NORTH GAUTENG HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG LOCAL DIVISION, PRETORIA)

14/11/2013

CASE NO: 24084/12

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

14 November 2013 ....

DATE SIGNATURE

CHRISTIAAN PAULAS VAN DER MERWE	**1ST APPLICANT**
WANNETTE GERALDINE VAN DER MERWE (NEE COETZEE)	**2ND APPLICANT**

and

THE SHERIFF OF THE HIGH COURT GERMISTON	**1ST RESPONDENT**
BLACK PEARL LIQUIDATORS CC N.O	**2ND RESPONDENT**
SCHOONRAAD ATTORNEYS	**3RD RESPONDENT**
REGISTRAR OF DEEDS JOHANNESBURG	**4TH RESPONDENT**
THE MASTER OF THE HIGH COURT	**5TH RESPONDENT**
STANDARD BANK LIMITED	**6TH RESPONDENT**
ANDRIES JOHANNES VAN DER MERWE	**7TH RESPONDENT**
ANNA JOHANNA HELENA VAN DER MERWE	**8TH RESPONDENT**

JUDGMENT

Kooverjie AJ:

A. NATURE OF THE APPLICATION

1. The Applicants seek relief on the following basis:

   1.1 To rescind the voluntary winding up order of the estate of Andries Johannes van der Merwe and to further compel the Sheriff (first respondent) to proceed with the sale of the property in question. The property in question is located at Erf 186, Elspark, Germiston.

   1.2 Alternatively, to rescind the aforesaid order and to order the First Respondent to repay to the Applicants the sum of R136 142,86 plus interest.

B. ISSUES IN DISPUTE

2 Having heard both counsel, the issues for this court to essentially determine are the following:

- whether the applicant has *locus standi* to launch the rescission application and;

- whether the winding-up order can be rescinded by virtue of Rule 42(1) of the Uniform Rules of Court, *alternatively* the common law, further *alternatively* s149(2) of the Insolvency Act ("Insolvency Act"); and

- whether this Court can compel the Sheriff to proceed with the sale of the property *alternatively* order the Applicants to refund the amounts paid the Applicants. It is noted that only the Sixth Respondent had defended this application.

C. BACKGROUND

3 The Applicants purchased the property at a Sheriff's sale of execution on the 4 March 2011. The Applicants successfully bidded at the auction and purchased same for R298 000,00. In addition to the purchase price, a deposit of R29 800,00 was paid as well as the Sheriff's commission of R8 750,00 plus VAT of R1 225,00. A total amount of R39 975,00 was paid to the Sheriff. In addition rates, taxes and municipal arrears was settled by the Applicants in the amount of R49 347,96 in order to obtain the clearance

certificate. The Applicants alleged that at the time this application was launched they had already paid a total amount of R136 142,87.

4 The sixth respondent was the execution creditor in relation to the aforesaid sale by virtue of non-payment of the debtors, Mr and Mrs van der Merwe (cited herein as the Seventh and Eight Respondents).

5 Subsequent to the Applicants purchasing the property, an application was brought before this Court where the estate of the Seventh Respondent was sequestrated.

6 The Third Respondent, Schoonraad Attorneys were the attorneys performing the winding up on behalf of the Seventh and Eighth Respondents.

7 The Second Respondent were the appointed trustees.

8 Subsequently on 28 November 2011, the Second Respondent held an auction of the property, without advising the Applicants thereof and appeared to have sold the property to a third party for the sum of R520 000.00.

9 The Applicants contend that they had not been informed at any stage of such auction and the sale to the third party. The Applicants learnt of the auction when they saw the board on the said property and proceeded to contact their instructing attorney to resolve this issue. It was alleged by the Sixth Respondent that the property was sold for R520 000,00 to the third party.

10 The Applicants' attorney then requested their attorney to contact the Respondents. On 13 June 2012, the Second Respondent sent a letter to the Applicants' attorney advising that neither the Second Respondent nor the Third Respondent had any objection to ratifying the sale of the property to the Applicants.

11 Further on 19 June 2012 the nominated trustee, Cornemari Viljoen sent an e-mail to the Applicant's attorneys advising that they will not proceed with the sale of the property to any other party, and are prepared to ratify the sale to the Applicant provided consent is obtained from the Fifth and Sixth Respondents.

D. <u>APPLICANTS' CASE</u>

12 The Applicants contend that they are entitled to a rescission order on the following basis:

13.1 In terms of Section 149 (2) of the Insolvency Act:

"A Court may resort or vary an order made by it under the provision of this Act" ***<u>OR</u>***

13.2 In terms of the common law provided that sufficient cause for rescission is shown – namely:

- The Applicants must give a reasonable (and obvious acceptable) explanation for their default.

- The Applicants must show that their application is *bona fide.*

- The Applicants must show that on the merits they has a *bona fide* defence which *prima facie* carry some prospect that is:

13.3 In terms of Rule 42(1) of the Uniform Rules of Court where:

"A court may, in addition to any other powers it may have, mero motu or upon the application of any effected party rescind or vary an order or judgement erroneously sought or granted the absence of any party effected thereby".

The Applicants contend that they should have been notified of the aforesaid winding up as they were interested parties thereto. Moreover a material fact - that the property had been sold to the Applicants prior to the Winding Up order for a sum of R290 000.00 (two hundred and ninety thousand rand) should have been disclosed to the above Court granting the winding-up order.

13 The disclosure was material as the court would have *inter alia* considered:

13.1 whether the Applicants were indeed interested parties;

14.2 what the true value of the property would be. The court would consider the sale price obtained at the sale and execution open to the public and determine whether the property was sold for the value as allegedly set out in the winding up application;

14.3 whether the application was merely a sham in an attempt to allow the Applicants to stay on the property for a longer period of time with no real benefit to any of the creditors and to the prejudice of the Applicants.

14 The Applicants contend that the Third Respondent colluded with the Second Respondent in obtaining the winding-up order. Counsel for the Applicants requested this Court to have particular regard to a very similar matter previously before this Court. (Naidoo matter).[1]

15 In such matter the Court sanctioned and granted punitive order against the Third Respondent and reported their conduct to the Law Society.

16 It was submitted by counsel for the Applicants that the *modus operandi* in the previous matter had been adopted in this matter. The scheme is similar and essentially followed a pattern namely:

17.1 Application for the winding up of the Seventh and Eight Respondents was brought after the date of the Sheriff's auction and the sale of the property to the Applicants.

17.2 Schoonraad published a notice of the purported winding up of the Seventh and Eight Respondents in the Government Gazette and posted copies of Notice of Surrender to their creditors but did not post copies of the notices to the Applicants.

[1] Siva Prakash Naidoo and Another v Nana Abram Matlala N.O. and others 2012(1) SA 143 (GNP)

17.3 The Third Respondent applied to Court for the winding up of the estate of the Seventh and Eight Respondents without advising this Court of the fact that the property had been sold to Applicants in execution prior to such application and the Court granted the aforesaid winding up of the estate, unaware of such facts.

17.4 The Third Respondent failed to respond to correspondence and attempts to obtain information requested by the Applicants' attorney.

17.5 Neither the Second nor the Third Respondents responded to the Applicants' attorney regarding the status of the property, as well as details of a potential third party purchase.

17.6 The conduct of the Second and Third Respondents in indicating a ratification of the sale in favour of the Applicants was merely as sham.

17.7 In this matter, there appears no clear documentary evidence supporting the allegations that the property has been sold for a higher amount to a third party, nor that such sale has been proceeded with.

17.8 Neither is there evidence as to who has in fact proved claims against the said insolvent estate.

17.9 The very same firm of attorneys had consulted with the execution debtors prior to the Sheriff's sale and execution with the view of trying to set up a liquidation.

17 However, in the ***Naidoo*** matter the Court found that the actual value of the property amounted to substantially less than what was eventually referred to in the application for winding-up of the estate in which a higher value was apparently obtained by a so called valuator.

18 The valuation of the property were therefore questioned by the Honourable court. The court made the following findings:

19.1 Schoonraad Attorneys and the Liquidators had deliberately concealed the details of the sale by the Sheriff.

19.2 such deliberate concealment of the information pertaining to the sale and execution was fraudulent and clearly induced the court to grant the winding-up order.

19.3 that the execution debtors obviously wanted to use the sequestration process to negate the sale of the property to the purchasers. Had the property been transferred, they would have been no better off financially and would have had to vacate the property.

20 In this matter counsel for the Applicants specifically requested special cost orders not only against the sixth respondent but also against the Third and the Second Respondents on the attorney client scale in light of the *modus operandi* demonstrated in the ***Naidoo*** matter and adopted in this matter.

21 The Applicants sought further relief that the Court compel the Sheriff to perform in terms of the sale agreement.

22 In the support of such relief counsel relied on the legal submissions extracted from ***Warricker N.O. & Another v Senekal (2006) SZG PHC 134 (13 October 2006)*** set out below.

23 Horwitz AJ was of the view that S20(1)(c) of the Insolvency Act, was distinguishable to those in relation to the winding-up of companies as provided in the Companies Act, and held that the trustee did not step into the shoes of the Sheriff. He held the following:

"I have difficulty... with the notion that upon the winding-up of a company whose property the Sheriff has sold in execution but not yet transferred to the Purchaser, the Liquidator takes the place of the Sheriff in the execution of the agreement of sale. Granted, control with the property passes to the liquidator but I don't follow why that leads to the conclusion that the liquidator takes the place of the Sheriff in the contract in which the latter acted as principal. But even if I am incorrect on this score in relation to the liquidation of companies in my view that certainly is not the position in relation to the sequestration of an individual's estate, because in such an instance, the provisions of sub section 20 (1) (C) of the Insolvency Act supervene..."

"...As I have said the logic behind the trustee stepping into the shoes of the insolvent is clear but into the shoes of the Sheriff? I cannot see why in Law or logic that should be so. There is no statutory endorsement for accepting this. The Sheriff had an obligation to recover the purchase price of the property from the execution purchaser. Upon sequestration of the debtor's estate, Section 20 of the Insolvency Act obliges him to then pay the amount to the trustee. I cannot accept that the right of the trustee to review this amount for the Sheriff somehow vests them with the right, which the Sheriff otherwise had to enforce provisions of the sale against the execution purchaser".[2]

"I *conclude that the trustees did not succeed to the rights of the Sheriff under the agreement of sale. It follows that the trustees likewise do not acquire the Sheriff's*

[2] Warricker case, paragraphs 17-18

rights to claim payment from the defendant, the surety and co-principal debtor with the execution purchaser for payment of the purchase price". [3]

[3] Warricker case, paragraph 24

"It seems to me that the Trustees invoked incorrect provisions of the Insolvency Act for the purposes of implementing and enforcing the sale by the Sheriff to the execution purchaser thereof: the Sheriff had concluded that agreement with the fullest authority of law. Because insolvency then intervened, the Sheriff was precluded by operation of the provisions sub section 20(1)(C) of the Insolvency Act from performing under the agreement which he had concluded, unless the court directed otherwise. The trustee or the sheriff or the execution purchaser could have applied to court for the latter's authority but I cannot grasp how the trustees could invoke Section 80 bis and sub Section 18(3) to obtain authority to enforce an agreement which they did not even conclude."[4]

"'The authority under Section 80 bis and Sub-section 18(3), are on the one hand and that under sub Section 20 (1) (C) on the other hand' serve different purposes. The former serves to enable the trustee to sell property of the insolvent for the benefit of all his creditors. The latter provision, on the other hand, although it might hold benefit for the Insolvent estate and therefore creditors, also benefit someone in the position of the purchaser, who, having paid a deposit prior to the Sequestration of the Insolvent estate and ordinarily should therefore only be a concurrent creditor for a payment of that amount can receive the full benefit of payment. Whilst the Master can give authority for the former, only the court can give authority for the latter".[5]

[4] Warricker case – paragraph 26
[5] Warricker case – paragraphs 27

E. THE RESPONDENTS' CASE:

24 The Respondents contended that the trustees had the right to terminate the sale to the Applicants and correctly did so. Counsel relied on ***Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation) 1981(1) SA 171A at 182D-H (Glen Anil matter).***

25 Counsel submitted that the so-called "agreement to ratify the sale" referred to by the Applicants as "settlement" is an attempt to introduce new matter (as set out in their reply). It amounts to an abandonment of the existing claim and the substitution therefore of a fresh and completely different claim based on a different cause of action.

26 Even if consideration is given to such "settlement" it was conditional to the Fifth and Sixth Respondents' approval.

27 It was further contended that the Applicants need not had been informed as they are not affected by the insolvent estate. They effectively have no *locus standi.*[6]

[6] Parkview Properties (Pty) Ltd v Haven Holdings (Pty) Ltd 1981(2) SA 52T

28 The Applicants in effect only possess a concurrent claim against the insolvent estate and therefore have no right to reclaim performance.

29 Consequently therefore a trustee cannot be compelled by the purchaser to perform in terms of the contract. A trustee may elect to enforce or to repudiate the contract.[7]

30 Hence the liquidators elected to repudiate the agreement since it was satisfied that it obtained a better selling price than that tendered by the Applicants. The property was sold for R520 000,00.

31 The Applicants do not possess any rights to enforce the contract which they had entered into with Sheriff on 14 March 2011.

32 The voluntary winding-up of the estate of the Seventh and Eighth Respondents cannot be rescinded. It was submitted that they are in fact insolvent and the order be stayed. The main intention behind this rescission application was to enforce the sale which the Applicants concluded with the First Respondent. This has no bearing on the solvency aspect of the Seventh and Eighth Respondents.

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[7] Glen Anil matter *supra* at p182D-H

33 It was further submitted that a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously as contemplated by Rule 42 due to a fact not disclosed to the Court granting the winding-up order.[8]

34 The Applicants can furthermore not be entitled to an order for repayment of the amount of R136 142,86 as they only possess a concurrent claim for damages for non-performance of the insolvent's contractual obligations against the insolvent estate.

35 The Respondents contended that the Applicants reference to the ***Naidoo*** matter is inappropriate as not only are the facts distinguishable but fraud was not pleaded by the Applicants in their papers.

36 Moreover in this matter there is no evidence reflecting that there was an intention to defraud the Applicants.

F. <u>ANALYSIS AND FINDINGS</u>

37 This Court is requested to determine if the Applicants have made out a case for rescission. In order to succeed in such application, they would

[8] Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007(6) SA 87 SCA at 94C

have to establish they have *locus standi*. The Respondents contend that the Applicants cannot be considered to be interested parties as they do not have a direct and substantial interest.

38 This Court has been cautious in having regard to the ***Naidoo*** matter in considering this matter. However, it cannot be disputed that the facts are similar.

39 The distinguishable facts pointed out by counsel for the Respondent were namely:

(i) Fraud has not been pleaded in this matter.

(ii) The sale price at the second sale was less than was obtained at the first sale. This was deliberately concealed from the Court. In this instance the sale price at the second sale was much more than what was offered by the Applicants.

<u>Locus standi</u>

40 This Court finds that the Applicants have *locus standi*. The ***Naidoo*** matter is instructive - where Southwood J referred to ***Amalgamated Engineering Union v Minister of Labour 1949(3) SA 673A at 651 and United***

Diamond Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972(4) SA 410C at 414D-G which held:

"Whether the application be founded upon Rule of Court 42(1)(a)... common law relating to the non-disclosure of material facts... it is clear that it is only a limited class of persons who are entitled to bring an application of this nature. The Rule of Court specifically speaks of the application being brought by any party affected..."

"An Applicant for an order setting aside or varying a judgment or order of Court must show in order to establish locus standi, that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgments were given...".

41 Southwood J found that the Applicants had a direct and substantial interest in the sequestration proceedings. They had purchased the property and were entitled to demand transfer from the Sheriff. If they had received notice for the winding-up they could have intervened to oppose the application.

42 At this juncture it should be pointed out that the winding-up application and order was not before this Court. Both parties were also not in possession of such application. This Court was thus unable to have regard to what was placed before that Court.

43 Nevertheless what is certain is that the Applicants as interested parties to the winding-up proceedings were not informed thereof.

44 Consequently issue following whether this was a concealment of a material fact which the Court should have considered in the sequestration proceedings.

(i) <u>S149(2) of the Insolvency Act: Grounds for Rescission</u>

45 A sequestration order may be set aside in terms of Section 149(2) of the Insolvency Act. Section 149(2) may be invoked both where the order should not have been granted and where it was properly made but supervening factors made its rescission necessary or desirable.

46 Southwood J referred to ***Storti v Nugent and Others 2001(3) SA 783 W at 806D-G*** which set out the relevant principles the Court should consider namely:

> ***"(1) The Court's discretionary power confirmed by this section is not limited to rescission on common law grounds".***

(2) Unusual or special exceptional circumstances must exist to justify such relief.

(3) This section cannot be invoked to obtain a rehearing of the merits of the sequestration proceedings.

(4) Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for common law rescission.

(5) Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship...

(6) A Court will not exercise its discretion in favour of such an application if undesirable consequences follow".

(ii) Common Law Grounds

47 A sequestration order may be set aside at common law if the Applicants satisfy the requirement – that there is sufficient cause. This involves three essential elements:

(i) A reasonable and acceptable explanation for the default must be given;

(ii) The application is made *bona fide*;

(iii) On the merits there is a *bona fide* defence which *prima facie* carries some prospect of success.

(iii) <u>Rule 42(1)</u>

48 A sequestration order may also be set aside on the basis that the order was erroneously sought or erroneously granted in the absence of any party affected thereby.

49 Southwood J found that a judgment is erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have included the Judge if aware of it, not to grant the judgment.

50 It follows then that if material facts are not disclosed or if a fraud is committed, the order will be erroneously granted.

51 In ***Clegg v Priestly 1983(3) SA 950W at 953I to 954I*** it was held that an order granted in an application brought *ex parte* without notice to a party

who has a direct and substantial interest in a matter is an order is erroneously granted.

52 Having regard to the aforesaid this Court finds that the Applicants have made out a case for rescission on the basis that they were interested parties who were not given the notice of the *ex parte* winding up application.

53 Moreso the sale of the property to the Applicants was a material fact which should have been disclosed to the Court granting the winding-up order. That Court was required to determine whether the sale to the Applicants or the sale to the third party was more advantageous to creditors in the sequestration of the two Respondents.

54 Even if, as the Respondent contended – the purchase price was much more than what the Applicants paid for, it remains a material fact which the court seized with the winding-up application should have considered.

55 In light of the above, a case for rescission has been made and this Court need not make a finding whether fraud was committed.

Compel the sale of the property

56 Can the Court authorize the Sheriff to proceed with the sale of the property to the Applicants?

57 This Court was informed that there has been a hold on the sale of the property to the third party as a result of the pending litigation.

58 Insofar as the further relief sought by the Applicants, counsel relied on Horwitz JA's reasoning in the ***Warricker*** matter. The gist of their argument is that the trustees in an insolvent estate cannot step into the shoes of the Sheriff by taking control of the sale in execution which was administered by the Sheriff and which took place prior to the insolvent estate having been sequestrated. It is the Sheriff, as the principal, who has to enforce the provisions of the sale against the purchaser.

59 Horwitz JA in his reasoning drew a distinction between liquidation and insolvency. With regard to the sequestration of an individual's estate, the provisions of s20(1)(c) of the Insolvency Act applies.

Section 20(1)(c) states:

"The effect of the sequestrations of the estate of an insolvent shall be as soon as any <u>Sheriff</u> or messenger, whose duty is to execute any judgments given against an insolvent <u>becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs".</u>

60 Horwitz JA went on to reason that since section 20 obliged the Sheriff to pay over the amounts made to the trustees, it does not vest the trustees with the right to enforce the provisions of the sale against the ~~extension~~ execution purchaser.

61 This case is distinguishable from the ***Warricker*** matter. In that matter the trustees intended to acquire the Sheriff's right to claim payments from the Defendant, the surety and co-principal debtor from the execution purchaser for the payments of the purchase price.

62 In this matter, the issue whether the trustee could repudiate the sale to the Applicants and proceed with the sale to the third party.

63 It is appreciated and Horwitz JA correctly referred to the various authorities which endorses the Sheriff as an executive of the law, who concludes the agreement with the fullest authority of the law.[9]

64 It is trite law that once insolvency intervenes, the Sheriff in terms of s20(1)(c) is prohibited from proceeding with the execution, in this case the transfer of the property to the Applicants, unless the court otherwise directs.

65 It is also accepted procedure that in terms of the common law, on sequestration an immovable property sold by an insolvent but not transferred, passes to the trustee.[10]

66 The contract of sale is not terminated, modified or in any way affected by the sequestration of the estate, with the exception that the trustee cannot be compelled by any party to perform the contract.

67 The general principle is that a trustee may either enforce or repudiate the contract. A purchaser can therefore not claim transfer of the land even if he

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[9] Sedibe and Another v United Building Society and Another 1993(3) SA 671T; Hiralal v Naicker and Another 2009(1) SA 636D

[10] Harris v Trustee of Buissine 2 Menz 105

had paid the full purchase price. He thus only has a concurrent claim for damages for non-performance of the insolvent's contractual obligations.[11]

68 The facts reflects that substantial payment was made in respect of the property and the Applicants now request this court to order the sale with the Sheriff to proceed. The trustee was aware of the sale to the Applicants and there is correspondence reflecting her undertaking to proceed with such sale.

69 However, the objective behind a sequestration order is to ensure that there is an advantage to creditors.[12]

70 The advantage to creditors must be demonstrated with sufficient clarity ~~darity~~ and the expected dividend must be calculated. The primary consideration in deciding the question of benefits of creditors is whether all the creditors will receive a dividend.

71 A court would be inclined to refuse a sequestration if the application is not a genuine attempt to benefit the general body of creditors but that its real

[11] Glen Anil matter at 182D-H
[12] S6(1) of the Insolvency Act, ex parte Vane 1956(4) SA 616 O

objects is to award payment of debt, or to interfere with, impede or evade the rights of a creditor.[13]

72 It is further a negative indication that the debtor intentionally fails to make a full and frank disclosure of his affairs.[14]

73 It is not disputed that the property was once again sold for almost double the value that the Applicants paid. The Respondent contended that the trustee could repudiate the sale if it was not to the advantage of creditors.

74 This Court however cannot make a finding whether the R520 000,00 sale was genuine or merely a sham. This Court was has not had sight of the merits in the sequestration application and therefore is not in a position to make a finding of fraud.

75 By granting the relief sought by the Applicants i.e. to order the Sheriff to proceed with the sale, would be against the very objective of the insolvency legislation and the Court's discretion namely that there must be an advantage to the creditors.

[13] Fesi v ABSA Bank 2000(1) SA 499C
[14] Ex parte Swart 193(5) NLR 432

76 It is obvious that such Court was not *au fait* with all the material facts. Full disclosure was certainly not made regarding the debtor's affairs.

77 It is only once full disclosure is made can the Court exercise its discretion and determine if the sequestration is favourable for the estate. It would therefore be premature for this Court to accede to the Applicants' request. All the circumstances of the affairs of the debtor the Applicants and the third party has to be properly considered in respect of sequestrating the estate of the Seventh Respondent.

ORDER:

In light of the findings aforesaid, the following order is made:

1. the order sequestrating the Seventh and Eighth Respondents' estate under case number 6470/2011 is set aside.

2. the Sixth Respondent is ordered to pay the costs of this application.

H KOOVERJIE
Acting Judge of the High Court