IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No 17827/2014

In the matter between:

BUSINESS PARTNERS LIMITED Applicant

(Registration number: 1……)

And

KONSTANTINOS TSAKIROGLOU First Respondent

(I.D. No: 6……)

SUSANNA MARGARETHA TSAKIROGLOU Second Respondent

(I.D. No: 6……)

JUDGMENT DELIVERED ON 13 MAY 2015

RILEY AJ:

[1] The applicant, Business Partners Limited ('BPL'), a registered credit provider and financier instituted an application for the provisional sequestration of the first respondent's estate on 8 October 2014.

[2] On 17 October 2014 first respondent gave notice of his intention to oppose the application and on 28 October 2014 Katz AJ postponed the hearing of the application to 17 March 2015 in the fourth division by agreement between the parties. In terms of the order of Katz AJ it was further agreed that:

1. First respondent will deliver his answering affidavit by 28 November 2014.

2. Applicant will file his replying affidavit by 19 December 2014.

[3] On 19 December 2014 first respondent served and filed his answering affidavit together with the confirmatory affidavit of his attorney of record, Leon Jansen Van Rensburg. On 27 February 2015 applicant served and filed applicants replying affidavit and on 4 March 2015 applicant served and filed its service affidavit.

[4] On the 17 the March 2015 and before the matter was to be heard, the first respondent urgently applied to be allowed to file and serve the affidavits of Margaret Ann Mackenzie ("Mackenzie") and Caryl Cindy Miller ("Miller"), two estate agents, in support of his opposition to this application. According to the first respondent he deemed it necessary to have their affidavits, together with the valuations prepared by them, placed before the court as the applicant attempts to impugn the municipal valuation filed in support of the main application which reflected the market-value of his '*residential home*' at Llandudno , Western Cape as at 1 July 2012.

[5] He states further that even though the estate agents provided him with the valuations on an earlier date, they could only depose to their affidavits late on 16 March 2015. No further explanation was provided as to why the affidavits were deposed to at such a late stage nor could Mr McClarty, who appeared on behalf of the first respondent, explain why the valuations, which were available as at 4 December 2014, were not attached to the first

respondents answering affidavit which was served and filed on 19 December 2014.

[6] Mr McClarty nevertheless urged me to condone the late filing and to allow the affidavits on the basis that should I not grant the first respondent the relief sought, that it would result in an injustice. To his credit Mr McClarty agreed that considering this proverbial eleventh hour developments, that first respondent was prepared to agree to a postponement of the application and tendered the wasted costs of such postponement to allow the BPL the opportunity to properly respond thereto.

[7] Mr Woodland, who was assisted by Mr Cutler, vigorously opposed the granting of the application and contended that the application was not in good faith and that it was calculated to ambush the applicant. He was however not prepared to agree to a postponement on the terms as proposed by the first respondent. After hearing argument, and even though I was not altogether satisfied with the reasons advanced for the late filing of the additional affidavits, I nevertheless in the interest of justice, granted the first respondents application.

Background and facts

[8] In terms of a loan facility concluded on 22 June 2009, ("BPL") loaned and advanced an amount of R10 million to Target Shelf 284 CC ('Target Shelf'). The first respondent is sued in his capacity as surety and sole member of Target Shelf in circumstances where Target Shelf is in business rescue and it has not paid BPL's claim.

[9] In terms of the loan facility, Target Shelf was to pay interest for the first year and make a so-called '*bullet payment*' of the capital amount in 2010. Certain payments were received but the '*bullet payment*' was not made.

[10] According to BPL the full amount owing by Target Shelf to it on the loan facility, is the amount of R12 038 582-40 as at 25 September 2014. I accept that interest has accrued substantially from that date.

[11] BPL avers that its claim is secured, proved and admitted by Target Shelf and by the business rescue practitioners. It is not in dispute that the claim is secured by first mortgage bonds over the immovable properties of Target Shelf.

[12] It is further not in dispute that BPL and Target Shelf also concluded a royalty agreement at the time when the loan facility was concluded and that BPL has a claim based on the Royalty Agreement, which calculated at 25 September 2014 stood at R1 192 911-86. In addition, BPL has two additional claims against Target Shelf in terms of two invoices of R595 818-68 and R28 353-22 respectively.

[13] It is common cause that on 15 June 2009 the first respondent being the sole member of Target Shelf, executed a written suretyship in favour of BPL for the performance of Target Shelf's payment obligations to BPL. In terms of the suretyship the first respondent bound himself as surety and co-principal debtor in solidum to BPL in an unlimited amount in respect of a continuing covering suretyship for any amount Target Shelf owes BPL at any time. It was specifically agreed that first respondent would not be released from any liability even if BPL enters into a further agreement with Target Shelf in respect of the debt or if BPL agreed to amend the terms and conditions of the debt or if the debt or any part thereof is novated.

[14] It is common cause that Target Shelf voluntarily commenced business rescue proceedings after first respondent, as the sole member of the close corporation, passed a resolution to this effect on 20 August 2013.

[15] The following requires mention in respect of the business rescue proceedings:

1. The business rescue proceedings commenced when the resolution referred to hereinbefore was filed on 27 November 2013.

2. The business rescue practitioners proposed a business rescue plan which according to BPL is nothing more than a '*disguised liquidation*' simply providing for the sale of immovable property owned by Target Shelf and wherein they allegedly refused to deal with the liability qua surety of the first respondent.

3. BPL has described the purported business rescue as an abuse of process.

4. When BPL executed its 100% voting interest at the meeting of creditors of Target Shelf held on 21 February 2014, and voted against the business rescue plan, the business rescue practitioners informed BPL that they would bring an application to court to declare the vote '*inappropriate*'.

5. At the time of hearing argument in this application, the aforesaid application had been launched and the outcome thereof was still pending.

6. BPL has raised serious issues and concerns in regard to the business rescue plan which relate *inter alia* to the fact that:

    6.1 BPL had insisted on a pre-condition of the approval of any business rescue plan that the liability of the surety (i.e. the first respondent) would remain in respect of any shortfall.

    6.2 The amended business rescue plan still did not deal with all the concerns raised by Attorney Veldhuizen on behalf of BPL in his email of 6 January 2014;

6.3 The amended business rescue plan still did not deal with the question of the liability of the surety and issues relating to a possible investigation of claims against first respondent of reckless trading in terms of Section 141 of the Companies Act No 71 of 2008. ('the Companies Act')

6.4 The amended business rescue plan allowed the business rescue practitioners to charge wholly inappropriate fees and it was in any event flawed because there was no substantiation for the reason why the business rescue practitioners represent that the immoveable properties will fetch more on a sale during business rescue than on liquidation and in any event a forced sale is envisaged after 120 days

[16] According to BPL it was justified in rejecting the business plan due to the following facts and circumstances:

a) Target Shelf, through the first respondent, has conducted its affairs unlawfully;

b) The buildings on the immovable properties owned by Target Shelf were erected illegally and amount to reckless trading of the business by Target Shelf.

c) First respondent has over a long period of time failed to submit tax returns on behalf of Target Shelf to SARS and he does not appear to have kept the required books of account in respect of the close corporation.

d) The business rescue practitioners have failed to comply with their statutory duties and obligations to investigate the affairs of the close corporation and to report reckless trading and fraud on the part of first respondent.

e) The business rescue practitioners have made it clear that they do not intend to comply with their statutory duties in terms of s141 of the Companies Act and are clearly acting in the interest of first respondent.

[17] It is not in dispute that the business rescue practitioners had changed the registered address of Target Shelf from Cape Town to Pretoria and that without citing BPL as a party, on an *ex parte* basis, launched an application in the North Gauteng Division to declare the vote by BPL, rejecting the amended business plan, as inappropriate.

[18] This resulted in BPL having to bring a counter application in terms whereof BPL sought leave to intervene in the application to declare the vote inappropriate and to wind up Target Shelf.

[19] BPL accordingly avers that first respondent is insolvent on the basis that BPL has a liquidated claim against the first respondent for an amount of not less than R12 038 582-40 and that first respondent's liabilities exceed his assets. Further, that even though first respondent avers that his assets are held in trust, that first respondent does not have any other assets to speak of. Although the first respondent alleges that he holds his assets in the Europa Trust, which he controls and he alleges that Target Shelf is indebted to the Europa Trust, BPL avers that this claim has not been accepted by the business rescue practitioners, nor is it clear on what basis the Europa Trust could have a claim against Target Shelf.

[20] Since the first respondent has no immovable properties registered in his own name, BPL avers further that the respondent is hopelessly insolvent and that it would be in the interest of the general body of creditors if the first respondent's estate were to be sequestrated so that:

1. an impartial trustee establishes a concursus in order to preserve the first respondent's estate pending proof of claims against it and the determination thereof by the trustee;

2. the immovable property of the insolvent be released for the benefit of the general body of creditors and to ensure that the proceeds be distributed in accordance with the legal order of preference;

3. the trustee investigate the machinery provided by The Insolvency Act to investigate the circumstances of the first respondent and in particular investigate whether there are assets that may be discovered and realised for the benefit of the general body of creditors.

The Amended Business Rescue Plan

[21] An examination of the information contained in the document titled 'Amended Business Rescue Plan prepared for Target Shelf 284 CC', reveals that the report was prepared by business rescue practitioners, Jonathan Christian Beer and Werner Cawood, and is dated 13 February 2014. I deem it necessary to highlight the following:

1. According to the business rescue practitioners the strategy envisaged with the implementation of the amended business rescue plan is to create a situation in terms of which the creditors ability to recover their debt is substantially improved.

2. To create a better return for creditors as opposed to immediate liquidation, the business rescue practitioners being of the view that they are required to sell the properties at its real market values.

3. The properties referred to above are a commercial property which has a value stated as R8,5 million and two residential properties

respectively valued at R500 000-00 and R400 000-00 in the *pro forma* liquidation and distribution account.

4. The close corporation is a property owning entity and earns rental income through the rental of the residential and commercial properties.

5. The two residential properties (which are flats) appear to be vacant currently and the CC is not earning any rental income thereon;

6. Only approximately 40% of the commercial property is currently tenanted;

7. Financial distress was caused to the CC due to:

   7.1 Lack of sufficient rental income in respect of all three properties;

   7.2 Tenancy in the commercial building is not optimal and the commercial property is leased on a month to month basis.

   7.3 The CC is involved in protracted, unnecessary and complicated legal proceedings with the City of Cape Town relating to a structure erected at one of the flats which the City alleges is illegal.

   7.4 An order for the demolition of the structure was granted on 4 December 2013.

   7.5 Property values in Hout Bay declined as a result of riots in the Hangberg area during 2010.

   7.6 When comparing Hout Bay to neighbouring suburbs, Hout Bay property prices are about 30% less for similar value

properties as a result of visible squatter camps and informal settlements in the area.

8. As a result of the aforegoing, Target Shelf could no longer meet its financial obligations as and when they became due.

9. The business rescue practitioners indicate that they will assist in regularising the plans which has resulted in the litigation with the City of Cape Town.

10. They propose to market the properties for a period of 120 days.

11. They envisage that creditors would stand to receive an increased return to the value of R5 854 008-58 against the immediate liquidation of the CC on the following basis:

    a) in the event that the properties are not sold in the initial sixty business days and are marketed for a further sixty business days: R11 765 640-76 (after business rescue fees of R250 000-00 is deducted);

    b) in the event of an immediate liquidation R6 255 999-08 (after business rescue fees).

Arguments raised by first respondent in opposition to the provisional liquidation application

[22] The first respondent has averred that had the business rescue plan which was drafted by the appointed business rescue practitioners, been approved and implemented, it would have resulted in the payment of applicant. According to the first respondent the implementation of the business rescue plan would have resulted in a better return to creditors compared to a situation where Target Shelf was to be liquidated. Mr

McClarty strongly contended that should Target Shelf be liquidated, then only applicant will be paid and that only a limited dividend would be paid.

[23] He contended further that in voting against the business rescue plan at the meeting of creditors and by intervening in the application by the business rescue practitioners to set aside the vote by BPL and by launching a counter-application seeking the liquidation of Target Shelf, that the conduct of BPL was prejudicial to the first respondent.

[24] In his view the first respondent is thus to be released from his obligations as surety due to the prejudicial conduct of BPL.

[25] I now turn to deal with BPL'S contentions against the '*defences*' raised by the first respondent to the provisional sequestration application by BPL. At the outset I mention that I do not propose to deal with them in any particular order.

[26] Mr Woodland contended that the allegation by the first respondent, that if BPL had not opposed the business rescue proceedings in respect of Target Shelf, that it would in all likelihood have paid the amounts due to BPL, as spurious and without merit. In support of his contention he submitted that BPL has a liquidated claim in excess of R12 million against Target Shelf arising from monies loaned and advanced to it in terms of a loan facility granted during 2009. This he argued, is in addition to other monies owed by it to the applicant. He emphasized that the loan amount referred to hereinbefore is secured by way of first mortgage bonds registered over Target Shelf's immovable properties in favour of BPL and that BPL has a claim against the first respondent by virtue of his position as co-debtor under the suretyship.

[27] I agree with Mr Woodland that in terms of Section 128(1)(a) of the Companies Act, BPL as '*the affected person*', and as the principal creditor of Target Shelf CC, holding 100% of the voting interest, was and is completely

within its rights to vote against the adoption of the business rescue plan. On the evidence before me it is clear that BPL will not agree that the business rescue practitioners dispose of the immovable property. There is further no basis on the facts upon which I can find that BPL was not entitled in terms of S152 of the Companies Act to vote against the adoption of the business rescue plan, considering *inter alia* the legitimate concerns and issues raised by BPL hereinbefore and the problems highlighted by the business rescue practitioners themselves in respect of the properties.

[28] There is merit in Mr Woodland's contentions that even were the proposed business rescue plan to be implemented, that the amount expected to be realised by the business rescue practitioner would have been insufficient to pay BPL's proved claim. In any event, it appears that all that the business rescue practitioners are in fact proposing amounts to, what has in my view, correctly been described as '*a liquidation under the guise of a business rescue plan*'. In these circumstances, BPL was in my view fully entitled to refuse to accept the proposed business plan. Accordingly I am satisfied that the first respondent cannot rely on the alleged prejudicial conduct of BPL.

[29] Where the respondent has, as in the case of the first respondent, bound himself as surety and co-principal debtor to BPL, the law is clear that he has undertaken the obligations of the co-debtor. His obligations are similar in scope and nature as that of Target Shelf and he is accordingly jointly and severally liable for the payment of the debts of Target Shelf.

[30] Accordingly, unless the parties have agreed otherwise, a surety's debt becomes enforceable as soon as the principal debtor is in default, subject however, to the surety's right to claim that the principal debtor first be excussed. If a surety has bound himself as a co-principal debtor (as in the present case), his debt becomes enforceable at the same time as the principal debt. See Prof. J.G. Lotz in Joubert, The Law of South Africa – Vol

26 para 161 and Millman & Another NNO v Masterbond Participation Bond Trust 1997(1) SA 113 CPD.

[31] As the law stands, BPL is therefore completely within its rights to proceed against the first respondent for the full amount of the indebtedness and was not obliged to look to Target Shelf for payment first. The position in our law is that once first respondent has paid the debt of Target Shelf to applicant, he is at liberty to proceed against Target Shelf, but only once he has paid the debt of Target Shelf to BPL. I pause to mention at this stage, that in terms of Clause 3.1 of the suretyship, first respondent as surety and co-principal debtor, renunciated the benefit of excussion. It follows that the contentions on behalf of the first respondent that BPL ought first to look to Target Shelf for payment cannot succeed.

[32] In *Absa Bank Ltd v Davidson 2000(1) SA 1117 SA* Olivier JA held *at 1124I – 1125A* that:

> *"As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as in the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer."*

[33] I am of course mindful that our law has long since recognised what is referred to as the Badenhorst principle, which holds that where a respondent disputes his or her liability on bona fide grounds, that it is improper for an applicant to seek to recover a disputed debt by sequestration proceedings, rather than by the usual action procedure. See *Investec Bank Ltd v Ceris 2002(2) SA 111(C) at 116 A – B* and *Kalil v Decotex (Pty) Ltd and Another*

1988(1) SA 943(A) at 976 A – B. I agree with Mr Woodland that The Badenhorst principle does however not amount to a '*get out of jail card*' for someone in the position that first respondent finds himself in.

[34] It is now settled that South African law of suretyship, does not recognise a so-called prejudice principle to the effect that if a creditor should do anything in his dealings with the principal debtor which has the effect of prejudicing the surety, the latter is released from his obligations.

[35] Mr McClarty has placed reliance on the judgment of *Investec Bank Ltd v Bruyns 2012(5) SA 430 (WCC)* for the proposition that where the creditor (in this matter BPL) intentionally caused its claim to become unenforceable and its payment to be delayed contrary to the provisions of the Companies Act, the claim against the surety becomes unenforceable. In my view the judgment of Rodgers AJ (as he was then) in Investec Bank Ltd v Bruyns *supra* does not support the first respondent's case. Rogers AJ in fact held that the obligations of the company as principal debtor are not extinguished or discharged and their validity is in no way impaired by the business rescue. The court held further that with the consent of the business rescue practitioner or the court; the obligations may be enforced.

[36] If I apply the aforesaid principles to the present matter I am not persuaded that BPL has committed a breach of its duties under either the loan or other agreements with Target Shelf or the deed of suretyship. As I have already found, BPL was within its rights to vote against the adoption of the business rescue prior in respect of Target Shelf. I agree with Mr Woodland that the attempt by first respondent to place reliance on the alleged prejudicial conduct of BPL is misplaced and amounts to what is commonly referred to as a '*red herring*'. In my view this argument on behalf of the first respondent is but a last ditch attempt at clutching at straws to stave off the inevitable and can accordingly not succeed.

[37] It was further contended on behalf of the first respondent that BPL has to satisfy the requirements of section 10(b) of the Insolvency Act in this application. According to Mr McClarty there has to be clear proof presented to the court that first respondent is actually insolvent. He submitted further that first respondent has not committed on act of insolvency.

[38] According to the first respondent, the fact that he does not have immovable property registered in his name, should not lead to the automatic conclusion that his liabilities exceed his assets. Mr McClarty contended that since first respondent is the sole member of Target Shelf that he would be entitled to any excess assets which enures to him after the payment of debts and that the combined values of the commercial and residential properties would be more than sufficient to settle BPL's debt.

[39] He argued that if the court took into account first respondent's loan account in the Europa Trust which he avers is worth at least R7,5 million and the December 2014 valuations, i.e. R19 million and R21 million in respect of the Llandudno property, then it could never be argued that first respondent was actually insolvent.

[40] It is trite law that a creditor who has a liquidated claim for not less than R100-00 or two or more creditors, whose liquidated claims together amounts to not less than R200-00, or such creditor's duly authorised agents, may bring an application for the sequestration of a debtor.

[41] It is further a generally accepted principle of our law that sequestration proceedings are not designed for the resolution of disputes as to the existence of the debt. Accordingly, if a claim is disputed on *bona fide* and reasonable grounds, an order ought not to be granted. In matters like the present, the court must be *prima facie* of the opinion that the applicant has established the elements set out in sections 10(a), (b) and (c) of the Insolvency Act. This principle is endorsed by Corbett JA in *Kalil v Decotex (Pty) Ltd and Another 1988(1) SA 943 at 976* when after placing reliance on

the judgment of Trollip J in *Provincial Building Society of South Africa v Du Bois 1966(3) SA 76 (W)*, he held that all that was required by the applicant was to establish a *prima facie* case of insolvency on a balance of probabilities.

[42] In the present matter I am not persuaded that the claims made by BPL are disputed on *bona fide* and reasonable grounds. In my view the following facts and circumstances read together with what I have already found hereinbefore point to the inescapable conclusion that the first respondent is in fact actually insolvent:

42.1 The first respondent is substantially indebted to BPL in the amount of R13, 855 666-16;

42.2 The first respondent has no meaningful assets. It is not in dispute that first respondent owns no immovable property. He appears to own a jeep with an estimated market value of R50 000-00 and unspecified movables consisting of household items which he avers is valued value at R100 000-00.

42.3 First respondent avers that he has an interest in the Europa Trust but has for reasons of his own elected not to present financial statements and or documentary evidence to show to this court his real interest therein, if at all, in the Europa Trust. Considering the fact that all the indications are that first respondent is unable to pay his debts, one would have expected that he would have made full and proper disclosure of his '*real*' financial interest in the Europa Trust to this court and not attempt to hide behind an alleged interest in the trust. The first respondent's failure to play open cards with this court regarding his interest in the Europa Trust leads me to conclude that he is deliberately concealing assets from his creditors. First respondent also avers that he has other business

interests, none of which he says bear mention in this application. Surprisingly he avers that the value thereof far exceeds any amount BPL could ever claim from him. This assertion boggles the mind. If it is so, that he does have these other business interest, of which the value allegedly far exceed any amount BPL could ever claim from him, it is illogical and incomprehensible that he does not place details thereof before the court particularly considering the severity of the situation that he finds himself in. It must have been very easy for him to provide this court with details about these other business interest which would give credence to his assertion that he is in fact solvent. His failure to provide evidence of these business interests, leads me to conclude that they do not exist, and or that he is deliberately hiding them from his creditors.

42.4 It is not in dispute that first respondent is also indebted to Investec Bank in the amount of R4 630 397-45 arising once again from a suretyship concluded in favour of Investec. It is further common cause that Investec instituted legal proceedings against first respondent and others on 29 May 2013 in this court. It is instructive to note that Target Shelf is the 5th defendant in that matter. Investec Bank avers in its summons that first respondent, the Europa Trust and Target Shelf and the other two defendants are liable jointly and severally for the payment of the debt.

42.5 The first respondent has raised more questions than given answers in regard to the evidence that he presented relating to the valuations that he wishes this court to attach to the properties. There is merit in Mr Woodland's contention that this court must view the valuations presented by first respondent with scepticism. On close scrutiny of the valuations and the evidence as a whole the following emerges:

42.5.1 Although first respondent in his affidavit in opposition to the application states that the value of the commercial property is R15 000 000 – 00, the *pro forma* liquidation and distribution account, as prepared by the business rescue practitioners state the value as R8 500 000-00;

42.5.2 First respondent states that the combined value of the two residential properties (i.e. the two sectional title units in the Panarama Hills sectional scheme at Hout Bay is R3 000 000-00, whereas the *pro forma* liquidation and distribution account, as prepared by the business rescue practitioners, state the combined value of these units as R900 000-00;

42.5.3 All the aforesaid properties have been on the market for several years and they have not secured any offers anywhere near the value stated by first respondent and or his estate agents or even the mortgage bond indebtedness.

42.5.4 What is cause for great concern is that although first respondent initially seeks to use a municipal valuation in respect of the Llandudno's property, showing its value at R15 500 000-00, it appears that on 30 April 2013 he (representing the Europa Trust) objected to the aforesaid valuation on the basis that:

a) the property value is far lower than that attributed by the City of Cape Town;

b) the property is negatively affected by the busy road, difficulties with access and is a security risk;

c) the current market value of the property is R4 500 000-00 with an offer having been received in the amount of R3 000 000-00.

42.5.5 First respondent requested the City of Cape Town to reduce the valuation to R3 000 000-00. If first respondent's assertions to the City of Cape Town is to be believed, then I am not sure what weight, if any, the first respondent wishes me to place on the further valuations provided by Mckenzie and Miller. In the alternatively I must conclude that either the first respondent was deliberately dishonest when he made the submissions to the City of Cape Town or he genuinely believes that the property is only worth R3 000 000-00.

42.5.6 As I have said the immovable properties have been on the market for a number of years and have not secured any offers near the value stated by the first respondent to cover the mortgage indebtedness in favour of BPL. I am not persuaded that a situation will arise in the near future where offers will be secured which will come close to covering the mortgage indebtedness in favour of BPL. On the contrary, the evidence shows that Auction Alliance valued the commercial property at R4,1 million in the event of a forced sale, and R5,8 million in the open market. This is substantially less that the value submitted by first respondent.

[43] The reality is that the immovable properties cannot be sold until the business rescue practitioners have regularised the building contraventions in respect of the immovable properties. On the evidence the business rescue

practitioners are required to apply to have the building plans in respect of the immovable properties approved in terms of the Building Regulations & Building Standards Act 103 of 1997. No evidence has been placed before me as to what progress if any has been made in this regard.

[44] In addition it is not clear why first respondent felt it necessary to obtain further valuations and or to place same before the court unless he had no confidence in the initial valuations he relied on. It is not unreasonable to find that the first respondent uses certain valuations of the property as and when it suits him.

[45] Considering the version presented by first respondent that there is a difference of R7.5 million due to him after deduction of the amounts due to creditors and the fact that he boldly asserts that he has loans and claims against the Europa Trust exceeding the amount of R7.5 million, it seems to me that on his own version the Europa Trust is insolvent in that its liabilities clearly exceed its assets.

[46] I am further not persuaded that the business rescue practitioners will be able to collect a substantial VAT claim from SARS considering that Target Shelf has not filed tax returns for 2008, 2009, 2010, 2011, 2012 and 2013 and that SARS are claiming the amount of approximately R133 3 38-80 which claim is likely to increase if Target Shelf eventually submits its annual tax returns for the above periods. What is clear is that there is a substantial indebtedness to SARS.

[47] In conclusion I find that it is clear that the first respondent has unrealisticly overstated the values of the properties in an attempt to bolster his claims of solvency. The evidence presented by first respondent in regard to the valuations are unreliable and conflicting. First respondent's purported interest and or benefits which he avers accrues from the Europa Trust is unsubstantiated and not supported by evidence. The *de facto* situation is

that first respondent is in fact actually insolvent and he is unable to pay his debts.

[48] I am satisfied that BPL has overwhelmingly demonstrated that there are indeed reasonable grounds for concluding that upon a proper investigation of the first respondents affairs, a trustee may discover or recover assets for disposal for the benefit of creditors. In particular, a trustee may, on investigating the Europa Trust and the affairs of Target Shelf, find that first respondent has sheltered and or dealt with his assets in those vehicles and may well be able to recover these assets for the benefit of creditors.

[49] Accordingly it is essential that a trustee be appointed so that the first respondent's assets can be realised and distributed to creditors in order of preference. In all the circumstances, it must therefore follow that I must grant a provisional sequestration order in favour of BPL is entitled to the relief as set out in the Notice of Motion.

[50] In the result I make the following order:

1. That the estate of the first respondent is placed under provisional sequestration.

2. That a *rule nisi* be issued calling upon the first respondent to show cause, if any, to the above Honourable Court on 26 June 2015:-

    2.1 why the first respondent's estate should not be placed under final sequestration; and

    2.2 why the costs of this application should not be costs in the administration of the first respondent's insolvent estate.

3. Directing that the order be served on:

3.1 the first respondent at No. [1… V…..] Road, [L…….], Cape Town, Western Cape;

3.2 the South Africa Revenue Service at [2…… [H…..] Avenue, Cape Town;

3.3 the employees of the first respondent, if any; and

3.4 all registered trade unions representing the employees of the first respondent, if any.

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RILEY, AJ