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REPUBLIC OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/50760

In the matter between:

INVESTEC BANK LIMITED Applicant

and

SINGH TRISHA Respondent

J U D G M E N T

LAMONT, J:

[1] This is an application brought by the applicant for the sequestration of the estate of the respondent.

[2] The heading is amended by the addition of the following words underneath the description of the respondent:

“The respondent is married out of community of property to Suren

Naidoo Identity Number (...). ”

[3] The applicant claims to be a creditor of the respondent in an amount of some R1,7 million together with interest thereon at an amount of 8,50% per annum calculated daily and compounded monthly from 27 October 2009 in respect of a limited suretyship in respect of a loan agreement under account number 245215/001. During November 2007 the applicant and the respondent's husband concluded a loan agreement in terms whereof the applicant agreed to lend and advance the sum of R1.7 million to him on certain terms and conditions. In particular it was a term that a first covering mortgage bond registered over certain immovable property owned by the respondent and her husband in equal undivided shares and a requirement that the respondent sign a deed of suretyship binding her as a surety for the debt of her husband to the applicant limited to an amount of R1.7 million plus certain other amounts.

[4] On 18 December 2007 the respondent signed a deed of suretyship binding herself as surety and co-principal debtor with her husband in favour of the applicant for an amount limited to R1.7 million. Notwithstanding that the suretyship was signed during December 2007 and the loan agreement was concluded with the respondent's husband only, the respondent and her husband signed an authority authorising the applicant to pay the loan on 23 November 2007 in terms of which their account at Nedbank would be credited with the amount of the loan outstanding and due to Nedbank.

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[5] On 23 November 2007 the respondent and her husband's duly authorised representative signed a mortgage bond which was registered in the Deeds Office on 19 December 2007 as ST205095/07. The bond was in favour of the applicant. It appears from the bond that the respondent and her husband signed a power of attorney authorising the conveyancer on 23 November 2007 and it further appears that the respondent and her husband as the mortgagor "*do hereby declare the mortgagor to be indebted to Investec Bank Ltd whether such indebtedness be a direct or indirect liability incurred by the mortgagor individually or jointly with others, and whether such indebtedness arises from monies lent and advanced ... and any payment made by the bank pursuant to this bond including future debts generally from whatsoever cause arising, up to, but not exceeding the sum of R1.8 million*".

[6] On 5 November 2007 a statement of assets and liabilities of the respondent and her husband was prepared. The respondent's and her husband's assets comprised immovable property with a value of R1.1 million; a BMW X5 valued at R725 000, 00, with no amount outstanding and a BMW Z4 valued at R315 000,00 furniture and fittings valued at R400 000,00; The liabilities comprised a debt due to banks in an amount of approximately R100 000,00. The income and expenditure statement reflected the income of the respondent (R22 000, 00) and her husband (R41 666,00) totalling of some R63 000,00. The total deductions from the salaries were some R14 000, 00. The other monthly payments included motor vehicles some R14 500,00

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(hence the claim by the respondent that there was no amount due in respect of the vehicle was questionable), the bond instalment some R11 000,00; expenses at department stores totalled R2 700,00, credit card expenses were R3 500,00, sundry other expenses totalled some R6 000,00. Including the amount due to the applicant as and by way of a bond payment there was an excess totalling R12 400,00 “in the family income”. The “family” had nett assets totalling R2.4 million less the amount of the bond namely R1,3 million more than the debt.

[7] It is apparent from the manner in which the loan transaction was structured that it could not succeed unless the respondent undertook liability as she was a 50% joint owner in the immovable property and no bond could be registered without her consent and without her incurring a liability. The respondent in fact admitted indebtedness in the bond as appears from what is said supra.

[8] It is apparent further that the immovable property in question is a home which was to be occupied and which had been occupied by the respondent and her husband. The transaction appears to have been entered into with a view to finalising an indebtedness to the previous bondholder and consolidating the debt in the hands of the applicant.

[9] On the face of it the respondent participated in and had full knowledge of all facets of the transactions. Information which is furnished in relation to

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the respondent and her husband in the statement of assets and liabilities and income and expenditure must have emanated from both her and her husband. Monies were advanced to the respondent by way of monies being paid to the respondent's and her husband's account at Nedbank at the instance of both respondent and her husband.. Subsequently further monies were advanced. The respondent claims that certain of these monies were advanced against her will.

[10] Under and in terms of the Insolvency Act No. 24 of 1936 (the Act) the applicant is required to establish that it is a creditor. If it is a contingent creditor this is sufficient.

[11] On the face of it the applicant is a creditor of the respondent.

[12] Respondent admits factual insolvency and has set out facts demonstrating that she is preferring creditors and that she is paying certain creditors and not paying others. In addition in the affidavit the respondent has indicated in writing that she is unable to pay the debt.

[13] On the face of it the respondent is factually insolvent and has committed the acts of insolvency contemplated in section 8(c) and 8(g) of the Act.

[14] This aspect of the case was not seriously contested by the respondent.
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[15] The applicant has established on the face of it that there will be a benefit to creditors. The respondent in paragraph 87 of the answering affidavit stated that all her concurrent creditors were being paid. These transactions on the face of it are impeachable. In addition on the face of it the respondent is the 50% owner of a property of significant value. The exact value was disputed and a value somewhere between R1 million and R1.3 million was suggested. On any valuation the apparent value is less than the amount of the indebtedness. The respondent and her husband own other assets including cars and furniture which they value at approximately R1.5 million. On the face of it as the applicant is a preferrent creditor the value in the property will accrue only to the applicant and to no other person unless the value of the other assets is also, as it should be, included in the calculation.

[17] It was submitted that in these circumstances there is no benefit to creditors meaning the general body of creditors.

[18] It is apparent from the facts and matters set out before me that the applicant foresaw significant difficulties in obtaining relief by way of instituting action against the respondent. The attempt made by the applicant to proceed by way of action resulted eventually in the applicant withdrawing the action. The anticipated difficulties relate to defences the respondent sought to raise concerning the National Credit Act No 34 of 2005 as also the delay in getting to trial.

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[19] In my view the general body of creditors benefits if the applicant is compelled to realise her assets to meet the liabilities to creditors as soon as possible. The current position is that the applicant resides in the immovable property funded by the loan and makes no payment in respect of the indebtedness due to the applicant who holds the covering bond. The property as to 50% is an asset in the respondent's estate. Whilst this asset exists in her estate she is able to reflect it as such and is able to transact business on the basis of such ownership. The respondent's and her husband's vehicles of significant value and other assets show a significant value. The respondent's husband's 50% share in the immovable property and his assets will fall into the estate. This being so there will be sufficient monies available on the face of it to meet debt due to the applicant and other creditors. The trustees will be able to recover the monies due to the estate pursuant to impeachable transactions being impeached.

[20] In my view the applicant has established all the necessary elements required to be established by the Insolvency Act pursuant to which in the ordinary course a provisional sequestration order would issue.

[21] The respondent submitted that the National Credit Act No. 34 of 2005 (the Credit Act) impacted upon the rights of the applicant to obtain relief. The applicant did not comply with provisions of that Act which are required to be taken in the event that a credit granter seeks to enforce a credit agreement.

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Those steps do not have to be taken in sequestration proceedings as sequestration proceedings do not enforce a credit agreement. Trengove AJ in *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 at 275 held that the purpose and effect of a sequestration is to bring about a convergence of claims in an insolvent estate and to ensure that it is wound up in an orderly fashion and that creditors are treated equally (p 275H-I). See also *Naidoo v Absa* [2010] ZASCA 72.

[22] The submission was made that reckless credit had been granted either to the respondent's husband at the time the loan agreement was concluded or to the respondent at the time the suretyship agreement in that the credit provider failed to conduct an assessment as required by section 81(2) of the Credit Act. The consequence so it was submitted is that in terms of section 83 of the Credit Act it is open to this Court to make an order setting aside all or so much of the consumer's rights and obligations under the agreement as the court determines just and reasonable in the circumstances or to suspend the force and effect of the credit agreement.

[23] The submission of the respondent was founded upon the fact that the respondent had tersely alleged in paragraph 53 that the applicant had failed to conduct an assessment as required in respect of the credit agreement concluded between it and the respondent's husband and had also failed to conduct such an assessment in respect of the credit agreement concluded between the applicant and herself. The applicant when it had dealt with that

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paragraph had so it was submitted not dealt with the matter issuably but had merely stated that this was not a reckless credit loan and that even if it was such that that would be no defence to a sequestration application coupled with a statement that a schedule attached would illustrate that numerous payments had been made by the respondent and her husband after the loan had been advanced.

[24] The respondent attached no affidavit from her husband. The respondent's knowledge of what happened vis-à-vis her husband would on the face of it be limited and hearsay.

[25] On the face of it the respondent has made a statement concerning herself. The applicant disputes this statement and refers to a schedule of payments. The fact of payment would corroborate the applicant's statement that there was no recklessness. There is however an additional document contained within the affidavits. That is the statement of assets and liabilities and income and expenditure to which I have referred earlier from which it clearly appears that the financial status of both the respondent and her husband was investigated prior to the granting of credit. Subsequent to the granting of credit for an extended period (in excess of twelve months) the respondent and her husband paid the debt due to the applicant. It is apparent from this on the face of it that the respondent and her husband were correctly assessed as being able to pay the debt. They in fact did so. There is no better proof of ability to pay than the fact of payment. The facts do not

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demonstrate a reckless amount of money being advanced by the applicant to the respondent's husband.

[26] Even if the contracts referred to above were recklessly concluded on the face of it, it would not be just and reasonable to set aside the entirety of the consumer's rights and obligations. If the entirety of the rights and obligations of it to be set aside as to the agreement of loan then the respondent and her husband would receive, an asset worth at least R1 million in equal undivided shares. If the effect of the suretyship were set aside in its entirety and, assuming that the bond does not contain an admission (which on the face of it does) the applicant would lose 50% of the security it had for the loan. The effect of this in my view is on the face of it neither just nor reasonable.

[27] Even accordingly were there on the face of it to be some adjustment for the non-compliance of the applicant with the Credit Act such adjustment would not result in the applicant not being a creditor as contemplated by section 9(1) i.e. for an amount of some R200,00.

[28] In my view the attack under the Credit Act fails.

[29] All the formalities have been complied with. On the face of it the respondent's estate falls to be sequestrated. Inasmuch as I expect that further affidavits will be filed as will reports by provisional trustees I have determined

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a longer than usual return date.

[30] During the hearing the parties agreed that the question of whether or not the joinder application of the respondent's husband should succeed could stand to be decided in the application itself. This procedure which on the face of it is unusual as there is no certainty as to who the parties are prior to the matter being heard resulted in the matter being able to proceed and the issue of joinder only becoming necessary to be decided if a decision was made affecting the contract between the respondent's husband and the applicant. As appears from what I have said above I do not believe that on the face of it the contract falls, on these proceedings, to be tampered with. On the face of it, it appears to me that the joinder application and counter-application seeking a change to the principal debt in accordance with the National Credit Act falls to be dismissed.

[31] The test at present is however whether or not on the face of it the applicant has made out a case. The test on the return day is different. It may be that when the different test is applied that a different result to the result which I have found appropriate eventuates. For this reason I am of the view that I should not presently dismiss the application for joinder or counter-application. I should not decide them and should rather postpone them to be heard on the return day.

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[32] I accordingly make the following order:

The respondent's estate is provisionally sequestrated. The return date is 25 July 2010. The question of joinder and the counter application are postponed to 25 July 2010.

C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Counsel for Applicant : Adv. S Weiner SC
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Date of hearing : 3 June 2010

Date of Judgment : 18 June 2010