



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **18273/2018**

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD

Applicant

and

RANDAL JULIAN SAUER

First Respondent

BRONWEN JANINE SAUER

Second Respondent

Hearing: 28 February 2019

Judgment: 12 March 2019

JUDGMENT

De Waal AJ:

- [1] The Applicant in this matter seeks the provisional sequestration of the Respondents' joint estate. The Respondents are married in community of property. The application was launched on 4 October 2018 as a matter of

urgency. On 22 October 2018 it was referred for hearing on the semi-urgent roll on 28 February 2019. The papers consist of 873 pages.

[2] In terms of s 10 of the Insolvency Act 24 of 1936, an applicant in an application for the provisional sequestration of a respondent, needs to satisfy the Court on a *prima facie* basis that:

2.1. The applicant has a claim against the respondent;

2.2. The respondent has committed an act of insolvency or is in fact insolvent; and

2.3. There is reason to believe that it will be to the advantage of creditors if the respondent's estate is sequestrated.

[3] Before dealing with the facts of the matter and the parties' contentions regarding whether the requirements are met, I briefly deal with the approach to disputes of fact in applications for the provisional sequestration of an estate.

[4] Given that sequestration applications deal with the status of a person, the bar for obtaining a provisional order is set somewhat higher than that which applies in applications for interim interdictory relief. The question of whether the requirements are met on a *prima facie* basis is determined by assessing whether the balance of probabilities on the affidavits favour the applicant's case.¹ The test can be traced back to the well-known Judgment of Corbett JA

¹ *Investec Bank Ltd v Hugo Amos Lambrechts N.O. & Others* Case Number: 6570/2014 (unreported Judgment delivered by Rogers J on 27 November 2014) at para 15.

(as he then was) in *Kalil v Decotex (Pty) Ltd & Another* 1988 (1) SA 943 (A). In that matter, Corbett JA held that a Court can hardly decide an application for the provisional winding-up of a company without reference to the respondent's rebutting evidence. Corbett JA then explained that the term "*prima facie case*" means that the balance of probabilities on all the affidavits should favour the granting of the application for provisional liquidation (or sequestration).² Applications for the referral of the matter to oral evidence will only be granted in exceptional circumstances in these applications because the granting of the relief does no lasting injustice to the respondent as she will on the return day generally be given an opportunity to present oral evidence on disputed issues.³

[5] As far as the first requirement is concerned, i.e. whether the applicant has a claim against the respondent, the SCA added in *Kalil* that an application for liquidation should not be resorted to in an attempt to enforce a claim which is *bona fide* disputed. In respect of this requirement, the onus on the respondent is not to show that she is not indebted to the applicant but she must merely show that the indebtedness is disputed on *bona fide* and reasonable grounds.⁴ This is known as the *Badenhorst* rule.⁵ In short, an application for provisional sequestration should not be used as a means of putting pressure on the respondent to pay a debt which is *bona fide* disputed.

[6] I now turn to deal with the three requirements in the context of the present matter.

² *Kalil* at 979A

³ *Kalil* at 979B

⁴ *Kalil* at 980B – D

⁵ With reference to the decision in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348B.

The Applicant's claim

- [7] When the sequestration application was launched, the Applicant claimed that the Respondents were liable to it for the payment of a sum of more than R16.5 million (plus interest); R5 376 654.00 in respect of three home loans; and various suretyship agreement entered into by the Respondents in favour of the Applicant.
- [8] The Applicant's claims are not seriously disputed by the Respondents. They contend that, save for a mere "I say so", the Applicant failed to properly account for the moneys due to them by providing the Respondents with property statements and consolidations of account. The Respondents contend that the real extent of the debts due to the Applicant cannot be established.
- [9] However, as pointed out by the Applicant, clause 24.8 of the Terms and Conditions for Loans Secured by Mortgage Bonds provides that a certificate signed by any of the Applicant's managers, whose appointment need not be proved, specifying the amount due to the Applicant and stating that such an amount is due, owing and payable, will on its mere production be sufficient proof of any amount due and/or owing by the debtor in terms of the agreement, unless the contrary is proved. A similar clause forms part of the suretyship agreements.
- [10] Certificates for each of the amounts due and claimed by the Applicant were attached to the founding affidavit. I fail to see what more needed to be done.

- [11] A slightly different argument was made by Mr De Vries, who acted for the Respondents, at the hearing of the matter. He pointed out that there was at least one anomaly in respect of the amounts due. This related to an instalment sale agreement with account number 73501646. In the founding affidavit the Applicant alleged that the amount due and owing in respect of this agreement was R256 872.45, whereas in the replying affidavit, that amount more than doubled to R554 374.29. It was contended that the debt could not have doubled over a period of approximately 4½ months between the signing of the founding and the replying affidavit.
- [12] Mr Van Rooyen SC, who appeared for the Applicant, contended there was no challenge in the answering affidavit to the validity of any of the certificates. The Applicant was accordingly not provided with an opportunity to deal with the alleged anomaly in respect of account 73501646. I agree. In order to show that the Applicant's claims are seriously disputed, it is not good enough to raise a discrepancy during argument. In any event, the reduction of the Respondents' overall debt by approximately R300 000.00 will have no effect on the outcome of the present matter. The Respondents' liability relates to three home loan agreements; and on my calculation at least 15 suretyships. The alleged discrepancy is raised in respect of one suretyship only and relates to an amount which is relatively small when compared to the overall debt.
- [13] I accordingly conclude that, on the balance of probabilities, the Applicant has established its claims against the Respondents.

Factual insolvency

- [14] I am aware that the Applicant argued factual insolvency in the alternative to the commission of an act of insolvency. But I find it convenient to deal with the former first as it requires a description of the complex, intertwining, personal and business interests of the Respondents and those of associated third parties, which will then serve as an introduction to the consideration of both factual insolvency and the act of insolvency alleged by the Applicant.
- [15] As was stated above, when the application was launched, the Respondents owed the Applicant more than R16.5 million. In its replying affidavit, the Applicant explains that the debt had been reduced to approximately R12.4 million, plus interest. This happened as a result of certain payments that were received following the sale of some of the Respondents' immovable properties. However, as a result of those sales, the value of the Respondents' assets also diminished. In this regard, I should point out that the Applicant annexed to the founding affidavit valuations by professional valuer, G.F. Zondagh, for each of the immovable properties to which the debts of the Respondents relate. These independent valuations, obtained in December 2017, established that the Respondents owned immovable properties to the combined market value of approximately R11 750 000.00. Due to the sales, the total estimated value of these assets was reduced to R9 165 000.00. Accordingly, on the Applicant's version, when the pleadings closed, the Respondents' liabilities still exceeded their assets by approximately R3 235 000.00.

[16] The Respondents do not contest the correctness of the valuations of their properties. Save for what is stated above regarding the discrepancy with account number 73501646, the extent of the Respondents' liabilities to the Applicant is also not disputed. Instead, on the issue of factual insolvency, the Respondents contend that the Applicant will receive an amount of approximately R6 839 885.30 from the proceeds of the winding-up of RK Sauer Construction South Cape CC ("**RK Sauer**"), which amount is already in the joint liquidators' bank account. If paid, the Respondents' liability as sureties will be reduced. If R6 839 885.30 is deducted from the R12.4 million claim, then the Respondents' assets will exceed their liabilities by more than R3.6 million.

[17] In order to assess this defence, it is necessary to explain the relationship between the Respondents and RK Sauer. The Respondents' liabilities to the Applicant consist of three categories:

17.1. The first is three home loans taken by the Respondents from the Applicant.

17.2. The second category is 13 suretyships in respect of the overdraft facility of RK Sauer and 12 instalment sale agreements concluded between the Applicant and RK Sauer for the purchase of vehicles and machinery.

17.3. The third category is two suretyships given by the Respondents in respect of an overdraft facility granted by the Applicant to October Sky

Planthire and Suppliers (Pty) Ltd ("**October Sky**") and a business loan to the Sauer Family Trust.

- [18] The Respondents' argument does not relate to the first and third categories. It relates to the second category, i.e. the overdraft facility and instalment agreements of RK Sauer. In respect of this category, the Respondents are liable as principal debtors and sureties. When pleadings closed, this category of debt amounted to R7 740 507.51 on my calculations. The bulk of the debt relates to the overdraft on RK Sauer's current account of R5 304 500.15.
- [19] RK Sauer commenced business rescue proceedings on 25 August 2017. Two rescue plans was presented but neither were accepted. On 20 February 2018, the business rescue practitioners informed the affected parties that they would proceed with an application for the winding-up of RK Sauer. The employees of RK Sauer then moved on an urgent basis for winding-up. The proceedings were then postponed on a number of occasions at the instance of the employees, i.e. the applicants in the liquidation application. In the meantime, RK Sauer continued to trade primarily if not exclusively because a special purpose vehicle that had been created by the name of CSJ Civils and Construction (Pty) Ltd ("**CSJ Civils**") which entity partly absorbed RK Sauer's workforce and rented its plant and machinery. RK Sauer then subcontracted work from CSJ Civils two tenders awarded to the former by the George Municipality. About R50 000.00 per month, was paid to the RK Sauer by CSJ Civils on the basis of this arrangement.

[20] RK Sauer was placed into provisional liquidation on 23 February 2018 and eventually, after the intervention of the Applicant, finally liquidated on 11 December 2018.

[21] It is in this context that a credit compromise proposal, dated 30 November 2018, prepared for RK Sauer by attorneys Rauch / Gertenbach in terms of s 155 of the Companies Act 71 of 2008, should be assessed. This proposal was compiled in the hope that it would be considered viable by the provisional liquidators of RK Sauer. It was however eventually rejected on 10 December 2018, i.e. the day before RK Sauer was finally liquidated.

[22] In developing their argument that the second category of debt can easily be drained if the Applicant was not "*obstructive*", the Respondents placed considerable reliance on the compromise proposal. The proposal recorded that RK Sauer had encumbered in favour of the Applicant vehicles and equipment to the value of R5 015 563.44 and debtors to the value of R1 824 322.30. At the hearing it was contended for the Respondents that the assets were realised and "*the money was lying*" with the joint liquidators for the Applicant.

[23] There are conceptual (legal) problems and factual problems with the Respondents' argument.

The legal obstacles

[24] I deal first with the conceptual (legal) problems with the Respondents' argument.

[25] In general a surety cannot claim to be released and cannot compel the principal debtor to pay before she herself has paid all that the principle debtor owes. No right of recourse arises before the surety has paid the principal debt. In the present matter it is of course common cause that the Respondents have not paid RK Sauer's debts and as things stand they have no right to recover any amount from RK Sauer in liquidation.

[26] Respondent's counsel however placed reliance on the judgment of *Millman and Another NNO v Masterbond Participation Bond Trust Managers (Pty) Ltd (under Curatorship) and Others* 1997 (1) SA 113 (C) and *Absa Bank Ltd v Scharrighuisen* 2000 (2) SA 998 (C) and the following passage in former, in particular:

*"It follows that in determining whether at any particular point in time the liabilities of the surety and co-principal debtor exceeded his assets, the obligations undertaken by him as surety and co-principal debtor must be included amongst his liabilities. To the extent to which an amount is recoverable pursuant to the right of recourse a corresponding amount must be taken into account as an asset."*⁶

[27] But as Griesel J pointed out in *Scharrighuisen*, there are considerable difficulties in placing any value on a conditional (or anticipatory) right of recourse particularly when the principal debtor is insolvent or in liquidation, as is the case with RK Sauer. Whilst there is a notional right of recourse against the insolvent debtor, its value is, at best, nebulous. For this reason Griesel J

⁶ *Millman* at 123C

concluded that no value could be placed on the right of recourse in *Scharrighuisen*.⁷

- [28] As seems to be suggested in *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff* 2014 (4) SA 521 (WCC) at paragraph 43(ii), *Scharrighuisen* actually stand for the proposition that the surety's contingent right of recourse against a distressed company is incapable of being ascribed a value in insolvency proceedings.
- [29] This is all the more so in the present instance where the creditor (the Applicant) has decided to hold back on lodging claims in the liquidation of RK Sauer for fear of having to make a contribution to the administration of that estate. There is nothing wrong with the wait-and-see approach adopted by the Applicant.⁸ It may turn out that the Applicant never lodges a claim against in the liquidation of RK Sauer and no right of recourse will then arise.⁹

⁷ *Scharrighuisen* at paras 23 – 29

⁸ See *Cools v The Master* 1998 (4) SA 212 (C):

"[33] It is understandable that a creditor would not want willingly to run the risk of a contribution becoming payable by him in an insolvent estate. It is, in my view, perfectly proper for a creditor to decline to prove a claim whilst there is such fear or until, because of changed circumstances, he is prepared to run that risk. A creditor would therefore be justified in withholding his claim from proof until he is satisfied that, in his opinion, it is worthwhile running the risk of becoming liable for a contribution in terms of the Act, should no assets of sufficient value be found to prevent a contribution being levied in terms of s 106 of the Act. There is, in my opinion, no basis for attacking the bona fides of third respondent for holding back proof of his claim until he was satisfied to run the risk of a contribution."

⁹ See *Proksch v Die Meester en Andere* 1969 (4) SA 567 (A) at 589D – F (my underlining):

"Wesenlik is die vordering van 'n borg, wat nie die skuldeiser betaal het nie, teen die insolvente boedel van die hoofskuldenaar, 'n voorwaardelike ongelikwildeerde vordering indien die skuldeiser 'n vordering teen die insolvente boedel ingestel het. Dit is voorwaardelik omdat die borg alleen dan 'n vordering sou hê wanneer hy die skuld van die hoofskuldenaar sou betaal, en dit is ongelikwildeer omdat die bedrag wat hy van dié skuldenaar kan eis alleen dan vasgestel kan word wanneer bekend is hoeveel die skuldeiser uit die boedel van die skuldenaar kry. Omdat die skuldeiser 'n vordering ingestel het teen die insolvente boedel van die hoofskuldenaar, is die borg alleen verplig om die verskil te betaal tussen die bedrag van die skuld en die bedrag wat die skuldeiser uit die insolvente boedel ontvang. In 'n geval soos hierdie, waar die skuldeiser wel 'n vordering teen die insolvente boedel ingestel het, kan die

- [30] For these legal reasons it is not possible to place any value of the anticipatory right of recourse in the present matter.

Factual problems

- [31] But even if one looks past the conceptual problem, which is that the conditional claim of the Respondents is by its very nature too nebulous to place any value on, then there is in any event sufficient evidence before me to conclude, on a balance of probabilities, that the conditional claim in fact has too little, if any value to make a difference.

- [32] The main reason for this is that the very document relied upon by the Respondents, i.e. the creditor's compromise proposal dated 30 November 2018, records at paragraph 9.6.3 that "*no dividend is expected to be paid to concurrent creditors either in a final liquidation scenario or in terms of the proposed compromise*". In exercising their right to recourse, should it ever arise, the claim of the Respondents will be a concurrent one and not a secured one. This means that the very document that they rely on indicates that there will be no dividend for them. The mere fact that the Applicant may have a secured claim against RK Sauer in respect of vehicles and equipment and debtors, does not mean that the Respondents' right of recourse is secured. The Respondents' right of recourse will be a concurrent claim.

quantum van die vordering wat die borg teen die skuldenaar het – en dit is hierdie vordering wat gelikwideer moet wees – dus eers vasgestel word nadat die krediteur sy dividend uit die insolvente boedel ontvang het."

- [33] But it is not even possible, on the evidence before me, to say that the Applicant's secured claims will be fully paid if submitted.
- [34] As far as the instalment agreements pertaining to vehicles and equipment are concerned, the Applicant's claim stood at R2 436 007.36 when the pleadings closed. The Applicant recorded that an amount of R3 062 336.89 had already been paid to the Applicant in this regard and that this had been taken into account in calculating the Respondents' overall liabilities. It is further stated that there remains a combined shortfall of approximately R2 million on the instalment agreements. This indicates that the claim made in the credit compromise proposal regarding the Applicant's security in respect of the instalment agreements (the movables, in other words) is at best doubtful.
- [35] The security of the Applicant's claim of R5 304 500.15 in respect of the overdraft facility is even more precarious. In the creditor's compromise proposal, i.e. the document relied upon by the Respondents, it is recorded that the debtors which have been ceded to Standard Bank only has a value of R1 824 322.30 and that no investigation was done as to whether these claims can be recovered. Also, in an email from RK Sauer's former General Manager, Mr Xavier Oswald Jantjies ("**Jantjies**"), it is indicated that the recovery of the retention funds is "*questionable*".
- [36] Even if the security in respect of the instalment agreement is good but the debtors book provide no cover for the overdraft facility, then the liabilities of the Respondents as sureties will remain over R5 million, which will mean, on my calculations, that their liabilities will still exceed their assets by approximately R1 million.

[37] For these reasons the argument of the Respondents also fails at a factual level.

Act of insolvency

[38] In terms of s 8(c) of the Insolvency Act, a debtor commits an act of insolvency if *"he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or preferring one creditor above another"*.

[39] In the founding affidavit, the Applicant contends that the First Respondent intends to sell assets of the joint estate and use at least a portion of the proceeds to settle the indebtedness of RK Sauer to its creditors. It is further submitted by the Applicant that the creditors of the joint estate are being prejudiced by the intended utilisation of the excess proceeds from the sale of the Respondents' assets for the payment of RK Sauer's creditors.

[40] The First Respondent himself states the following in his answering affidavit:

"The decision was made by my wife and I to withdraw all the funds that [we] would have invested in the business rescue of Sauer Construction, together with the assets owned by the Sauer Family Trust, from the business rescue proceedings and instead to use these funds / assets to support and enable the liquidators to be appointed to trade Sauer Construction in liquidation, to the benefit of all the employees, as well as the general body of creditors."

[41] It is further stated in the answering affidavit in respect of the winding-up application brought by the employees of RK Sauer that:

"Properly handled, with the support from the Sauer Family Trust and other financial contributions by my wife and I, all emanating from the sale of assets, some of which were already in the process, the liquidators should continue trading the business to realise the benefit of two pertinent contracts, as well as all the other projects that were still ongoing."

- [42] The Respondents contend that the above only amounts to the expression of an "*intention*" by the First Respondent to make their assets available for purposes of the business rescue or for RK Sauer to continue trading whilst in liquidation.
- [43] In my view, the above statements amount to more than the expression of such an intention. It is at least an attempt by the Respondents to dispose of their property with the effect of prejudicing their creditors. It is probably more than an attempt because it is stated that some of the asset sales were already in the process of being sold to help RK Sauer to keep trading.
- [44] In the circumstances I have no difficulty in concluding, on the balance of probabilities, that the Respondents made a disposition of their property, or at least attempted to make such a disposition, which had or would have had the effect of prejudicing their own creditors. As explained above, RK Sauer's liabilities far exceed the value of its assets. If the Respondents made dispositions to RK Sauer, it is highly improbable that any of it would ever be recovered.
- [45] Thus, even if factual insolvency was not established on the balance of probabilities, an act of insolvency certainly was.

Advantage to creditors

[46] I did not understand the Respondents to have contended at the hearing that if the first and second requirements for a provisional order of sequestration are met, that there will be no reason to believe that provisional sequestration will be to the advantage of creditors.

[47] Given that I have already found that there was at least an attempt by the Respondents to dissipate their assets to the prejudice of their creditors, it follows in my view that there is reason to believe that there will be pecuniary benefit for creditors if a trustee is appointed to sell the Respondents' assets in an orderly fashion.

[48] I indeed understood the parties at the hearing to be *ad idem* that the relationships and transactions between the Respondents, RK Sauer, to some extent the Sauer Family Trust, and the new entity CSJ are, to put it mildly, murky and that an investigation would be in the interest of the Respondents' creditors. The Second Respondent transferred her shares in CSJ Civils to RK Sauer's former General Manager, Jantjies, on 30 September 2018. Jantjies is now the director of CSJ Civils. The possibility cannot be excluded that RK Sauer has simply moved its business over to CSJ Civils with the financial assistance of the Respondents.

Conclusion

[49] In the circumstances, I conclude that a proper case has been made out for a provisional order of sequestration. I note that it is not in dispute that service of

the application has been effected on all relevant parties; that the required security has been furnished; and that the Master has filed a report stating that there are no facts to his knowledge that will justify dismissal of the application.

[50] An order is accordingly granted in terms of the annexure marked "X" hereto.



H J DE WAAL AJ
Acting Judge of the High Court
Cape Town
12 March 2019

APPEARANCES

Appellant's counsel: Adv R Van Rooyen SC
Appellant's attorneys: Edward Nathan Sonnenbergs, Cape Town
Respondents' counsel: Adv J De Vries
Respondents' attorneys: Liesel Scholtz Inc., George

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Tuesday, 12 March
Cape Town, ~~Thursday 28 February~~ 2019 *H.Q.*
Before the Honourable Acting Justice De Waal

Case No: 18273/2018
12-03-2019

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD
(Registration number: 1962/000738/06)

Applicant

and

RANDAL JULIAN SAUER

First Respondent

(Identity number: 790202 5049 08 1)
(Residential address: Goukou Crescent, Kraaibosch Country
Estate, George, Western Cape)
(Marital status: married in community of property to Bronwen
Janine Sauer)

BRONWEN JANINE SAUER

Second Respondent

(Identity number: 780103 0073 08 8)
(Residential address: Goukou Crescent, Kraaibosch Country
Estate, George, Western Cape)
(Marital status: married in community of property to Randal
Julian Sauer)

H.Q. **DRAFT ORDER**

Having read the papers filed of record and having heard counsel for the parties,

IT IS ORDERED THAT:

1. The joint estate of the first and second respondents be placed under provisional sequestration;
2. A rule nisi be issued calling upon the first and second respondents to show cause, if any, to this Court, at 10h00 on Thursday **18 April 2019**, or as soon thereafter as the matter may be heard:
 - 2.1 why the first and second respondents' joint estate should not be placed under final sequestration; and
 - 2.2 why the costs of this application should not be costs in the sequestration of the first and second respondents' joint estate.
3. This order be served on:
 - 3.1 the first respondent at Goukou Crescent, Kraaibosch Country Estate, George, Western Cape;
 - 3.2 the second respondent at Goukou Crescent, Kraaibosch Country Estate, George, Western Cape;
 - 3.3 the South African Revenue Service at 22 Hans Strijdom Avenue, Cape Town, Western Cape.

BY ORDER OF COURT

COURT REGISTRAR

Edward Nathan Sonnenbergs

Cape Town

Box 123