

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

DATE 20/September 2018 SIGNATURE

CASE NO: 3330/2018

In the matter between:

PASHA IMPORT AND EXPORT CC

APPLICANT

And

YANAR HUSREV

1ST RESPONDENT

HACER YANAR

2ND RESPONDENT

JUDGMENT

TSOKA J

- [1] On 30 May 2018, this Court (Molahlehi J) granted a provisional order of sequestration against the two respondents.
- [2] The application for the sequestration of the estate of the respondents was brought by the applicant, Phasha Import and Export CC (Phasha) whose main business is the importation of carpets from Turkey into South Africa.
- [3] The two respondents are Husrev Yanar (Husrev) and Hacer Yanar (Hacer) who are married to each other according to the laws of Turkey.
- [4] The order referred to in paragraph 1 above was returnable on 19 June 2018. On that day, as it was opposed, it was postponed to 10 September 2018 for argument. This is the application that served before me on that day.
- [5] Phasha seeks confirmation of the order while Husrev and Hacer opposed the order sought. In order for the former to succeed, it must prove on a balance of probabilities that the requirements of the provisions of s12 of the Insolvency Act 24 of 1936 (the Act) have been met. For the latter to succeed in resisting the

order sought, they merely have to show that they resist the order on bona fide and reasonable grounds.

[6] Section 12 of the Act provides that –

‘(1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that –

(a) the petitioning creditor has established against the debtor a claim as is mentioned in subsection 1 of section nine;

(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 sequester the estate of the debtor.

(2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die’.

[7] Phasha alleges that it is the creditor of Husrev and Hacer who are indebted to it in an amount of not less than R100 as referred to in subsection 1 of section nine of the Act, namely the amount of about R4.9 million. It is Phasha’s allegations

that Husrev is its erstwhile employee who was employed as a manager with full authority to manage the former's business including the operation of its business accounts, its stock inventory programme; its invoicing and accounting programme; the cash-flow and its customer relations. Husrev was entrusted with these responsibilities as Phasha's sole member, Fatih Erdogan (Erdogan) was in Turkey which is the home country of both Husrev and Erdogan.

[8] On 24 December 2017, Erdogan came into the country while Husrev was on leave until 15 January 2018 to oversee Phasha's business. Later that month, the former noticed a customer, one Begashaw purchasing and removing stock from the business of Phasha without paying for it. This was a surprise and shock to him. He, Erdogan enquired from the bookkeeper what the procedure is in purchasing stock. The bookkeeper informed him that it is a normal practice that customers take stock without paying and that payment usually is made only after delivery has been effected.

[9] In early January 2018, Begashaw again collected stock from Phasha without any payment having been made. He, Erdogan, then phoned Begashaw and enquired about the payment. It was only then that Erdogan learnt that payment was in fact made. Begashaw immediately sent proof of payment made on 20 December 2017 in the amount of R28 000 into the bank account of an entity

known as Allemris Trading and Investments (Allemris) and another one made the following day in the amount of R520.00 also made into Allemris' bank account.

[10] It is common cause that Allemris has no relation with Pasha. The former, which is also a close corporation, was once run by Husrev in Cape Town as a restaurant business. It has since been handed over to Husrev's brother while the latter remains its sole member. Later Husrev's brother also disposed of the restaurant business to a third party. Shocked by the discovery, he phoned Husrev in Turkey to return to South Africa.

[11] On 10 January 2018 Husrev returned to South Africa. On being confronted of the payment in the sum of R28 520 made into Allemris instead of Phasha's account, the former explained that as he left South Africa in hurry, he forgot to pay the amount into the correct account. He then explained that he has since re-transferred the amount in the bank account of Phasha's clearing agent, namely NC Du Plooy Logistics.

[12] Erdogan sensing that something untoward was happening, demanded Husrev to open the latter's laptop. To his shock Erdogan discovered that numerous payments intended for Phasha were made into the account of Allemris. The initial investigation revealed that these payments amounted to R4.9 million. Erdogan

then realized that Husrev perpetrated fraud on Phasha and Husrev realizing that his game was up, undertook to transfer his immovable property to Erdogan and immediately surrendered his Mercedes Benz 350ML, Golf CC and the Citroen C4 motor vehicles to Erdogan. According to Erdogan, not only did Husrev confess to the fraud but requested Erdogan not to publish his shenanigans in his home country. He also handed Phasha the title of his immovable property.

[13] Dissatisfied with Husrev's tender, Erdogan laid a criminal charge of fraud against the former. This is still pending. While the criminal charges were still pending, Husrev, sold all his other assets, took his children out of school and left South Africa.

[14] Sight should not be lost that Husrev is a Turkish citizen who came into this country on an inter-company transfer and temporary permit that expires on 18 October 2021. For this court to have jurisdiction over him, an order for attachment of his property to confirm jurisdiction had to be obtained.

[15] From Phasha's allegations, it is obvious that Husrev is indebted to the former in an amount of not less than R100 i.e R4.9 million. His sudden departure from the Republic of South Africa to his home country; the selling of some of his movable properties and the uprooting of his children from school to Turkey enforces an

intention to evade his financial responsibilities to Phasha. The inevitable conclusion reached is that he committed an act of insolvency in terms of section 8(a) of the Act in that his departure from the Republic was solely with the intention to evade or to delay his indebtedness to Phasha. In any event other than the immovable property that is worth R1 million, which he owns, he has no other assets. The value of Husrev's assets do not exceed Phasha's loss in the amount of R4.9 million. In the circumstances, Husrev has not only committed an act of insolvency, he is in fact insolvent as his liabilities are more than his assets. There is therefore reason to believe that it will be to the advantage of his creditors if his estate is sequestrated.

[16] Husrev on the other hand contends that the order of provisional sequestration should not be confirmed. The contention is based on his assertion that he resists Phasha's provisional order on bona fide and reasonable grounds. This contention is shared by Hacer.

[17] According to Husrev, Allemris was used by Phasha to launder money with the sole aim of defrauding the South African Revenue Service. The utilization of the account of Allemris, so the contention goes, was with the blessing and approval of Phasha. The latter demanded from its customers to settle their purchases by utilizing Allemris and other third parties' accounts in order to minimize its turnover thus reducing its tax to be paid to the fiscus.

[18] Husrev's contention is at odds with the objective evidence in this matter. If indeed there was a scheme devised by Phasha to default the fiscus of the tax to be paid, it does not make sense that Phasha on its own initiative queried Begashaw when the latter on two occasions collected purchases without paying for them. At that time Husrev was on leave and in Turkey and there is no plausible reason why Phasha would question the very scheme it devised to defraud the fiscus.

[19] It is common cause that Allemris was first given to Husrev's brother to operate as a restaurant in Cape Town. It has since been disposed of to a third party. In spite of the disposal, Husrev still remains its sole member. He still has an unlimited access to the account of Allemris. He still uses Allemris' account for his personal accounts. The third party to whom the restaurant was sold to, has also access to the account of Allemris. As to how the R28 520 paid into the latter's account in December 2017 was to be separated from the third party's personal money and that of Husrev is not explained. That this explanation is contrived, admits no doubt.

[20] On January 2018 when Phasha confronted him about the December 2017 payment made by Begashaw into Allemris' account, if there was this elaborate scheme to defraud the South African Revenue Service, his explanation was "I simply forgot to transfer the money into Mufy Carpet's nominated account",

instead of just reminding Phasha of the existing money laundering scheme between Phasha and Allemris. That Husrev's contention is contrived and an afterthought to explain his fraud on Phasha, is clear. In the result I find that the resistance of the confirmation of the provisional order is not on bona fide and reasonable grounds. The provisional order of sequestration must be confirmed.

[21] The following order is made –

21.1 The provisional order granted on 30 May 2018 against the respondents is hereby confirmed.

21.2 The costs of the application shall be costs in the sequestration.



M TSOKA

JUDGE OF THE HIGH COURT

Date of hearing: 12 September 2018

Date of judgment: 20 September 2018

Appearances:

Counsel for the Applicant: Adv Kaplan

Instructed by:

Hirschowitz Flionis Attorneys

Counsel for the Respondent:

Adv Mostert

Instructed by:

Shaheed Dollie Incorporated