

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 12381/14

In the matter between:

**OBC DISTRIBUTION CENTRE (PTY) LTD
t/a OBC COLD STORAGE**

Applicant

and

**PAUL ALEXANDRE ANDRADE CORREIA
EVELINA CHANTELLE CORREIA**

First Respondent

Second Respondent

JUDGMENT

FOURIE, J:

[1] This is an application for the provisional sequestration of the respondents' joint estate. The applicant is a trade creditor of Inkwazi Meet and Wors (Pty) Ltd ("the principal debtor"). The first respondent has bound himself as surety for and co-principal debtor with the principal debtor in favour of the applicant. The first and second respondents are married in community of property. It is alleged that the principal debtor is currently indebted to the applicant in the sum of R790 204.77 and that the first respondent, in his capacity as surety, is unable to pay the outstanding debt, notwithstanding demand.

[2] Section 8 of the Insolvency Act No. 24 of 1936 sets out the circumstances under which a debtor commits an act of insolvency. Section 9(1) provides for two grounds only upon which it is competent to apply for the sequestration of a debtor's estate, i.e. that the debtor has committed an act of insolvency, or that the debtor is insolvent. Notwithstanding that a creditor is able to *prima facie* establish all the elements of the case for sequestration, the Court still has a discretion as to whether or not to grant the sequestration order (section 10 and section 12(1)).

[3] In the founding affidavit it is stated that the applicant relies on one ground only for the sequestration of the respondents' estate, namely "that the respondents are factually insolvent and in no position to pay their debts" (par 19). Later, in its replying affidavit, the applicant attempted to also rely on section 8 of the Act by alleging that the respondents have committed an act of insolvency as set out in some of the annexures attached to the founding affidavit. As correctly pointed out by counsel for the respondents, the necessary allegations must appear in the founding affidavit, for a Court will not, save in exceptional circumstances, allow the applicant to make or supplement a case in the replying affidavit. As the applicant was unable to demonstrate exceptional circumstances, the alleged act of insolvency relied upon for the first time in the replying affidavit, constitutes an impermissible departure from its cause of action as disclosed in the founding papers and will therefore not be taken into account.

[4] This brings me to the central issue to be decided: has it been proven, at least *prima facie*, that the respondents' estate is insolvent? One may seek to establish factual insolvency either directly by adducing evidence of the debtor's liabilities and of the market value of his assets at the date of the application, or indirectly by providing evidence of circumstances indicative thereof, e.g., the fact that debts remain unpaid, or that the debtor has sought a moratorium or that he has endeavoured to compromise with his creditors (Meskin, Insolvency Law, par 2.1.3). However, a Court must be cautious to infer insolvency from such circumstances. As was pointed out in Corner Shop (Pty) Ltd v Moodley 1950 (4) SA 55 (T) at p 60 the inability to pay a debt should not be taken out of its context, for it may be "consistent with a state merely of temporary financial embarrassment" or due to "commercial insolvency" in circumstances where a debtor's liabilities do not exceed the value of his assets.

[5] It appears from the founding affidavit that the applicant seeks to draw the inference from the respondents' alleged inability to pay their debts that their liabilities in fact exceed the value of their assets. However, this is not as simple as it may appear. The outstanding principal debt, according to the applicant, amounts to R790 204.77. Attached to the founding affidavit is a copy of the application for credit facilities dated 31 July 2014. In paragraph 2.6 thereof reference is made to three immovable properties registered in the names of the respondents. They have declared that there is a net value over these properties totalling R1 400 000.00. In addition thereto, it is also alleged in the answering affidavit that the respondents' assets in fact exceed their liabilities. According to the respondents there is a net equity of

R3 483 539.00 in the business and that equity represents the value of the respondents' shareholding in the company. The applicant takes issue with the valuation of the company, but concedes that the value of the equipment in the business is R700 000.00 in the open market and not more than R400 000.00 on a forced sale basis. Apart from the alleged indebtedness to the applicant in the amount of R790 204.77 and the existence of registered mortgage bonds over the properties referred to above, no allegation is made of any other liabilities on the part of the respondents.

[6] It was argued on behalf of the applicant that one should also take into consideration the respondents' inability to pay the principal debt and the fact that there was a request to allow payment of the current outstanding indebtedness in consecutive monthly instalments. It was submitted, taking into account these circumstances, that there is *prima facie* evidence of factual insolvency for the purposes of obtaining a provisional sequestration order. I would have been prepared to accept this submission if it were not for the respondents' evidence in rebuttal that there is a net equity of R3 483 539.08 in the business which represents the value of their shareholding.

[7] I am mindful of the fact that the applicant takes issue with this valuation. However, apart from the alleged indebtedness to the applicant in the amount of R790 204.77, no allegation is made of any other liabilities except for those referred to above. Furthermore, the first respondent's explanation that the principal debtor has been momentarily unable to pay the amount outstanding due to "cash flow problems", is a further indication that I should be cautious not take their inability to pay out of context. Under these

circumstances I am unable to find that actual insolvency was proved, either by means of direct or circumstantial evidence. Even if I have misdirected myself in this regard, this is, in my view, a matter where I should exercise my discretion in favour of the respondents. In the result the application must fail.

ORDER:

The application is dismissed with costs.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 23 September 2014