



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

Case Number: 31005/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

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

(3) REVISED

DATE: 9 September 2020

SIGNATURE:

In the matter between:

BUTI ANDRIES MNISI

Applicant

And

NEDBANK LTD

First Respondent

ALL TRUSTEES OF THE INSOLVENT ESTATE OF

BUTI ANDRIES MNISI (N.O.)

Second Respondent

In re

NEDBANK LTD

Applicant

And

BUTI ANDRIES MNISI

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN

Introduction

[1] The applicant brought an urgent application claiming, *inter alia*, the following relief:

“2. [that] *the execution of the final sequestration order granted on 24 June 2020 by the Honourable Mr Justice Sardiwalla J in relation to the Applicant’s estate (“the Applicant’s property”), is stayed, and/or no property belong to the Applicant will be realized, pending the final determination of the Appeal, under the above case number;*

3. *The Second Respondent is to return forthwith, if any assets of the Applicant have been removed, and/or cease the sale of any assets/property belonging to the Applicant’s estate;”*

[2] The second respondent opposed the application and launched a counter-application. Save for the relief pertaining to the point *in limine* referred to *infra*, the trustees did not persist with the remainder of the relief claimed therein.

Background

- [3] The first respondent brought an application for the sequestration of the applicant's estate which application culminated in the final sequestration order granted by Sardiwalla J on 24 June 2020.
- [4] On 3 June 2020 CA Starbuck and L van der Merwe were appointed by the Master of the High Court, Pretoria as provisional trustees in the insolvent estate of the applicant.
- [5] In executing their duties as appointed liquidators, the liquidators informed the applicant on 6 July 2020 that they intend to evaluate his residential property.
- [6] This led to K Mokale Attorneys ("Mokale") entering the fray on behalf of the applicant. Mokale advised the respondents that the applicant will seek leave to appeal the order of Sardiwalla J and that pending the finalisation of the application for leave to appeal, the trustees are not allowed to take possession of any of the applicant's assets.
- [7] An application for leave to appeal Sardiwalla J's order was duly filed on or about 15 July 2020.

- [8] Notwithstanding the aforesaid and on 22 July 2020, the trustees attended at the premises of the applicant and informed the applicant that they intend removing the two motor vehicles on the premises.
- [9] The applicant informed his attorney of the developments and Mokale addressed a letter to the respondents on 22 July 2020 seeking an undertaking that the applicant's assets will not be removed or realised pending the finalisation of the application for leave to appeal. The undertaking was sought before close of business on 24 July 2020.
- [10] On 27 July 2020 NJ de Beer ("De Beer"), the attorney acting on behalf of the trustees, responded to the letter and pointed out that the trustees may not, in terms of section 150(3) of the Insolvency Act, 24 of 1936 ("Insolvency Act") sell the assets in the applicant's insolvent estate. De Beer, however, maintained that the trustees are still under a duty to take possession of all the assets in the insolvent estate.

Point in limine

- [11] The applicant raised as a point *in limine* the lack of authority of the liquidators to oppose the application. The liquidators, in turn, brought a counter-application seeking, *inter alia*, the consent of this court to oppose the application.
- [12] Section 18 of the Insolvency Act makes provision for the appointment of provisional trustees by the Master. Section 18(3) provides as follows:

“A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the Court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the Court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct.”

- [13] It is patently clear that the liquidators should, in the circumstances, be authorised to oppose the relief claimed by the applicant. It is the only avenue open to the liquidators to protect the assets of the insolvent estate. In the premises, an order granting the liquidators authority to oppose the application was granted prior to dealing with the merits of the application.

Legal position

- [14] Once an appeal has been noted against a sequestration order the provisions of section 150 of the Insolvency Act, 24 of 1936 apply. Section 150(3) states the following:

“When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal has been noted: Provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned.”

- [15] In the premises an order directing the liquidators not to realise the property of the applicant is not necessary. The Insolvency Act clearly prohibits such conduct.

- [16] Counsel for the applicant, Mr Mudau, however, contended that the liquidators may not, pending the finalisation of the application for leave to appeal, take possession of the applicant's assets.
- [17] Mr Minnaar, counsel for the liquidators, relying on the provisions of section 20(1)(a) of the Insolvency Act, submitted that the provisional trustees are duty bound to take control of the assets of the insolvent estate. Section 20(1)(a) provides that upon sequestration the insolvent is divested from his estate and that the estate vests in the provisional trustees.
- [18] Mr Minnaar is clearly correct. His submission is further supported by the wording of section 150(3). Had the legislature intended that the provisional trustees may not take possession of the assets of an insolvent pending an appeal, the prohibition would have been included in section 150(3).
- [19] Mr Mudau lastly submitted that the deputy-sheriff and not the provisional trustees should, in terms of the provisions of section 19, attach the assets of the applicant.
- [20] Section 19 provides for steps to be taken by the deputy-sheriff to attach and remove the assets of an insolvent estate prior to the appointment of a trustee. Section 19(3)(b) states that the deputy-sheriff shall as soon as possible after the appointment of a trustee, submit a copy of the inventory of the goods that had so been attached and removed to the trustee.

[21] Save that the deputy-sheriff did not act in terms of the provisions of section 19 *in casu*, the section, in any event, clearly applies to the time period between the granting of a sequestration order and the appointment of a trustee.

[22] It is, furthermore, not clear what difference it will make to the applicant if his assets are removed by the deputy-sheriff instead of the duly appointed trustees.

Conclusion

[23] In the premises, the relief claimed by the applicant stands to be dismissed.

Costs

[24] Mr Minnaar with reference to the provisions of section 74 of the Insolvency Act submitted that the attorney acting on behalf of the applicant should pay the costs of the application *de bonis propriis*. Section 74 reads as follows:

"If it appears to the court that any attorney or counsel has, with intent to benefit himself, improperly advised the institution, defence or conducting of legal proceedings by or against an insolvent estate or has incurred unnecessary expense therein, the Court may order the whole or part of the expense thereby incurred to be borne by the attorney or counsel personally."

[25] It does not appear that either the attorney or counsel appearing on behalf of the applicant intended to benefit themselves by the launching of this application.

[26] Mr Minnaar, however, submitted that in view of the correct legal position contained in the letter of De beer dated 27 July 2020, Mokale should not have launched the

application. The expenses incurred by the trustees in opposing the application amounts to “*unnecessary expenses*” as provided for in section 74 and will need to be paid out of the insolvent estate of the applicant to the detriment of the *concursum creditorem*”.

[27] The De Beer letter dated 27 July 2020, simply referred to section 150(3) of the Insolvency Act and did not clearly stipulate that the duty of the provisional trustees to take the assets of the applicant into possession flows from the provisions of section 20(1)(a) of the Act. The effect of section 20(1)(a) was for the first time explained in the opposing affidavit filed on behalf of the trustees.

[28] The question then arises whether Mokale should have withdrawn the application upon receipt of the opposing affidavit of the trustees.

[29] During argument the matter, however, did not only revolve around the provisions of section 20(1)(a), but also dealt with the interaction between sections 19 and 20 of the Act. The latter was debated at length and shed some light on the applicant’s contention that the deputy-sheriff should take control of the applicant’s assets.

[30] In the premises, the applicant exercised his right to have a contentious point in law ventilated through the hearing of the application. In the result, I am not convinced that the application resulted in unnecessary expenses and in exercising my discretion contained in section 74 am not prepared to direct Mokale to pay the costs of the application.

[31] Costs in the ordinary cause will, however, follow the result.

ORDER

[32] In the premises, I grant the following order:

1. The application is dismissed with costs.
2. The costs of the counter-application are costs in the insolvent estate.

DATE "HEARD" PER COVID19 DIRECTIVES: 04 September 2020

DATE DELIVERED PER COVID19 DIRECTIVES: 09 September 2020

APPEARANCES

Appearance for the Applicant: Advocate Mudau
Instructed by: K Mokale Attorneys
Ref: BAT/001

Counsel for the Second Respondent: Advocate Minnaar
(082 441 2960)
Instructed by: NJ De Beer Attorneys
(010 010 5359)
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