10/6/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

DATE 10/6/2011 SIGNATURE

Case Number: 49214/2007

In the matter between:

HAROLD LEVIN N.O.	**1ST APPLICANT**
ANDREW MAXWELL TULLY N.O.	**2ND APPLICANT**
COLIN GRAIG ELSWORTH N.O.	**3RD APPLICANT**
RANDAL JAMES BRERETON N.O.	**4TH APPLICANT**
vs	
HANS JACOB WESSELS	**RESPONDENT**

JUDGMENT

Delivered on: 10 June 2011

POTTERILL J,

1 The matter before me is a return date of an interim order wherein the First, second, third and fourth applicants are applying for the final sequestration of the respondent. The respondent was provisionally sequestrated on 21/ 9 /2010 after variation of the order on 27/10/2010.

2 The application was issued and served on 1 November 2007. The grounds for the application are that the respondent committed a deed of insolvency as anticipated in Section 8(g) of the Insolvency Act, Act 24 of 1937 and the respondent's inability to pay his debt.

3 The background to the application is set out in the following common cause facts:

3.1 The Tully Family Trust and Imuniti Holdings Limited signed an agreement of sale of shares in Impilo Marketing (Pty) Ltd and P B Tully Family Holdings (Pty) Ltd. In terms of clause 4 the purchase price was to be paid no later than 31 January 2006. The respondent represented Imunitu Holdings Limited.

3.2 On 1 February 2006 an addendum to the agreements of purchase and sale was concluded wherein Imuniti requested an indulgence that the payment date referred to above be extended to 28 February 2006. On 6 April 2006 a third addendum to the agreements of purchase and sale is concluded wherein a further indulgence by the seller is granted to the purchaser whereby the payment date was extended to 31 May 2006.

3.3 On 1 August 2006 a fourth addendum to the agreements of purchase and sale entered into wherein the parties agreed that the balance of the purchase price would be paid as follows:
R1.4 million by 31 July, 2006, R3 million by 14 August 2006 and R15,6 million by 15 October 2006. Clause 1.4 set out that Imuniti was to be listed on the JSE and the Applicants would be issued shares at 60c per share to the value of R20 000 million; the effect thus that half of the purchase price is be paid by means of shares in Imuniti.

3.4 On 30 October 2006 a Deed of Assignment is signed wherein Imuniti assigned rights and obligations to the respondent. The Applicants' interests were to pass to Imuniti upon signature and issue of the agreed number of shares. This agreement is concluded because, as set out in the preamble, to be JSE compliant Imunity was to be debt-free. In this assignment Wessels warranted that a parcel of shares having a value of R30 million at 0.60c per share were his sole and absolute property. The effect with regard to payment was that the Respondent had to pay the outstanding balance of R15.6 million by 8 January 2007.

3.5 In the fifth addendum to the agreements dated 20 October 2006 it was recorded that Imuniti paid R1.4 million and the R3 million in accordance with clause 3.1 of the Addendum dated 1 August 2006. However the R15.6 million that had to be paid on 15 October 2006 was not paid and an extension was granted for payment until not later than 8 January 2007. The parties confirmed in the addendums the terms of the original agreement.

3.6 Between October 2006 and March 2007 the respondent made payments totalling R4 million. The outstanding balance was thus reduced to R11.6 million but the full outstanding balance was not paid on 8 January 2007 as agreed to in the fifth addendum.

3.7 On 9 March 2007 a first letter of demand is sent to the respondent.

3.8 On 8 June 2007 a second letter of demand is sent off to the respondent.

3.9 On 15 March 2007 the respondent sent a text message to the applicants wherein he asked a further extension of the payment date to the end of June 2006, he offered 300 000 Imuniti shares as director of Imuniti.

3.10 On 15 March 2007 in an e-mail from the respondent the following was stated:

" ... *I am confident that I will be able to raise an amount of R2 million with a property in Pretoria as security for such amount....."*

3.11 On 23 October 2007 this application for sequestration was launched, a notice of opposition was filed and served on 1 November 2007. The matter was removed from the unopposed roll and the respondent had to file his opposing affidavit by 22 November 2007.

3.12 No opposing affidavit was filed and the matter was set down for 18 March 2008 on the unopposed roll. The respondent asked for time to pay and the matter did not proceed.

3.12 The matter was then set down on the unopposed roll for 7 May 2008. On 7 May 2008 an affidavit is filed by the respondent wherein he admitted in paragraph 3.1 that: "*the effect of the Deed of Assignment signed by me (Annexure "A") would be to render my estate insolvent immediately upon its signature.*" In paragraph 3.4 *"I admit that I am lawfully indebted to the Applicant, that I am presently unable to pay the Applicant and that I will be unable to do so until the said Trust makes the necessary funds available to me."* In the affidavit he confirmed each and every allegation made by the applicants, once again asked for a further extension for payment and confirmed his withdrawal of opposition to the Application for sequestration. The matter was then postponed to 20 June 2008.

3.13 On 13 June 2008 the respondent's attorney sent a surety bond wherein the respondent again acknowledged his indebtness to the applicants.

3.14 On 20 June 2008, the postponement date, the respondent's attorney filed an affidavit. The thrust of the affidavit is that the respondent was pulling

out all stops to facilitate payment and that security was offered in a letter dated 13 June 2008. In court on the 20th a settlement agreement was made an order of court with the crux that the respondent was to pay R1 million by 27 June, R1 million by 4 July and the balance on 8 September 2008. It was also agreed that the applicants may forthwith take judgment against the Hans Wessels Trust in case number 38861/07 for payment of R11 600 000, 00, interest and costs on attorney and client scale.

3.15 By 5 July 2008 the order made on 20 June 2008 was not complied with in that the 2 million that had to be paid before 27 June 2008 and 4 July 2008 was not paid. An addendum to the settlement agreement was entered into wherein the respondent agreed to pay:
Clause 2.2.: "The amount referred to in clause 4.2 (R1 million) will no longer be payable on 4 July 2008 but will be added to the balance which shall be paid, by close of business on Monday 8 September 2008."
Interest on the capital amount is to run from 9 March 2007 and was to be paid to the Applicants by close of business on Monday 10 September 2008.

3.16 On 5 September 2008 the Respondent sent an e-mail to Harold Levin with content that the respondent had successfully raised an amount of R1 million and will on 8 September 2008 be advised as to when payment thereof will be effected and then the R1 million will be paid over to the applicants' attorney trust account.

3.17 On 4 September 2008 the matter is set down on the 22nd of September 2008. No payments were by then received. On 26 September 2008 the respondent filed an affidavit requesting that this matter be postponed *sine die* because the "*the sequestration of my estate would not be in the in anyone's interest at this stage. I further wish to bring to the notice of the above Honourable Court certain recent developments, in particular the*

sale of an immovable property, the proceeds of which would be utilized to extinguish the Applicants' claim against me. I request an indulgence of sixty days to finalize the transfer.

By virtue of a payment of R1 M made by me on 27 June 2008, the balance of the Applicants' claim against me amounts to R10.6M." [Paragraph 4]

He further set out that the Applicants have security in the form of fifty million shares held by him in Imuniti Holdings (Pty) Ltd. "*These shares were pledged to the Applicants in securitatem debiti for the outstanding liability due by me the Applicants. At the time of the pledging of these shares, these shares were valued at approximately sixty cents each. They have decreased in value but are still presently worth approximately eight cents a share on the ALTX Division of the JSE. This will translate into security of R4M, which the Applicants presently hold."* [Par 5]

He also set out that the proceeds from the sale of an immovable property would be utilized to extinguish the Applicants claim.

This matter is then on 26 September 2008 postponed to 28 November 2008.

3.18 On 28 November 2008 the matter is postponed to 6 March 2009 and the following agreement is made an order of court:

Respondent was to pay R1 million before 7 November 2008. Respondent also undertook to pay R200 000 on 15 December 2008, 15 January 2009 and 15 February 2009. The full outstanding balance was to be paid on or before 28 February 2009. During the period 29 November 2009 to 14 February 2009 respondent made payments totalling R1.6 million but the balance was not paid on or before 28 February 2009 or at all.

3.19 On 6 March 2009 the matter is postponed to 14 April 2009. On 9 April 2009 the respondent delivered his opposing affidavit. Herein the respondent for the first time denied any liability towards the applicants. He denied that he committed an act of insolvency. He denied that the

applicants held no security for the amount owing to him and that it would be to the benefit of his creditors if he was to be sequestrated.

3.20 On 24 March 2010 the respondent signed particulars of claim in the Kwa-Zulu High Court claiming repayment of the R5.6 million from the applicants that he had paid to the applicants.

3.21 On 30 August 2010 the respondent filed and served a supplementary affidavit in this application. The averment is made that the agreement of assignment that was concluded is to be set aside due to misrepresentations made to him by the applicants. It would be premature to sequestrate him before the matter in the Kwa-Zulu High Court relating to these misrepresentations is finalized.

4 All of these facts were before my brother Mabuse J when he granted the provisional sequestration of the respondent.

5 It was argued on behalf of the respondent that the Applicants had not on a balance of probabilities proven its claim. The respondent instituted a claim in the High Court in March 2010, now disputing the Applicants claim. The tenure of the dispute is that when the respondent concluded the agreement it was reported to him that the share value of the Imuniti Shares were 60c per share. It was in fact represented to him that the shares transferred to the respondent were transferred at a discount of 20% of the real value of the shares. These were however all material misrepresentations. In fact the latent defects in Impilo Pharmaceutical Factory rendered the shares worthless. The respondent was not informed that the Medicine Control Council (MCC) had placed Impilo Drugs on terms to implement certain changes to the factory. The main asset of Imuniti was Impilo Drugs and therefore the misrepresentations are material. The Applicants made these misrepresentations to persuade the

respondent to enter into the Delegation Agreement. The respondent only became aware of these misrepresentations during 2009 when he was handed a file from which the misrepresentations became apparent.

6 In opposition to these averments the applicants deny making any misrepresentations. It was common cause that the respondent was the attorney for Imuniti since early 2004. Imuniti's chosen domicilium was the respondent's address. A due diligence on Impilo was done by BDO Spencer Steward and their report was available on 18/2/2004. The Applicants set out that the Deed of Assignment was signed on 30 October 2006. This deed was a proposal from Imuniti represented by the respondent and did not emanate from the Applicants. *"The Respondent, at a meeting at the Applicant's Attorneys' office, personally implored me and my co-trustees to conclude the agreement in order to assist him and Imunitt."* [Paragraph 9.3.7 of replying affidavit]

The Applicants deny that they made any representations to Imuniti or the Respondent as to the value of Impilo, they were made an offer and they accepted this offer.

They further deny that any information relating to the business of Impilo was held from BDO Spencer Steward. This is borne out by the fact that in the due diligence report BDO Spencer Stewart refers to the "*changes in progress as was required per plant evaluation audit conducted on 5 November 2003.*" On 24 May 2006, this after the agreement was concluded, Ernst and Young invite prospective investors and attach a SWOT analysis and set out as a weakness "Environmental control of operations area" [AMT2" to applicants' replying affidavit]. The MCC Notice to suspend the licence was issued after the GMP Audit conducted on17/18 May 2007, after the control and management of Impilo was taken over by Imuniti. In Impilo Drugs written answer to the MCC Audit the following is stated:

"Subsequent to the MCC audit in November 2003 Impilo had an airflow system installed in 2004, which was completed in early 2005. Once installed the efficiency of the airflow system was found to be lacking in terms of temperature control however the airflow and pressure differentials have been found to be acceptable. A second opinion has been requested and is being awaited with respect to the system." [HJ12B to opposing affidavit]

The Applicants deny that they made any misrepresentation pertaining to the value of the shares. The allocation of the shares in Imuniti was made by the respondent and not by the Applicants. In the preamble of the Deed of Assignment the respondent warrants that the shares in Imuniti belong to him and the value of the shares are given as 60c per share and R30 million in total. On 26 September 2008 the respondent under oath stated that the shares were now worth 8 cents. The Applicants contend that if there was misrepresentation the appropriate time to raise it could only have been then. Yet the respondent requested postponement of payment because the proceeds of a sale of an immovable property would be utilized to extinguish the Applicants claim.

7 I am satisfied that the applicants have on a preponderance of probabilities proven their claim. Only when all else failed this claim is instituted three and a half years after the contract was concluded. From the respondent's own papers he knew of the MCC's 2003-audit and had the queries therein classified as a weakness in the SWOT analysis. In paragraphs 16.6-16.21 of the respondent's subsequent affidavit he set out in vague terms that from the middle of 2007 he heard that the applicants had made misrepresentations and that the factory of Impilo had to be upgraded. This is in stark contrast to his averment that he only knew of the alleged misrepresentations in 2009. If these alleged misrepresentations were real then when the notice of opposition to this application was filed on 1 November 2007 this would have been a good defence to this application,

yet it is not raised. Instead many addendums to the agreement are concluded and many court orders granted deferring payment of this admitted debt. This claim then surfaced when the court orders and addendums were not complied with. The respondent's version is so clearly untenable and palpably implausible that there is no bona fide dispute of fact before me. The claim as set out by the applicants has been proven.

8 The respondent acknowledged his indebtness to the Applicants in more ways than one. Once too many he had made deals and schemes from which he offered deferred payment. These orders always included cost orders for which he was accountable. His deferring led to interest accumulating and as a businessman and attorney he was prepared to succumb to this to facilitate payment of his debt. His communications amount to acts of insolvency as set out in Section 8(g) of the Insolvency Act, 24 of 1937. His averred duress when signing acknowledgement of debts and settlement agreements which where by consent made orders of court are far-fetched and untenable and I agree with the reasons proffered by my brother Mabuse J for his decision. The respondent did not and does not have the ability to pay the debt and this was proven on a preponderance of probabilities before me.

9 The applicants have no security for the debt. The respondent has now tendered a first covering mortgage bond in favour of the Applicants over immovable property registered in the name of a company, Burnside County Estate (Pty) Ltd. This security paragraphs 1.2, 1.3 and 1.4 read as follows:

"Bogenoemde Eerste Verband word gegee as sekuriteit in die saak wat Hans Jacob Wessels ingestel het teen die Tully Family Trust onder Saaknommer 3741/201 in die Natal Hoe Hof, Durban.

Die geld uit hoofde van die verband sal betaalbaar wees indien die Hof in bogenoemde saak of enige enige Hof van Appel, in die guns van die Tully

Family Trust sou beslis. Hans Jacob Wessels gemagtig word om alle dokumente wat uitvoering daaraan moet gee, namens die maatskappy te onderteken."

This document is then signed by one director being the respondent's wife.

10 Security in the form of a power of attorney also to register a bond over different property as security was already offered on 25 September 2008, but on 26 October 2008 he once again offered to pay the debt. In his affidavit the respondent set out that he consented to the court orders not with the motive to pay, but to obtain a delay. This is an attorney who in this application acted deceitful and was prepared to say so under oath, yet it is argued that the applicants should accept a security, not from the respondent himself, signed by his wife, not all the directors, over properties not belonging to the applicant. The amount offered is *prima facie* suspect as to covering the capital amount, the agreed interest and costs. The Burnside Company provides security for another asset of the Trust impacting on the value of the security. I agree with the submission made by the applicants' counsel; the security is not worth the paper it is written on. The respondent has in essence not complied with one undertaking or fully with any court order and the probability of him honouring security involving the registering of a mortgage bond over property of which he is not the owner is not satisfactory or sufficient security.

11 There was no argument on whether the sequestration would be to the advantage of the debtors before me. I am satisfied that for the reasons set out in Mabuse J's judgment applicant also proved on a preponderance of probabilities that there is reason to believe that it would be to the advantage of the creditors if the respondent is sequestrated.

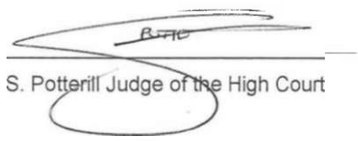
12 The respondent argued that even if I find the applicants proved all three requirements of section 12(1) of the Insolvency Act, 24 of 1936 then I still have a discretion to discharge this *rule nisi.* In exercising my discretion judicially I must factor in that if the respondent is successful in the matter in Kwa-zulu Natal High Court then the sequestration of the applicant would be very unfair. The Applicants have judgment against the Hans Wessels Trust and they have additional security in the form of the first mortgage bond. The applicants would not be in a worse position even if the respondent is unsuccessful in the Kwazulu Natal matter because the applicants' claim would be paid in full. I was specifically referred to **Millward v Glaser** 1950 (3) SA 547 (W) and **Dal's Service Station (Pty) Ltd v Labuschange** 1962 (3) SA 723 (SR) at 726 FG as support for these contentions.

I have found that on these papers the claim is untenable and the security insufficient and I can accordingly not exercise my discretion based thereon. As for the judgment in the Hans Wessels Trust Randal James Brereton [4th applicant and attorney of the applicants] in his affidavit set out the sheriff attached shares in Canopusstraat 210 (Pty) Ltd and Maroelana Sentrum (Pty) Ltd. The shares per the certificate however reflect that the shares belong to the respondent's wife as from 1/2/2010. The shares in the Maroelana Sentrum (Pty) Ltd were also transferred to his wife on 1 February 2010. These transfers were made after the attachment by the sheriff. No court can exercise a discretion in favour of a party conducting himself in this manner; i.e frustrating the execution now relied on as a factor in his favour. The respondent did not deny these facts, but stated it was a mistake.

Distinguishable from the Dal's Service Station matter supra I can not find one fact in support of the submission that the object of this application was to embarrass the respondent; it was brought due to his inability to pay and for no ulterior motive. In the Dal's Service station matter the arbitration proceedings was to commence before the application for sequestration,

not three and a half years after the agreement was concluded. It was also argued that the prejudice that the respondent would suffer would be more than that what the applicants would suffer if the application is granted. On the facts before me I can not exercise my discretion judicially in favour of the respondent, it would be an endorsement of delaying tactics, contempt of court orders and not be in the interests of justice.

13 The rule nisi is confirmed.



S. Potterill Judge of the High Court

Matter heard on: 24 March 2011

Delivered on: 10 June 2011

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