IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 11494/2020

In the matter between:

SILKSTAR 178 (PTY) LIMITED Applicant

and

WILLEM ADRIAAN SMIT Respondent

Date of hearing: 30 August 2021
Date of judgment: 3 September 2021

JUDGMENT

SAVAGE J:

Introduction

[1] The applicant, Silkstar 178 (Pty) Limited (“Silkstar”), seeks the provisional sequestration of the respondent, Mr Willem Adriaan Smit, arising from his indebtedness to Silkstar in the amount of R1 047 214,43 under a written agreement of suretyship.

[2] The undisputed facts are that Mr Johannes Viviers, a director of Silkstar, entered into a loan agreement with the ABP Group (Pty) Ltd (“ABP”), represented by Mr Smit, on 19 June 2018. In terms of the agreement an amount of R700 000,00 was loaned by Silkstar to ABP. The loan agreement recorded that ABP was indebted to Silkstar in the total amount of R1 221 750,00, made up of the loan amount of R700 000,00 and additional amounts of R205 000,00 and R316 750,00. The R205 000,00 debt arose from funds advanced by Silkstar to ABP in relation to the lease of an excavator used by ABP at Optimum Coal Mine. After the mine was placed under business rescue Mr Smit and Mr Brett Pritchard assured Mr Viviers that ABP would repay Silkstar but proposed that to do so Silkstar advance a further loan of R700 000,00 to ABP in order to enable it to start its specialised crusher plant machine so as to generate funds to pay Silkstar. Silkstar agreed to make the further loan to ABP on the basis that both Mr Smit and Mr Pritchard sign written suretyships in favour of Silkstar in respect of ABP’s indebtedness; and that ABP register a notarial bond for the amount of R905 000,00 over the crusher plant in Silkstar’s favour. The written suretyship agreements were signed on 19 June 2018. Although both Mr Smit and Mr Pritchard indicated to Mr Viviers that the crusher plant machine belonged to ABP, it later transpired that this was not the case and that no notarial bond had been registered over the machine in favour of Silkstar.

[3] ABP made payment of the first instalment under the loan agreement in the amount of R174 535,37, but the second payment due on 31 August 2018 and subsequent payments thereafter were not paid. On 17 September 2018 letters of demand were sent by Silkstar to ABP, Mr Smit and Mr Pritchard. Mr Viviers was shortly thereafter informed that ABP was to be placed in business rescue, with the special resolution to this effect signed on 7 September 2018 and business rescue practitioners appointed on 14 September 2018.

[4] On 1 November 2018 Mr Viviers was told that no notarial bond had been registered over the crusher plant in favour of Silkstar. He stated that he was "completely flabbergasted" when he found out on 5 November 2018 that Mr Smit and Mr Pritchard had been dishonest in claiming that the APB owned the crusher plant when in fact it did not. Mr Pritchard in a meeting did not dispute that this was so, with Mr Viviers stating that had he known this fact he would not have agreed to loan APB a further R700 000,00.

Basis of application

[5] In his founding affidavit filed in support of the application for provisional sequestration Mr Viviers stated that as surety Mr Smit is indebted to Silkstar in the amount of R1 047 214,43 and that -

> "Notwithstanding the letter of demand addressed to [Mr Smit] wherein payment of the aforementioned amount is claimed, [he] has not affected any payment to [Silkstar]. The only reasonable inference that can be drawn from [his] failure to effect payment to [Silkstar] is that [Mr Smit] is factually insolvent. If [he] was solvent, he would have paid the admitted debt."

[6] The relevant company and deeds office searches undertaken on behalf of Silkstar indicated that Mr Smit is a director of various companies and the owner of one immovable property situated in Cape Town, which was purchased in December 2016 for the amount of R925 000,00. It was said that his sequestration would be to the advantage of creditors when Silkstar had been "blatantly defrauded" by Mr Smit and Mr Pritchard, and that the further loan amount would not have been advanced had it been known that ABP did not own the crusher plant. Mr Viviers expressed his view that a trustee should be appointed to investigate the financial affairs of Mr Smit as this was the only hope of recovering Silkstar's debt.

[7] The application for provisional sequestration was opposed by Mr Smit on the basis that there is no evidence to prove that he is factually insolvent in that the immovable property owned by him is "*valued conservatively at R1 300 000"*; that an agreement was entered into between the parties to discharge the debt of ABP to avoid litigation which constituted a *pactum de non petendo in*

anticipado; and that while he signed the suretyship agreement, he did so in error in that he did not intend to agree to the renunciation of benefits recorded in such agreement.

[8] In reply Mr Viviers produced a deeds office search from which it was apparent that First Rand Bank holds a mortgage bond registered over Mr Smit's property for the amount of R825 000,00. Mr Smit was invited to seek to file a further affidavit to explain what amount remains outstanding to First Rand Bank but no further affidavit was filed by Mr Smit.

Submissions of the parties

[9] It was submitted for Silkstar that Mr Smit is clearly a major creditor of the respondent who cannot realistically dispute its indebtedness to it. From the papers it is evidence that he is factually insolvent in that his liabilities exceed his assets and that despite the opportunity afforded to him to show differently, the contrary has not been proved. There is reason to believe that there will be an advantage to creditors if his estate is sequestrated and in this regard our courts have emphasised repeatedly that the wishes of an unpaid creditor is a serious consideration to be taken into account.[1] Consequently Silkstar seeks that Mr Smit's estate be placed under provisional sequestration.

[10] In opposing the application Mr Smit states that he is solvent. He disputes that it has been shown that he is insolvent, with no factual or legal basis advanced to show this and that Silkstar is using the application as a means of debt enforcement. Although he relies on an agreement apparently concluded between the parties to discharge the debt of ABP, this agreement was not produced. Nevertheless, he states that the intent of such agreement was to avoid litigation, submitting that it could be deemed a *pactum de non petendo in anticipado.* While he admits having signed the suretyship agreement on behalf of ABP, he denies that it was ever his intention to renounce the benefits of and states that this would be a matter for evidence.

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1 With reference to *Port Shepstone Fresh Meat and Fish Co. Ltd v Schultz* 1940 TPD 163 at 165; *Meaker v Heyns and Others* 1965 (3) SA 496 (SR) at 500–501; and *Buzyna v Buzyna* 1962 (1) SA 165 (C).

Discussion

[11] Section 9(1) of the Insolvency Act, No. 24 of 1936 ("the Act") permits a creditor with a liquidated claim "*who has committed an act of insolvency, or is insolvent,* …[to] *petition the court for the sequestration of the estate of the debtor*". In terms of section 10 of the Act, a provisional order of sequestration may be granted where "the court… is of the opinion that *prima facie* –

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection [9(1)]; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if is estate is sequestrated*…".*

Claim established

[12] The current indebtedness of ABP under the 2018 loan agreement concluded with Silkstar is not disputed by Mr Smit, nor is the fact that he concluded the written suretyship agreement expressly binding himself as –

> "…surety for and co-principal debtor jointly and severally with [ABP]…to Silkstar…for the due and punctual performance by the debtor of all its obligations to the creditor whether presently due, owing and payable or becoming due, owing and payable in the future*".*

[13] Mr Smit's contention that although he signed the suretyship agreement, he did not intend to renounce the benefits be would ordinarily enjoy and only became aware that he had done so when he met with his lawyers, is without merit. A surety that signs a suretyship as "*surety and co-principal debtor*" *ipso facto* renounces the benefit of excussion and division.[2] The suggestion that a unilateral mistake exists in relation to the agreement does not create a factual dispute which requires determination when it is not contended that the

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[2] *Gerber v Wolson* 1955 (1) SA 158 (A); *Neon and Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 472B–E.

agreement does not reflect the common intention of the parties and there is no attempt to seek a rectification of such agreement.[3]

[14] In such circumstances the belated attempt to rely on an alleged unilateral mistake is no more than an opportunistic attempt to avoid liability. It does not provide a legal defence, nor does it advance a *bona fide* or reasonable basis on which to dispute Silkstar's claim. Furthermore, without more, the purported reliance on an agreement which is alleged to constitute a *pactum de non petendo in anticipado*, but which is not placed before this Court, takes the matter no further. This is so since the terms of such agreement are simply not disclosed. It follows that such averment similarly does not provide a *bona fide* or reasonable dispute to Silkstar's claim.

Factual solvency

[15] Mr Smit suggestion that his failure to respond to Silkstar's letter of demand is not a sufficient basis upon which to infer that he is factually insolvent and that no evidence has been put up to allow the Court to find that his liabilities exceed his assets, is equally lacking in merit. As is made clear in Bertelsmann *et al*, *Mars: The Law of Insolvency in South Africa*[4] a debtor's factual solvency is to be established on a balance of probabilities in the sense that clear proof, but not necessarily the clearest proof, must be advanced that the debtor's liabilities as a fact exceed his assets. The affidavits before this Court show clearly that Mr Smit's liabilities exceed his assets and that he is unable to pay his debts due to his factually insolvency. The opportunity provided to Mr Smit to show differently was not grasped by him, with him electing instead to advance as little information on the issue as possible to enlighten the Court.

[16] It remains so that, in the words of Innes CJ in *De Waard v Andrew and Thienhaus Ltd*:[5]

> "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".

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[3] Christie The Law of Contract (7th ed) at 366 para 2.1.
[4] 9th edition at para 5.34.
[5] 1907 T 727 at 733.

> To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

[17] The submission advanced for Mr Smit that new material pertinent to his financial position could not be put up in reply by Silkstar is, on the facts of this matter, without foundation. In reply Mr Viviers responded to the information raised by Mr Smit in his answering affidavit. As much is the purpose of a replying affidavit. This new information put up by Mr Viviers related to the mortgage bond registered over Mr Smit's property. While it is so that the general rule in motion proceedings is that the applicant must make out its case in the founding affidavit and that new matter is not be introduced in the replying affidavit, this is neither an inflexible nor absolute rule. In *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* [6] recognising the general rule, the Court made clear that there will exist circumstances in which it is apposite to allow new matter to be introduced in a replying affidavit. Since it was impossible for Silkstar to have a full knowledge of all facts relevant to Mr Smit's financial affairs before it launched the application, it was apposite and appropriate for it to put up the information it had obtained relating to the mortgage bond registered over Mr Smit's property for the first time in reply. This was so given that Mr Smit in detailing the value of his immovable property had failed to provide such information himself. Given his recognition that this constituted new material, Mr Viviers appropriately invited Mr Smit to seek to place a further affidavit before this Court to answer to this material. He failed to do so.

[18] It follows that having regard to the information placed before this court, it has been shown prima facie by Silkstar that Mr Smit's liabilities exceed his assets and that he is factually insolvent.

Advantage to creditors

[19] While it has been recognised that the best judges of their own interest are creditors themselves,[7] it is the court which must ultimately be satisfied that

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[6] 1984 (3) SA 202 (T) at 205E relying on *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O).
[7] *Realizations Ltd v Ager* 1961 (4) SA 10 (D & C.L.D.) at 14H.

sequestration is to the benefit of creditors and the *ipse dixit* even of a sole creditor not being decisive. [8] In *Meskin & Co v Friedman*[9] it was stated that:

> "(T)he facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the [Insolvency Act] some may be revealed or recovered for the benefit of creditors, that is sufficient".

[20] In *Stratford and Others v Investec Bank Ltd and Others*[10] the Constitutional Court held that:

> "The correct approach in evaluating advantage to creditors is for a Court to exercise its discretion guided by the dicta outlined in Friedman. For example, it is up to a Court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment except through sequestration; or that some pecuniary benefit will be renowned to the creditors*."*

[21] It was made clear in *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd*[11] that whether sequestration would render any benefit to creditors does not require that *a Court "be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The Court need be satisfied only that there is reason to believe - not necessarily a likelihood, but a prospect not too remote - that as a result of the investigation and enquiry assets might be unearthed that will benefit creditors."*

[22] I am satisfied on the facts placed before this Court that there is reason to believe, in the sense that it seems to me that a reasonable prospect exists,

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[8] *Investec Bank Ltd v Lambrechts N.O and Others* [2014] ZAWCHC 175; 2019 (5) SA 179 (WCC) at para 58.
[9] 1948 (2) SA 555 (W) at 559.
[10] [2014] ZACC 38; 2015 (3) BCLR 358 (CC), 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC) at para 45 (footnotes omitted).
[11] Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd [2006] ZASCA 51; 2006 (4) SA 292 (SCA) at para 29.

that it will be to the advantage or that a pecuniary benefit will be obtained by creditors if the estate of Mr Smit is to be sequestrated.

Conclusion

[23] The applicant has shown *prima facie* that the balance of probability on the affidavits is in its favour[12] in respect of each of the issues required by section 10. Silkstar's claim has not been shown by Mr Smit to be *bona fide* disputed on reasonable grounds. I am satisfied therefore that sequestration proceedings are not inappropriate.[13] It follows that Mr Smit's estate should be placed under provisional sequestration in the hands of the Master of this Court.

Order

[24] In the result the following order is made:

1. The respondent's estate is placed under provisional sequestration in the hands of the Master.

2. A rule nisi is issued calling upon all interested parties to show cause on 11 November 2021:

   (i) why the respondent's estate should not be placed under final sequestration;

   (ii) the costs of the application, on the attorney and client scale, should not be costs of administration in the sequestration.

3. Service of this order shall be effected in the following manner:

   (i) on the respondent; and

   (ii) on the South African Revenue Service, Cape Town by the applicant's attorney of record per hand.

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[12] *Investec Bank Ltd v Lambrechts N.O and Others* [2014] ZAWCHC 175; 2019 (5) SA 179 (WCC) at para 15.

[13] See *Hülse-Reutter & Another v HEG Consulting Enterprises Pty Ltd (Lane & Fey NNO Intervening)* 1998 (2) SA 220 (C) at 218D-219H

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SAVAGE J

Appearances:

Applicant: APJ Els

Instructed by Barnard Patel Attorneys

Respondent: L Zazeraj

Instructed by Alcock & Associates Inc.