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

Case number: 3621/2020
Reportable: YES/NO
Of interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

**THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA** Applicant
(Reg. No.: N[...])

and

**PHILIPPUS PRINSLOO PRETORIUS** Respondent
**(ID NO: 7[...])**

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| **JUDGMENT BY:** | MHLAMBI J, |
| **HEARD ON:** | 10 December 2020 |
| **DELIVERED ON:** | 12 March 2021 |

**MHLAMBI, J**

[1] On 22 October 2020 the applicant approached this court for an order on the following terms:

*"1.1 That the estate of the respondent be placed under final sequestration.*

*1.2 That the applicant's costs in this application be costs in sequestration.*

*1.3 In alternative to paragraphs 1 and 2 above:*

*1.3.1 That the respondent be placed in provisional sequestration in the hands of the Master;*

*1.3.2 That a rule nisi be issued calling on the respondent and any other interested parties to show cause to this Honourable Court on a date to be determined by the above Honourable Court why the respondent should not be placed under a final sequestration.*

*1.3.3 That this order be served forthwith on:*

*1.3.3.1 The respondent;*

*1.3.3.2 The respondent's employees, if any;*

*1.3.3.3 The Master of the High Court;*

*1.3.3.4 The offices of the South African Revenue Service.*

*1.4 That the applicant's costs in this application be costs in the sequestration.*

*1.5 Further and/or alternative relief."*

[2] The notice of intention to oppose was filed on 5 October 2020 but a notice of withdrawal as attorney of record was filed on 8 October 2020.The current attorneys filed a notice of entry as attorneys of record on 15 October 2020. On 22 October 2020, the application was removed from the roll by agreement between the parties and was enrolled for hearing on 5 November 2020. On that day, the application was postponed to the opposed roll of 10 December 2020 with certain directions as to the filing of the application for condonation and further documents.

[3] The respondent filed and served its documents on 4 December 2020 contrary to the court order of 5 November 2020. The application for condonation was opposed. In a nutshell, the respondent's failure to file the documents as per the court order was that the parties were still engaged in settlement talks. In the interests of justice and for purposes of the proper adjudication of this matter, I am of the view that the application for condonation for the late filing of the answering affidavit should be allowed as the parties also argued on the papers filed of record.

[4] The application is based on the provisions of section 9(1), 9(3)(a)(iv) and 10(b) of the Insolvency Act, Act 24 of 1936 (as amended) in that the debtor is in fact insolvent and there is reason to believe that it will be to the advantage of creditors of the debtor if his testate is sequestrated.

[5] It is common cause that the respondent was an active member of Eco Grain CC (hereinafter referred to as the principal debtor). The respondent's indebtedness to the land bank arose from various agreements concluded with the principal debtor. The facilities and loans were secured by, amongst others, a deed of suretyship entered into by the respondent and Grocapital Financial Services (Pty) Ltd, the latter having sold, ceded and delegated the rights, title and interest in and to its existing corporate debtors' book to the applicant in terms of a sale of book debts agreement during October 2011. The principal debtor successfully applied for voluntary liquidation during May 2020. A certificate of balance issued by Grocapital[1] indicated that as of 30 June 2020, the balance outstanding in respect of the working capital facility and the term loan account amounted to R 24 921 532.92. A letter of demand[2] was issued at the instance of the applicant on 7 August 2020 for the payment of the sum of R 24 921 532.92. The letter of demand was served by the sheriff on 12 August 2020.

[6] Based on the above, the applicant was of the view that the principal debtor, which had been voluntarily liquidated in the meantime, was totally unable to

[1] Annexure "ECO6" on page 169 of the Indexed papers
[2] Annexure "ECO7" at 170 of the indexed papers

satisfy the debt due to the applicant. The principal debtor's estate had an apparent shortfall of R 38 000 000.00 as indicated on the liquidators' report which was submitted to a first and general meeting of the creditors held on 12 August 2020.[3] The total value of the encumbered assets held by both the Trust and the principal debtor, of which the applicant held a continuing covering mortgage bond, was the amount of R 23 000 000.00.[4]

[7] In its answering affidavit, the respondent raised a preliminary point of lack of authority in that *ex facie* the contents of annexure "ECO2", it was apparent that the authority bestowed upon the deponent pertained to matters subsequent to sequestration, albeit provisional or final. As such, "*the authority did not pertain to the present scenario*."[5] The application should therefore be dismissed with costs on a scale as between attorney and client.[6]

[8] Annexure "ECO2"[7] is a power of attorney by the applicant authorising the deponent to the founding affidavit to represent the applicant and to appear before*, inter alia*, the Master of the High Court; to attend all meetings of creditors with regard to any claims which the Land Bank may have against any insolvent estate; sign all relevant documentation and declare under oath to that which may be required for the submission of and proving of the land Bank claims.[8]Save for the bare allegation that the deponent lacked authority, no facts were canvassed by the respondent that it was indeed so. The special plea is therefore dismissed for lack of substance.

[9] On the merits, the respondent pleaded that all of the properties of Eco Grain CC were bonded in favour of the applicant and were sold for the amount of R 15 065 000.00; R 10 000 000.00 of which was paid to the applicant as a provisional dividend.[9] The respondent's maximum exposure (so also the

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[3] Annexure "A" at 180 of the indexed papers; paragraph 8.12 of the founding affidavit; paragraph 89 of the answering affidavit.
[4] Paragraph 9.5 of the applicant's founding affidavit; paragraph 105 of the answering affidavit.
[5] Paragraphs 43-45 of the answering affidavit.
[6] Paragraph 45 of the answering affidavit.
[7] Page 67 of the indexed papers.
[8] Paragraphs 1-3 on page 68 of "ECO2".
[9] Paragraph 53 of the answering affidavit.

exposure of Eco Grain CC) was the amount of R 14 921 352.92.[10] The respondent denied that Eco Grain's debtors only amounted to R 1 237 008.43 as reflected on the liquidator's report and maintained that the applicant was informed on 26 August 2020 that there were two additional debtors whose debts were in excess of R 12 000 000.00.[11]

[10] According to the respondent, the two amounts owed by the debtors (R 1 237 008.43 *plus* R 12 000 000.00) and the amount of R 15 065 000.00, realised from the sale of the properties, totalled the amount of R 28 302 008.44. This amount was sufficient to extinguish Eco Grain's indebtedness to the applicant.[12] Furthermore, the applicant held mortgage bonds over all the Trust's property in the amount of R 14 000 000.00. The Trust had undertaken to retain the amount of R 14 921 352.92 in its attorney's trust account. This amount included the mortgage bonds to the value of R 14 000 000.00 and the difference between the debt and the mortgage bond in the amount of R921 352.92.

[11] Should the principal debtor not collect the R 12 000 000.00 owed by the debtors; the respondent suggested that the Trust should sell sufficient property to pay its debt. If the applicant were not content with such an arrangement, it was free to issue summons and*, "if judgment were granted, seek to enforce it through execution"*[13]. The applicant would likely be settled in full by the Trust from the proceeds of the assets over which it held mortgage bonds in the amount of R 14 000 000.00, besides taking into account the disputed R 12 000 000.00.[14]

Discussion

[12] In both oral and written submissions, the applicant moved for an order in terms of prayers 3 and 4 of the notice of motion*,* that is, the provisional sequestration of the respondent. The respondent did not deny that he was

[10] Paragraph 55 of the answering affidavit.
[11] Paragraph 57 of the answering affidavit.
[12] Paragraph 58 of the answering affidavit.
[13] Paragraph 69 of the answering affidavit.
[14] Paragraph 7 of the answering affidavit

unable to pay his debts which far exceeded his assets.[15] He admitted that he was insolvent[16] and that the debts that stemmed from the principal debtor had placed him personally in a precarious position.[17] The thrust of the respondent's defence to the application for sequestration was that his sequestration would not be to the benefit of the *concursus creditorum.*[18] On the contrary, it would be to the prejudice of the convergence of creditors as his liability to pay the debts would come to an end at sequestration.[19]

[13] The respondent owns several vehicles but stated that there was no equity in such vehicles as they were being financed. The only equity was in the firearms, the Ford truck and the Senwes members investment fund, the total of which was R 296 033.41. Apart from the applicant, he was also indebted to Business Fuel (Pty) Ltd in the amount of R 1 173 485.75 and Vleipan Boerdery and Huilsapan Boerdery in the amounts of R 4 207 050.97 and R 1 528 079.58, respectively.[20] The respondent's precise relationship with, and the circumstances surrounding these farms and the business are not clear. It is obscure how, when, for whom and why these big debts were incurred and whether there are corresponding assets to match these debts. The respondent is also a director of various entities whence he receives an income (though undisclosed). He is also a trustee and gets paid a trustee's remuneration. There is a dearth of particularity as regards these circumstances to enable a proper weighing up of all the advantages, indirect as well as direct, and find where the balance of advantage lies.[21]

The Legal requirements

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[15] Paragraphs 10.1.1 and 10.1.2 of the Applicants Founding Affidavit and Paragraphs 108 and 109 of the Answering Affidavit
[16] Paragraph 20 of the Answering Affidavit
[17] Paragraph 23 of the Answering Affidavit
[18] Paragraph 20 of the Answering Affidavit
[19] Paragraph 23 of the answering affidavit, in which the following was stated:" My sequestration would be to the prejudice of my concursus creditorum as appears more fully from my assets and liabilities, whereas if I am not sequestrated and I am able to make arrangements to pay my dues. Moreover, even if judgments are obtained against me, those judgments would last some 30 years, thus would afford my debtors ample time to recover monies and allow me time to pay the dues which in the event of a sequestration, would simply come to an end at sequestration."
[20] Paragraphs 13, 18 and 19 of the Founding Affidavit (Respondent)
[21] Meskin &Co v Friedman 1948(2) SA 555 (W).

[14] The main objective of a sequestration order is to secure the orderly and equitable distribution of a debtors' assets where they are insufficient to meet the claims of all his creditors.[22] An order for the sequestration of a debtor's estate is not an order for the enforcement of sequestrating creditors' claims and sequestration is thus not a legal proceeding to enforce an agreement. Where a provisional order for sequestration is sought, an applicant need to establish a prima facie case, whereas in the granting of a final order, the degree of proof required is higher.[23]

[15] In *Stainer v Bukes*[24], on a question whether it would be to the advantage of creditors to sequestrate, it was stated that the important factor was whether the creditors taken as a whole would benefit. In *Meskin*, *supra*, it was stated that the court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that that will be so. 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 benefitting creditors.[25] In *London Estates,*[26] the following was said: *" If no substantial estate is shown to exist, circumstances may yet establish a reasonable prospect, a prospect that is not too remote, that concealed assets will be found or others recovered. The mere fact that sequestration enables investigation of the insolvent's affairs is not sufficient: there must be additional facts establishing that not too remote possibility. This is the approach in Meskin's case, which, in the premises, should be followed. The conflict between that case and cases such as Awerbuch's case is in this respect also more apparent than real. It is difficult to understand how a 'reasonable cause for investigation' could be made out without showing that there is not too remote a prospect of the investigation having an advantageous result. Awerbuch's case may very well be read to say nothing more than this:*

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[22] Paragraph 1.2 Hockly's Insolvency Law 9th Ed, paragraph 1.2 on page 4; Walker vs Syfret NO 1911 AD 141

[23] Braithwaite v Gilbert (Volkskas Bpk Intervening) 1984 (4) SA 717 (W); Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others 1993(4) SA 436 (C); London Estates(Pty) Ltd v Nair 1957 (3) SA 591 (N).

[24] 19333 OPD 86

[25] Hillhouse v Stott; Freban Investments(Pty) Ltd v Itzkin; Botha v Botha 1948(2)SA 555 (W).

[26] Supra.

*an applicant need not show a likelihood of an asset being discovered or recovered".*

[16] The respondent's evidence is meagre and throws faint light on his financial state. Not much light has been shed about the activities surrounding the business and the farms and the nature of the transactions which resulted in the respondent's indebtedness to the other creditors. In *Stratford v Investec Bank Limited and Others*,[27]the court said: *"The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in Friedman. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment, except through sequestration; or that some pecuniary benefit will redound to the creditors."*

[17] Once the applicant for a provisional order of sequestration has established on a prima facie basis the requisites for an order, the court has a discretion whether to grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.[28] There are no such exceptional circumstances in this case to warrant the court to exercise its discretion in favour of the respondent. Besides, what weighs heavily against the respondent is that he has not been forthright and transparent in his disclosures of his income and expenditure or assets and liabilities. *In Amod v Khan*[29] the following was said: *"A debtor knows all about his own affairs and can easily prove the advantage of the creditors. On the other hand, the creditor has normally little knowledge of the exact position of the debtor; he probably does not know what creditors he has, nor the amounts he owes, nor the assets he possesses."*

[27] 2015 (3) SA 1 CC.
[28] FirstRand Bank v Evans 2011 (4) SA 597 (KZD) para 7.
[29] 1947(2) SA 432 at 438.

[18] In the premises, the applicant has discharged the burden of proof for the provisional sequestration of the respondent. I therefore make the following order:

**Order**

1. The respondent is placed under provisional sequestration in the hands of the Master;

2. The rule nisi is issued calling upon the respondent and any other interested parties to show cause to this court on 15 April 2021 why the respondent should not be placed under final sequestration;

3. This order be served forthwith on:

   The respondent;

   The respondent's employees, if any;

   The Master of the High Court;

   The offices of the South African Revenue Services.

4. The applicant's costs in this application be costs in the sequestration.

**JJ MHLAMBI, J**

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| Counsel for the applicant: | Adv. R Van Der Merwe |
| Instructed by: | Badenhorst Attorneys |
| | 16 Paul Farrel Crescent |
| | Bloemfontein |
| Counsel for the respondent: | Adv R Sander |
| Instructed by: | FJ Senekal Inc. |
| | 42 President Steyn Street |
| | Westdene |

Bloemfontein