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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA**

CASE NO: 022940/2022

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

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

JOHANNES JACOBUS NEL

Respondent

Neutral Citation:

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGEMENT

SENYATSI J

Introduction

[1] The applicant, a financial institution, seeks is an application for provisional sequestration of the respondent on the ground that the respondent has committed an act of insolvency.

Background

[2] The applicant is a judgment creditor of the respondent as contemplated in sections 9 and 10 of the Insolvency Act, 1936 (the Act"). The applicant avers that the respondent has committed an act of insolvency as contemplated in section 8(c) and (g) of the Act and that he is, on his own version, insolvent.

[3] The applicant has obtained a judgment debt of R39 400 679.35 against the respondent on 16 May 2022, and the amount remains unpaid. The judgment was obtained following the enforcement of suretyship agreement concluded in favour of the applicant and bound himself individually and jointly as co-principal debtor with Servigraph CC (now known as Xolisa General CC and in liquidation). Xolisa conducted a large-scale farming operation and was funded by the applicant. Litigation to recover the amount was institution against the respondent and resulted in the unsatisfied judgment which is the ground for the proceedings before me.

[4] The respondent, a chartered accountant and a businessman avers that he earns between R15 000 - R18 000 per month and that he can make arrangement to pay the applicant. He contends furthermore that it will not be for the benefit of creditors if his estate is sequestrated and placed in the hands of the Master. Consequently, so avers the respondent, if he gets sequestrated there is nothing the creditors will benefit.

[5] It is common course that the respondent disposed of his share to his matrimonial house valued at an aggregate amount of R3.2 million to his wife who is married out of community of property for an aggregate amount of R1.5 million. It is also not denied by the respondent that he is unable to pay the amount of judgment debt. Consequently, he is factually insolvent.

Defence and issue

[6] The respondent contends that as he is hopelessly insolvent due to the amount of the judgment debt against him, the general body of creditors will not derive any benefit from his sequestration. He contends that based on that ground, the

application seeking to sequester him should be dismissed with costs. The issue that should be determined is whether the defence raised by the respondent can be sustained.

Legal principles

[7] It is trite that for a creditor to succeed in an application for the sequestration of the estate of a debtor, it needs to establish that it has a claim which is not less than the sum of R100 which the debtor is unable to contest on reasonable and *bona fide* grounds, that the debtor has committed an act of insolvency and that there is reason to believe that it will be to the advantage of the creditors of the debtor that his estate is sequestrated.

[9] Section 12 of the Act provides as follows:

“Final sequestration or Dismissal of Petition for Sequestration

(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 such as is mentioned in subsection (1) of section nine; and
- (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.”

[10] The respondent contends that although the applicant was not obligated legally to conduct a credit risk assessment on him when he was required to stand surety and co-principal debtor with Xolisa for an aggregate amount of almost R40 million, he has never in his life had an estate worth that kind of money. He contends that

because he is hopelessly insolvent and that other than a payment arrangement from his monthly income, he has no assets.,

[11] In *Meskin & Co v Friedman*¹ the court held that the right to an investigation by a trustee which follows upon a sequestration is not sufficient to constitute the 'advantage' contemplated in insolvency legislation. The court stated the following:

"As the 'advantage' of investigation follows automatically upon sequestration, the Legislature must, in my opinion, have had some other kind of advantage in view when it required that the Court should have 'reason to believe' that there would be advantage to creditors. The right of investigation is given, as it seems to me, not as an advantage, but as a possible means of securing ultimate material benefit for the creditors in the form, for example, of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collusive claims. 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 the creditors. It is not necessary to prove that the respondent has any assets. Even if there are none at all, but there are reasons to believe that as a result of an enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient"

Roper J went on to state that²:

"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 that there are reasons for thinking that a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient."

[12] In *Hillhouse v Stott; Freban Investments Pty Ltd V Itzkin; Botha v Botha*³ , Leveson J said the following about the advantage to creditors:

¹ 1948 (2) SA 555 (WLD) at 559

² At page 559

³ 1990 (4) SA 590 (W) at 585C-F

“...a Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that that 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,”

[13] In *Dunlop Tyres (Pty) Ltd v Brewit*⁴ the Court referring to the *Meskin* decision quoted supra stated the following:

“It will be sufficient if the creditor in an overall view of the papers can show, for example, that there is reasonable ground for coming to the conclusion that upon a proper investigation by way of an enquiry under section 65 of the Act a trustee may be able to unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors.”

[14] Recently, in *Stratford and Others v Investec Bank Limited and Others*⁵ the Constitutional Court stated as follows:

“The meaning of the terms ‘advantage’ is broad and should not be rigidified. This includes the nebulous ‘not negligible’ pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or ‘not-negligible’ benefit in the context of a hostile sequestration where there could be many creditors is unhelpful.”

[15] I do not agree with the contention by the respondent that because of what he avers regarding the alleged lack of advantage to creditors as “he is hopelessly insolvent”, the Court should not favourably consider the application. The contention

⁴ 1999 (2) SA 580 (WLD) at

⁵ [2015] (3) SA (CC) para 44

losses sight of the fact that the applicant has no statutory authority to conduct an inquiry envisaged in the Act. The respondent and his colleague, Mr Naude oversaw Xolisa through which over R40 million funding by the applicant disappeared. Furthermore, his contention that the suretyship he concluded with the applicant had no substance as he had no assets whose value was equivalent to the amount of loans advanced to Xolisa. The argument lacks any legal and factual basis and stands to be rejected out of hand.

[16] More importantly, it is common fact that the respondent disposed of his share in the house jointly owned with his wife to her. It is not known at this stage whether the R1.5 million that it was sold to her for represented a fair value. This is so given that the transaction of such nature would not be a long arm transaction. The benefit of the inquiry will result in assessing all dispositions by the respondent immediately prior to his sequestration.

[17] I now consider the principles applicable to interpretation of a legislation and in particular, section 12 of the Act. In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*⁶, the Constitutional Court dealt with the interpretation of the provisions of a statute and stated the following:

“It is by now trite that not only the empowering provisions of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing ‘as a result of past racially discriminatory laws or practices’ in its setting of section 2 (1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as

⁶ [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10 BCLR 1027 (CC) at para 53

a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This so even when the ordinary meaning of the provision to be construed is clear and unambiguous.”

[18] More recently, in *Independent Institution of Education (Pty) Limited v KwaZulu Natal Law Society and Others*⁷ the Constitutional said the following on the purposive interpretation of statute:

“[1] It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution.

[2] The interpretive exercise is no exception. For, section 39(2) of the Constitution dictates that ‘when interpreting any legislation ... every court, tribunal, or forum must promote the spirit, purpose and objects of the Bill of Rights’. Meaning, every opportunity courts have to interpret legislation, must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself.”

[19] The Court continued and stated the following:

“[18] To concretise this approach, the following must never be lost sight of. First, a special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a

⁷ [2019] ZACC 47 at paras 1 and 2

word or expression in a statute, without straining the language, ‘promotes the spirit, purport and objects of the Bill of Rights’, then that is the meaning to be adopted even if it is at odds with any other meaning in other statutes.

[38] It is a well-established canon of statutory construction that ‘every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature’. Statutes dealing with the same subject matter, or which are in pari material, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.

[41] The canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to the words used therein. While maintaining that word should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where the words to be construed are clear and unambiguous.”

[20] In this Division, where a respondent raised the defence that it would not be to the advantage of the creditors to sequester him, my brother, Twala J held as follows in the purposive interpretation of the Act in *Mercantile Bank Limited, A Division of Capitec Bank Limited v Ross and Another*⁸ :

⁸ [2023] ZAGPJHC 435 para 25.

“Even if I am wrong in finding that the respondent’s estate should be sequestrated on the basis of the reasons stated above, it should also be borne in mind that the purpose of the Insolvency Act is not only for securing the pecuniary benefit to the creditors, but to protect the general body of the public from people who behave in this manner. It would be an absurdity to interpret s 12(2) of the act in a way that, even if the creditor has established and met the requirements of s 12 (a) and (b), but the debtor does not have any assets which when realised may yield a dividend to the benefit of the body of creditors, an order sequestrating the estate of the debtor should not be granted because the sequestration of the estate will not be to the advantage of the creditors. I say so because that would be a narrow and rigid interpretation of s 12(2) of the Act.”

[21] I agree with the judgment of my brother, Twala J. The respondent is a chartered accountant and is expected to know better when it comes to managing the loans advanced Xolisa by the applicant. He stood as surety for Xolisa. His sequestration should serve as a reminder to the public about his dealings. Xolisa failed under his watch together with his colleague Mr Naude. I find that there is advantage to the general body of creditors that he should be sequestrated and that the inquiry into his affair may yield some benefit given the known disposition that he has made. In my view, the concerted effort to avoid being sequestration is contrived because of the risks of not being able to serve as a director of any company in the future.

[22] Based on the authorities quoted above, I am satisfied that the applicant has made out a case for sequestration of the respondent.

Order

[23] Having heard the submissions by both counsel and having considered the facts and the law, the following order is made.

[23.1] That the estate of the Respondent be placed in provisional sequestration in terms of the provisions of the Insolvency Act, 24 of 1936;

[23.2] That a rule nisi be issued calling upon all persons interested to show cause, if any, to this Court within 20 (twenty) days of this order, why the estate of the Respondent should not be finally sequestrated and why the costs of this application on the attorney and client scale should not be costs in the sequestration;

[23.3] This order operates, with immediate effect, as a provisional order for the sequestration of the Respondent;

[23.4] The service of the order be **effected** by:

[23.4.1] Service on the Respondent at 3[...] S[...] M[...], 2[...] S[...] Street, W[...], R[...], Johannesburg, Gauteng;

[23.4.2] Service on the employees of the Respondent, if any;

[23.4.3] Service on every registered address that represents any of the employees of the Respondent, if any;

[23.4.4] Service on the South African Revenue Service; and

[23.4.5] Service on the Master of the High Court, Johannesburg.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 14 April 2023

DATE JUDGMENT HANDED DOWN: 13 May 2023

APPEARANCES

Counsel for the Applicant: Adv J E Smit SC

Instructed by: Edward Nathan Sonnenbergs Inc

Counsel for the Respondent: Adv Charles E. Thompson

Instructed by: Martin van Vuuren Attorneys