

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

844/2008

DATE:

5 MAY 2008

5 In the matter between:

HARDLEY MOTSHEMI PUDUMO

APPLICANT

and

JACQUELINE DONSON-OLSEN

RESPONDENT

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J U D G M E N TBOZALEK, J:

[1] On 5 February 2008 applicant obtained a provisional
15 order of sequestration against the respondent which was
extended a number of times, *inter alia*, to allow for the
intervention for a creditor, Marie Francois Yankee Liang.
The creditor, represented by Ms E Nel, filed affidavits
opposing the granting of a final order.

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[2] On the latest return day, 29 April 2008, Mr Benade on
behalf of applicant moved and argued for a final order
whilst Ms Nel argued for the discharge of the provisional
order. Applicant claims to be a creditor of the
25 respondent in the amount of R20 000 comprising two

unsecured loans of R10 000 each which he made to respondent in December 2006 and which, despite demand, remain unpaid. Applicant also relies on the respondent's actual insolvency based on a list of her assets and liabilities as furnished by her to him. This act of co-operation alone between respondent and applicant shows that this is a friendly sequestration.

[3] One of the questions which arises in this matter is whether this friendliness amounts to collusion between creditor and debtor. According to the respondent's list her only assets are a residential property in Ravensmead sold to purchasers for R500 000 but not yet transferred, a loan account valued at R400 000 in a company called Grey Trade and a vehicle valued at R110 000, whilst her liabilities consist of a bond over the property to the tune of R410 000 and sundry creditors totaling R1.8 million. It would appear that respondent traded as Fantique Africa, assembling personal computer circuit boards. According to applicant the sale of the property for R500 000 did not represent value and it should fetch at least R600 000. In this regard he furnishes a valuation of the property in the amount of R700 000.

[4] According to the applicant, respondent experienced difficulties in her business and has not traded since October 2007. He contends that it would be to the benefit of creditors for respondent's estate to be wound up so that a trustee can halt the sale of the property, sell it for value and distribute the proceeds of respondent's estate to all creditors. A letter dated March 2006 from a company called Lifestyle Investments Ltd purports to confirm respondent's loan account of R400 000, but also says that R125 000 thereof would be repaid at the end of that month.

[5] Respondent also filed an affidavit in the application in which she lays claim to the R400 000 loan account in the aforesaid company but provides no proof thereof, nor does she explain whether she received the payment of R125 000. According to her calculations her liabilities of R1.8 million will exceed her assets by R600 000 and she is not in a position to pay her creditors. The filing of this affidavit puts it beyond any doubt that respondent desires to be sequestrated. That being the case, one wonders why she did not simply apply to surrender her estate. Respondent annexes a list of her 11 creditors, nine of whom, including two family members, appear to have

loaned monies to her for undisclosed purposes in round sums.

[6] A somewhat different picture of the respondent's
5 financial affairs emerges from the intervening creditor's papers. She firstly details how she invested R150 000 in respondent's business in September 2006 on the strength of a contract making provision for a joint venture agreement, the business of which was the assembly of
10 personal computer circuit boards for an entity known as Donna Dey Trade. According to the written agreement, within 45 days of payment of the initial investment sum, the intervening creditor would receive at least R300 000. However, the intervening creditor never received a cent.
15 She sued the respondent and took default judgment against her in the Magistrate's Court and is accordingly a creditor of the respondent in the amount of R300000. Strangely, however, the intervening creditor is nowhere reflected or acknowledged by the respondent as one of
20 her creditors.

[7] The intervening creditor tells a tale of attaching goods in execution, which subsequently disappeared, promises by
25 respondent's attorneys of payment and an application by her for respondent's sequestration in 2007, which she

ultimately abandoned. During negotiations attendant upon the earlier sequestration proceedings, respondent's legal representative advised of a lucrative contract which respondent was about to conclude and also made reference to payment of R8 million which had been collected from Donna Dey Trade on behalf of respondent.

[8] The intervening creditor states she believes that some R22 million could be received from Donna Dey Trade by respondent, an allegation which finds an echo in the applicant's allegation that respondent's financial difficulties arise from the fact that she concluded a contract with the said entity to the value of R21 million for the manufacture of electronic equipment but could not recover any monies because that firm left the country and is now in the Democratic Republic of Congo. No word emanates from respondent regarding Donna Dey Trade and there is nothing in the papers to substantiate the existence of any such business or, indeed, that respondent ever conducted an electronic equipment business.

[9] The intervening creditor states in her affidavit that she opposes the sequestration application because she believes that respondent will receive substantial monies

from Donna Dey Trade and that the sequestration application is not *bona fide* and is rather an attempt by respondent to rid herself of her creditors.

5 [10] In substantiation hereof she questions the validity of respondent's alleged loan account credit; her valuation of the property, respondent's account of the sale of the property and whether respondent has in fact ceased business. In regard to these aspects the intervening
10 creditor raises pertinent concerns based on investigations which her legal representative has done, or on the basis of information which she has and which she details in her papers. Neither the applicant nor the respondent, who is clearly co-operating with applicant in bringing the application, answers to attempts to deal with
15 any of these questions or this information.

[11] The result is that this Court is left in doubt (1) whether the respondent has any loan account credit; (2) whether
20 the residential property will fetch anything more than R500 000; (3) if this be the case, whether there will be any surplus for the general body of creditors after the mortgagor's claim has been settled; (4) whether the respondent is still trading; (5) whether respondent may

indeed receive monies, even substantial monies, from Donna Dey Trade.

[12] What is clear is that, more realistically, albeit roughly
5 assessed, respondent's declared net assets are no more than approximately R220 000 made up as follows:

R40 000 equity in the vehicle

R40 000 equity in her residential property

R140 000 being the value of the remainder of
10 the loan account discounted by 50%

If the loan account credit turns out to be a fiction or to have been repaid to respondent and already utilised by her, her assets could be as little as R80 000.

[13] Respondent's creditors, excluding the bank/mortgagee
and the vehicle financier accounted for above, amount to
R1.6 million being respondent's own list of creditors plus
the intervening creditor's claim. Allowing for the costs of
administration and legal fees in an amount of
20 approximately R75 000, the dividend to creditors could range from nil to ten cents in the rand. Given the doubt about the extent of respondent's assets and liabilities, this exercise which I have set out is itself somewhat speculative. I might add that, notwithstanding that
25 respondent and applicant have co-operated in bringing

the application, neither has assisted the Court by providing figures or estimates showing what dividend or tangible benefit there might be to creditors upon sequestration.

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[14] In terms of section 12 of the Insolvency Act, if at the hearing pursuant to the granting of the rule *nisi*, a court is satisfied that the petitioning creditor has established a claim against the debtor as is mentioned in section 9(1) of the Act, and the debtor has committed an act of insolvency or is insolvent and there is room to believe that it will be to the advantage of creditors of the debtor if his or her estate is sequestrated, it may sequester the estate of the debtor.

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[15] In my view, because of the paucity of reliable information, the conflicting claims and the failure of the applicant or respondent to respond to the intervening creditor's allegations as made in her opposing affidavit, applicant has not satisfied the Court that respondent is insolvent. However, as Mr Benade pointed out, even on the intervening creditor's version of events, the respondent has committed a number of acts of insolvency and thus section 12's second requirement is met.

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[16] The remaining questions are firstly, whether the petitioner has established a valid claim against the respondent and, secondly, whether the applicant has established that a final order will be to the advantage of creditors.

[17] Before dealing with these questions, I should add that Ms Nel also opposed the relief sought on behalf of the intervening creditor on the grounds that certain of the formal requirements of section 9 of the Act had not been met. By the time of argument, however, the only information outstanding was the date of birth and identity number of respondent's husband, to whom she is married out of community of property. Having regard to the provisions of section 157 of the Act, I considered that this omission, although unsatisfactory, is not such that the application must be refused on this ground alone.

[18] The intervening creditor's other criticisms in regard to satisfying the requirements of section 9, namely that there is insufficient information concerning applicant's claim and respondent's insolvency or active insolvency, shall be dealt with in considering whether the requirements of section 12 of the Act have been met.

[19] Turning to the requirements of section 12(1)(a) I have grave doubt whether the applicant has established a proper claim against the respondent. The two loans of R10 000 each are substantiated by *pro forma* “investment contracts” set out in the briefest of terms on respondent’s letterhead. These homemade contracts stand in sharp contrast to the detailed contract concluded between the intervening creditor and respondent in September 2006 when the former similarly invested R150 000 with respondent.

[20] To have concluded contracts such as those relied on by the applicant one would have to be trusting indeed given their lack of detail and their un-businesslike appearance.

The alleged debts also bear many of the hallmarks of the debts found by Satchwell, J in Esterhuizen v Swanepoel & 16 Others 2004(4) 89 (W) at 92E-95A to be a feature of collusive “friendly” sequestration applications, namely a relatively small loan no, or in this case, a brief and enigmatic description of the background reason for and purposes of the loan, little information regarding the source of the funds which would be indicative of the ability to make the loan was disclosed, compounded in this case by applicant’s failure to set out his relationship to the respondent.

[21] The basis for applicant's confidence that the loan would be repaid together with a handsome commission are likewise undisclosed. In this latter regard the further factor may be added, the unlikelihood of the return on the investment which, in effect, calculated on an annual basis would amount to 360% per year. Other factors are the applicant's apparent lack of concern as to the respondent's ability to repay the loan or investment, the complete absence of any paper trail which would substantiate the payment of R20 000 by applicant to respondent and the absence of any independent professional taking a hand in recording the loan of what, for most people, would be a comparatively large sum or the consequences of non-repayment.

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[22] As in the Esterhuizen case, the applicant appears to have done nothing to recover his "investments" for more than a year before suddenly embarking on the most drastic remedy to attempt to recover what could only be a small portion of the monies allegedly owing, i.e. by way of a sequestration application. Similarly the applicant seems unconcerned that only a limited portion of his claim may be recovered or that legal and administrative costs may devour a large portion of the respondent's limited assets.

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[23] Co-operation between debtor and creditor is considered acceptable, collusive behaviour is not. A court should be on its guard against collusion. When the signs are there the Court requires more from the applicant in order to establish his claim than it might otherwise do. The friendly petitioner should present sufficiently detailed evidence to satisfy a sceptical court of the veracity of his claim against the respondent. The petitioner must also give sufficient details of the assets of the respondent, for example how he arrived at the estimated value so that the Court can ascertain whether the sequestration would be to the advantage of the creditors. (See as authority for these propositions Craggs v Dedekind; Baartman v Baartman & Another; Van Jaarsveld v Roebuck; Van Aard v Borrett 1996(1) SA 935 (C) at 937)

[24] Taking all these factors into account I consider that the applicant has failed to establish a valid claim against respondent to the extent that is required of him in a friendly application as is required by section 12(1)(a) of the Act. The requirements of section 12(1)(b) have been satisfied in that, at the least, acts of insolvency on the part of the respondent have been established to the satisfaction of the Court.

[25] There remains the final requirement for a final order, namely that there is reason to believe that sequestration of the respondent's estate will be to the advantage of creditors. I have already indicated that the evidence proffered by the applicant concerning the value of the residential property and the merits, if possible, of setting aside the existing sale and attempting to re-sell it for more than R500 000 is at odds with that put up by the intervening creditor. In this regard, the remarks of Leveson, J in Dunlop Tyres (Pty) Ltd v Brewitt 1999(2) SA 580 (W) at 582-3 concerning the realities of forced sales are entirely apposite.

[26] In the present softening residential property market I am left unpersuaded that a possible re-sale will bring an advantage to creditors. There are other instances of apparent non-disclosure by respondent through applicant relating to her financial position, for example whether she is due any monies from Donna Dey Trade and the extent of her claims, if any, against that entity, the present state of her loan account claim against Grey Trade and the failure to list applicant as one of her creditors and therefore possibly others.

[27] With regard to the value of the property, the intervening creditor filed a sworn valuation of the property in the amount of R600 000 and indicated furthermore that the sale of the property in May 2007 for R500 000 represented a realistic price. Furthermore, she filed documents emanating from the respondent's legal representatives which indicate that in November 2007 at a sale price of R500 000 the anticipated surplus after meeting all charges and levies was in the region of R30 000. That small surplus is likely to have been extinguished with the lapse of almost a further six months in the intervening period.

[28] In my view, the information relating to respondent's financial affairs is both partial and apparently unreliable. I have already indicated that on one scenario the dividend to creditors could range from nil to 10 cents in the rand. That scenario seems to be a more realistic one than any others which can be sketched on the papers.

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[29] In my view there is simply not enough reliable factual material for a finding that the applicant has established that there is reason to believe that a sequestration of the respondent's estate will bring an advantage to the body of creditors. Even if I am wrong in my findings that the

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requirements of neither section 12(1)(a) nor 12(1)(c) of the Act have been met, I am left with the discretion as to whether to grant a final order or not.

5 [30] In the circumstances of this matter and also taking into account that a major creditor of the respondent opposes the sequestration and that but one friendly, if not collusive creditor, seeks the order, I would exercise my discretion against the granting of the order.

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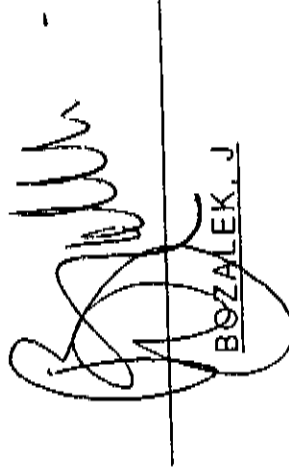
[31] In the result the following order is made:

1. The provisional order of sequestration is set aside and the petition for sequestration is dismissed.

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2. The intervening creditor is awarded her costs in opposing the application.

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BOZALEK, J