THE REPUBLIC OF SOUTH AFRICA

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

Case No: 4826/2014

In the matter between:

FIRSTRAND FINANCE COMPANY **Applicant**

and

EMERALD VAN ZYL **Respondent**

Coram: **BOZALEK J**
Heard: **12 MAY 2015**
Delivered: **27 MAY 2015**

JUDGMENT

BOZALEK J:

[1] The applicant seeks a final order of sequestration against respondent having been granted a provisional order by Meer J on 12 March 2015. Respondent opposes the granting of a final order seeking instead its discharge.

[2] At the prior hearing it was common cause that the first two requirements for a sequestration order had been satisfied, namely, the petitioning creditor's claim was established and the debtor had committed an act of insolvency or was insolvent. Then,

as now, the element in dispute between the parties was whether it would be to the advantage of the creditors if respondent's estate was sequestrated.

[3] Applicant's claim against respondent is for an amount of R3 328 000.00 being a taxed costs award obtained by applicant against respondent. That litigation was a test case run in the North Gauteng High Court by respondent in which he sought to establish that applicant's predecessor, Saambou National Building Society, had over many years unlawfully charged interest on loans to clients secured by mortgage bonds. It would appear that respondent's business is assessing such claims and taking cession thereof subject to an agreement to share in the proceeds of any successful action for the repayment of monies or interest overpaid.

[4] The action was dismissed in May 2013 and respondent's attempts to appeal the judgment were unsuccessful. When applicant sought to execute on the costs award, the sheriff's return indicated that respondent had no meaningful assets beyond some household furniture and equipment. His life partner lays claim to those goods, in any event. Respondent resides in a dwelling in Welgemoed which is registered in the name of a trust bearing his name and which, in 2009, had a municipal valuation of R1 261 600.00.

[5] Meer J granted a provisional order on the strength of applicant's argument that there were reasonable grounds for concluding that upon a proper investigation of respondent's affairs a trustee might discover assets for the benefit of creditors. In particular there was a reasonable prospect that a trustee of respondent's estate might, after investigation, succeed in piercing the corporate veil of the trust which applicant alleges serves as a vehicle to render the immovable property attachment – proof and *'insolvency remote'*.

[6] In seeking a final order a petitioning creditor must establish the same three elements but, whereas a provisional order can be granted where the Court is prima facie of the opinion that the such elements have been established, a final order will only be granted where the Court is satisfied that these elements have been established. Failing such proof it must dismiss the petition or require further proof of any such element and postpone the hearing to that end.

[7] In seeking a final order applicant relies upon the case which it made out in its founding papers. Respondent likewise relied on the case it had made out in its opposing papers but as supplemented by his additional affidavit and that of his attorney of record, Mr G Falck, filed on the morning on which the final order was sought.

SUPPLEMENTARY AFFIDAVITS

[8] In his supplementary opposing affidavit respondent states that since the provisional order for sequestration was granted the debts of additional creditors have become due and payable, namely, one of R2.5mil in respect of professional services rendered by his attorney and an amount of R125 000.00 being monies lent and advanced by Banger Investments CC.

[9] No proof is provided of the first debt beyond an insolvency requisition form on which the attorney nominated a certain person as provisional trustee and lays claim to a liquidated claim in the aforesaid sum in respect of *'professional services'*. Likewise no proof is provided for the second debt beyond a similar requisition form, also completed by the respondent's attorney as *'member/director of Banger Investments CC'* stating that it has a liquidated claim for R125 000.00 in respect of a *'loan'*. In his supplementary affidavit respondent is now more forthcoming regarding his source of finance for the litigation which he ran against applicant, stating that a certain Anthorex (Pty) Ltd paid him the sum of R300 000.00 in May 2012 for half of the proceeds which he might obtain

in the actions or claims ceded to him by clients of Saambou Bank. Respondent encloses a copy of an agreement with Anthorex to that effect but it is only signed by himself and not by the company.

[10] In the balance of his affidavit respondent continues to insist that there are no hidden assets in his estate, no possibility of finding any such assets and that applicant has failed to prove a benefit for the body of creditors.

[11] In Mr Falck's affidavit he states that his firm has a claim against respondent for R2.5mil for professional services rendered since 2009, which claim could even be greater and that a detailed account *'should still be drafted'*. He mentions, but gives no details of, the claim by Banger Investments CC for R125 000.00. He submits that it would not beneficial for these two creditors were respondent to be sequestrated as it will effectively extinguish those two debts when it is *'quite clear'* that there are no assets in respondent's estate from which any claims can be paid.

THE APPLICANT'S CASE

[12] Applicant rested its case for a final order squarely on the dictum in *Commissioner SARS v Hawker Air Services (Pty) Ltd; In re Commissioner for, SARS v Hawker Aviation Services Partnership and others* [2006] 2 All SA 565 SCA at para [29] to the effect that a benefit to creditors is established where the Court is satisfied *'only that there is reason to believe – not necessarily a likelihood, but a prospect not too remote – that as a result of investigation and inquiry assets might be unearthed that will benefit creditors'*. That dictum was in turn based on findings in *Meskin and Co v Friedman* 1948 (2) SA 555 (W) at 559 and *Dunlop Tyres (Pty) Ltd v Brewitt* [1999] 2 SA 580 (W) at 585. The question then is whether applicant has managed to satisfy the Court that there is reason to believe that as a result of investigation and inquiry assets might be unearthed that will benefit creditors.

[13] In support of this case applicant essentially relies upon the striking discrepancy between respondent's lifestyle, livelihood and the manner in which he conducted the litigation which gave rise to applicant's claim and his apparent penurious state. In the first place the litigation which respondent pursued against applicant was clearly indicative of someone with means. Quite apart from the costs of more than R3.3mil which were awarded against respondent it now appears that his own legal representative considers the respondent to be liable for legal fees in the region of R2.5mil. Earlier in the litigation, in June 2012, applicant taxed certain wasted costs against respondent in the amount of R253 000.00 odd and this sum was paid in full by respondent. It is difficult to envisage litigation being pursued by respondent on such a scale without some source of finance yet all that he has disclosed in this regard is the payment of R3000.00 allegedly made to him by Anthorex (Pty) Ltd. Nor was an explanation tendered as to why this information was not initially disclosed in respondent's opposing affidavit.

[14] In its replying affidavit, in response to respondent disclosing that he enjoyed a credit facility from an affiliate of applicant, the latter put up material showing that in August 2012 respondent declared a gross monthly income of R106 000.00 and, as at May 2014, his account had a debit balance of R212 000.00. It also put up material showing that in August 2013 when respondent applied to another of applicant's subsidiaries for credit he declared a gross income of R65 000.00 per month plus an additional income of R7400.00 per month. Despite thereafter filing a supplementary opposing affidavit, respondent did not deal with these allegations and explain on what basis he had laid claim to these levels of income. Respondent, was, in fact, extremely cagey about his income, setting out only his existing creditors, totalling more than R750 000.00, and stating that his remuneration as a *'financial investigating consultant'*

was subject to obtaining successful results for his clients whom he represented on a *'contingency basis'*.

[15] He annexed a copy of the deed of trust in whose name the residence which he occupies is registered which records that he, his son and his apparent life partner are the only beneficiaries of the trust. In suggesting that the trust was no more than a vehicle to conceal respondent's assets, applicant relied on a sworn affidavit by respondent deposed to in 2005 in which he stated that he was a trustee of that trust and that the house in Welgemoed was leased to Ms JM Roux, his apparent life partner. In response respondent did not dispute that he had made the affidavit but sought to explain that his statement that he was a trustee was a merely a bona fide mistake but without explaining how this mistake arose.

[16] A further factor relied upon by applicant was that a Windeed search had revealed that in recent years respondent had been involved in a total of five companies, albeit all of them having by then been dissolved or being in the de-registration process. There is also the matter of the remaining claims against applicant which have been ceded to respondent. In his affidavit respondent states that there are approximately 1600 such claims to the value of some R117mil already instituted and a further 3000 claims to the value of R135mil yet to be instituted. He also complains that the applicant's strategy is to neutralise him as the cessionary to the claims through the sequestration application. If the claims indeed have some value this would be a substantial asset in respondent's estate but in argument his legal representatives stated that no value could be attributed to them since they were no than *a spes*. This may well be so but in that event respondent can hardly have it both ways i.e. they carry no weight as an asset or a potential asset in his estate but are an important factor as to why the Court should exercise its discretion in refusing a final order of sequestration.

[17] Applicant's counsel also relied on various dicta to the effect that, where appropriate, a Court would be entitled to pierce the veil of a trust where it is, in effect no more than the alter ego of a particular beneficiary. See in this regard *Harris v Rees* 2011 (2) SA 294 at page 306 paras [5] and [6] and the statement of Cameron JA in *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at para [19] – [38] where, in para [37.3], the learned judge stated as follows:

> *'It may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invites the inference that the trust form was a mere cover for the conduct of business 'as before', and that the assets allegedly vesting in trustees in fact belong to one or more of the trustees and so may be used in satisfaction of debts to the repayment of which the trustees purported to bind the trust. Where trustees of a family trust, including the founder, act in breach of the duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced in the interests of creditors.'*

See also *Niewoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486

[18] Respondent's opposing affidavit is characterised by the scantiness of the information which he supplies in respect of his financial position, in particular his income and the sources of finance for the litigation which generated enormous legal fees and bills of costs. The anomalous position is revealed of someone with considerable debts, who at times has laid claim to a substantial income and who can conduct litigation at a lavish scale but yet states he has absolutely no assets of any significance, either movable or immovable, notwithstanding that he lives in a house, the value of which must now be at least R2mil, situated in a sought-after area.

[19] In these circumstances respondent's insistence that no assets belonging to him will be revealed by any inquiry or investigation must be approached with some sceptism. Similarly, the statements made in the supplementary affidavits by his legal representative qua creditor that a sequestration order, together with the associated

possibility of an inquiry will produce no assets must also be considered in a similar light. Neither of his legal representative's two claims have been proved or substantiated, even by rudimentary documentation such as a bill of costs, an account rendered or a loan agreement. Respondent's legal representative has, furthermore, a conflict of interest. His client has clearly instructed him to oppose the granting of a sequestration order and in these circumstances he is hardly likely to assert, qua creditor, that it would be in creditors' interests for a sequestration order to be granted. The position of these, as yet, unproven creditors is, moreover, also weakened by the fact that neither of them has seen fit to intervene in these proceedings.

[20] In granting a provisional sequestration order Meer J made the following finding:

> *'In short, the fact that the respondent conducts a business of an interest re-calculator on a contingency basis, utilises the assets of a Trust without any counter prestation as contended by the applicant, was quite capable of paying wasted costs in a not insubstantial amount and conducted extensive litigation against the applicant employing various experts, counsel and attorneys, and that he obtained substantial credit from finance houses are all factors in my view indicating that an insolvency enquiry would be appropriate and that such may lead to the recovery of property or monies.'*

[21] Having considered the matter, the fresh arguments made by counsel and the supplementary material put up by respondent, I find myself in agreement with the conclusion reached by Meer J. Furthermore, applicant has succeeded in establishing that there is reason to believe that it will be to the advantage of the creditors if respondent's estate is sequestrated. To the extent that, notwithstanding any such finding, I enjoy a discretion whether to grant a final order I can see no good reason to exercise my discretion in favour of respondent. In this regard I give little if any weight to the argument that the effect of a final order would be to frustrate respondent's apparent intentions of proceeding with claims on behalf of his clients against applicant. It does not follow as a matter of course that such claims will be discontinued since that is a decision

which may yet have to be taken by the trustees of the insolvent estate. If an improper or unlawful decision is taken in that regard respondent, or other persons with an interest in such a decision, will have remedies at their disposal to challenge any such decision. More importantly, this is not an instance where claims whose merits are undisputed are being stymied. Respondent has had a test case fully ventilated in the High Court. That case failed and he was unable to obtain leave to appeal.

[22] Applicant has complied with all the formalities consequent upon the granting of a provisional order. In these circumstances a final order of sequestration is granted against respondent with applicant's costs being costs in the sequestration.

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BOZALEK J

APPEARANCES

For the Applicant:	Mr EL Theron SC
	Instructed by:
	Norton Rose Fulbright South Africa Inc
For the Respondents/Defendants:	Mr G Falck
	Instructed by:
	Falck Inc