**IN THE HIGH COURT OF SOUTH AFRICA**
**FREE STATE DIVISION, BLOEMFONTEIN**

**Case No. : 2942/2013**

In the matter between:-

**WERNER LE ROUX** Applicant

and

**ABSA BANK LIMITED** Respondent

---

**JUDGMENT BY:** JORDAAN, J

---

**DELIVERED ON:** 17 APRIL 2014

---

[1] The applicant (Werner le Roux) applies for leave to appeal against the final sequestration of his estate granted by me on the 20th March of this year. The applicant was the respondent in the application for sequestration brought by Absa Bank Limited and will be referred to in this matter as the respondent whilst Absa Bank will be referred to as the applicant.

[2] It is necessary to briefly set out the history of the matter. The application was first heard on 12 September 2013 when it was postponed by agreement to 7 November 2013. On the latter date it was again postponed by agreement to 5 December 2013 to enable the respondent to file an

application for condonation for the late filing of opposing affidavits and the applicant to file replying affidavits, if any. On 5 December the matter was finally postponed at the request of the respondent to the 30th January of this year to enable the respondent to make payment of a sum of R2 million on or before 30 January 2014 and make suitable arrangements for payment of the balance of the debt due. At that stage all the necessary affidavits have been filed. On 30 January 2014 the matter was again postponed to the 20th February of this year at the request of the respondent for the same purposes, namely to make payment of the amount of R2 million and arrange for payment of the balance. On the 20th February of this year the matter was argued and a provisional sequestration order granted returnable on the 20th March of this year. It does not appear as if any reasons were given at that stage. Although the matter was not heard by me on 20 February it is alleged by the applicant's counsel in his heads of argument pertaining to this application that, on that date, the matter was again at the request of the respondent stood down for some time to enable the respondent to arrange the necessary payments.

[3] On the return date, namely the 20th March of this year, no further heads of argument was filed on behalf of the respondent and Mr Van Rhyn, who acted on behalf of the respondent, asked for the matter to stand down, the reason being that the respondent is negotiating with the applicant with the view of obtaining the necessary funds to make payment of a sufficient amount as to satisfy the applicant not to proceed with the final liquidation application. The matter

then stood down until after the motion court roll when Mr Van Rhyn appeared on behalf of the respondent and informed the court that the respondent could only that far arrange for payment of R200 000.00 but was still in the process of trying to obtain the funds to pay an amount of in the vicinity of R1.1 to R1.2 million but that, as he was sitting in court, he was waiting for confirmation that the amount has been obtained.

[4] At that stage I ruled that the matter proceed and specifically asked Mr Van Rhyn whether he has any further argument as to the merits of the matter before I adjudicate upon it. His attitude was that he cannot take the matter further than what was contained in his initial heads of argument when the provisional order was sought. Specifically, there was no application for a further postponement of the application on behalf of the respondent. I then granted a final sequestration order.

[5] Without again asking for reasons as to the order made, the respondent filed the present application for leave to appeal and sets out the following grounds as the basis of the application, namely:

(i) that the respondent's evidence as to the extent and value of his estate should not have been rejected;

(ii) that the court misdirected itself by finding that a final order of sequestration would be to the advantage of creditors;

(iii) that the court failed to apply its discretion in favour of finding not to discharge the provisional order of sequestration (sic).

(iv) that the court should have found that the applicant did not discharge the onus resting upon it in terms of the provisions of section 12(1) of the Insolvency Act; and

(v) that the court failed in the circumstances not to postpone the hearing of the application for a reasonable period in terms of the provisions of section 12(2) in order to grant respondent an opportunity to satisfy the applicant's claim or come to an arrangement with the applicant.

[6] The parties were requested to file heads of argument pertaining to the application for leave to appeal so that the matter can be adjudicated upon in chambers and both parties were invited to raise any objection to the procedure if they wish to. None of the parties objected and indeed filed heads of argument.

[7] In the heads of argument on behalf of the respondent, Mr Van Rhyn did not labour any of the other points raised in the application for leave to appeal, but only dealt with the advantage to creditors, in particular the dispute as to the ownership of the property known as the Monte Video Unit No 10.

[8] It is clear from the above that the fifth point of the application for leave to appeal, namely the failure to postpone the matter further, is without any substance since there was no application brought on behalf of the respondent for such a postponement and it was never an issue.

[9] The only remaining question, which covers all the other grounds of the application for leave to appeal, is whether the court erred in not finding that advantage to creditors has not been proven.

[10] As to the advantage to creditors, it appears that the main bone of contention is the ownership of the Monte Video property, which, undisputedly, was bought for an amount of R1,2 million a few years ago and transferred into the name of the respondent, an attorney. At the time of the hearing of the application there was no indication that the value of that property decreased to less than the purchase price and it can be accepted that it at least had that value which, if being the property of the respondent, would be available for the advantage of creditors.

[11] Being the registered owner of that property, the respondent is for all intends and purposes regarded as the owner thereof and it forms part of his estate. His reply thereto is that the property was transferred into his estate mistakenly and that it indeed belongs to another person to whom the property has to be retransferred. According to the respondent the only reason that the property has not yet been retransferred to the real owner was because that person was still trying to obtain funds to pay for the said transfer costs. On behalf of the applicant it was correctly pointed out that the respondent, being an attorney, would know that there were various documents and power of attorney that had to be signed before transfer could be effected, none of which were produced in evidence to show that it was mistakenly done. It

was also correctly pointed out that the property has been transferred to the respondent almost two years before the present application and nothing was done in the meantime to effect retransfer to the alleged real owner.

[12] It is clear that the said property remains the property of the respondent, being registered in his name. The probabilities of that having happened mistakenly are extremely remote in the circumstances, especially where the respondent is a practising attorney himself. It furthermore appears that the respondent, notwithstanding his dire financial position, was in the position to obtain an interest in a company that envisaged an enterprise to start a ferry business between Cape Town and Robben Island. How he obtained that and what the amount was that he had to invest to obtain that interest, is unclear and not accounted for in the papers. In the least, this is an aspect which tends to show that the respondent was in a sufficient financial position to obtain such interest and is something that can be investigated by the trustees. The ownership of the Monte Video property is also something that, at the moment, is undisputedly registered in the name of the respondent and, if mistakenly so, can be investigated by the trustees.

[13] Throughout the history of this application the respondent's main thrust was to obtain finances to pay the outstanding debt so as to avoid sequestration. The claim, being in an amount of the vicinity of R7 million, represents a vast amount of money and the mere fact that the respondent was of the opinion that he would able to obtain the necessary funds to

pay that claim, points to the probability that he must be able to raise funds in some or other way and is not in such a dire financial position as he suggested.

[14] In view of all the circumstances I am not convinced that there is any reasonable prospect that another court would come to a different conclusion and the application for leave to appeal is therefore refused with costs.

**A.F. JORDAAN, J**

| | |
|---|---|
| **On behalf of applicant:** | Adv A.J.R. van Rhyn SC |
| **Instructed by:** | Goodrick & Franklin Inc<br>BLOEMFONTEIN |
| **On behalf of respondent:** | Adv P.J. Heymans |
| **Instructed by:** | E G Cooper Majiedt Inc<br>BLOEMFONTEIN |

/spieterse