IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

7/8/2015
CASE NO: 75535/2013
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

THE BODY CORPORATE OF GALLOWAY **APPLICANT**

and

VAN DYK LUCASJOHANNES **RESPONDENT**

NEDBANK LIMITED **INTERVENING CREDITOR**

JUDGMENT

COLLIS AJ:

INTRODUCTION

[1] In the present application, the applicant is seeking the sequestration of the respondent's estate. On 14 August 2014 and at the instance of the applicant,

this Court granted a provisional order[1] of sequestration against the estate of the respondent. The return date for final sequestration was 3 October 2014 and subsequently extended on a few occasions until 31 March 2015.

BACKGROUND

[2] A brief history of the matter is as follows: The applicant is the Body Corporate of Galloway, a body corporate, duly established in terms of Section 36 of the Sectional Titles Act, 95 of 1986, to attend to the managing of the sectional title scheme known as Galloway established under scheme number S[...] 3[...] and with chosen domicile situated at Kibo Property Services (Pty) Ltd of 2[...] J[...] Avenue, J[...] P[...] C[...] Building […], Unit 2[…] Centurion.

[3] The respondent is the registered owner of Unit 1[…] in the sectional title development known as Galloway Unit 1[…], situated at 2[...] S[...] Avenue, Highveld, and as such is a member of the applicant.

[4] Pursuant to the respondent falling into arrears with his levy contributions towards the applicant the latter obtained judgment against the respondent on 25 March 2013.[2] Thereafter on 8 April 2013, the Sheriff made an attempt to execute the warrant of execution at the respondent's unit situated in Galloway. Upon performing a diligent search at the premises the Sheriff was unable to find any assets belonging to the respondent which he could attach in order to satisfy the judgment debt. It is then that the Sheriff proceeded to issue a nulla bona return.[3] It is significant to note, that on this day the sheriff found Ms. Slabbert to be the occupant of the premises.

[5] Thereafter, on or about 25 September 2013, a further attempt was made by the Sheriff to execute against the movable property at the unit of the respondent. On this day similarly the Sheriff found no assets belonging to the respondent and found one Mr. Loubout to be the current occupier.

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[1] See Index 2.2 page 116A.
[2] See Index 2.2 page 27
[3] See in this regard Founding affidavit para 6.1

[6] It is on the above outlined basis that the applicant alleges that the respondent has committed an act of insolvency in terms of section 8 of the Insolvency Act,[4] and as a consequence it applied for the sequestration of the respondent.

INTERVENING CREDITOR'S GROUNDS OF OPPOSITION

[7] At the onset it should be noted, that the respondent himself does not oppose the sequestration of his estate.

[8] Such opposition is forthcoming from the intervening creditor, in this instance Nedbank, who opposes the application on the following grounds:

8.1 that the respondent has not committed an act of insolvency and is not insolvent;

8.2 that there would be no advantage to creditors, if the respondent's estate is sequestrated; and

8.3 that the applicant has failed to comply with the provisions of the Insolvency Act.

THE LAW

[9] In order for the applicant to succeed in placing the estate of the respondent under sequestration, the applicant must comply with both formal and substantive requirements set out in the Insolvency Act.

[10] It is for this reason that the result of this application will depend on the interpretation and application of section 8(b), and section 12(1)(c) of the Insolvency Act. These sections are quoted hereunder for ease of reference.

Section 8(b) reads as follows:

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[4] Act 24 of 1936

'A debtor commits an act of insolvency- if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment.'

Section 12(1)(c) reads as follows:

'If at the hearing pursuant to the aforesaid *rule nisi* the Court is satisfied that-
(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated'

[11] In **Meskin & Co v Friedman 1948 (2) SA at 558 (W),** Roper J stated as follows: 'Under sec. 12, which deals with the position when the *rule nisi* comes up for confirmation, the Court may make a final order of sequestration if it is satisfied that there is such reason to believe. The phrase *'reason to believe',* used as it is in both these sections, indicates that it is not necessary, either at the first or final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the advantage to creditors. At the final hearing, though the Court must be *'satisfied'* it is not to be satisfied that sequestration will be to the advantage to creditors, but only that there is a reason to believe that it will be so.'

ONUS

[12] It is trite that the *onus* of establishing that all the requirements of the Insolvency Act have been met rests upon the applicant. In order to succeed, the applicant has to show that the respondent (debtor) has committed an act of insolvency and that there is reason to believe that when a final order is sought, the sequestration will be to the advantage of the creditors of the respondent.

[13] A closer scrutiny of the intervening creditor's grounds of opposition will next

be looked at.

ACT OF INSOLVENCY

[14] The first ground that the intervening creditor relies upon is the failure on the part of the applicant to prove that the respondent has committed an act of insolvency. As previously mentioned, the returns of service which the applicant places reliance upon were produced by the Sheriff of the Court pursuant upon executions which took place respectively during April 2013 and September 2013.

[15] The said executions took place at the *domicilium* address so chosen by the respondent and which address is further made provision for in terms of Regulation 3(2) of annexure 8 to the Sectional Title Act.

[16] Upon perusal of the Notice of Motion, it is apparent that the said notice was issued out of this Court on 25 March 2014 exactly six (6) months since the last attempt to execute was made.

[17] In its opposing affidavit, the intervening creditor did not place the time, place or returns produced pursuant to such executions in dispute, but rather had placed in issue the failure on the part of the applicant, to first have taken steps to execute against the immovable property, prior to taking steps to sequestrate the respondent. Therefore the intervening creditor contends that the application for sequestration is not the last remedy available to the applicant.

[18] The Insolvency Act, with specific reference to the provisions of section 8(b), places no requirement that prior to reliance being placed on a nulla bona return, or as per the present matter, nulla bona returns. the applicant in sequestration proceedings would first be obliged to obtain an order to execute against immovable property of the debtor. The Act furthermore, places no requirement that the returns on which an applicant places reliance should be of recent origin. However, it follows that where the return relied upon is not of recent origin, a Court would find it difficult to conclude that it is satisfied that the

respondent's financial position has not materially been altered, since date that execution of the writ had taken place.

[19] In the present matter the last execution date of the writ had taken place precisely six months before the applicant launched the present proceedings. As such it could therefore not be contended, as it has been by counsel for the intervening creditor, that the applicants' position could materially have been altered since date of last execution.

[20] As a consequence I am satisfied, that the applicant has discharged it's onus in proving that the respondent has committed an act of insolvency.

ADVANTAGE TO CREDITORS

[21] The applicant in its founding affidavit as per paragraph 8 sets out that save for the unit that the respondent has registered in terms of the sectional title scheme, it is unaware of any other assets or liabilities which the respondent might have. Furthermore, that the unit when it was acquired during 2006, was purchased for an amount of R 430 000.00 and that the applicant holds no security for its claim against the respondent.

[22] The applicant went on to state that it has very little personal knowledge about the financial circumstances of the respondent but that in terms of section 89 of the Insolvency Act read with section 158 of the Sectional Titles Act, it is a preferential creditor for any unpaid levies or contributions due to it. The judgment debt due to it as at December 2013 amounted to R 33 000.00.

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[23] By sequestrating the respondent it will result in the removal of the respondent as a defaulting member in the scheme and in that way will bring the negative effect of his actions (by non-payments of his levies and contributions) to an end.

[24] In opposition the intervening creditor avers that according to a valuation conducted on the respondent's property, the forced sale value of the property would be an amount of R 500 000.00,[5] and that this is the only known asset of value in the respondent's estate. Furthermore, that the outstanding balance due to it in respect of the loan agreement, amounts to R 604 822.76.[6] That by mere deduction of these two amounts there already would be a shortfall of R 137 822.76, without taking into consideration the costs of the present application, in addition to the costs of the administration process. These costs it tabulated at paragraph 21 to its opposing affidavit, would at least amount to R 76 125.00. It further contends that sequestration would as a result not be to the advantage of creditors, save for the applicant.

[25] Counsel appearing on behalf of the intervening creditor further submitted that the applicant has failed to establish that there is reason to believe that sequestration will be to the advantage of creditors, which is established if there are facts proved which indicate that there is a reasonable prospect--not necessarily a likelihood, but a prospect which is not too far remote--that some pecuniary benefit will result to creditors.[7]

[26] In **Botha v Botha 1990 (4) SA 580 (W) at 585C-F, Leveson J** said the following:

> " ....a Court need not be satisfied that there will be advantage to creditors, only that there is a reason to believe that that will be so. That in turn, in my opinion, leads to the conclusion that the expression 'reason to believe' means 'good reason to believe'. The belief itself must be rational or reasonable and in my opinion, to come to such a belief the Court must be furnished with sufficient facts to support it. In a broad sense it seems proper to say, on the basis of the cases, that 'advantage to creditors' ought to have some bearing on the question as to whether the granting of the

[5] See Opposing Affidavit para 18 Index page 128
[6] See Opposing Affidavit para 20.3 Index page 129
[7] See in this regard London Estates (Pty) Ltd v Nair 1957 (3) SA 591 (N)

application would secure some useful purpose. I express it thus because as Roper J has shown in the Meskin case, there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and enquiry under the relevant provisions of the Act might unearth assets thereby benefiting creditors."

[27] Having regard to the founding affidavit, one of the main purpose the granting of the application would serve, would be to terminate the membership of the respondent from the scheme and thereby seizing his estates liability for levies. That having been said, sequestrating the respondent would also result in all likelihood that assets will come to light when a proper interrogation is conducted under the provisions of the Insolvency Act and herein also lies a further advantage to creditors.

[28] As per the Meskin case cited above, at the final hearing a Court need not be satisfied that sequestrating the respondent would be to the advantage to creditors, but that there is reason to believe that it will be so.

[29] It is for this reason that I conclude that for present purposes advantage to creditors under section 12(1)(c) of the Act has been shown.

ORDER

[30] Accordingly the following order is made:

30.1. The intervening party's opposition is dismissed;

30.2 the Rule nisi granted on 14 August 2014, is hereby confirmed;

30.3 the estate of the respondent is placed under final sequestration;

30.3 costs to be costs in the sequestration.

C. J. COLLIS

ACTING JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPLICANT:	ADV J. MYBURGH
INSTRUCTED BY:	STUART van der MERWE
INCORPORATED FOR RESPONDENT:	ADV R. CARVALHEIRA
INSTRUCTED BY:	EDELSTEIN VAN DER MERWE INC.
DATE OF HEARING:	2 JUNE 2015
DATE OF JUDGMENT:	7 AUGUST 2015