**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE, PORT ELIZABETH CASE NO: 1271/2010**
**DATE HEARD: 13/07/10**
**DATE DELIVERED:05/08/10**

**In the matter between**

**SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD APPLICANT**

**And**

**PANTELS KAKNIS RESPONDENT**

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**JUDGMENT**

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**TSHIKI J:-**

A) **Introduction**

[1] The Applicant, an incorporated company with limited liability, seeks an order for the provisional sequestration of the estate of the Respondent who owes it an amount of R970 334 – 00. The owed debt arises from the written lease agreements which the applicant and respondent entered into in terms of which Applicant leased to Respondent various vehicles on various dates between 2004 and 2010. Having failed to pay in full the required instalments as per agreements the applicant advised the Respondent of his indebtedness but the latter failed to pay the arrear instalments in terms of the lease agreements. It is the uncontested view of the applicant that the respondent's conduct amounts to a contravention of section 8(g) of the Insolvency Act[1].

[2] Respondent has opposed the application on the basis that a settlement between himself and the applicant was reached on the 14 May 2010 as a result of which the

[1] Act 24 of 1936 which provides that a debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts.

Applicant's application for sequestration was eventually settled, inter alia, on the following exact terms:

> '2.1 That the vehicles forming the subject matter of the applicant's application would be refinanced.
>
> 2.2 That the said financing of the vehicles would be concluded on the same terms and conditions as per the consolidation agreement enclosed to the applicant's affidavit marked 'D'
>
> 2.3 That the aforesaid Finance Agreements terms and conditions as well as the consideration agreement will be entered into by and between a new Close Corporation to be formed.
>
> 2.4 That the members of this new Close Corporation would sign as sureties together with my father, Ioanis Kaknis.
>
> 2.5 That my father Iaonis Kaknis, would allow the Applicant to register a mortgage covering bond for the security to the value of R3 417 629-90 against his re-encumbered property known as Erf 1538 Stutterheim in the Municipality and Division of Stutterheim, in extent of nine hundred and twenty nine square metres held under Deed of transfer T 932/1984; and
>
> 2.6 That no document, fees will again be levied on the respective finance agreements.'

[3] On the strength of the above terms and conditions the Respondent tendered full compliance with the aforesaid agreement allegedly reached between himself and the applicant.

[4] Mr Dyke appears for the Applicant and Mr Buchanan SC for the Respondent.

[5] In his Heads of Arguments respondent has raised a point that on the basis of the compromise agreement annexure D the original order has been extinguished so that it is no longer possible for the Applicant to obtain a sequestration order on the basis of the

original debt. In a nutshell respondent is contending that there is a settlement of the debt in terms agreeable to all the parties.

[6] Applicant in his replying affidavit re-iterated his earlier assertion that there was no new binding agreement whose terms would then settle the debt owed by Respondent to applicant. On the contrary according to applicant Annexure D is an agreement for the benefit of the Applicant consolidating the individual lease agreements between the parties herein into one agreement which has the effect of linking the individual transactions with the general terms and conditions such that a breach of one of the terms and conditions for a specific transaction may be dealt with as a breach under the main agreement as a whole.

B) **Novation / Compromise**

[7] Mr Buchanan's main argument is based mainly on the non-existence of the original contract as, according to him, has been replaced by the new one. Mr Dyke's argument is that the facts do not establish novation instead they show the contrary.

[8] H.R Christie[2] at page 449 describes novation as 'Replacing an existing obligation by a new one, the existing obligation being thereby discharged'.

[9] The onus lies on the Defendant (Respondent) to establish the defence of novation. The authorities are adamant that clear and cogent proof of the alleged novation would be required in view of the fact that it involves a waiver of rights[3]. In

[2] H.R Christie On The Law of Contract in South Africa, 5th Edition

[3] Woolfson's Credit (Pty) Ltd (formerly Vavasseur (SA) Credit (Pty) Ltd v Holdt 1977 (3) SA 720 (N)

**Barclays National Bank Ltd v Smith**[4] at page 683 B-D Booysen AJ aptly explained the requirements of novationas follows:

> ' In regard to novation it is clear that:
>
> (a) the onus of proving novation rests on the person alleging novation (Antonie en Andere v Koekoe 1966 (2) SA 610 (O) at page 613; Trust Bank of Africa Ltd 304 (N) at 307);
>
> (b) the intention to novate is never presumed (Van Coppenhagen v Van Coppenhagen 1947 (1) SA 576 (T) at 578 – 581);
>
> (c) the question is one of intention and that, in the absence of any express declaration of the parties the intention to effect novation cant be held to exist except by way of the necessary inference from all the circumstances of the case. (Electric Process Engraving and Stereo Co. v Irwin 1940 AD 220 at 226 – 7)
>
> (d) The circumstances of the case of course include the conduct of the parties (French v Sterling Finance Corporation (Pty) Ltd 1961 (4) SA 732 (AD) at page 736.'

[10] In the present case in order to establish whether the parties have in fact entered into a new contract which has extinguished the original contract I have to examine thoroughly the terms of the agreement in 'exhibit D'. The parties herein have entered into a written agreement which is referred to by the applicant as a consolidation agreement (annexure D). In my view paragraph 2 of the agreement shows clearly the intention of the parties when they entered into this agreement and it reads thus:

2. '**Consolidation**

> a) The original agreements and the additional agreements are hereby consolidated into a single, indivisible agreement (the Consolidation Agreement) to the full extent permitted by the law, the intention and effect being that notwithstanding anything to

[4] Barclays National Bank Ltd v Smith 1975 (4) SA 675 D.

the contrary contained in the Original Agreement[s] or the Additional Agreement[s], ownership in the Original goods and the Additional goods shall remain vested in the lessor until all amounts payable by the lessee to the lessor in terms of the Original Agreement have been paid in full;

b) This Consolidation Agreement shall amend the Original Agreement[s] and Additional Agreement[s] only to the [stated] herein;

c) In the event of any conflict between the provisions of the Original Agreement[s], the additional agreement[s] and this Consolidation Agreement, the terms of this Consolidation Agreement shall prevail.

d) …………………………………………………..

3. **Breach**

In the event that the Lessee commits an event of default, under any of the *Original Agreement or Additional Agreement*;

a) Such a default shall be deemed to be a default under the Consolidation Agreement;

b) The Lessor shall be entitled to take such action in terms of the Consolidation Agreement *as it shall have been entitled to take [if] the Lessee[has] committed an event of the default under any of the Original Agreements or the Additional Agreements ……….'[*my emphasis*]*

[11] Both Mr Marius Cloete on behalf of the applicant as well as the Respondent have signed the above agreement. It is evident from the extract quoted *supra* that the parties have never, even for a moment, intended to novate the original contract into a new one. The wording of the clauses show beyond a reasonable doubt that this was an improvement of the existing contract to the benefit of the Applicant. There was never

an intention to replace the old contract with the new one. In any event the applicant has explained in the founding affidavit that the purpose of the agreement was to protect the interests of the applicant in that any default by the respondent is a default of each of the individual lessee agreements.

[12] The respondent, who has raised novation as a defence herein, has not convinced me that there was any novation of the original agreement by the parties.

C) **Application (or not) of National Credit Act (the NCA)**

For the reason that respondent in his affidavit relied on the provisions of the NCA[5] as a matter of completeness, I must deal with this issue *albeit* summarily.

[13] Mr Buchanan has conceded, correctly in my view, that he was no longer relying on this defence. For obvious reasons the respondent would not successfully rely on the said Act because it had been previously decided[6] that the provisions of the National Credit Act, cannot be an obstacle to a Creditor who applies for the sequestration of the debtor. At paragraph 29 and 30 Trengore AJ stated **in Investec Bank Ltd and Another v Mutemeri and Another** *supra*;

[14] "…………… It does not apply to an application by a credit provider for the sequestration of a consumer's estate based on a claim in terms of a credit agreement between them. Such an application is not one for an order enforcing the credit provider's claim against the consumer. Section 9(2) of the Insolvency Act indeed makes it clear that the sequestration creditor's claim

[5] Act 34 of 2005

[6] See Judgment of Trengrove AJ in Investec Bank Ltd and Another v Mutemeri and Another- 2010 (1) SA 265 (GSJ)

> need not even be due, that is, need not yet be enforceable. An application for sequestration may be made on the strength of a claim which is not yet enforceable, because a sequestration order is not an order for enforcement of the claim. It's purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally……….. . I conclude that an application for sequestration is not an application for enforcement of the sequestrating creditor's claim and is thus not subject to the requirements of section 130(1) of the National Credit Act'.

[15] I agree with the above dictum more so that the facts of that case in this regard are similar to ours. In addition, a sequestrating creditor may even get nothing from his or her sequestration of the debtor unlike a credit provider who would certainly enforce a claim against the consumer for the sole purpose of receiving money owed to him or her by the debtor.

[16] For the above reasons I have no reason to uphold the respondent's opposition to the applicant's application.

In the result I make the following order:

16. 1 That the Estate of the Respondent be and is hereby provisionally sequestrated in the hands of the Master of this Honourable Court.

16.2 That a Rule Nisi do issue calling upon the Respondent and all interested parties to show cause, if any, to the above Honourable Court on Tuesday, the 24th day of August 2010 at 09h30 or so soon thereafter as Counsel may be heard, why the Respondent should not be finally sequestrated.

16.3 That the service of the order of the above Honourable Court shall be effective as follows:

16.3.1 by the sheriff or;

16.3.1.1 the Respondent personally

16.3.1.2 the local office of the South African Revenue Service;

16.3.1.3 if applicable

16.3.1.3.1 upon the employees of the Respondent by affixing a copy thereof at the gate to the Respondent's premises;

16.3.1.3.2 upon the known Trade Union(s) representing the employees of the Respondent.

16.3.2 by one publication in each of The Herald (English) the Die Burger (Ooskaap) (Afrikaans) newspapers.

16.4 That the costs of this application be costs in the sequestration of the Respondent.

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P.W TSHIKI

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv Dyke instructed by Senekal Simmonds Inc attorneys- Port Elizabeth

For the Respondent: Adv Buchanan instructed by Pierre Kitching Attorneys – Port Elizabeth