IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **11147/2019**

In the matter between:

ROTA INVESTMENTS CC Applicant

(Registration No. 2008/191048/23)

and

JUSTICE PATON SWARTS First Respondent

(Identity No. […])

TINA TERINA SWARTS Second Respondent

(Identity No. […])

[Married in community of property]

Heard: 1 August 2019

Delivered: 13 September 2019

JUDGMENT

MYBURGH AJ:

Introduction

[1] In this application the applicant ('Rota') seeks a provisional order of sequestration of the estate of the respondents. The application is brought in terms of ss 9(1) and 10 of the Insolvency Act, No. 24 of 1936 ('the Act'), in terms of which the court may grant a provisional order of sequestration in the event that:

(a) the applicant has a liquidated claim against the respondents of R100 or more;

(b) the respondents have committed an act of insolvency or are factually insolvent;

(c) there is reason to believe that it will be to the advantage of the respondents' creditors if their estate is sequestrated.

[2] I deal with these requirements seriatim.

Liquidated claim

[3] In the founding affidavit, Mr Marius Botha ('Botha') sets out the history of the business relationship between Rota and the respondents ('Mr or Mrs Swarts', 'the Swarts' and 'the parties'). It is a relationship that goes back many years, and one which was initially, and for a number of years, conducted

successfully. However, by the end of 2016, the Swarts had fallen into substantial arrears.

[4] While it was mainly Mr Swarts who dealt with Rota, Mrs Swarts was aware of the business being undertaken by her husband with Rota and on a number of occasions she would participate in meetings with the latter. With the Swarts being in arrears, matters came to a head on 19 March 2019 when three agreements were entered into between the parties. The purpose of the agreements was, certainly on the face of it, to deal with the existing indebtedness and chart a way forward.

[5] The first of the three is a loan agreement entered into by Rota and the Swarts.

[6] While the loan agreement commences with a preamble of sorts which states that: '. . . the Borrower has lend money from the lender and both parties wishes to regulate their agreement, therefore it is agreed as follows: . . .'. The preamble is thus couched in the past tense, ie it refers to an existing situation. Clause 3 of the loan agreement is less clear. The heading is also couched in the past tense, ie 'THE AMOUNT ADVANCED', whereas clause 3.1 provides that 'The lender shall advance . . .'.

[7] However, any residual uncertainty is resolved when one considers the next in the troika of agreements. The second agreement is an acknowledgement of debt, in terms of which the Swarts acknowledge their indebtedness to Rota in the amount of R1,3 million. Importantly, the acknowledgement of debt provides that the Swarts '. . . declare and acknowledge that I am truly and lawfully indebted to Rota Investments CC . . . in respect of monies lent and advanced to myself on my request in an amount of R1 300 000.00 (the capital amount),

which amount is currently outstanding'. Further on in the document, it is provided that 'The outstanding amount is payable in monthly instalments . . .'. Thus, the acknowledgement of debt, in clear terms, refers to an existing debt.

[8] The third document is a deed of suretyship whereby the Swarts bind themselves as sureties and co-principal debtors in favour of Rota in respect of all obligations owing by themselves. The deed of suretyship is thus a superfluous document as the Swarts and the principal debtors are the same people. It is thus of limited significance.

[9] While the defence of the respondents regarding the liquidated claim is somewhat opaque, it would seem that they rely on the non-fulfilment of a suspensive condition which was to provide motor vehicles for the R1,3 million loan. The argument is that, as Rota did not provide those vehicles, it cannot be said that the Swarts owe Rota the money.

[10] The question is whether this amounts to a legitimate defence. In this regard, counsel for Rota provided a succinct setting out of the legal principles which are of application. With reference to the relevant case law, I highlight a number of these principles:

(a) facts must be clearly distinguished from 'contention, submission or conjecture', which are not facts even when made under oath;[1]

(b) bona fide must be given its ordinary meaning of 'genuine', 'honest' and 'in good faith', while 'reasonable grounds' requires that the

[1] *Wilcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602A; *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C-E; *Die Dros (Pty) Limited and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) para 28; *Great River Shipping Inc. v Sunny Face Marine Limited* 1994 (1) SA 15 (C) at 75I; *The Maritime Valour* 2003 (SCOSA) B291 (D) at B293H-I.

defence have an objectively sustainable, justifiable or substantial basis.

[11] Counsel referred to the well-known cases dealing with disputes of fact in motion proceedings with reference to be leading cases such as *Room Hire Company (Pty) Limited v Jeppe Street Mansions and Others*.[2]

[12] In my view, in addition to the cases quoted, it is instructive to have regard to the words of His Lordship Justice Cameron (referring to both the *Room Hire* and the *Plascon-Evans* cases), who held as follows:

> 'It is an elementary rule of motion proceedings that an applicant cannot succeed in the face of a genuine dispute of fact that is material to the relief sought. Conflicting averments under oath cannot be tested on affidavit but only by oral evidence. Nearly eighty years ago Innes CJ explained that –
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> > "(The) reason is clear; it is undesirable in such cases to endeavour to settle the dispute of fact upon affidavit. It is more satisfactory that evidence should be led and that the court should have an opportunity of seeing and hearing the witnesses before coming to a conclusion,"
>
> Innes CJ added a significant qualification: '(Where) the facts are not really in dispute . . . there can be no objection, but on the contrary a manifest advantage in dealing with the matter by the speedier and less expensive method of motion."
>
> This qualification endorsed in the subsequent classic expositions on the subject led to a gradual but not inconsiderable relaxation of the criteria for determining whether despite a factual dispute relief can be granted in affidavit proceedings. Most notably, Corbett CJ in Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited amplified the ambit of uncreditworthy denials that would not impede the grant of relief. He extended them beyond those not raising a real, genuine or bona fide dispute

[2] 1949 (3) 1155 at 1162-1165.

> of fact, to allegations or denials 'are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers'.[3]

[13] The Swarts, when dealing with this aspect, make some sparse allegations that motor vehicles were to be provided for the R1,3 million. However, as pointed out by Botha in his reply to this allegation, the name and make of the motor vehicles are not mentioned, and neither are the number or value of such vehicles.

[14] The paucity of the Swarts' version in this respect is untenable and so far-fetched, that it does not give rise to a material dispute of fact, and thus a Court is justified in rejecting the allegations on the papers.

[15] In the circumstances, I find that Rota has discharged the onus of showing that it has a liquidated claim of R1,3 million in its favour.

Act of insolvency or factual insolvency

[16] The act of insolvency relied upon in this matter is the failure on the part of the Swarts to pay the debt referred to above. In addition, Rota alleges factual insolvency on the part of the Swarts. Counsel for the applicant quite rightly referred to the well-known case of *De Waard v Andrew and Thienhaus*[4], where Innes CJ held that:

> 'Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor but my assets far exceed my liabilities'. In my mind the best proof of solvency is that

[3] *South African Veterinary Council and Another v Symanski* 2003 (4) SA 42 SCA.
[4] 1907 TS 727 at 723.

> a man should pay his debt; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes'.

[17] The Swarts, despite their failure to pay the debt, are at pains to explain that they are solvent. However, this assertion must be treated with suspicion in light of the fact that they have not paid a debt that they have acknowledged to be due by themselves to Rota.

[18] In the circumstances, I find that Rota has discharged the onus of showing an act of insolvency. Furthermore, as will become clear, Rota has also shown factual insolvency.

Advantage to creditors

[19] Botha, in the founding affidavit, asserts that the Swarts have assets to the value of R1,45 million, liabilities of R2 710 762 and thus that there will be a likely dividend of R0,60c in the Rand.

[20] In answer the Swarts assert factual solvency.

[21] In the circumstances, it is common cause that there will be a significant advantage to creditors, and I find that this requirement is also met.

Section 15 of the Matrimonial Properties Act, 88 of 1984 ('the MPA')

[22] Section 15(9)(a) of the MPA provides that:

> '(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16(2), and-
>
> (a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consents required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;'.

[23] In addition to the deeming provision which assists Rota, Botha sets out in both his founding affidavit and the replying affidavit that the parties communicated closely and Mrs Swarts had knowledge of the business relationship between the parties. In any event, Mrs Swarts signed the three agreements and, in so doing, expressly bound herself in respect of the debt, whatever its provenance.

The National Credit Act, No. 34 of 2005 ('the NCA')

[24] Regarding the defence raised by the Swarts, based on the NCA, counsel for the applicant referred to the well-known *Firstrand Bank Ltd v Raymond Clyde Kona and Another*[5], where it was held that:

> '[14] I conclude, therefore, that an application by a credit provider for the sequestration of a consumer's estate in which it relies on its claim in terms of a credit agreement to qualify as a creditor for the purpose of instituting sequestration proceedings does not constitute 'litigation or other judicial process' by which the credit provider exercises or enforces any right or security under the credit agreement within the meaning of s 88(3) of the NCA.

[5] 20003/2014 [2015] ZASCA 11 (3 March 2015).

> An application for the sequestration of a consumer's estate is thus not precluded by the prohibition on institution of proceedings envisaged in s 88(3) of the NCA'.

[25] In the circumstances, for the reasons set out in the passage quoted, the defence of the Swarts, based on the non-compliance with the NPA, is bereft of merit.

Conclusion

[26] Given what is set out above, I find that the applicant has made out a case for the relief it seeks and order as follows:

(a) The estate of the respondents is placed under provisional sequestration in the hands of the Master of the High Court (Western Cape Division, Cape Town);

(b) A rule nisi is issued calling upon the respondents, and any other interested parties, to appear and to show cause, if any, to this Honourable Court, on Tuesday, 22 October 2019 at 10h00 or so soon thereafter as counsel may be heard:

(i) why the estate of the respondents should not be placed under final sequestration; and

(ii) why the costs of this application should not be costs in the sequestration;

(c) Service of this order is to be effected:

(i) on the respondents personally;

(ii) on any trade union referred to in s 11(4) of the Act, and on the respondents' employees (if any), in terms of s 11 2A(b) of the Act;

(iii) by publication in the Cape Times and Die Burger newspapers;

(iv) on the South African Revenue Service;

(v) by pre-paid registered post to all known creditors of the respondents whose claims are in excess of R20 000.

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P A MYBURGH
Acting Judge of the High Court

Appearances:

For the applicant:	Mr A Ferreira Instructed by Visagie Vos Incorporated
For the respondents:	Colin Goeffreys Incorporated