



THE REPUBLIC OF SOUTH AFRICA
**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 17496/2013

In the matter between:

MILA HAUSER

Applicant

Versus

MAUREEN QAZI

Respondent

JUDGMENT: 9 JUNE 2014

BOZALEK, J

[1] Applicant seeks a provisional order of sequestration against Respondent. In doing so she relies upon a claim in the amount of R1 661 485.00 which is partly evidenced by an annexed agreement of sale in which Respondent's former partner, a Mr Wayne Lee-Warden (*'Lee-Warden'*), sold to Respondent his 50% membership in the business conducted by Lyness Algemene Handel 7 cc which traded as The Orchard Farmstall and Restaurant in Grabouw.

[2] Clause 2 of the agreement provided that the purchase price would be the sum of R1 730 075.00 payable as follows:

'2.1.1 The purchaser shall repay the bond of R1 733 075.00 (one million seven hundred and thirty three thousand and seventy five rand) registered on Erf 603 Pringle Bay which is registered under the name of (Mila Hauser) ... at the monthly instalments as supplied by Standard Bank.'

[3] The agreement was signed by the seller ('Lee-Warden') and Respondent in her capacity as purchaser and concluded with the signature of Applicant under the phrase *'I accept the benefits and responsibilities conferred upon me in terms of this agreement'*. Applicant testified that she had subsequently been paid the amount of R111 590.00 but only in irregular payments which, she added, was clearly the result of financial difficulties in which Respondent (and her business) found themselves.

[4] In January 2013 Applicant's representatives made written demand of Respondent to pay the arrear bond instalments in the amount of R64 772.88 within 14 days failing which the full outstanding balance would become due and payable. This was presumably sent pursuant to the default clause in the agreement which provided that all amounts owing by Respondent to Applicant covered by the bond over the property in question would immediately become due and payable inter alia in the event of her committing any breach of the provisions and failing to remedy same within 14 days of date of written notice handed to her.

[5] Applicant's case is further that Respondent is either insolvent or has committed an act of insolvency in that she was indebted to Applicant in the amount of her claim and her business, The Orchard Farmstall, is in serious financial difficulties. These difficulties are also evidenced by the fact that Respondent had borrowed further monies from her in March 2013 in order to prevent a sale in execution in respect of outstanding rental owing by Lyness and the fact that in January 2013 the close corporation had filed for business rescue in terms of section 129(3)(a) of the Companies Act, 71 of 2008.

[6] It is trite that in order to secure a provisional sequestration order an applicant has to establish against the estate of the debtor a claim in excess of R100.00, that the debtor has committed an act of insolvency and/or is in fact insolvent and thirdly, that there is reason to believe it would be to the advantage of creditors if Respondent's estate is sequestrated. As was stated in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 in the context of a provisional winding up order, where on the affidavits there is a prima facie case (used in the sense of a '*balance of probabilities*') in favour of Applicant, then a provisional order of winding up should be granted.

[7] That case quoted with approval a line of cases establishing the above mentioned principle in liquidation and sequestration matters, principally *Provincial Building Society of South Africa v Du Bois* 1966 (3) SA 76W.

[8] As far as the advantage to creditors is concerned Applicant referred to material in the affidavits which suggested that some R200 000.00 worth of restaurant or dining equipment once owned by Respondent appeared to have been disposed of by her.

[9] Respondent opposes the provisional order of sequestration. However, her opposing affidavit is an extremely terse document consisting largely of bald denials of the various allegations and averments made by Applicant. Amongst the points made by Respondent are the contentions that Applicant was not a creditor inter alia in that she had failed to submit proof of having made any payments to Respondent; that Applicant was lying about her claim and that in proceeding with the application she was just being vindictive in that she is a close friend of Respondent's former partner, Lee-Warden, with whom Respondent had fallen out.

[10] In regard to the sale agreement evidencing Applicant's claim Respondent submits that it constitutes a credit agreement and is void in that should Applicant indeed have loaned the amounts she alleged, Applicant was not registered with the National Credit Regulator and her alleged loans and claims exceed R500 000.00. Furthermore, contends Respondent, Applicant had failed to comply with the provisions of section 129 of the National Credit Act.

[11] Respondent admits, however, that she and Lee-Warden had purchased the business of Lyness during June 2011 and that she had concluded the agreement of sale relied upon by Applicant. Respondent also confirmed that she had 100% of the

interest in Lyness and that she was no longer in possession of the R200 000.00 worth of movables referred to earlier.

[12] In argument on behalf of Respondent, Mr le Roux submitted that Applicant had made out none of the three requirements for a provisional sequestration order. His main point was, however, that Applicant was not a registered credit provider in terms of National Credit Act (*the NCA*) and therefore her claim, even if accepted, did not serve to establish her *locus standi*. It is to this point that I turn first.

[13] It is common cause that the monies advanced by Applicant exceeded the statutorily imposed limit of R500 000.00 stipulated by the NCA and that Applicant was not a registered credit provider. Mr Benade, on behalf of Applicant contended, however, that the provisions of the NCA were not applicable to the debt or the claim inasmuch as the credit agreement was not hit by the Act by virtue of an exemption created in section 4 for dealings between parties which were not at arm's length.

[14] Insofar as it is relevant, section 4 provides that the NCA applies to every credit agreement between parties dealing at arm's length. Sub-section 4(2)(b) expands on the meaning of arrangements between parties who are not dealing at arm's length and includes under (iv) any other arrangement – '*aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction*'.

[15] It is within this particular niche of the exemption that Applicant's seeks to place her credit agreement. In support thereof Applicant relies on the previous close personal relationship between her and Respondent both of whom are Dutch speaking and who became friends, a friendship which included Lee Warden, Respondent's former life and business partner. In further support of her case Applicant testified that Respondent often spent weekends with her at her home in Pringle Bay, that Respondent's mother stayed over at Applicant's house on some occasions when she visited Respondent from abroad and that she (Applicant) and Respondent had even spent a short holiday together during April 2011. Applicant annexed photographs of her and Respondent together on social occasions and testified that after Respondent and Lee-Warden purchased The Orchard Farmstall business during June 2011 and needed money to set up the business, purchase furniture and equipment and do renovations, she made loans to them and then continued doing so until they totalled an amount of R1 773mil. As Applicant stated *'this loan was always meant to be a transaction between two friends, as I was never part of the business'*. Applicant withdrew the monies which she loaned to Respondent for the business from her personal bond account. In the course of time the working and personal relationship between Respondent and Lee-Warden deteriorated which led to the agreement whereby Respondent purchased Lee-Warden's membership interest in the close corporation and concluded the sale agreement referred to earlier.

[16] That agreement, as described, clearly invests liability in Respondent for the repayment to applicant of the monies which she had previously loaned to the business and/or Respondent and/or Lee-Warden. It bears out Applicant's case in all material respects. Mr le Roux pointed to the fact that the agreement requires Respondent to pay the bond instalments on Applicant's property and argued that the Court could take judicial notice that such instalments contain an interest component. This may well be so and I am prepared to make that assumption but in my view that does not change the essential nature of the credit agreement as being that of dealings which were not at arm's length. Even though interest may well have been included in the instalments that was interest charged by and payable to the financial institution which granted the bond finance and in no way did it represent a profit or an improvement in the nett position of Applicant. Similarly, there is no dispute that Applicant had no share in the business and all that she stood to recover was the repayments of the loan which she initially made to Respondent and/or Warden and/or the business albeit that these repayments included interest levied on these monies by the bank from whom Applicant was borrowing the money at first instance.

[17] Respondent's affidavit, brief as it is, does not take serious issue with Applicant's version of the initial friendship and the basis upon which these monies were loaned. In the circumstances I have no difficulty in concluding that the agreement, a one-off agreement at that, was not an arm's length transaction and certainly not one in which the parties can be described as being independent of the

other or of concluding an agreement in which both parties were striving to obtain the utmost possible advantage out of the transaction.

[18] In the result I find that the credit agreement was exempt from the provisions of the NCA and that what in effect was a point in limine raised by Respondent must fail. Respondent did not seriously dispute the existence of the debt or claim and indeed could not do so. It stands in black and white in the agreement of sale and Applicant's allegation that only a small number of Respondent's repayments, which instalments soon ceased, were made cannot be seriously disputed. The provisions of the agreement's breach clause were invoked and it is clear that Respondent is unable or unwilling to make any further payments of the instalments. For good measure Respondent's business rescue application lists one of the liabilities of the close corporation as *'loan account M Hauser – R1, 7mil'*.

[19] This not being a friendly sequestration Applicant was not able to place much before the Court by way of a setting out Respondent's financial position. What is clear that Respondent has a liability of at least R1,6mil odd and an apparent inability to meet even monthly instalments of some R15 000.00 in reduction of this sum. Her principal asset appears to be her share in the business but, as set out above, that business appears to have been in financial difficulty for at least six months so much so that a business rescue application was launched at the beginning of the year. Evidence from Applicant regarding sales in execution involving the business being stopped at the last moment, and further smaller loans being made by her to

Respondent, contribute to the general picture of the latter experiencing a financial crisis. Most significantly, there is no explanation from Respondent as to why the payments by her of Applicant's bond instalments have ceased resulting in substantial arrears.

[20] Faced with the general picture of financial difficulties and a failure on her part to meet her financial obligations there is a complete silence from Respondent. She makes out no case that her business is in a healthy state, explains why she has ceased to make repayments to Applicant or states in detail or even general terms that she is financially solvent in that she can meet her obligations or that her assets exceed her liabilities. In these circumstances the approach approved in *Kalil v Decotex* (supra) and initially established in *Provincial Building Society of South Africa v Du Bois* (supra) finds application.

[21] With regard to the third requirement, namely, that there will be an advantage to creditors, apart from the evidence relating to the R200 000.00 worth of restaurant/kitchen equipment previously owned by Respondent but which she now states is no longer in her possession, a matter which could profitably be investigated by a trustee, it must be in the interests of Applicant and other creditors that a trustee take over the administration of Respondent's case. The facts proved by Applicant relating to Respondent's assets, namely her 100% interest in Lyness and the other material assets which she holds, or recently held, indicate there is a prospect, and one not to remote, that some pecuniary benefit would result to creditors on

sequestration. In this regard see the approach of Watermeyer J in *Hill and Co and Others v Ganie* 1925 (CPD) 242 at page 245. Furthermore, given the secrecy with which Respondent appears to be conducting her affairs, notwithstanding Applicant's material interest in them, the machinery which will come into play on insolvency will be beneficial to all creditors. This factor was discussed by Horwitz J in *Chenille Industries v Vorster* as follows:

'the Court must have regard, inter alia to the superior legal machinery which creditors acquire by sequestration, the right to control the collection, custody and disposal of all assets through their nominee, the trustee, the right to control similarly the sale of assets, the certainty that the insolvent cannot contract further debts and diminish the estate and the assurance that all creditors will be accorded the treatment prescribed by law in the division of the proceeds'

[22] The trustee will be in a position to liquidate Respondent's membership interest in the business and investigate whether she has dissipated any of her assets. Although Respondent disputes that the sequestration of her estate would be to the advantage of creditors, she advances no reasons for this submission.

[23] For these reasons I am satisfied that Applicant has made out at least a prima facie case for the granting of a sequestration order and for these reasons the following order is made:

1. *Respondent's estate is placed under provisional sequestration order in the hands of the Master of this Honourable Court;*
2. *A Rule Nisi is issued calling upon all interested parties to show cause on Tuesday, 8 July 2014, if any, to the above Honourable Court, as to why:*
 - 2.1 *Respondent's estate should not be placed under final a sequestration order and,*
 - 2.2 *Why the costs of this application should not be costs in the insolvent estate of Respondent*
3. *That service of the this order be effected by:*
 - 3.1 *By the sheriff of this Honourable Court, or his duly appointed deputy, on respondent;*
 - 3.2 *Prepaid certified mail on all known creditors of respondent with claims exceeding R25 000.00;*
 - 3.3 *Applicant's attorneys of record on the South African Revenue Services.*

L J BOZALEK
JUDGE OF THE HIGH COURT