

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 24/2016

Date Heard: 13 October 2016

Date Delivered: 20 October 2016

In the matter between:

SHACKLETON CREDIT MANAGEMENT (PTY) LTD

Applicant

and

BELINDA LINDANA VABAZA
Identity No.: [6...]

Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant is the cessionary of the benefits flowing from a judgment debt in the amount of R249 716,98, together with interest, against the respondent. The judgment debt remains unpaid and attempts to execute on the judgment yielded a *nulla bona* return. The applicant, accordingly, brings the present application for the provisional sequestration of the respondent.

[2] Section 10 of the Insolvency Act, 24 of 1936 (herein referred to as the Insolvency Act) provides that if a court to which an application for the sequestration of the estate of a debtor has been presented is of the opinion that-

“prima facie –

- (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 make an order sequestrating the estate to the debtor provisionally.”

[3] The respondent admits her indebtedness to the applicant and admits the *nulla bona* return. She concedes too that she is factually insolvent, however, contends that she has no assets at all and that there is accordingly no advantage to creditors if her estate were to be sequestrated. The only issue for resolution in the present matter is therefore whether there is reason to believe that there will be an advantage to creditors of the respondent if her estate were sequestrated. In the present instance the applicant obtained cession of the book debts of a commercial enterprise which included the judgment debt to which I have referred earlier. The applicant accordingly has very limited knowledge of the financial affairs of the respondent and it is not known in the present case whether the respondent has other creditors.

[4] The deponent to the founding affidavit, Ms Dalene Woodgett states that she had conducted a search on the data base of the companies and intellectual property commission which revealed that the respondent is an active director of Samil Natural Fibres (Pty) Ltd (registration no. 1992/003060/07)(herein referred to as “Samil”). The search revealed further that the respondent was also an active director of South African Mohair Industries (Pty) Ltd (registration no.: 1963/005248/07)(herein

referred to as “South African Mohair”). She accordingly postulated that it is highly probable that the respondent, in addition to being a director, also holds shares in these companies, which shares could be sold to the advantage of concurrent creditors. Ms Woodgett further contended that it would certainly be to the benefit of the general body of the respondent’s creditors if an enquiry into her affairs were held by a duly appointed trustee whereupon an opportunity for investigating her estate to recover any assets belonging to her could be undertaken. On the basis of these averments she submitted that it was reasonably foreseeable that there would be a benefit to creditors.

[5] This averment the respondent denies. She states that she owns no fixed property and that the home in which she resides together with her husband, to whom she is married out of community of property, is rented by her husband. The furniture therein, she states, is “almost entirely” owned by her husband. The “few items” which do not belong to her husband, she says, belongs to them jointly and are in the nature of small items that they have been given as gifts by their children. She does not believe them to be of any significant value.

[6] The respondent states that she has no investments of any kind, save for her provident and pension fund arising from the termination of her employment with the Eastern Cape Development Corporation in November 2013. These funds are protected and they do not fall into her insolvent estate. I pause to record that the respondent was the former regional head for the Western District of the Eastern Cape Development Corporation.

[7] The respondent proceeds to state that she owns no jewellery other than costume jewellery which she states is of no commercial value whatsoever. She owns no motor vehicle and utilises a Volkswagen Polo which her son is in the process of paying off.

[8] She is the sole director of Sebenza Enabling the Environment (Pty) Ltd which provides assistance to small businesses to enable them to access finance. The company, she states, was registered in 2013 and has struggled to become viable. In support hereof she has annexed the financial statements of the company for the year ending 28 February 2014 and she declares that she does not have any subsequent financial statements. The financial statements for 2014 reveal that the respondent has a loan account in the company in the amount of R133 904. The respondent does not disclose what her present loan account in the company is but states that "such loan account as which I might presently have in the company" is worthless as the company has no money to pay for it. She believes that the shares in the company are "probably worthless". The company, she says, is presently owed approximately R67 000 by its debtors, however, some of these debts, she says, are old and irrecoverable and accordingly she estimates that, at best, probably half of them would be recovered.

[9] The respondent did annex to her answering affidavit the most recent statement of an FNB account in the name of the said company which revealed a balance of R3 385,47 as at the end of the period. From this amount the respondent states that she must pay the rent and other operating expenses of the company. When regard is had, however, to the period covered by the bank statement, being 17

January 2016 to 17 February 2016, it is apparent that virtually all the expenses reflected on the bank account are of a personal nature and very few, if any at all, are business expenses. Furthermore, neither the bank statement nor the financial statements for the year ending February 2014, reflect any rental payments.

[10] In respect of Samil and South African Mohair the respondent acknowledges that she is a director of the company but denies that she is a shareholder in the company. To this end she has annexed a supporting affidavit by one Joy Language. Ms Language states that Samil and South African Mohair are essentially one business and she refers to them collectively as “the company”. She is the “support services manager” of the company and she declares that the respondent is a non-executive director in the company who receives director’s emoluments of R7 500 per board meeting and that she derives no other income from the company. I pause to record that the respondent’s personal bank statement annexed to her answering affidavit reflects a payment of R12 500 into her bank account described as “Samil Director’s Fees”. The discrepancy is not explained. Ms Language further states that the respondent is not a shareholder in the company. She does not, however, confide in the court as to who the current shareholders in the company are nor does she state whether the respondent was at any time a shareholder in the company and, if so, when and to whom she had alienated her shares.

[11] In reply Ms Woodgett points out that Ms Language does not state that she has had sight of the share allotment register nor has she attached a confirmatory affidavit from the company’s auditors. She alludes to the shortcomings in Ms Language’s affidavit which I have recorded above and accordingly she contends that

it remains possible that the respondent was indeed allocated a shareholding which she then transferred to another person or entity for purposes of avoiding attachment by creditors. This, she contends that a trustee ought to investigate.

[12] In addition, no doubt to compound this suspicion, she states that she has learnt that the respondent's son, a law student, is a trustee in two trusts. These trusts were fully dealt with in supplementary papers filed by the respondent's son and it is not in dispute that it has been comprehensively shown that they have no bearing on the estate of the respondent.

[13] Finally Ms Woodgett has attached to her replying papers a number of articles relating to the respondent's achievements when employed with the Eastern Cape Development Corporation and various initiatives of Sebenza Enabling the Environment (Pty) Ltd. This she contends is inconsistent with the picture which the respondent paints and ought to be investigated by a trustee. The respondent is a trustee in the Eastern Cape Disability Economic Empowerment Trust and one of the documents annexed sets out the track record of various trustees. In respect of the respondent it records:

"As Regional Head with ECDC, Belinda has built on her technical and industrial background to assist people to build and grow their businesses. In recognition of her abilities she has served on many Boards, Trust and Fora in the industrial, construction and business sectors. One of her driving principle is the self-empowerment of women, which earned recognition as a finalist in the Regional *Business Women's Association* ."

[14] Two newspaper articles are also annexed published in October and November 2014, some nine months after the year-end reflected in the financial statements annexed by the respondent. In an article published in October 2014 the Eastern Cape Herald reported:

“Vabaza, whose new consultancy operates closely with parastatals set up to aid business growth, called for integration between various parastatal and private business platforms to fast-track the growth of small, medium and micro enterprise (SMMEs).”

[15] This is compatible with the report in the Dispatch Live on 7 November 2014 in which it reported that:

‘Key Eastern Cape political and private sector figures have come together in a plea to government to “change the way it thinks about the Eastern Cape” in a bid to reclaim the province’s former status. ...

The calls were made at the second of a series of talks organised by former Eastern Cape Development Corporation (ECDC) regional head Belinda Vabaza, now head of her own consultancy called Sebenza: Enabling the Environment.’

[16] In consequence of these averments, which the respondent alleges were new allegations and ought to have been included in the founding papers an application was initially launched to strike out these allegations. The application was, in due course abandoned and the respondent obtained leave to file a supplementary affidavit in order to deal with these allegations. Somewhat surprisingly, the respondent did not herself attest to a supplementary affidavit. Rather, her son, now an article clerk at a firm of attorneys in Port Elizabeth, filed an affidavit in support of her contentions. Notably, in the face of the criticisms raised in respect of the affidavit

of Ms Language no mention is made of whether or not the respondent previously owned shares in the companies and, if so, what she did with them. The criticisms of the applicant in this regard remained unanswered.

[17] As set out earlier the contentions in relation to the trusts raised in the answering affidavits have been comprehensively refuted in the supplementary affidavit. However, the deponent to the supplementary affidavit Tembeleni Vabaza reveals therein that in fact the respondent is also a beneficiary and a trustee in the Dan Qeqe Family Trust. The respondent is the daughter of the late Dan Qeqe, a well-known figure in sporting activities in the Eastern Cape. The trust is an entirely discretionary trust and Tembeleni records that no distributions have been made from the trust. He has annexed the trust deed which records, *inter alia*, that:

“No rights or hopes of any beneficiary under this trust deed and no part thereof shall be attachable by any creditor of any beneficiary or vest in his trustee insolvency ...”

[18] Tembeleni, however, states in his affidavit that the trust currently “has assets in the form of cash amounting some R500,000.00.” The terminology seems to be to be ambiguous and does not exclude the possibility of assets in other forms. Tembeleni does not declare when the trust became possessed of such a sum of money and what the source thereof was.

[19] Section 10 of the Insolvency Act to which I have referred earlier clothes the court with a discretion whether or not to grant a provisional sequestration order even where the requirements set out in the section have been met. It is not in dispute that

the applicant bears the onus to establish that “there is reason to believe” that the sequestration will be to the advantage of creditors. “Reason to believe” predicates facts which engender belief, which must be proved by the applicant, *prima facie* at the stage when a provisional order is sought, and on a balance of probabilities when a final order is sought. (See **London Estates (Pty) Ltd v Nair** 1957 (3) SA 591 (N) at 593; **Nedbank Ltd v Thorpe** [2009] JOL 24292 (KZP) at para [12] and **Nedbank Ltd v Groenewald** 2013 JDR 0748 (GNP) at para [36] and [37]; and *Butterworths: Law of Insolvency* p. 2-20 para 2.1.4.)

[20] It has been held that there is reason to believe that the sequestration will be to the advantage of creditors if the applicant satisfies the court that “there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote, that some pecuniary benefit will result to creditors”. (See **Meskin & Co. v Friedman** 1948 (2) SA 555 (W) at 559.) It would be sufficient therefore for an applicant to show that there are reasonable grounds to conclude that upon a proper investigation of the debtor’s affairs, or otherwise, a trustee may discover or recover assets for disposal for the benefit of creditors. (See **Dunlop Tyres (Pty) Ltd v Brewitt** 1999 (2) SA 580 (W) at 583.) This, it seems to me, accords with the finding in **London Estates (Pty) Ltd supra** that “if no substantial estate is shown to exist, circumstances may yet establish a reasonable prospect, a prospect not too remote, that concealed assets will be found or others recovered. The mere fact that sequestration enables investigation of the insolvent’s affairs is not sufficient: there must be additional facts establishing that not too remote possibility. This is the approach in **Meskin’s** case, which ... should be followed.”

[21] In the present case it has been established that the respondent held a loan account in Sebenza Enabling and Environment in an amount of approximately R130 000 in 2014. The respondent does not confide in the court as to what her current loan account in the company is and states merely, without the benefit of any financial statements, that the loan account is worthless as the company has no money. On her own version the company has debtors in the amount of R67 000. Some of these debtors, she states, without any further elaboration, are old and irrecoverable. Other than to state that they are “old” she makes no mention as to the age thereof. It is significant, however, that the company was, on her own admission, registered in 2013. It appears therefore improbable that many debts would have prescribed. At worst 50% thereof could be recovered on her own estimate. In addition she owns all the shares in the company which must be realisable. Respondent states boldly that they are worthless, however, no financial facts are disclosed in support of this averment.

[22] It has certainly been established on the papers that the respondent is a director of Samil and South African Mohair. It is not uncommon for directors to be issued with shares. This was the proposition made on behalf of the applicant. The high-water mark of the respondent’s response thereto is that she does not currently own shares. In the face of the express response relating to her silence as to whether she previously owned shares and how she has disposed of them the respondent is silent. In these circumstances there is a prospect not too remote, that a trustee may recover such shareholding.

[23] She did not disclose the existence of the Dan Qeqe Family Trust in her answering papers and there is some ambiguity in the supplementary papers as to precisely what assets the trust may own and what the origin thereof was or when it was acquired. While it may be speculative to assume that there may be a loan account in the trust, when regard is had to the vague averments made by the respondent on a number of issues and her total silence relating to the existence of the trust. I think that it is a factor which must be weighed together with the other issues set out above.

[24] For these reasons I consider that there is a reasonable prospect, not necessarily a likelihood, but a prospect which is not too remote, that some pecuniary benefit will result to creditors.

[25] In the circumstances, I make the following order:

1. The estate of the respondent is provisionally sequestrated in the hands of the Master of the High Court, Port Elizabeth.
2. The respondent and all other interested parties are called upon to show cause before this Honourable Court on 1 December 2016 at 09h30, or as soon thereafter as the matter may be heard, why the estate of the respondent should not be finally sequestrated in the hands of the Master of the High Court, Port Elizabeth.
3. This order is to be served:

- (i) By the sheriff on any employees of respondent in terms of section 9(4A)(a)(ii) of the Insolvency Act, 24 of 1936.
 - (ii) By delivery thereof to the South African Revenue Service.
 - (iii) By one publication in English in "The Herald" and one publication in Afrikaans in "Die Burger".
4. The costs of the application will be costs in the administration of the insolvent estate.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv K Williams instructed by Lynn & Main Incorporated c/o
Smith Tabata Incorporated, Port Elizabeth

For Respondent: Adv T Rossi instructed by BLC Attorneys, Port Elizabeth