IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 11665/2010

DATE: 7 SEPTEMBER 2010

In the matter between:

FILIGRO (PTY) LIMITED Applicant

and

LOUIS KAMFER 1st Respondent

CHARMAINE KAMFER 2nd Respondent

J U D G M E N T

BOZALEK, J:

This matter came before me in the 3rd Division on Friday past as the return day of a *rule nisi* in terms of which the estate of the respondents, a couple married to each other in community of property, was placed under sequestration. On the matter being called, the applicant's counsel sought a final order, relying, *inter alia*, on the applicant's full compliance with the service provisions contained in the *rule nisi*.

The respondents appeared in person and in open court the first respondent submitted that although he and his wife could not presently effect full payment of the underlying debt owing to the applicant, nevertheless their joint estate was by no means insolvent. In addition the first respondent tendered, on several occasions in open court, to immediately pay the applicant R10 000,00, which I understood him to be holding in cash, and the balance of the debts, some R8 100,00, either in monthly instalments or R1 000,00 commencing immediately, or alternatively one full payment in December this year when he receives his salary bonus.

In addition, first respondent was prepared in principle to pay the applicant's legal costs. From the bar, the first respondent advise that he was an employee of the Department of Health of some 20 years standing, that he had recently been transferred to Knysna from Cape Town and, although unable to afford legal representation, he and his wife had travelled from Knysna to oppose the granting of the final order of sequestration. The first respondent advised furthermore that the joint estate was the owner of fixed a property in Mitchells Plain presently being rented out. Although bonded, there was substantial equity in the property in the order of several hundred thousand rand.

This information was confirmed by the second respondent from the bar, who added that she herself was not employed. I did not understand Mr Van Zyl, who appeared for the applicant, to dispute the factual accuracy of any of the submissions made by the first respondent from the bar. Indeed he confirmed that it was his instructions that the estate was indeed the owner of a fixed property. Notwithstanding the Court's encouragement that his client engage positively with the respondents' proposals and the standing down of the matter for several hours, Mr Van Zyl advised that his instructions were to reject the respondents' offer made in court and to move for a final order. Counsel was then afforded an opportunity to address the Court on all aspects of the matter, in response to which Mr Van Zyl advised that he relied simply on the case made out by the applicant in its founding papers. Judgment was then reserved.

The case made out by the applicant arises out of a debt of R18 120,74, owing by the respondents to applicant, which in turn arises out of a loan of R20 000 made by the applicant to the respondents in December 2007 for a period of 62 days at an interest rate of 44.2% per annum. The applicant is in the business of providing bridging finance to sellers of immovable property. The respondents have already paid R10 081,00 to the applicant. It appears further from the applicant's papers

that in April 2010 summons was issued out by the applicant and served on the respondents for recovery of the outstanding balance of the loan and interest and that no notice of intention to defend was filed by the respondents.

Somewhat strangely, no reference is made in the applicant's papers to whether default judgment was taken or not, or why applicant was not minded to pursue that cause of action. Given the existence of fixed property in the joint estate, it seems reasonably clear that were it to follow that path the applicant would, sooner rather than later, obtain satisfaction of the debt. Instead the applicant, in seeking relief, relies on a written communication received from the first respondent on or about 5 May 2010 in response to the summons, stating that the respondents were unable to satisfy the debt and offering to pay it off by way of monthly instalments.

There is nothing then to gainsay the applicant's case in this regard on the papers and thus I am satisfied that the respondents have committed an act of insolvency as envisaged by the Act. Similarly, I am satisfied that the applicant has satisfied what I shall term all the procedural requirements for a final order. What remains to be determined is whether the applicant has proved that a sequestration order will result in an advantage to creditors and if so, whether the Court should

exercise its discretion to grant such an order.

A court may not grant a sequestration order, whether provisionally or finally, unless it is established that:

> "there is reason to believe that it will be to the advantage of creditors of the debtor, if his estate is sequestrated."

The applicant bears the onus of establishing that there is reason to believe that sequestration will be to the advantage of creditors, even where reliance is placed on an act of insolvency by the respondent. See Paarl Wine & Brandy Company Limited v Van As 1955(3) SA 558 at 559-560.

In the present instance the only other debtor, apart from the applicant, which can be identified on the papers is Nedbank. No details are furnished of the quantum or nature of this debt beyond the fact that such debt apparently exceeds R5 000,00. One possibility is that Nedbank is the mortgagee of the fixed property in the respondents' joint estate. There is no suggestion that Nedbank is not receiving its monthly instalments on the bond. In fact the indications, if anything, are to the contrary. Nor do I see in what way the sequestration of the respondents' estate will be to Nedbank's advantage.

That leaves the applicant as the only other creditor. On the papers it has, at the very least, issued a summons against the respondents for its debt. Whether it has taken default judgment and proceeded to execution, is unknown, but appears not to be the case. I can see no good reason why the applicant, having gone that far, namely issuing summons in the magistrate's court, has not taken those additional steps. If it were to do so and the debt were to remain unsatisfied upon presentation of execution of its writ, it would be open to the applicant to attach and sell the respondents' fixed property in further execution of its judgment, and failing unsuccessful execution, would then be able to bring a sequestration application.

When one has regard to the founding affidavit in this matter, the question of an advantage to creditors is not addressed directly at all. At best for the applicant in this regard, are four generalised averments to the effect that, it would be just and equitable for the respondents' estates to be wound up, in that:

1. it would enable an impartial trustee to gain control of the respondents' assets, realise same and distribute the proceeds.

2. it will prevent certain of the respondents' creditors from incurring unnecessary legal expenses in attempting to procure payments from the respondents.

3. it will ensure that none of the respondents' creditors receive payments from the respondents to the prejudice of other creditors.

4. it will enable a duly appointed trustee to properly investigate the affairs of the respondents.

None of these allegations are supported by facts justifying their invocation. The reference to "unnecessary legal expenses" is ironic in view of the magistrate's court action on the part of applicant to recover the amount, the debt outstanding, which appears to have been halted and replaced instead by this relatively much more expensive application for a sequestration order.

In Gardee v Dhanmanta & Others 1978(1) SA 1066 (NPD), the Court was concerned with a proposed sequestration where there was a single creditor, which already had a judgment against the debtor and which had led to a *nulla bona* return. In that case Didcott, J stated as follows at page 1068 *et sequor*:

"There is, I suppose, no reason in principle why a debtor with only one creditor should not have his estate sequestrated, but the potential advantages of sequestration in that situation are inherently fewer and the case for it is correspondingly weaker. Then it is really no more than an elaborate means of execution and, because of its costs, an expensive one too. Perhaps it has enough merit in some circumstances for the Court nevertheless to sanction it. This may consist of the possibility that through the Act's machinery, impeachable transactions, the concealment of assets and other irregularities are detected, exposed and remedied, with the result that the single creditor eventually recovers more than an ordinary execution would have yielded. No mention of that possibility, and far less any evidence elevating it to a real prospect is, however to be found in these papers. Straightforward execution is the aim of the application.....

Sequestration, it is true, has been described on occasions as a legitimate form of execution (see Wilkens v Pieterse 1937 (CPD) 165 at 170, Moldenhauer v De Beer 1959(1) SA 890 (O) at 892F). That does not however mean that the

judgment creditor has the same automatic right to it which ordinarily governs execution of the routine kind. Like everyone else seeking sequestration, he must first show the Court reason to believe in its advantages to creditors and then, having done so, await the Court's exercise of its discretion in his favour. Nor even has he *ex debito justitiae* as strong a claim for relief as the creditor of a company who applies for its liquidation when it cannot pay its debts. The grant of a winding up order is not absolutely dependent, in terms of the Companies Act, on its advantages to the company's creditors. That the applicant for sequestration is himself convinced of its benefits to him is not decisive, even when he is the only creditor. It is for the Court to decide the question.....

Applying these criteria to the case of a single creditor who uses sequestration proceedings as a mode of execution, one draws the following conclusions. He must satisfy the Court at the least that there is reason to believe in all the circumstances that after the costs of sequestration are paid, he will recover an amount which is not negligible. What is more, in my opinion, he must demonstrate some reasonable expectation that it

> will exceed the likely proceeds of an ordinary execution. Unless he does that, the laborious and substantially more expensive remedy of sequestration, can hardly be thought advantageous.....
>
> The notion of advantage to creditors is a relative and not an absolute one. Sequestration cannot be said to be to the creditors' advantage unless it suits them better than any feasible and reasonably available alternative course. It follows that the enquiry necessarily postulates a comparison."

In my view the principles enunciated by Didcott, J in the matter which I have just quoted, are squarely applicable in the present case. Applying these to the present matter, one sees that the applicant has presented absolutely no evidence that its interests will be better served by a sequestration order rather than execution upon a judgment taken by it against the respondent in the magistrate's court, nor has it explained whether it has followed that process to its logical conclusion or if not, why it has not done so.

In my view, having regard to all the facts, the applicant has failed to establish that there is reason to believe that a sequestration order will be to the advantage of creditors. In

the result the application must fail. The question of cost does not arise in view of the fact that the respondents were not legally represented. The following order is made: the *rule nisi* issued on 3 August 2010 is discharged and the application is dismissed.

BOZALEK, J

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