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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2015/28608

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE

MOKOSE SNI

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

WILLEM ANDRIES AUGUSTINUS GOUWS

Respondent

And

CASE NO: 28607/2015

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

JUDGMENT

MOKOSE AJ

- [1] The applicant seeks a final sequestration of the estates of Mrs Elizabeth Cassandra Gouws (“Mrs Gouws”) and her husband Mr Willem Andries Augustinus Gouws (“Mr Gouws”). The bank instituted action against Mr and Mrs Gouws by way of separate notices of motion, however, in view of the facts being similar and the application against Mr Gouws being intertwined with that of Mrs Gouws, this judgment is handed down in respect of both the matters.
- [2] The applicant initially sought the provisional sequestration of the estates of the respondents. The application was opposed by the respondents and the provisional sequestration order was granted by Barrie AJ on 27 March 2017.
- [3] Subsequently, the respondents delivered supplementary answering affidavits and the applicant delivered a replying supplementary affidavit whereupon, the return day was extended.
- [4] There was no dispute that the applicant had established a case for the provisional sequestration of the respondents. The test on the return day is a different one. The respondents aver that although the applicant complied with the statutory requisites to

obtain the provisional sequestration order, this court should exercise its discretion in their favour in dismissing the application.

[5] The respondents are of the view that the discretion of the court should be exercised in their favour for the following reasons:

- (i) that there is only one creditor being the applicant;
- (ii) that there is only one realizable asset being the immovable property which has been offered to the applicant;
- (iii) that the sequestration of the second applicant, a practising chartered accountant, will have the effect of depriving him of an income and in turn the opportunity of paying the balance of his debt to the applicant. The respondents also allege that it will deprive him of the opportunity of maintaining his health.

[6] The issue to be determined is whether the court should exercise its discretion in favour of the respondents by refusing the application for his sequestration.

[7] It is common cause that Mr Gouws is a 74 year old chartered accountant who owns one realizable asset being an undivided half share in Erf [...] Parkwood, situate at [...] W. Road, Parkwood. Mrs Gouws, who describes herself as “an adult female housewife”, is 72 years old and is the owner of the other undivided half share in the same property.

LEGAL PRINCIPLES

[8] Section 12(1) of the Insolvency Act 24 of 1936 (“the Act”) provides as follows:

“12 Final sequestration or dismissal of petition for sequestration. – (1) If at the hearing pursuant to the aforesaid rule *nisi* the court is satisfied that –

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section *nine*, 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 his estate is sequestrated,

it may sequester the estate of the debtor.”

[9] Corbett J, in the matter of Ressel v Levin 1964 (1) SA 128 (C) pointed out that where the insolvent has no assets and an application for a final order of sequestration is justified by reason of his salary, the onus is upon the applicant to satisfy the court, regard being had to his ordinary financial requirements for the purpose of his and his dependants’ day-to-day living and whether or not the sequestration order is likely to place his employment in jeopardy, that there is a real likelihood of moneys becoming available to creditors.

[10] If on the return day the court is satisfied that the applicant has established a liquidation claim of not less than R100 against the debtor and that the debtor has committed an act of insolvency or is in fact insolvent and further that there is reason to believe that it will be to the advantage of creditors if the debtor’s estate is sequestrated, the court may sequester the estate of the debtor. The degree of the onus of proof in an application for a final order of sequestration is higher than that of a provisional sequestration where a mere *prima facie* case needs to be established. The court needs to be satisfied, on a balance of probabilities that the abovementioned three *facta probanda* exist.

[11] The respondents are of the view that the court must exercise its discretion judicially and if it is not satisfied, it must dismiss the application and set aside the provisional order of sequestration or require further proof of the three *facta probanda*. Such additional proof may entail the furnishing of *viva voce* evidence but only in exceptional circumstances.

[12] Counsel for the applicant was of the view that the principles pertaining to the admission of *viva voce* evidence in applications for provisional sequestration are applicable to applications for final sequestrations. If it can be established that the *facta probanda* exist the court has no option but to grant the order. It relied on the matter of *Firststrand Bank v Evans* 2011 (4) SA 597 where Wallis J at p 607 D - E said:

“Once the applicant for provisional sequestration has established on a *prima facie* basis the requisites for such an order, the court has a discretion whether to grant the order. There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within a class of cases generally described as involving a power combined with a duty. In other words, where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court’s discretion in his or her favour.”

[13] It is evident from the papers before this court that there are more creditors than the applicant itself. Mr Gouws, in his affidavit has indicated that he is a shareholder in at least two businesses and that should he be sequestrated, “it will be to the disadvantage of all creditors as any recovery of any debt owing to them, apart from the bond of the Parkwood property, will be impossible”.¹ Furthermore, Mr Gouws has indicated in the papers before this court, that should he not be sequestrated, he will

¹ Supplementary answering affidavit page 320 para 45

be able to continue working as a chartered accountant and health permitting will earn a sufficient amount of income to settle all other outstanding debts.² In his own words, Mr Gouws has admitted that there is indeed more than one creditor.

[14] Counsel for the applicant also brought to the court's attention that despite Mr Gouws averring in his affidavit that his present monthly income is the sum of R165 000,00, there has been no attempt by Mr Gouws to reduce his indebtedness as the last amount paid is the sum of R50 000,00 in June 2017.

[15] The respondents have not made out a case why the court's discretion should be exercised in favour of the respondents. I am satisfied that the applicant has established on a balance of probabilities the three *facta probanda* that need to be established to grant the order. As such the following order is granted:

- (i) The respondents are placed under final sequestration;
- (ii) Costs are costs in the sequestration.

MOKOSE AJ

Acting Judge of the High
Court of South Africa
Gauteng Local Division,
Johannesburg

For the Applicant:

Adv L Hollander instructed by
Jason Michael Smith Inc

² Supplementary answering affidavit page 312 para 17

For the Defendant:

Adv EJ Ferreira instructed by

GH Lyell Inc

Date of Hearing: 19 February 2018

Date of judgement: 28 March 2018