

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
DATE	SIGNATURE
20/06/2019	<i>[Signature]</i>

Case No: 66282/18

In the matter between:

SA RETAIL PROPERTIES (PTY) LTD

APPLICANT

and

NICOLA ENGLEZAKIS

RESPONDENT

JUDGMENT

G JACOBS (AJ)

[1] In this Application the Applicant seeks an order:

“That the estate of the Respondent is placed under provisional sequestration.”

[2] The Respondent is further called upon to advance reasons on a return date (which have since passed, as this Application was opposed by the Respondent) why the Court should not order the final sequestration of his estate.

[3] The Respondent opposed the Application and also moved that certain allegations in the Founding Affidavit be struck on the grounds of hearsay. I will deal with the the Respondent’s opposition to the relief the Applicant seeks, *infra*.

[4] Respondent did not file Heads of Argument and a Practice Note, in accordance with the Practice Directive of this Court. The Application was duly set down by the Applicant on the opposed roll for the week of 3 June 2019 and was allocated (in the week preceding 3 June 2019) for argument on 4 June 2019. On 4 June 2019 Counsel on behalf of the Respondent, Advocate T Lipshitz requested the Court to accept a Practice Note and Heads of Argument from the bar. In order to avoid a further delay in the hearing of the matter I asked Advocate GT Avvakoumides, who appeared on behalf of the Applicant, if he had any objection. No objection was raised and I stood the matter down to be argued on 5 June 2019 and for me to consider the Heads of Argument filed on behalf of Respondent. As a result of the aforesaid, the Respondent is liable for the wasted costs of 4 June 2019, notwithstanding the outcome of this Application.

- [5] The Application to strike was not persisted with neither in the Heads of Argument nor in Argument before this Court.
- [6] The Applicant's *locus standi* to bring the Application is based on a "Deed of Settlement, Acknowledgement of Debt, and Court Order", incorporated in a Court Order by Prinsloo J, on 6 June 2017 (hereinafter the "June 2019 Order").
- [7] The relevant part of the June 2017 Order, for purpose of this Application reads as follows:

"2.

On the Applicant's version, the Respondents are indebted to the Applicant in the sum of R2 187 548.27 ... [not relevant] ... in accordance with the attached annexure marked Annexure "A".

3.

The Respondents will within 30 days, provide the Applicant with their calculations of arrears due and owing by the First Respondent in order that the quantum thereof be agreed within the aforementioned 30 day period.

4.

Should the Respondents fail to do so within the aforementioned period of 30 days, then it shall be accepted by the parties that the quantum is as set out in Annexure "A" hereto."

- [8] The June 2017 Order, in paragraph 5 and 6 thereof, undertook to make certain interim payments, in liquidation of the First Respondent's (in that Application) indebtedness to the Applicant, and payment of future rental on due date. The current Respondent was the Second Respondent in that Application. These paragraphs (5 and 6) were the subject of an urgent application on 9 March 2018 (Case No.: 57082/2016) before Tuchten J and is also the subject of a pending action in Case No.: 38530/17 in this Court.
- [9] In the pending action in Case No.: 38530/17, the indebtedness, as acknowledged by the Respondent and set out in paragraph 7 *supra*, is not challenged, nor has that order (the June 2017 Order) been varied or rescinded. Even if certain payments (as Respondent alleges) should have been allocated to the amount of R2 187 548.27, the Applicant has shown on the papers that the Respondent is indebted to the Applicant, as provided for in Section 9(1) of the Insolvency Act (Act 24 of 1936). In this regard see: (as to a disputed claim) ***Braithwaite v Gilbert (Volkskas Bpk Intervening)* 1984 (4) SA 717 (W)**. Therefore, the Applicant has the necessary *locus standi* to ask for the relief it seeks. Even if the Respondent implies that the amount of R2 187 548.27 is not yet due, Section

9(2) of the Insolvency Act assists the Applicant in this regard. As this is an Application for Provisional Sequestration, in terms of Section 10(1) of the Act, the Applicant only has to show this *prima facie*.

[10] The Applicant further has to either:

10.1 Show that the Respondent is insolvent; or

10.2 Show that the Respondent has committed an act of insolvency as defined in Section 8 of the Insolvency Act.

[11] In my view the Respondent, in the Opposing Affidavit, by (and referring to paragraph 14 of the Founding Affidavit) not dealing with the alleged indebtedness to the Applicant (and other creditors) and stating:

“43. The total alleged liability on the Applicant's papers amounting to R10 149 062.89 ... and

44. The Applicant has reflected no value in my sequestration.”

Admitted that he is actually insolvent. Therefore, the debate as to whether Applicant has complied with Section 10(b) of the Insolvency Act should stop here.

[12] In the event that I am wrong in the finding that Respondent is insolvent, (or admitted that he at least by implication admitted same) I am of the view that Respondent did commit an act of insolvency, as envisaged in Section 8(b) of the Act. The reasons therefore, the following:

12.1 The alleged hearsay argument have been abandoned.

12.2 The fact that Applicant relies on a *nulla bona* return of another creditor is of no consequence. See: **Abel v Strauss 1973 (2) SA 611(W) at 612 and 613**. See further: **Kerbell v Chames 1925 WLD 72 at 75**.

12.3 The allegation of the Respondent that the *nulla bona* return reflects an address other than the Respondent's place of residence or his place of business, also does not assist the Respondent. See: **Beira v Raphaely-Weiner and Others 1997(4) SA 332 (SCA) at 338**.

12.4 The Sheriff's allegations in the return of *nulla bona* is prima facie proof of the allegations therein. See: **Van Vuuren v Jansen 1977 (3) SA 1062 (T) and De Wet v Le Riche 2000 (3) SA 1118 (T)**.

[13] Therefore, the Applicant has, in my view, complied with Section 10(b) of the Insolvency Act.

[14] The last question that remains is whether the Applicant has shown that there is a reason to believe that it will be to the advantage of Respondent's creditors if his estate is sequestrated (See Section 10 (c) of the Insolvency Act).

[15] In this regard the Applicant has to show at the stage when it seeks the provisional sequestration of the Respondent, prima facie that there is reason to believe that it (the sequestration) will be to the advantage of creditors. See: ***Amod v Khan 1947(2) SA 432 (N) at 437*** as well as ***Nescum & Co. v Freedman 1948 (2) SA 555 (W) at 558***.

[16] The words, "reason to believe" was dealt with in Commissioner, ***SARS v Hawker Aviation Partnerships and Others 2006 (4) SA 292 (SCA)*** at paragraph [29] ...

"The answer seems to lie in those decisions that have held that a court need not to be satisfied that there will be an advantage to creditors in the sense of immediate financial benefit. The court need be satisfied only that there is reason to believe – not necessarily a likelihood, but a prospect not too remote – that as a result of investigation and inquiry assets might be unearthed that will benefit creditors."

[17] In the present case it is undisputed:

17.1 That there is a trust "Nicola Englezakis Trust (IT14302/06) (hereinafter "the Trust") who owns an immovable property at 33 Peacanwood Estate,

Hartbeespoort. The Respondent is a Trustee of the Trust as alleged by himself, in "Annexure "N" to his Replying Affidavit. This house (33 Peacanwood) is not where the Respondent allege he resides (24 Fairway View, Peacanwood). The latter is his personal property (See paragraph 17.2 *infra*).

- 17.2 The Respondent is the owner of two immovable properties, Erf 687 Bryanston and Erf 426 Peacanwood Extension 7. (See paragraph 7.1 of the Founding Affidavit read with Annexure "K" thereto). This allegation is met with the following reply (see paragraph 37 and 38 of the Opposing Affidavit – replying to paragraph 6.10 to 7.6, 9, 10 and 13 of the Founding Affidavit):

- "37. *The allegations contained in these paragraphs are not pertinent to this matter and we dealt with above,*
[nothing was said with regards to the properties]
38. *Ms Koning and the Applicant have no personal knowledge of the dealings between Hyprop, NFGR and I. This evidence amounts to hearsay.*" [my comment]

As the hearsay allegation was not persisted with this does not dispute the factual allegation made by the Applicant. Respondent further admits that

he has two outstanding bonds. (See paragraph 42.1 of the Answering Affidavit and Annexure "NE7" thereto).

17.3 The Respondent is a businessman and Director of at least Coalmans Steak Ranch (PTY) Ltd and NFGR Investments (Pty) Ltd.

- [18] The Respondent does not deal with his financial position at all. The values of the properties in his name is not disclosed. His interest in the business and the Trust are not disclosed, nor does he even attempt to take the Court in his confidence and set out his financial position. From this a negative inference can and should be drawn.
- [19] The Western Cape High Court in an unreported judgment **[Bozalek JJ]**, 9 October 2013 in **Vincemus Finance (Pty) Ltd t/a Kempston Finance v DH Kaye and B Kaye (Case No.: 20498/2012)** dealt with how the Court should approach the question of benefit to creditors, *inter alia* where Trusts are involved.
- [20] Taking into account all the facts of the present case and applying the principles set out above, I am of the view that the Applicant satisfied this Court that *prima facie* there is a reason to believe that there will be advantage to creditors, if the estate of the Respondent is sequestrated.
- [21] This leaves only the question of costs and the return date for the provisional order. A new return date has been obtained by Counsel on behalf of the

Applicant and included in a draft order handed to me. The costs, of the Application, in my view, should be costs in the sequestration, both appearances on 4 and 5 June 2019 inclusive.

[22] In the premises, the following is ordered:

22.1 The Respondent's estate is provisionally sequestrated and placed in the hands of the Master of the High Court.

22.2 A *rule nisi* is hereby issued, returnable on 17 September 2019 at 10h00 or as soon thereafter as Counsel may be heard, calling upon the Respondent to advance reasons, if any, why the Court should not order final sequestration of the said estate.

22.3 A copy of this order shall be served upon the Master of the High Court, the South African Revenue Services and shall be advertised once in the Government Gazette and once in the Pretoria News.

22.4 Costs of the Application shall be costs in the sequestration. These costs shall include the costs of the appearances on 4 and 5 June 2019.


G JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the plaintiff: Adv GT Avvakoumides (SC)
Instructed by Mark Efstratio Attorneys
PRETORIA

For the defendant: Adv T Lipshitz
Instructed by Manong Badenhorst Attorneys
JOHANNESBURG