In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No : 9874/2014

In the matter between:

Body Corporate of Redberry Park Applicant

and

Nkosingiphile Welcome Sukude NO Respondent

Judgment

Lopes J

[1] The applicant in this matter is the body corporate of Redberry Park, established in terms of s 36 of the Sectional Titles Act, 1986. The body corporate seeks a provisional order sequestrating the estate of the late Sokesibone Alfred Sukude. The respondent in the application is the executor of the estate of the late Sokesibone Alfred Sukude.

[2] The facts giving rise to this application may be summarised as follows:

(a) the deceased in this matter Sokesibone Alfred Sukude died on the 13th April 2014;

(b) the respondent, Nkosingiphile Welcome Sukude was appointed as executor to his estate on the 24th July 2014;

(c) the deceased was the owner of the sectional title property described as Section 180, Door No 49, Redberry Park on the 21st August 2014;

(d) summons was issued against the estate for outstanding levies and other charges due by the estate to the body corporate;

(e) default judgment in the sum of R112 621,87 was granted together with interest thereon calculated at the rate of two per cent per month compounded monthly and calculated from the date of service of the summons to date of final payment. Costs of suit on an attorney and client basis was awarded;

(f) a warrant of execution was issued on the 29th October 2014;

(g) the Sheriff attempted to execute service on the 19th November 2014, was unable to locate any disposable property against which execution could be levied, and rendered a *nulla bona* return.

[3] The founding affidavit in the application is deposed to by one Andre Grundler who is the administrator of the sectional title scheme, having been appointed as such by this court on the 12th March 2009 under case number 2020/09. That appointment was extended on the 25th February 2013 under case number 1531/12. I called for the files in those matters in order to obtain more background information to the matter. It appears from the files that the original application for the appointment of an administrator was sought by the eThekwini Municipality under case number 2020/09. This followed the lapsing of the appointment of a previous administrator. The lack of proper management of the sectional title scheme had created a crisis which required intervention. At that stage the sectional title scheme was indebted to eThekwini Municipality in an amount of approximately R1,5M in respect of rates, taxes and other municipal services. Outstanding levies due to the body corporate represented an average of R33 000 per unit for each of the 297 units of the sectional title development. The case was made out that even if the levies were to be recovered in their entirety, they would not have been sufficient to cover all the expenses of the sectional title development.

[4] The principal motivation for the appointment of an administrator was the fact that very few of the sectional title unit owners were up to date with their levy payments. It seems clear from the correspondence that the sectional title development falls within what may be described as lower income housing.

[5] The application papers record that as at the 11th February 2015 the judgment debt had escalated to an amount of R136 705,65. An examination of the statement rendered by the body corporate to the insolvent estate reveals that the majority of the amount for which default judgment was granted constituted interest charges or 'finance charges' as they are reflected on the statement, together with legal fees.

[6] In the application for default judgment the body corporate put up a resolution of the administrator dated the 21st April 2009 resolving that interest would be charged on unpaid levies at the rate of two per cent per month compounded monthly. In addition interest would be charged at two per cent per month for the full month where levies remain unpaid after due date.

[7] A concern which emerges from the papers is that although s 46(3) of the Sectional Titles Act, 1986 bestows upon an administrator the powers and duties of

the body corporate, s 35(3) records that any management or conduct rule made by a body corporate shall be reasonable. Given that the current interest rates are relatively low (as evidenced by the legal interest rate which is 9,5 per cent per annum) the levying of an interest rate on arrear or outstanding levies in excess of 24 per cent per annum does not seem reasonable. This is more particularly so when one takes into account the economic level of the sectional title holders in the development. However, as the judgment was granted on the 10th October 2014 there is nothing to be done in the present matter.

[8] The reasons why the body corporate seeks a sequestration order against the estate are recorded in the founding affidavit as follows :

(a) non-payment of levies impacts upon, and prejudices other members of the sectional title scheme, because the errant unit constitutes a monthly drain on the resources of the body corporate;

(b) the body corporate will be able to derive an income from the unit after its sale in execution, or by private treaty by the executor;

(c) there will no longer be prejudice to the other sectional title holders;

(d) the unit in question will become less valuable as levies accumulate against it;

(e) an order for sequestration would avoid any problems with possible defences under the Prevention of Eviction from and Unlawful Occupation of Land Act, 1998 which would lead to delays and further prejudice;

(f) the mortgage bond holder (Nedbank Ltd), who has been advised of the application, will have its preferential claim against the sectional title unit ranked after the body corporate by virtue of the provisions of s 15 of the Sectional Titles Act, 1986.

[9] Mr *van der Westhuizen* who appeared for the applicant submitted that the applicant must abandon the suggestion that it would be advantageous to pursue a sequestration, because that would obviate problems caused by the defences raised in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998. I agree with that submission, but remain unpersuaded that I should exercise my discretion in terms of s 10 of the Insolvency Act, 1936 permitting the sequestration the deceased estate.

[10] In my view the administrator has not made out a proper case establishing that it would be to the advantage of creditors to sequestrate the estate. The presence of a mortgage bond held over the property by Nedbank Ltd is not a factor in favour of

sequestration, because although, as suggested by the administrator, the body corporate may gain a ranking preference to Nedbank Ltd, that is not an advantage to the general body of creditors, which includes Nedbank Ltd.

[11] It is not clear to me why it is necessary for the administrator to be granted an order for the sequestration of the insolvent estate of the erstwhile sectional title holder, when there is no apparent reason why the property cannot be sold in execution. Although Mr *van der Westhuizen* eschewed any reliance on the avoidance of the consequences of the eviction of persons from the unit as a basis for justifying sequestration proceedings, there is no doubt that that was in the mind of the administrator when the papers were drawn. In addition one of the main reasons the administrator wishes to proceed with a sequestration process, is to secure an advantage over the bond holder. In my view neither of those are legitimate reasons for seeking to issue sequestration proceedings as opposed to simply following the normal execution process against immovable property.

In *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (N) at 1070 C, Didcott J stated :

'The notion of advantage to creditors is a relative and not an absolute one. Sequestration cannot be said to be to the creditors' advantage unless it suits them better than any feasible and reasonably available alternative course. It follows that the enquiry necessarily postulates a comparison. HATHORN J.P. made the point very clearly in *O'Flaherty & Co. v. Meiklejohn,* 1940 NPD 371, by saying (at p 371) :

"It is obvious that, in order to form an opinion upon the question whether or not *prima facie* there is reason to believe that it will be to the advantage of creditors if the estate is sequestrated, the Court must compare the position of the creditors if there is no sequestration with their position if there is a sequestration."'

[12] There is no information disclosed by the administrator as to the relative costs of recovering the debt via a sequestration process, as opposed to levying execution against the sectional unit in the normal course. There is no indication whatsoever as to the costs of sequestration. Had these aspects been fully dealt with by the administrator, it would have been of some assistance in arriving at the proper exercise of my discretion.

[13] Mr *van der Westhuizen* raised the problem that in terms of s 30 of the Administration of Estates Act, 1965, no person charged with the execution of a writ shall, before the expiry of the period referred to in the notice referred to in s 29 of the

Act, levy execution against any property which has been attached. After the expiry of the notice period, in the case of property with a value exceeding R5 000, consent of the court is required. In my view, ensuring the publication of a s 29 notice is not an onerous task, and there is no reason why the administrator cannot procure compliance with the provisions of ss 29 and 30 for the sale of property, albeit after invoking the assistance of the Master, if necessary.

[15] In all the circumstances the application is dismissed.

Date of hearing :27th May 2015

Date of judgment : 25th June 2015

Counsel for the Applicant : Mr van der Westhuizen (instructed by Erasmus van Heerden Attorneys)