IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: 8623/2013

In the matter between:

THE SOUTH AFRICAN BANK OF ATHENS **APPLICANT**

vs

JUNAID MUHAMMED **FIRST RESPONDENT**

AMINA BIBI GHOUSE **SECOND RESPONDENT**

ORDER

In the result, I make the following order:

1. The Respondents are provisionally sequestrated and their estate is placed in the hands of the Master of the High Court.

2. That a rule nisi do hereby issue calling upon the Respondents and all interested parties to show cause, if any, to this Court on the **31st** day of **July 2014** why their joint estates should not be finally sequestrated.

3. That this order shall serve as an order for the provisional sequestration of the Respondents.

4. A copy of this provisional order is to be published once in the Government Gazette and once in the Daily Newspaper published and circulated in the greater Durban area.

5. A copy of the provisional order is to be served upon:

    a. The Respondents;
    b. The Master of the High Court;
    c. The South African Revenue Services

6. The costs of this application be costs in the sequestration.

JUDGMENT

DATE DELIVERED: 20 JUNE 2014

NDAMASE, A.J:

A. INTRODUCTION

[1] The Respondents concluded a home loan agreement with the Applicant on 19 April 2011 in an amount of R1 300 000.00 which was secured by means of a first covering bond registered over the property known as "*ERF […] Q[…] Township Registration Division FT, Province of KwaZulu-Natal*", which property is registered jointly in their names.

[2] They, on the same date, stood as sureties for and co-principal debtors in favor of the Applicant on behalf of their company, Issman Packaging (Pty) Ltd ("the Principal Debtor"), in terms of which the Applicant afforded to the Principal Debtor overdraft facilities.

[3] When the Respondents breached the terms of their home loan agreement, the Applicant addressed a notice in terms of section 129 of the National Credit Act 34 of 2005 ("the NCA").

[4] In response thereto, the Respondents chose not to make use of the debt relief options provided for by the NCA, but directed a written proposal to the Applicant to settle their outstanding arrears under the credit agreement over a period of nine (9) weeks. The proposal was however rejected by the Applicant.

[5] Subsequently, the Principal Debtor was indebted to the Applicant in the amount of R732 921.96. It is this overall indebtedness, being the outstanding balance on the mortgage bond together with the Principal Debtors' indebtedness to the Applicant that gives rise to the present application for provisional sequestration proceedings of the Respondents' joint estates.

B. APPLICANT'S VERSION

[6] The Applicant's case is based on the following, that:

6.1 the Respondents have committed an act of insolvency in terms of section 8(g) of the Insolvency Act 24 of 1936 ("the Act") by making a written proposal to settle their outstanding debt over a period of time; and

6.2 the estates of both Respondents are factually insolvent.

[7] The Respondents in their replying affidavit reject the Applicants application on several grounds and aver that:

7.1 their written response to the Applicant's section 129 notice by e-mail does not constitute an admission on their part of the inability to pay their debts but that it was a *bona fide* response to the section 129 notice in line with the provisions of the NCA.

7.2 the Applicant was not correct in including the debt due by the Principal Debtor into their liabilities for the purpose of working out their net worth in order to arrive at the solvency test. In fact in their replying affidavit, the Respondents aver that, had the Applicant communicated its rejection of the written proposal within the prescribed ten day period in

terms of the NCA, the Respondents would have timeously referred the matter to a debt counsellor.

7.3 the Respondents further object to the Applicant establishing the Respondents' "insolvency" by reference to the assessment of their assets and liabilities which the Applicant used as a basis of granting them the home loan in 2011 and relying on the amounts reflected therein which are in their view not necessarily correct.

[8] It is accordingly the Respondents' submission that the Applicant has not established insolvency on a *prima facie* basis.

C. PROVISIONAL SEQUESTRATION

[9] The Court, in terms of section 10 of the Act has a discretion to grant an order sequestrating the Respondents' estates provisionally if it is of the opinion that the Applicant has *prima facie* established against the Respondents the following three elements:

9.1 a liquidated claim of not less than R100.00;

9.2 the Respondents committed an act of insolvency OR are insolvent; and

9.3 there is reason to believe that it will be to the advantage of the Respondents' creditors if the estates of both Respondents are sequestrated.

[10] The Respondents' indebtedness to the Applicant, the cause of action and nature of the Applicant's claim, appears to be common cause. Hence the first element in 9.1 *supra*, is satisfied.

D. ACT OF INSOLVENCY

[11] Section 8 of the Act lists certain conduct by the debtor which constitutes an act of insolvency.

[12] Section 8 (g) of the act reads as follows;

> "a debtor commits an act of insolvency if he gives notice in writing to anyone of his creditors that he is unable to pay any of his debts"

[13] The Applicant avers that the Respondents written proposal to settle their indebtedness over a period of time constitutes notification by the Respondents that they were not in a position to pay in accordance with their commitments under the home loan agreement and in accordance with their contractual undertakings. Accordingly, such conduct in the Applicant's view constitutes a clear indication of their inability to pay their debts in accordance of section 8(g) of the Act.

[14] In support of its contention, Counsel for the Applicant relied on the decision of *First Rand Bank Ltd v Evans 2011* (A) SA 597 (KZD) where a debtor notified his creditor that he has applied for debt review and intends to pay his debts in accordance with a rearrangement order under section 87 of the NCA. Wallis J, as he then was, held that such a notification

amounted to giving notice by the debtor that he is unable to pay his debts and is therefore an act of insolvency as envisaged by section 8(g) of the Act.

[15] Relying upon the above case, Applicant's counsel further contended that the proper approach to adopt in determining whether such proposal constitutes a notice of inability to pay in terms of section 8 (g) is to consider how it would be understood by a reasonable person of the creditor receiving the letter.

[16] In the present case, the Respondents' counsel argued that the Respondents did not send a proposal informing the Applicant of their inability to pay nor could the mere advancement of such a proposal be elevated to such an inference. Accordingly, she argued that the written proposal to settle debt over time could not be constituted as an inability or unwillingness to pay any indebtedness legally due.

[17] What is clear from the above case is that it is now trite law that debt review proceedings in terms of the NCA, including payment proposals made to creditors, do not bar the Applicant from applying for the sequestration of the Respondents, provided that the requirements of the Act are met.[1]

[18] It is my view that whilst the proposal did not contain the actual words "*inability or unwillingness to pay*", when one looks at the overall intention of

[1] *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA). See also *Investec Bank Ltd and Another v Millenium and Another* 2010 (1) SA 265 (GSJ) and *First Rand Bank v Evans supra.*

the Respondents in reference to their own version, that *"if the Applicant had timeously communicated its intention to reject their written proposal, they would have approached a debt counsellor"* as an option available to them in accordance with section 129 notice. Accordingly, it cannot be denied that their ultimate intention was to approach a debt counsellor if their proposal was not accepted by the Applicant. It is only debtors who are unable to pay their debts who either approach creditors proposing an alternative mechanism to settle their indebtedness or who make use of the statutory debt relief mechanism afforded by section 129.

[19] I agree with the reasoning of Wallis J, as he then was when he stated that the purpose of an application for debt review is to obtain a declaration that the debtor was over indebted because that is always the purpose for debt review.

[20] In reaching his conclusion above, he expressly approved the reasoning of Scott J in Standard Bank of SA Ltd v Court 1993 (3) SA 286 (C) at 293 B-G;

> "A debtor who gives notice that he will only be able to pay his debt in the future gives notice in effect that he is *'unable to pay"*". The request for a time to pay a debt which is due and payable will, therefore, ordinarily give rise to an inference that the debtor is unable to pay a debt and such request contained will accordingly constitutes an act of insolvency in terms of section 8(g) of the Act."[2]

[2] *First Rand Bank v Evans supra* at 604 para B

[21] Accordingly, I am of the view that the Applicant has proved the requirement for section 8(g) of the Act and the written proposal to the Applicant constitutes proof of the Respondents inability to pay their debts in accordance with their commitments under the loan agreement.

[22] As Counsel for the Applicant in his heads of argument and in his argument before court, chose to confine his arguments to one based on "commission of insolvency", it follows that there is accordingly no reason to consider the alternative leg of the enquiry of the second element *supra* namely, "act of insolvency".

[23] I will however mention that had the Applicant confined its case solely upon "actual insolvency", to prove the second element of the test, my decision would have favoured the Respondents. I say this because I find the Applicant's reliance on the Respondents' statement of assets and liabilities in its current unsubstantiated state as being problematic and is further disputed by the Respondents. The dispute is one of fact and it is material. As was correctly stated in the case of *Standard Bank of South Africa Ltd v Van Zyl and Another*[3], it is trite "that generally speaking, where material disputes of fact arise in motion proceedings the matter must be decided on the version advanced by the Respondent, unless the dispute concerned is not real, genuine or *bona fide*, or whether the Respondents' allegations or denials are "so far fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (*Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd*[4]*)".*

[3] (6112/2009) [2009] ZAWCHC 157 (23 October 2009).
[4] 1984 (3) SA 623 (AD) at 634 H to 635 C.

E. ADVANTAGE TO CREDITORS

[24] The Applicant at this stage of the third element also has the *onus* to merely make out a *prima facie* case.

[25] The Applicant avers that it is clear that the Respondents are unable to pay their debts therefore there is good reason to believe that there is some advantage to the creditors of the Respondents.

[26] In my view, the fact that the Respondents own immovable properties indicates that there are reasonable grounds for concluding that upon an investigation of the Respondents affairs there is reason to believe that there will be a pecuniary benefit to the Respondents' creditors.

[27] I am accordingly of the view that the Applicant has discharged the *onus* of establishing that there is reason to believe that the provisional sequestration will be to the advantage of the creditors.

F. DISCRETION

[28] It is trite that once the Applicant for a provisional order of sequestration has established on a *prima facie* basis the requisites for such an order, the Court has a discretion to grant the order and it would seem that only in the existence of special or unusual circumstances that the Court would exercise its discretion in favour of the debtor.

[29] In the present case, the Respondents do not place any form of evidence to show that they are able to pay their debts. They do not make out any strong case to prove that they are financially sound and that their assets exceed their liabilities fairly valued and assessed.

[30] I am in agreement with Wallis J, as he then was, when he states that

> "A person who claims that they are solvent and for that reason that they should not be sequestrated, should be able to establish this by way of acceptable evidence."[5]

[31] The above point was taken further by Wallis J, when he quoted the words from Innes CJ in *De Waardt v Andrew and Thienhause Ltd:*

> *"…Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities'. To my mind the best proof of solvency is that a man should pay his debts…"*

[32] Overall I am satisfied that the Applicant has made out a *prima facie* case for provisional sequestration of the Respondents' estates. Accordingly I exercise my discretion in the Applicant's favour.

G. ORDER

[33] In the result, I make the following order:

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[5] *First Rand Bank v Evans supra* page 610 para E-F

1. The Respondents are provisionally sequestrated and their estate is placed in the hands of the Master of the High Court.

2. That a rule nisi do hereby issue calling upon the Respondents and all interested parties to show cause, if any, to this Court on the **31st** day of **July 2014** why their joint estates should not be finally sequestrated.

3. That this order shall serve as an order for the provisional sequestration of the Respondents.

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    a. The Respondents;
    b. The Master of the High Court;
    c. The South African Revenue Services

6. The costs of this application be costs in the sequestration.

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Ndamase, A.J.

APPEARANCES

FOR THE APPLICANT:	Adv P Combrink, instructed by KG Tserkezis, c/o Stirling Attorneys in Durban.
FOR THE RESPONDENT:	Adv U Lennard, instructed by Lockhat & Associates, Durban.
Date of judgment reserved:	26 February 2014.
Date of judgment delivered:	20 June 2014.