:

[12.1] in her ex parte application to surrender her estate ("the main application") the applicant stated that she only owns a television, three beds and a fridge. The trustees then attached a large list of assets.

[12.2] the applicant failed to state, in the main application, that she owned a second immovable property. She states in the founding papers that Annexure "SJG04" indicates, "*what I also believed to be correct*" that her estate consisted of two immovable properties. Annexure "SJG04" is the report by the trustees. This annexure is not annexed to the main application. The applicant failed to disclose the second property in the main application.

[12.3] the applicant failed to disclose that she owned a third immovable property. She states that she "forgot" about the settlement agreement in her divorce but the evidence of the trustees is that when she was asked about the settlement agreement in the insolvency enquiry she could not provide the trustees with a copy thereof.

[12.4] the trustees submitted that the applicant's conduct has been uncooperative and that the timing of the disclosure of the additional property is *mala fide*. This application was brought after subpoenas were served on the applicant's mother and her son to attend a insolvency enquiry.

[12.5] the applicant had knowledge of the third immovable property during 2014 but only launched this application during 2015. The applicant did not inform the trustees of the additional properties upon becoming aware thereof.

[13] The applicant persisted in the application under rule 42 on the basis that the judgment was incorrectly sought and incorrectly granted. I cannot agree with this submission. The application should have been brought under the common law. In any event, the applicant has made out no other case than that she sought to obtain a rehearing of the merits of the voluntary surrender application proceedings, given the newly disclosed assets. The remaining submissions on behalf of the applicant did not support the relief sought by the applicant and I am not persuaded that the application should succeed. Moreover, on the facts before me I am of the view that this application is not brought *bona fide*.

[14] I accordingly make the follow order: the application is dismissed with costs.

G. T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 28 OCTOBER 2016

Representation for Applicant:

Counsel: D. A. De Kock

Instructed by: Walker Attorneys

Representation for First and Second Respondents:

Counsel: G. Naude SC

Instructed by: Heiko Draht Attorneys