IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

In the matter between: **CASE NO. 3869/2010**

FIRST RAND BANK LIMITED
t/a FIRST NATIONAL BANK **APPLICANT**

and

RAJENDARAN NARAINSAMY NAIDOO
Identity No.:
Married out of community of property to

VANEETHA MOODLEY
Identity No.) **RESPONDENT**

AND

In the matter between: **CASE NO. 8118/2010**

SOUTH AFRICAN BANK OF ATHENS **APPLICANT**

and

RAJENDARAN NARAINSAMY NAIDOO
Identity No.
Married out of community of property **RESPONDENT**

JUDGMENT Delivered on 14 February 2011

SWAIN J

[1] Before me are two applications, in which the objectives of both applicants are identical, that being the sequestration of the

respondent.

[2] In Case No. 3869/2010, First Rand Bank Limited has the advantage of having already obtained a provisional order of sequestration of the respondent's estate, before Hughes-Madondo A J on 07 December 2010. Before me First Rand Bank Limited (First Rand) seeks a final sequestration order and by agreement between all of the parties, the application by South African Bank of Athens (the Bank of Athens) awaits the outcome of the First Rand matter, which may be dispositive of the Bank of Athens matter.

[3] The respondent launched proceedings to consolidate both matters for hearing, but in the light of the agreement referred to, did not proceed with the application. I mention this solely for the reason that Mr. Harrison, who appeared for the respondent in both matters, accepted that in dealing with the First Rand matter I would be entitled to have regard to the affidavits filed in the Bank of Athens matter.

[4] The only ground upon which the respondent resisted the grant of a final order of sequestration, was that the applicant had failed to establish that it was to the advantage of creditors to sequestrate his estate because the respondent was hopelessly insolvent. The same defence did not find favour with Hughes-Madondo A J, who found that the facts showed that there was a not too remote

prospect, that as a result of investigation, assets other than those mentioned may be found, or recovered, to the pecuniary benefit of the applicant and other creditors.

[5] Mr. Harrison submits however that whereas the applicant bore the onus of establishing at the stage of a provisional order, that sequestration was *prima facie* to the advantage of creditors, at the stage when a final order was sought, the applicant bore the heavier onus of proving this issue on a balance of probabilities. His submission was that the applicant had failed to discharge this onus.

[6] The advantage I have however, is that I have before me not only the facts that were before Hughes-Madondo A J at the provisional sequestration stage, but also the facts disclosed in the Bank of Athens case, which are of relevance to the issue of whether the applicant has established, that it is to the advantage of creditors to finally sequestrate the respondent's estate.

[7] With regard to the issue of an advantage to creditors, I find the following words of Roper J, particularly relevant on the facts of this case

Meskin & Company v Friedman

1948 (2) SA 555 (W) at 559

'In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient.'

The following words of Leveson J are equally relevant

Hillhouse v Stott;
Freban Investments (Pty) Ltd. v Itzkin;
Botha v Botha
1990 (4) SA 580 (W) at 585 C – F

'….a Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that this will be so. That in turn, in my opinion, leads to the conclusion that the expression "reason to believe" means "good reason to believe". The belief itself must be rational or reasonable and, in my opinion, to come to such a belief the Court must be furnished with sufficient facts to support it. In a broad sense it seems proper to say, on the basis of the cases, that "advantage to creditors" ought to have some bearing on the question as to whether the granting of the application would secure some useful purpose. I express it thus because as Roper J has shown in the *Meskin* case, there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and enquiry under the relevant provisions of the Act might unearth assets thereby benefiting creditors.'

[8] In addition, it is also apparent that creditors "may often lack detailed knowledge of the debtor's affairs, but may be able to adduce sufficient facts to indicate that the debtor may be possessed of substantial assets that have been squirreled away and that may be discovered by an insolvency enquiry. If this is the case, advantage to creditors has normally been

established".

Mars The Law of Insolvency in South Africa 9th Ed pg 140 and authorities cited

[9] Of significance in this regard are striking disparities between a list of the respondent's assets and liabilities furnished by him to First Rand, in October 2009 (Annexure "FA9") and a list of the respondent's assets and liabilities, furnished by him to the Bank of Athens dated 13 October 2007 (Annexure "J").

[10] The respondent confirmed the accuracy of the statement of assets and liabilities furnished to First Rand, under oath at a Section 65 enquiry, conducted in the Magistrates' Court. As regards the statement of assets and liabilities furnished to the Bank of Athens, which is annexed to the applicant's founding affidavit, the respondent was content to deal with what was reflected thereon by simply stating that it was given to the Bank of Athens "at a time when the businesses in which I was involved and more particularly the values that were set out therein, were also based on current market values at that time before the property market took a substantial slump." He then went on to say "As can be noted, these were values given to the applicant based on a best case scenario". The affidavit in which the respondent made these remarks is dated 24 August 2010. It should be noted that the answering affidavit filed by the respondent in the First Rand matter is dated 21 May 2010.

[11] What is immediately apparent is that there are assets reflected on the schedule presented to the Bank of Athens, which are not dealt with by the respondent in the First Rand matter at all.

[12] The first item is that of "thoroughbred horses" which the respondent represented he was the owner of, with a value of R1M. In the First Rand matter the respondent raised the issue of horses, solely for the purpose of showing the existence of two further debts which he owed, to substantiate the hopeless state of his insolvency. The respondent stated that he owed the Breeders Association R132,890.82 for horses which he purchased as part of a syndicate and which had been sold. That the horses were allegedly bought as part of a syndicate contradicts the representation he made to the Bank of Athens. No details are furnished to explain how horses, which he valued at R1M in October 2007 are sold for an undisclosed amount, with the result that an amount is left owing to the Breeders Association in 2010.

[13] In addition the respondent refers to a debt owed to the Normandy Stud for stabling fees for a horse in the amount of R80,000.00. The respondent asserts that the trainer of the horse is exercising a lien over the horse, which again was bought by a syndicate. The respondent states that the account is however in his name, which may result in the debt being set off. Again no details are furnished by the respondent as to the price paid for the horse and why, if owned by a syndicate, he is liable alone for the stabling

fees. Again, no information is furnished by the respondent to explain whether the value of this horse forms portion of the estimate of R1M placed upon the value of the race-horses he owned in 2007.

[14] First Rand as a result, makes the valid point that the respondent's interest in horses was never disclosed by the respondent before this point and no mention was made of this interest by the respondent at the Section 65 A enquiry.

[15] In addition, in the statement of assets and liabilities furnished to the Bank of Athens, the respondent reflected as an asset, an immovable property situated at 291A South Ridge Road, Glenwood valued at R3.5M, owned by Fixed Point Investments (Pty) Ltd. The respondent represented that he had a fifty percent interest in a loan account with a value of R1.2M. As pointed out above, the respondent did not dispute that he still owned this asset, and in his affidavit in the First Rand matter, made no mention of it.

[16] An immovable property situated at 112 Lyndhurst Mews was reflected on the schedule supplied to the Bank of Athens valued at R650,000.00 encumbered by a bond of R250,000.00, producing a net value of R400,000.00. This asset was not reflected on the schedule furnished to First Rand, because as pointed out by the applicant in that matter, the property was sold to the Ted Naidoo Incorporated Trust on 02 July 2008 and transferred on 10 March

2009. The respondent, despite having represented to the Bank of Athens that he was the sole owner of the property, states in his affidavit in the First Rand matter, that the property was co-owned by the respondent and his wife. The respondent states that the property was sold to enable the respondent to pay the creditors of Tiger Steel, including the applicant. The respondent gives no details of what balance was raised after the sale of the house, but has furnished the sale agreement which reflects the sale price as R750,000.00. The agreement however is subject to the suspensive condition

"That a loan of R750,000.00 secured by a mortgage bond to be registered over the property is obtained by the purchaser on the normal terms and conditions of any registered Commercial Bank within thirty days of signature".

According to First Rand, the Trust in question possesses no assets other than the house and from a Deeds Office search conducted by the applicant, two bonds were registered over the property on 09 February 2009. The first was in favour of ABSA Bank in the sum of R495,000.00 and the second was in favour of the respondent for the sum of R290,000.00. I therefore put to Mr. Harrison that it appeared the suspensive condition had not been fulfilled, and that the respondent by way of a book entry, had loaned the Trust the balance of the purchase price. Mr. Harrison found himself unable to dispute the proposition which I had put to him. No details were furnished by the respondent of the terms of the loan that he gave to the Trust.

[17] In the statement of assets and liabilities furnished by the respondent to First Rand, he reflects a property situated at 19 John Geekie Road as having a nil value, by virtue of the fact that it is valued at R1.6M with a bond of R1.6M, including arrears of R400,000.00. However, in the schedule provided to the Bank of Athens, the property is reflected as having a net value of R700,000.00 by virtue of the property being valued at R2M with a bond of R1.3M. Due allowance being made for the respondent's statement that the value placed upon the property was a "best case scenario", the undertaking made by the respondent in his affidavit to furnish an up to date bond statement, as well as a valuation of the property before the hearing of the matter, becomes of vital importance. No such valuation, or statement, has been provided by the respondent and when I brought its absence to the attention of Mr. Harrison, no explanation was advanced for its absence. In addition, the respondent maintains in his affidavit that he is only a co-owner of this property, whereas in both of the schedules provided respectively to First Rand and the Bank of Athens, no such limitation is placed upon his ownership of the property.

[18] When all of the above is considered, I am satisfied that the applicant has established that there are reasons for thinking that as a result of enquiry under the Act, some assets may be revealed or recovered, for the benefit of creditors.

[19] Mr. Harrison submitted however, that the advantages to

creditors of enquiry and investigation could be equally satisfied without finally sequestrating the estate of the respondent, by directing that the respondent be interrogated in terms of Section 152 of the Insolvency Act. Mr. Harrison drew my attention to the severe consequences for the respondent in his practice as an accountant of being finally sequestrated. Regard being had to the critical shortcomings by the respondent in revealing the true and accurate state of his assets and liabilities, I do not consider this to be a viable alternative.

[20] Mr. Harrison also submitted, in what may only be termed "a last gasp" defence that the applicant had failed to comply with the peremptory requirements of Section 9 (4) (A) (b) of the Insolvency Act. This argument was raised before Hughes-Madondo A J and rejected and consequently need not detain me further.

[21] Mr. Harrison also asked that I order that the respondent's costs of opposition be included as costs of the sequestration in terms of Section 97 (3) of the Insolvency Act. In the light of the serious shortcomings in the respondent's affidavit referred to above, I am not prepared to make such an order.

[22] In the light of the conclusion I have reached in the First Rand case, it becomes unnecessary to deal with the merits in the Bank of Athens matter, which will simply be adjourned *sine die.*

The order I make is the following:

a) In Case No. 3869/2010 the estate of the respondent is finally sequestrated.

b) In Case No. 3869/2010 the costs of the applicant are to be costs in the sequestration of the estate of the respondent.

c) In Case No. 8118/2010 the application is adjourned *sine die.*

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K. SWAIN J

Appearances /…

Appearances:

CASE NO. No. 3869/2010

For the Plaintiff	**:**	Mr. A. Camp
Instructed by	**:**	J M S Incorporated C/o Gavin Price Attorneys Durban
For the 1st Respondent	**:**	Mr. G.M. Harrison
Instructed by	**:**	Attorneys Ebrahim Ameer Durban

<u>CASE NO. 8118/2010</u>

For the Plaintiff	**:**	Mr. A. Escott Watson
Instructed by	**:**	K G Tserkezis Inc. Durban
For the Respondent	**:**	Mr. G.M. Harrison
Instructed by	**:**	Attorneys Ebrahim Ameer Durban
Date of Hearing	**:**	07 February 2011
Date of Filing of Judgment	**:**	14 February 2011