IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 8358/2016

DATE: 14 SEPTEMBER 2016

In the matter between:

ABSA BANK LIMITED Intervening Creditor

JOHANNES GERHARDUS FREDERIK RADEMAN First Respondent

CATHARINA WILHELMINA RADEMAN Second Respondent

JOHANNES GERHARDUS FREDERICK RADEMAN N.O. Third Respondent

CATHARINA WILHELMINA RADEMAN N.O. Fourth Respondent

In the re application for sequestration:

JOHANNES GERHARDUS FREDERIK RADEMAN First Applicant

CATHARINA WILHELMINA RADEMAN Second Applicant

and

JOHANNES GERHARDUS FREDERICK RADEMAN N.O. First Respondent

CATHARINA WILHELMINA RADEMAN N.O. Second Respondent

Both in their respective capacities as

Trustees of Johan Rademan Familie

Trust No. 1-IT 997/2000

EX TEMPORE JUDGMENT

ROGERS J:

[1] This is the extended return day of a provisional order of sequestration. Absa Bank Limited ('Absa') seeks leave to intervene and to oppose the application. The applicants have responded to Absa's allegations and the merits of the sequestration have been debated in the event that I allow Absa to intervene.

[2] Very briefly by way of background, Absa lent money to a trust of which the applicants are the sole trustees. The loan was secured by a mortgage bond. The trust fell into default and the bank took out legal proceedings against the trust which resulted in a judgment in favour of the bank delivered by my colleague Binns-Ward J on 28 October 2014. Applications for leave to appeal to the Supreme Court of Appeal and the Constitutional Court were rejected by those courts on 28 April 2015 and 27 June 2015 respectively.

[3] On 7 April 2016 the mortgaged property, which appears to be the only asset of the trust and the applicants' personal residence, was sold in execution of the bank's judgment for a price of R3 million.

[4] On 17 May 2016, that is about six weeks after the sale in execution, the applicants brought an urgent application for the trust's sequestration to be heard the following day. Mr Rademan, who made the founding affidavit, said that the applicants in their personal capacities had locus standi to bring the sequestration application because the trust was indebted to them personally in the sum of R2,3 million. On 18 May 2016 Van Staden AJ granted the provisional order returnable on 17 June 2016.

[5] The provisional order having come to Absa's attention. it gave notice to intervene and oppose, as a result of which on 17 June 2016 the matter was postponed to today for hearing on the semi-urgent roll with a timetable. Further affidavits have been exchanged. Mr Benade appears for the applicants for sequestration and Ms Treurnicht for Absa.

[6] Although the intervention is opposed by the applicants, there is no merit in that opposition. The rule nisi called upon interested persons to show cause why the provisional order should not be made final. It is common cause that Absa is a creditor of the trust. Indeed on the applicants' version it is the only creditor apart from themselves. The bank was thus entitled to appear to show cause. I am not sure that Absa

strictly speaking had to intervene but if such intervention were necessary it plainly must be granted.

[7] Turning to the sequestration application itself, I raised with Mr Benade a preliminary matter not raised by Absa, namely whether it was permissible for the applicants in their personal capacities to institute proceedings for the sequestration of a trust citing themselves nomine officii as the representatives of the trust.

[8] Sequestration proceedings are at least potentially adversarial which is why the debtor to be sequestrated is cited. The debtor might or might not choose to oppose the proceedings. There must always be two sides in adversarial litigation. In *Enyati Resources Ltd & Another v Thorne NO* 1984 (2) SA 551 (C) Berman AJ (as he then was) said that although a person may have different capacities he is nevertheless a single person and cannot feature on both sides of litigation. That puts one in mind of the observation of another judge that a man can wear two hats but only has one head.

[9] The principle appears to me to be sound. There is an obvious conflict of interest where the only trustees of a trust to be sequestrated are facing a sequestration application

effectively from themselves. The position in other Commonwealth jurisdictions appears likewise to be that a person cannot take out proceedings against himself in a representative capacity. Many of the cases are discussed in an Australian judgment *Hayes v Hayes* [1994] NSWCC 7. Reference can also be made to *Gross & Others v Pentz* 1996 (4) SA 617 (A) at 627D-G citing an old Transvaal case. That was in the context of explaining why in certain circumstances beneficiaries of a trust can take out proceedings against the trustees for delinquency *inter alia* on the basis that the trustees could not take out proceedings against themselves.

[10] I think that this is a sufficient basis to find that the present proceedings are fatally defective. This does not mean that the applicants were without a remedy if they thought the trust should be sequestrated. They could have caused the trust to apply for voluntary surrender subject to compliance with the provisions of the Insolvency Act for that type of procedure. Failing that, it seems that the only remedy would be to resign as trustees so that the trust could be represented by other and hopefully independent persons.

[11] However, since this point was not fully argued and since it might only present a temporary obstacle in the way of the trust's sequestration, I think I should deal with Absa's grounds

of opposition. In regard to Mr Benade's submission that Absa's deponent did not duly establish his authority to represent the bank in opposing the sequestration, my view is that the objection cannot be taken in the way it has. The bank's application for intervention and for the dismissal of the sequestration application was presented as a notice of motion signed by a firm of attorneys, as was the notice of opposition filed a few days before.

[12] Rule 7 provides a method by which a litigant can challenge the authority of attorneys who file such documents to establish that the relief claimed or the opposition is authorised by the litigant. My understanding of the judgments of the Supreme Court of Appeal is that rule 7 provides the only way in which such authority can be challenged. See *inter alia* *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624-625 and *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) paras 14-16. A deponent who swears to the affidavit in support of the application or opposition is merely providing evidence and does not need to establish or prove authority. If the applicants were concerned that Absa had not authorised intervention and opposition, they should have challenged the attorneys' right to file the documents which they did, in which event the attorneys would in all probability have procured a resolution.

[13] In any event it seems to me that the allegation by the deponent, Mr Coetsee, sufficiently alleges authority. He says he is duly authorised to depose to the affidavit. From the nature of his position that seems inherently plausible. Mr Benade cited the decision of *Mall (Cape) (Pty) Ltd v Marino Korporasie Bpk* 1957 (2) SA 347 (C). On my reading of the relevant part of that judgment (at 352-353), an allegation in very similar terms was found to be sufficient. If the deponent says that he is authorised to depose to the affidavit and proceeds to say that the bank wishes to intervene and oppose, that covers the opposition as well as the giving of the evidence. I therefore reject the preliminary objection.

[14] On the assumption, then, that the applicants in their personal capacities can in these particular circumstances bring the application, Absa contends that the founding affidavit contains inadequate information about the applicants' supposed claim of R2,3 million. The sum total of what is said in that regard is contained in para 9 of the founding affidavit which reads, and I translate, that the Rademans have a liquidated claim against the trust in the amount of R2,3 million and that the claim is unsecured. Later, in the setting out of the assets and liabilities of the trust, the applicants' claim of R2,3 million is repeated with reference to an annexure signed by an

accountant confirming that the trust owes the applicants R2,3 million in respect of monies lent for building costs incurred. Very little, if anything, was added in the replying affidavit after the objection to the paucity of information was made. The same letter from the accountant was filed and it was said that in the course of the sequestration the applicants would provide full documentary proof of the claim.

[15] I think, particularly in a friendly sequestration of this kind, that something more is required. One does not know when the money was lent or precisely what it was lent for. No documents at all have been supplied to vouch for the fact that the money was lent. There is in the replying affidavit an attachment, being financial statements of the applicants in their personal capacities, which reflects the claim of R2,3 million against the trust but this does not take the matter much further. The said financial statements contain a qualification by the accountant who furnished the certificate of indebtedness to the effect that he had conducted no audit and could thus not express confirmation of the particulars. It thus seems that his knowledge does not go further than what the applicants have told him.

[16] I thus think that, in the face of an explicit challenge to the adequacy of the information, not enough has been provided to

meet the test of establishing a liquidated claim at the final stage of sequestration proceedings.

[17] In regard to the question whether the trust is insolvent, it seems that on both sides' versions of the value of its only asset this is likely to be the case. It does not follow, however, that the sequestration would be to the benefit of creditors, ie whether, as laid down in section 12, there is reason to believe that it will be to the advantage of creditors for the trust's estate to be sequestrated. That is obviously a higher test than at the provisional stage since this must be established not only prima facie but on a balance of probability, including (where the facts are disputed) in accordance with the *Plascon-Evans* rule.

[18] The case one has here is rather unusual. The trust's only asset has been sold at a duly advertised sale in execution for a sum of R3 million. The applicants contend that there would be a benefit to creditors because the true value in accordance with the valuation annexed to the founding papers is between R4,5 million and R5 million. Absa has provided a valuation stating that the value is only R3,8 million. I take both of these to be what one might call an ordinary market valuation rather than forced sale values.

[19] I cannot on the material before me say that the applicants' valuation is right and Absa's valuation wrong. As far as I recall, I do not have affidavits from either of the valuers in support of the valuations.

[20] Mr Benade argued that in insolvency a trustee would be able to sell the property by private treaty and might thus be able to achieve the property's ordinary market value, even if that value were R3,8 million rather than the higher figure furnished by the applicants' valuer. However it seems to me that in insolvency a trustee is obliged to proceed to realise the property. This is also a form of execution and will also thus generally give rise to a forced sale. It may be that an insolvency trustee has greater flexibility than an execution creditor but that also comes with additional costs. Here the costs of the sale in execution have already been incurred. If there is a sequestration, the trustees' fees in addition to any estate agent's commission or auctioneer's commission will have to be defrayed out of the property's value.

[20] One must also take into account what would happen to the proceeds of the sale. Absa's claim currently exceeds R5 million so that if it was secured to the full extent of its claim there would not, even on the applicants' version, be anything left for concurrent creditors. Mr Benade submitted that the

bank's security is in fact limited to R3 million, being the sum of the two mortgage bonds in the respective amounts of R2,6 million and R400 000.

[21] The affidavits themselves do not contain allegations as to the extent of the bank's security. Mr Benade relied for his submission on the bond information contained in the valuation attached to the founding affidavit. While I have no reason to think that the information in the valuation report is inaccurate, this is a very unsatisfactory way of proceeding. The founding papers should clearly set out the extent of the secured creditor's claim so that the question of advantage to creditors can properly be assessed.

[22] Furthermore the sums which Mr Benade mentioned and which are reflected in the valuation report are not necessarily the full secured sums. I have a signed version of what was the first of apparently two loan agreements entered into between the bank and the trust. The agreement indicates that the bond would be in the sum of R2,6 million with an additional amount of R520 000 which would thus come to R3,12 million. Precisely what the additional sum covers is not known because I do not have the bond but typically an additional sum, while it might not cover interest, would cover legal costs incurred in enforcing the mortgagee's claim as well as fees, commissions

and the like.

[23] It is a fair supposition that the bond of R400 000 contains a similar allowance for an additional sum. If it was 20%, as in the case of the first bond, the second bond would secure a total amount of R480 000.

[24] The sum of the two bonds would thus come to R3,6 million. Even if only R3 million were security for the capital and interest of the bank's claim, one knows that there has been extensive litigation. The matter in which Binns-Ward J gave judgment was a trial action and there were subsequent applications for leave to appeal to the Supreme Court of Appeal and the Constitutional Court. It may thus well be that the bank will be entitled to the amount of R3,6 million as a secured creditor. At any rate the applicants have not provided sufficient information for me to conclude that this is not the position. If the property were sold for R3,8 million, being the bank's ordinary market valuation, then – after allowance of costs associated with the sequestration process and the selling of the property – there would be nothing left for concurrent creditors.

[25] In regard to the value of the property, one may also wonder why, if the property was worth as much as the

applicants claim it is, they have not found a purchaser and introduced the purchaser to the bank. It would clearly be in Absa's interests to obtain the best value for the property. It seems on any reckoning that the bank is not going to recover its full claim by way of its security. The fact that the bank had a claim against the trust and that the property were specially executable in respect of the bank's claim was finally determined in June 2015 when the Constitutional Court dismissed the trust's petition for leave to appeal. The applicants knew for more than a year that the property would be sold at execution.

[26] There was in fact a prior sale in execution scheduled for 23 September 2015. On the day before that sale was due to take place, the trust's former attorneys brought an application for the trust's sequestration. The result was that the sale in execution had to be postponed. According to the bank's deponent, the trust's former attorneys only withdrew the sequestration application after papers had been filed and the matter enrolled for hearing and after the bank had filed heads of argument.

[27] I am not sure I can find that the first sequestration application was a friendly one. According to the applicants, they dispute the quantum of their former attorneys' fees.

Nevertheless they were aware of the first sequestration application and they must have been aware that another sale in execution would follow yet they did not, through estate agents who might think that the property is R5 million, find somebody prepared to pay that sum. I do not know whether they have tried.

[26] In the circumstances, and treating the value of the property as being no more than R3,8 million and probably less in a forced sale scenario, I do not think that the applicants have shown a benefit to creditors. However, if that has been shown, it is at best marginal, in which case the question of the court's discretion comes into play. If a creditor has made out a case, then the court will not ordinarily exercise a discretion to refuse sequestration if the person requesting a favourable exercise of the discretion is the debtor himself. See *First Rand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) para 27.

[27] Here, however, it is another creditor – apparently the only other creditor and certainly the largest creditor – who is opposing confirmation of the provisional order. Furthermore the creditor does so not only on the basis of inadequacies in the founding papers and benefit to creditors but alleging that the applicants have been guilty of an abuse of the process. I regret to say that I indeed regard their application for

sequestration as an abuse. Even if the applicants were not behind or associated with the previous sequestration application, I think it was reprehensible for them to bring the second sequestration application effectively ex parte. They must have known that Absa, if it were given notice of the application for provisional sequestration, would oppose.

[28] The founding affidavit in support of sequestration made only the barest mention to the fact that a judgment had been granted against the trust. There was no reference to the judgment of Binns-Ward J, when it was delivered or the fact that petitions for leave to appeal had been refused. There was no mention of the previous sequestration application and its effect on a previously scheduled sale in execution. There also was and is no satisfactory explanation as to why, if the sale in execution took place on 7 April 2016, they waited more than six weeks to bring the sequestration and then effectively did so on less than 24 hours' notice and ex parte insofar as Absa is concerned.

[29] They also provided extremely scanty information about their claim and of certain other matters which I have mentioned. I cannot but conclude that a judge properly informed of the relevant circumstances would not have granted a provisional order there and then but would have required

notice to Absa. If the property achieves more than the bank's secured claim and if this surplus is appreciable, the applicants' (if they establish their claim for R2.3 million) will get some modest share as concurrent creditors but the property also serves as their primary residence and I have little doubt that the sequestration was an attempt to stave off having to give up the property.

[30] Absa has had to litigate a long way to get finality and there has already been one cancelled sale in execution. Nothing has been shown to indicate that the second sale in execution was not properly advertised and I do not think it would be in the interests of justice to accede to the applicants' request effectively for further delay in the mere hope that something appreciable above the execution sale price would be achieved.

[31] For all these reasons I make the following order:

1. **THE INTERVENING CREDITOR, ABSA BANK LIMITED, IS GRANTED LEAVE TO INTERVENE AND TO OPPOSE THE CONFIRMATION OF THE PROVISIONAL ORDER OF SEQUESTRATION.**
2. **THE PROVISIONAL ORDER OF SEQUESTRATION IS DISCHARGED AND THE APPLICATION FOR**

SEQUESTRATION DISMISSED.

3. **THE APPLICANTS ARE DIRECTED TO PAY THE INTERVENING CREDITOR'S COSTS OF INTERVENTION AND OPPOSITION, INCLUDING THE COSTS OF 17 JUNE 2016.**

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ROGERS J