IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 1318/2012
Date heard: 14 February 2013
Date delivered: 26 February 2013

In the matter between:

NEDBANK LIMITED (formerly trading as NEDCOR BANK LIMITED) Intervening Party

YUNUS ABRAHAMS Applicant

and

AHDIEL ABRAHAMS First Respondent

RAFIEKAH ABRAHAMS Second Respondent

J U D G M E N T

DAMBUZA, J:

[1] In this matter a provisional order was granted by this Court on 15 May 2012. In terms of that order the estate of the first and second respondents was placed under provisional sequestration in the hands of the Master of this Court. The provisional order was returnable on 19 June 2012. On the return day Nedbank (the Intervening Party) filed its papers seeking to intervene and to oppose the application for sequestration. As a result of the application to intervene the matter was postponed on the return date and was further postponed on a number of occasions for various reasons.

[2] Nedbank is one of the creditors in the estate of the respondents. It opposes sequestration of the respondents' estate on, essentially, two grounds; firstly, that the sequestration is *"overly friendly"* (and not *bona fides*), and that no benefit to creditors will result therefrom.

[3] The applicant, Yunus Abrahams, is a businessman and is the first respondent's brother. The first and second respondents are married to each other in community of property. The first respondent is employed by the applicant. The second respondent is employed as an administration officer by the Nelson Mandela Bay University.

[4] The application for sequestration of the respondents' estate was brought against the background of the applicant having *"lent"* R6,100.00 to the first respondent and the latter having confessed his inability to repay that loan. In the founding affidavit, the applicant states that the loan of R6,100.00 was made to the respondents on 28 February 2012 and was due to be repaid by no later than 15 March 2012. A letter addressed by the first and second respondents to the applicant, dated 20 March 2012, expresses the respondents' inability to repay the loan. It is this letter which prompted this application.

[5] The applicant also alleges that the respondents are, in fact, factually insolvent as their liabilities exceed their assets.

[6] In seeking to intervene in the sequestration proceedings and to oppose same, Nedbank sets out details relating to five loans granted by it to the respondents over time, from 1994 to 2008. The various amounts of loans are secured by Mortgage Bonds registered over the respondents' property, Erf 4536, Gelvandale Township, Port Elizabeth. The total amount owing on these loans appears in a certificate of balance issued by Nedbank, on 1 June 2012, as R2,106,108.02.

[7] The application to intervene is not opposed; in fact an admission is made in the applicant's heads of argument to the effect that Nedbank does indeed have a real interest in the proceedings. I am also satisfied that this is so. The application for leave to intervene therefore succeeds. However, for convenience I shall, continue to refer to the intervening creditor as *"Nedbank"*.

[8] As I have stated, Nedbank opposes the application for sequestration of the respondents' estate on the basis that, firstly, such sequestration is *"overly friendly"* and should be considered with circumspect. The contention on behalf of Nedbank is that the conduct of the applicant and the respondents with regard to the loan does not accord with what would ordinarily be expected of persons in their position and is suggestive of collusion aimed at avoiding legal proceedings being taken by the respondents' creditors against the respondents. Brendan Shane Edwards who had deposed to the answering affidavit on behalf of Nedbank contends that given the *"negligible"* amount due by the respondents to the applicant there is no reason why the applicant has not explored alternative means of recovering the money, such

as deducting it from the first respondent's salary, instituting proceedings in the Small Claims Court which would culminate in execution on the respondents' movable assets (valued at R16,000.00), or causing a garnishee order to be issued against the respondents' salaries. *Mr Mullins* who appeared on behalf of Nedbank submitted that this application constitutes an abuse of court process and that this Court should, for that reason alone, discharge the provisional order made.

[9] It has been said that:[1]

> "The giving of a notice of inability to pay debts is frequently the means used for the purpose of obtaining what is designated as a 'friendly sequestration', ie, the notice is deliberately given in order to furnish the 'friendly' creditor with an act of insolvency for the purpose of sequestration proceedings to be brought by the latter. Such a notice is indeed an act of insolvency, provided the application for sequestration does not constitute an abuse of the process of the Court..." (Emphasis supplied)

[10] On the other hand in addition to its statutory discretion when asked to grant a sequestration order, the Court has an inherent jurisdiction to prevent abuse of its process. Therefore:

> "... although a case for sequestration may be capable of being established, the Court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the *bona fide* achievement of the sequestration of the estate for its own sake, ... [2]

[1] Meskin, Insolvency Law, Issue 37, 2.1.2.7 at 2 – 16, 17 and the authorities cited therein.

[2] Meskin, *supra*, Issue 34, 2.1.5 at 2 – 25.

[11] As to the approach by Courts when considering friendly sequestrations the following has been said:

> "Although the consideration that an application for sequestration is a "friendly" one does not for that reason alone preclude the grant of the application, it entails the careful scrutiny thereof by the Court in order to protect the interests of creditors, and to satisfy itself that the application is not brought <u>primarily</u> for the relief of a harassed debtor. Such scrutiny should be directed, *inter alia*, to the sufficiency of the evidence of the claim upon which the applicant relies. Even where a provisional order of sequestration has been granted, the Court may still refuse the granting of a final order where it appears that there is an abuse of the process.
>
> A "friendly" sequestration which is not an abuse of the process of the Court may still be refused by the Court in the exercise of its discretion."[3]

[12] During argument *Mr Mullins* referred me to *Mthimkhulu v Rampersad and another (BOE Bank Ltd, Intervening Creditor)*[4] in which Combrinck J cited, with approval, the following remarks made by Conradie J (as he then was) in *Craggs v Dedekind and others*[5] about collusive arrangements in sequestration proceedings:

> "Friendly sequestrations seem to share certain characteristics. Although, like pornography, they may be hard to define, they are easy to recognise. The debt which the sequestrating creditors relies upon is almost always a loan. It is usually quite a small loan, very often made in circumstances where it would have been apparent to the whole world that the respondent was in serious financial difficulty. Despite this, the loan is customarily made without security of any sort. It is seldom evidenced by a written agreement, or even

[3] Meskin *supra*, Issue 34 at 2 – 26

[4] *[2000] 3 All SA 512 at 516 e-h.*

[5] *1996 (1) SA 935 (C) at 937B*.

> subsequently recorded in writing. The only writing that is produced to the Court is the letter stating, with appropriate expressions of dismay that the debt cannot be paid and, sometimes, for good measure, setting out details of the respondent's assets and liabilities. Very often debtor and creditor are related: fathers commonly sequestrate sons, wives sequestrate husbands and sweethearts sequestrate each other, without, I am sure, any damaging effect on their relationship.
>
> Co-operation between debtor and creditor, which is fine, can easily turn into collusion which is not. A Court should, I consider, be on its guard against it. Because of this, and when the signs are there; a Court may be forgiven for requiring rather more from a friendly petitioner in the way of establishing his claim than it might otherwise do. He should, I believe, present sufficiently detailed evidence to satisfy a sceptical Court that he indeed has a claim against the respondent."

[13] In this case, I agree that the debt owed to the applicant is negligible, just as in *Mthimkhulu's* case where the amount of the debt was R6,000.00. The loan was repayable only two weeks after it was made by the applicant. On the applicant's version, he would have already been aware of the respondents' difficulties in meeting their (monthly) financial obligations when he made the loan; yet he did not insist on any security for it. Further, as was submitted on behalf of Nedbank, the conduct of the applicant, in writing to his brother, demanding repayment of the loan on the due date is/was unusual, given their relationship and that they worked together. One would have expected that the applicant would have, at first, simply demanded payment orally, and only thereafter, when he experienced difficulty in getting a positive response, start to establish a *"paper trail"*. It is also significant that, although the loan was made to the first respondent, repayment was immediately demanded from both respondents and both respondents responded in writing.

[14] The submission by *Mr Dyer,* on behalf of the applicant, that alternative means of recovering the debt would have constituted preference of one creditor over others does not add much value to the applicant's case in my view. The creation of the loan at a time when the respondents were already experiencing such financial difficulties that the loan would be irrecoverable was designed to facilitate the sequestration.

[15] Before a Court can grant a final order of sequestration it must be satisfied that there is reason to believe that such sequestration will be to the advantage of creditors. The applicant is required to state why this will be so.[6] Even where an act of insolvency has been committed, the Court cannot grant a final sequestration order if the applicant does not discharge the onus on it to establish that there is reason to believe that sequestration will be to the advantage of creditors.

[16] In order for there to be an advantage to creditors a pecuniary benefit in the form of a dividend, which is not immaterial, must be anticipated. There must be a reasonable prospect of a *"not negligible"* dividend.

[17] The method generally used in assessing whether there is reason to believe that sequestration will be to the benefit to creditors is to first make an allowance for the anticipated costs of sequestration and then determine if there is a reasonable prospect of an actual payment being made to each creditor who proves a claim.

---

[6] See *Paarl Wine and Brandy Company Limited v Van As* 1955 (3) SA 558 (O).

[18] In the founding papers the applicant sets out the respondents' financial position as composing of an immovable property valued at R860,000.00, two vehicles valued at R30,000.00 each and movable assets valued at R16,000.00 (i.e. assets valued at a total of R936,000.00). The applicant, then gives an estimate of the respondents' liabilities as R1,017,851.85; resulting in the liabilities exceeding the assets by R81,851.85. The applicant then contends that the creditors will receive a benefit of R0.60. He then makes an allowance for trustee's costs of R25,000.00. The applicant then computes the benefit to creditors as follows:

Total Assets	R936,300.00
LESS	
Preferred Creditor (SARS)	R21,000.00
Secured Creditor NEDBANK	R726,000.00
Cost of Sequestration	R25,000.00
SURPLUS	R164,300.00
Value of Concurrent Creditors	R270,850.94
DIVIDEND	**R0.60**

[19] In disputing the benefit to creditors Edwards points out that firstly provision has to be made for trustees fees calculated as 3% of the value of immovable and 10% of movable assets in the estate. Further costs which, according to Edwards are not provided for in the applicant's calculation include auctioneer's fees, Master's fees, bonds of security, night watchmen's charges and advertising costs. These costs amount to R147,026.33, which, on estimated proceeds of R700,000.00 from a forced sale, would result in

Nedbank being a secured creditor for R596,165.00 and a concurrent creditor for the remaining portion of its claim for an amount of R174,752.48.

[20] It is not in dispute that when these administration costs are taken into account in the end there will be unpaid debts of R420,726.62 and unpaid costs of R28,819.33. It is for this reason that Nedbank contends that there will be insufficient free residue to discharge the administration costs of the sequestration and that sequestration will most likely result in additional contribution towards costs having to be paid by the creditors.

[21] I am mindful of the fact that the parties disagree on the evaluation of the respondents' immovable property. The difference in the evaluation by the parties is R160,000.00, in that, whereas the evaluation on behalf of the applicant is R860,000.00, the evaluation on behalf of Nedbank is *"R700,000.00 to R850,000.00"*. The requirement is that applicant must put up acceptable evidence upon which the Court can determine, not what the market value of the assets is prior to sequestration, but what they will realise post sequestration at a forced sale.[7] No such evidence was put up in the founding affidavit. On the other hand Nedbank's estimate of R770,000.00 as proceeds of a forced sale is, in my view, fair, reasonable and even generous. But a shortfall will still remain after deduction of administration costs.

[22] Having considered all these issues I am not satisfied that a proper case has been made out for sequestration of the respondents' estate.

[7] *Mthimkhulu (supra)* at 517.

[23] An application to strike out certain portions of the Edward's affidavit was brought by the applicant on the basis that allegations made therein are either malicious, vexatious and/or scandalous. In a nutshell these allegations are that the applicant placed no proof of his allegations that he had first made a verbal demand for repayment of the loan amount, that the amount of debt is *"trifling"* and that other courses were open to the applicant to recoup the loan. My view is that there is nothing malicious, vexatious or scandalous about these allegations. During argument when I expressed this view to *Mr Dyer* I gained the impression that the applicant was not persisting with the application. It remains my view that the allegations were properly made in the course of advancing Nedbank's case.

[24] Consequently I make the following order:

(a) leave is granted to Nedbank to intervene in this application;

(b) the application to strike out is dismissed with costs;

(c) the Rule *Nisi* is discharged; and

(d) the applicant is ordered to pay the intervening party's costs of the application.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the Intervening Party:

Adv N. Mullins

Instructed by:

BLC Attorneys, Port Elizabeth

For the applicant:

Adv E. Dyer

Instructed by:

Keith Deitrich Attorneys, Port Elizabeth

For the respondent:

No appearance

Instructed by: