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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, JOHANNESBURG

Case number: 12174/17

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

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In the matter between:

INVESTEC BANK LIMITED

APPLICANT

AND

ENVER LIONEL SWARTZ

1ST RESPONDENT

PETULA SWARTZ

2ND RESPONDENT

JUDGMENT

IA. GOODMAN, AJ:

1. This is an application for the final sequestration of the joint estate of the respondents, Mr and Mrs Schwartz, a couple married in community of property.
2. The application finds its genesis in a mortgage and credit facility agreement concluded between the applicant, Investec Bank, and the first respondent during May 2008, and formally re-structured on four subsequent occasions, the most recent being during June 2011. In terms of those agreements, Investec loaned the first respondent R11 705 700 against a bond over the respondents' residential property situated at 34 George Street, Bryanston. The second respondent, Mrs Swartz, also executed two suretyship agreement in favour of the Bank, as security for the indebtedness owing by her husband.
3. The loan agreements provided, among others, that the first respondent was liable to pay the Principal Debt in monthly instalments of R107 151.68. If the first respondent defaulted on payment, he would become liable to pay penalty interest, and the total amount owing under the loan agreement would become immediately due and payable.
4. The first respondent paid the monthly instalments until December 2014, when he fell into arrears. Investec brought an application against both respondents for payment of the full amount outstanding under the loan agreement, and for an order declaring the property to be specially executable. That resulted in a settlement agreement being concluded, on 19 February 2015, between the respondents and Investec, in terms of which the loan was effectively again re-structured, and the first respondent became liable to pay instalments of R120 000 per month commencing on 1 March 2015, until an amount of R11 104 425.60 plus costs and fees had been repaid. The Settlement Agreement provided that its terms would be breached, and the full amount of the indebtedness, as well as all other costs, would become immediately due and payable, if the respondents defaulted on two or more instalments.
5. The respondents failed to pay the very first instalment due under the settlement agreement – or, indeed, on the papers, any amount thereafter. Investec's counsel, Mr Suttner SC, was at pains to point out that it has meant that the respondents have continued to live in their luxury home since 1 March 2015, without making any payments in respect thereof.
6. Investec then procured a warrant of execution from this Court, the execution of which elicited a nulla bona return. The respondents concede that this constituted an act of insolvency in terms of section 8(b) of the Insolvency Act.
7. During April 2017, Investec brought an application for the sequestration of the respondents' joint estate. The respondents opposed the application but failed to file deposed opposing affidavits before the matter came before my sister, the

honourable Justice Nicholls. The service and other requirements having been met, she granted a provisional sequestration order and issued a rule nisi calling on any interested party to show cause why a final order of sequestration should not be granted. The rule has since been extended, but now comes before me for hearing.

8. The confirmation of the rule has been opposed only by the respondents. They accept that the requirements of sections 12(1)(a) and (b) of the Insolvency Act have been met, but dispute that their sequestration would be to the advantage of to the general body of creditors. Even if it is, they seek to persuade the court to exercise its residual discretion to refuse the sequestration order sought.
9. I deal with each of these issues in turn.

Advantage to creditors

10. Section 12(1)(c) of the Insolvency Act provides that a court may sequester the estate of a debtor if it is satisfied that *“there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated”*.
11. Investec’s counsel prepared a helpful case note tracing the treatment of that requirement through the courts, beginning with *Meskin & Co v Friedman* 1948 (2) SA 555 (W) and culminating in the Supreme Court of Appeal case of *Commissioner, SARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA) para 29. They correctly pointed out that in arm’s length sequestrations, a court need not satisfy itself that a sequestration will be to the advantage of creditors, but merely that there is reason to believe it will. This lower threshold is imposed, first, because a creditor will often not have sufficient insight into the debtor’s estate to conclusively establish a benefit to creditors in sequestration and, second, because the requirement of showing an advantage to creditors is not intended as a technical defence to be invoked by the debtor to avoid or postpone a sequestration order being made. This has also been accepted by the Constitutional Court in *Stratford and Others v Investec Bank Limited and Others* 2015 (3) SA 1 (CC) paras 42-45.
12. Against this background, Investec points to at least three factors which it says show that is reason to believe that the sequestration of the respondents’ estate will be to the advantage of the body of creditors.
13. First, it contends that, on the papers, the respondents are factually insolvent. But, even if they are not and there are sufficient assets in the estate to meet their liabilities, Investec submits that the sequestration would serve to liquidate those assets and increase the respondents’ cashflow, such that creditors can be paid.

14. Counsel for the respondents, on the other hand, argued that Investec had undervalued the respondents' estate because it had not taken account of fees earned by the first respondent or the current value of a retirement annuity policy. Once those assets were taken into account, it was submitted, the respondents were factually solvent on Investec's own reckoning.
15. It is by no means clear that the respondents are factually solvent. They have failed to put up any evidence of the fees apparently earned by the first respondent. Nor have they disclosed the terms of the retirement annuity that they seek to have taken into account. But in any event, the respondents gave no answer to Investec's alternative contention that a sequestration order would likely advantage creditors even if they are factually solvent, by liquidating assets that are currently unavailable to them. I am satisfied that this, of itself, provides reason to believe that the sequestration would be to the advantage of creditors.
16. Second, Investec argued that although the respondents claim that the first respondent has over a million rand in fees owing to him, and anticipates future fees in excess of R80 million, he has apparently proved unable to collect and pay over these fees. A trustee, it was argued, would have enhanced powers under the Insolvency Act, to ascertain whether those fees were in fact recoverable and to procure their collection, if that was warranted.
17. Third, Investec pointed out that, on the papers, the respondents appear to have pawned their Land Rover mere days before the provisional sequestration order was granted, to procure a further loan of R102 000 and that they have failed to account for either the money borrowed or the car itself in their papers. Sequestration would enable a trustee to investigate the disposition, by way of inquiry, if necessary, and to ascertain whether any money could be recovered for the benefit of creditors.
18. These points similarly, to my mind, disclose reasons to believe that sequestration would be to the advantage of creditors. They were not met, by the respondents either on the papers or in argument.
19. Instead, counsel for the respondent argued that there was no evidence that a sequestration would be to the advantage of the general body of creditors (rather than just Investec), and suggested that the respondents could procure better value in the estate if they were allowed to dispose of the property that formed the key asset through an ordinary commercial sale rather than a forced sale.

20. I am unpersuaded on these points. On the first, Investec's counsel correctly pointed out that Investec held a bond only over the property and would take the proceeds of its sale. But it would become an unsecured creditor in respect of the remainder of the estate and would be repaid together with other unsecured creditors. They appear to include the City of Johannesburg, to whom the respondents are substantially in arrears. There is reason to believe that it will also stand to benefit from a sequestration.
21. As to the second point, it is, as I have foreshadowed, not for a debtor to seek to defeat a sequestration by suggesting that creditors could be better advantaged by an order refusing sequestration. But in any event, the respondents have been trying for a considerable period of time, and without success, to sell the property in order to repay Investec. There is no real basis to believe, at this stage, that they will imminently manage to procure a sale. I return to this issue below. But no doubt, if the property can be sold through an ordinary commercial transaction, a trustee will do so. It is not in a trustee's interests, or that of the estate, to sell the property for less value than it could procure. A forced sale can, moreover, only occur once a court order has been procured authorising it. Such order may well be refused if the forced sale is shown to be unnecessary.
22. In the all the circumstances, I am satisfied that there is reason to believe that the sequestration of the respondents' estate will be to the advantage of creditors. The requirements of section 12(1)(c) of the Insolvency Act are accordingly met.

Discretion

23. The respondents counsel urged me nevertheless to exercise my discretion to refuse a sequestration order, and instead to extend the rule in order to afford the respondents more time to right their affairs and to repay Investec. He suggested that such a remedy was appropriate given:
 - 23.1. First, that offers have been coming in on the property and there are reasons to believe that it will be sold for considerably more than it would procure on a forced sale;
 - 23.2. Second, the claim by the first respondent that had recently returned to a successful practice as an attorney and estimated that his firm would imminently earn substantial fees; and
 - 23.3. Third, the provisional order already granted which, he suggested, reduced the potential prejudice to creditors in delaying in the sequestration. (In support of this claim, he relied on Smith Law of

Insolvency at p 69, where the author records that a dispute may be referred to oral evidence where a provisional sequestration order has been granted because the interests of creditors are somewhat safeguarded by the interposition of a trustee.)

24. To my mind, each of these considerations is open to doubt.

- 24.1. In relation to the property, the respondents have, so far, proved unable to find a buyer for it. In their answering affidavit, they recorded that they had received an offer, on 28 April 2017, to purchase the property for R11 500 000. Despite the buyer having been granted two extensions for the furnishing of guarantees, the sale failed. No further offers appear to have been made until 10 November 2017 – a mere 3 days before the hearing of the matter. At the hearing of the matter, the respondents handed up a supplementary affidavit recording that they had received a further offer to purchase the property, this time for R12 000 000.00. The offer to purchase provides for no deposit to be paid, and is conditional on the buyer receiving an inheritance (in an unspecified amount) by 31 January 2018. There is no evidence whether and when such inheritance is likely to materialise. In the circumstances, it is speculative, to assume that the sale will materialise.
- 24.2. In relation to the fees, I accept that the first respondent's return to practice will garner him fees that will no doubt improve his financial position. However, his affidavits merely provide estimates of such anticipated fees without furnishing evidence thereof. Moreover, I am persuaded by Mr Suttner's argument that the first respondent's sequestration would neither prevent him from continuing his work in the law, nor from collecting the fees that have already fallen due. They would merely affect his ability to practice for his own account. As against this, he has proved unable to pay over any fees collected since he first tendered to do so, in May 2017.
- 24.3. As to the protection offered by the provisional order, I have been unable to find any cases where a rule nisi was extended only in order to afford debtors further time to repay their debts and to get their affairs in order. I accept Mr Suttner's contention that there is a distinction between extending the rule in order to establish locus standi (which is an essential prerequisite for the grant sequestration order), and the mere postponement of a sequestration where the requirements have all been made out.

25. In the circumstances, I do not find the factors put up in favour of extending the rule compelling. They must, moreover, be weighed against the considerations that:
- 25.1. the respondents have, on the papers, failed to make any payments to Investec for more than two years. In the meantime, their debt presumably continues to mount;
 - 25.2. they accept that they cannot afford to remain in their current property and that it must be sold;
 - 25.3. they have proved unable to find a buyer for the property but have not moved out; and
 - 25.4. Investec is entitled to effective relief as against the respondents.
26. In the circumstances, I find that a proper case has been made out for the sequestration of the respondents' joint estate.
27. I accordingly make the following order:
- (a) The joint estate of Enver Lionel Swartz (ID [...]) and Petula Swartz (ID number [...]) is placed under final sequestration;
 - (b) The costs of the application, including the costs of two counsel, shall be costs in the sequestration of the estate.

I A GOODMAN, AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Counsel for the Applicant: Adv J Suttner SC; Adv A Laher
Counsel for the Respondents: Adv R Du Plessis SC
Date of hearing: 13 November 2017

Date of Judgment: 20 November 2017