IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 757/2016

In the matter between:

HOLLARD LIFE ASSURANCE COMPANY LIMITED
trading as HOLLARD LIFE (Registration No: 1993/001405/06) Applicant

and

SANJAY CHETTY (Identity No: …) Respondent

JUDGMENT

HENRIQUES J

Introduction

[1] This is an opposed sequestration application. After hearing the submissions of the parties' representatives on 17 February 2017, I granted a provisional sequestration order and indicated that my reasons would follow. These are my reasons.

Background facts

[2] The applicant instituted these proceedings against the respondent in May 2016, seeking the provisional sequestration of the respondent in terms of s 8(b) and s 8(d) of the Insolvency Act 24 of 1936 ("the Act") and the attempts the respondent made to compromise his indebtedness with the applicant.

[3] On or about 28 January 2013, the applicant instituted action in the Gauteng Division, Pretoria, against the respondent, an insurance broker,[1] for payment of the sum of R 119 688 for broker commission paid in advance but not earned. Such action, I am advised, is presently pending between the parties. During litigation, cost orders were obtained against the respondent. The applicant has attempted to execute in respect of an amount taxed in its favour. The sum involved in respect of the taxation is the sum of R 3 131.66 and a sale in execution was arranged for September 2015.

[4] Pursuant to an attachment by the sheriff, interpleader affidavits were filed by L. J. Snyman[2] and Shelika Khelawan.[3]

[5] *Ms. Khelawan* stated under oath that she was employed on a temporary basis

[1] The respondent traded in his personal capacity and also under the name Everton Financial Strategies.
[2] Pages 82 and 83 of the indexed papers.
[3] Pages 86 to 88 of the indexed papers .

at Everton Financial Strategies and the items attached by the sheriff were her personal belongings and did not belong to the respondent. As a consequence of the interpleader affidavits, the sale did not proceed on 15 September 2015 and was cancelled. As at the time of the opposed application, being 17 February 2017, the taxed amount together with legal costs remained unpaid.

[6] It is common cause, and it was not an issue raised by the respondent in either his preliminary answering affidavit or by *Mr Deoduth*, who appeared for the respondent at the hearing of the matter, that there had been non-compliance with any of the procedural requirements in terms of the Act.

[7] It is also not disputed that the applicant is a creditor as envisaged in s 9(1) of the Act.[4]

[8] In terms of s 10 of the Act, a court may make an order of provisional sequestration in respect of the estate of a debtor if the court is of the opinion that, *prima facie*:

[8.1] a creditor has established against the debtor a claim such as is mentioned in subsection 1 of section nine; and

[8.2] the debtor has committed an act of insolvency or is insolvent; and

[4] Section 9(1) of the Act reads as follows:
'A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.'

[8.3] there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated.

Issue

[9] The issues for determination in this application are whether:

[9.1] the applicant is entitled to an order of provisional sequestration either in terms of s 8(b) and / or s 8(d), alternatively, whether or not the respondent has committed an act of insolvency or is factually insolvent; and

[9.2] whether sequestration will be to the advantage of the creditors of his estate.

[10] When the matter initially served before the court, the respondent filed a preliminary answering affidavit and sought leave to file a more comprehensive affidavit. No such further affidavit has been filed.

[11] In the initial answering affidavit, the respondent disputed the amount of his indebtedness to the applicant. He indicated that as he had continued in his employment as a financial broker, he has been able to, from policies written up, liquidate his indebtedness to the applicant in the sum of R 60 000. In addition, he submitted that an order of provisional sequestration would not be to the advantage of his general body of creditors, as the applicant had not made any allegations in respect thereof in its papers.

[12] The only assets which he owned was an immovable property over which there were two (2) mortgage bonds registered, the value thereof exceeding the value of the property. As a consequence, it would only be secured creditors who would be paid and there would be no advantage to concurrent creditors as there were no assets against which monies could be recovered to settle his debts.

[13] The respondent reserved his right to deliver a comprehensive opposing affidavit together with documentary evidence once he was in a position to do so. Among the reasons he submitted for not being in a position to do so, was that he was involved in a dispute with his former attorneys of record who exercised a lien over his file.

[14] At the hearing of the opposed application, *Mr Deoduth* indicated that his instructing attorneys had received instructions to tender payment of the taxed amount together with legal costs, and that a cheque was available at court for immediate payment. As a consequence, because the amount in the action was disputed, the applicant would not be entitled to an order of provisional sequestration.

Analysis

[15] Ultimately, the question which this court has to decide, in my view, is whether or not the amount claimed by the applicant in the action for broker commission advanced is disputed or not? If it is not, then the applicant is entitled to an order of sequestration, provided it can demonstrate advantage to creditors.

[16] If one considers the annexures to the founding affidavit, it would appear that the amount is not disputed. I say so for the following reasons. If one has regard to the contents of annexure "JVN6", an e-mail was sent on 31 July 2013 by the respondent's (former) attorney to the applicant's attorneys of record. It is apparent therefrom that the respondent admitted an indebtedness to the applicant in the sum of R 100 439.83. A proposal is contained in such e-mail which reads as follows:

> 'We refer to our without prejudice telecon dated 30 July 2013.
>
> We referred to your summons dated 24 January 2013 were out client was indebted to Hollard Life Assurance for an amount of R119 688.00. (One hundred and nineteen thousand six hundred and eight rands).
>
> Our client has provided us with a commission statement dated 27 March 2013 where it reflects that our client is presently indebted to Hollard Life for an amount of R100 439.83 (one hundred thousand four hundred and thirty nine rands and eighty three cents.
>
> It is our understanding that as our client "signs up" new clients the debt is being liquidated.
>
> We propose that we hold our file in abeyance until the entire amount is liquidated or alternatively our client is willing to satisfy this debt by paying an amount of R2500.000 per month.' [5]

[17] Subsequently, on 26 August 2013, a full and final settlement figure was is requested.[6]

---

[5] Page 89 of the indexed papers.
[6] Page 90 of the indexed papers.

[18] On 15 August 2013, a further letter is sent on a "without prejudice" basis in which a tender was made to pay 'R 10 000.00 per month towards the capital, interest and costs the latter being either taxed or agreed with the first instalment being the 15th October 2013'. [7]

[19] On 29 August 2013 an e-mail was exchanged which reads as follows:

> 'We advised that we requested a full and final settlement figure on the 26 August 2013. We received an email on the 27 August 2013 with the capital amount of R119 688.00.
>
> We attach a copy of our clients commission statement dated 27 March 2013 reflecting an amount of R100 439.83.'[8]

[20] Further correspondence is exchanged on 22 August 2015. An e-mail is sent by one Shelika Khelawan to the applicant's attorneys of record. The contents of the e-mail record the following: [9]

> 'I refer to the abovementioned matter:
>
> 1. A letter of demand or summons was not received by us / Sanjay Chetty.
>
> 2. We have received the invoice from our appointed attorneys and informed them of our current financial situation.
>
> 3. Due to the nature of our business (insurance), we have had numerous lapses which resulted in large commission clawbacks. This is something we unfortunately cannot control.

[7] Page 91 of the indexed papers.
[8] Page 92 of the indexed papers.
[9] Page 97 of the indexed papers.

4. We do not intend on shirking this responsibility, however due to not receiving a commission from the relevant insurance companies in the past 5 months, we unfortunately could not meet this payment.

We apologise for the delay in responding to your email, however please advise if you would accept payments split over two (2) months as at this point, due to our financial situation, we cannot settle in full.

Part payment will be done by 31 August 2015 and the remainder will be settled in full before 30 September 2015.

I trust the above to be in order and invite you to contact me if you require further clarification.'

[21] Subsequently and on 4 September 2015, presumably after the sheriff had affected the attachment, Shelika Khelawan sent an e-mail to Carolyn at the applicant's attorneys of record which reads as follows:

'Dear Carolyn

As discussed with Mr. Sanjay Chetty, please advised us on the amount we need to settle, to stay the sale in execution.

Thanking you

Regards,

Shelika Khelawan.'

[22] In his heads of argument and at the hearing of the matter, *Mr Deoduth* submitted that the only claim which the applicant has is the one for the taxed costs.

[23] He submitted that the amount claimed by the applicant for broker commission in the action is the subject of pending litigation and is disputed. In addition, the e-mail of July 2013 did not amount to an unequivocal acknowledgement of indebtedness. *Mr Deoduth* submits that in none of the correspondence referred to did the respondent unequivocally acknowledge his indebtedness in the amount claimed in the summons. Further, the communications were marked "without prejudice" and constituted *bona fide* settlement negotiations and therefore, I could not have regard to same.

[24] The Supreme Court of Appeal has considered the very issue raised by *Mr Deoduth* in relation to the admissibility of the correspondence referred to earlier on in this judgment. In *Absa Bank Ltd v Hammerle Group*[10] the court held that the correspondence exchanged between the parties constituted an unequivocal acknowledgement of indebtedness by the respondent and showed that the respondent was unable to pay its debts, and as a consequence was commercially insolvent. In addition, the court was of the view that where a party concedes insolvency in correspondence written "without prejudice", an exception exists to the general rule that negotiations between parties, which are undertaken with the view to settlement of the disputes, are privileged from disclosure.

[25] At paragraph 12 of the judgment, the court held the following:

> 'In my view the contents of this letter again serve, not only as an unequivocal acknowledgment of indebtedness by the respondent, in the amount claimed under the loan agreement, to the appellant. It also shows that the respondent is unable to

[10] 2015 (5) SA 215 (SCA).

pay its debts and is, in consequence, commercially insolvent. The respondent contended that the letter was written with a view to settling a dispute and was as such inadmissible. It accordingly applied that the letter be struck out, which application was granted.'

[26] At paragraph 13 the court went on to say the following:

'It is true that, as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest. A concursus creditorum is created and the trading public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged.'[11]

[27] In my view, if one has regard to the correspondence exchanged between the parties, the following is evident:

[27.1] the respondent unequivocally acknowledges an indebtedness to the applicant for broker commission;

[27.2] the amount appears to have been compromised by the parties;

[11] The Supreme Court of Appeal confirmed that this was the principle enunciated in *Absa Bank Ltd v Chopdat* 2000 (2) SA 1088 (W) at 1092H – 1094F which was subsequently affirmed in this division in *Lynn & Main Inc v Naidoo & another* 2006 (1) SA 59 (N) paras 23 to 24.

[27.3] despite undertakings to settle his indebtedness in instalments of R 2 500.00 per month and subsequently in two (2) payments, the respondent has failed to do so. The letter written on behalf of the respondent clearly acknowledges that he is insolvent and unable to pay his debts and “further compromises the compromise concluded” by tendering to make payment in two (2) instalments. None of these tenders of compromise have been complied with;

[27.4] I must thus conclude that payment of the taxed amount would not have non-suited the applicant as there has been a compromise and an unequivocal acknowledgment to pay the amount of broker commission.

[27.5] the respondent has committed acts of insolvency as envisaged in terms of the Act and is insolvent;

[27.6] in addition, the taxed costs are in respect of a bill taxed on the 18th of May 2015. As at the time of the sale in execution, being September 2015, such amount had not been paid. The amount in respect of the taxed costs and legal costs is only tendered on the 17th of February 2017.

[28] Insofar as the aspect of advantage to creditors is concerned, the applicant submits the following:

[28.1] the respondent, on his version, appears to have interests in other entities;

[28.2] he is the owner of two (2) immovable properties and no proper valuations have been put up by the respondent. This is despite an undertaking that he would do so within a month of the filing of the preliminary answering affidavit;

[28.3] by effecting the compromise with the applicant, the respondent has also preferred one creditor above the other;

[28.4] the respondent indicates that he is employed, which implies an income to be used for the benefit of creditors. In addition, from a list of his liabilities, it is apparent that he has several credit cards and bonds which imply either an income to service such debt or to satisfy bank credit checks. The corollary of this is that there would be an advantage to creditors if no further debt is incurred;

[28.5] there is a prospect that a trustee will uncover interest in several corporate entities as well as movable assets. This is consistent with the respondent's continued practice as an insurance broker.

Advantage to creditors

[29] Advantage to creditors need not be established, only that there is reason to believe that sequestration will be to the advantage of creditors. The applicant bears the onus to prove this *prima facie* at a stage when a provisional order is sought. That there is reason to believe, is established if there are facts proved which indicate that there is a reasonable prospect, not necessarily a likelihood, but a prospect which is

not too remote, that some pecuniary benefit would result to creditors.[12]

[30] The leading authority on what is meant by an advantage to creditors is the decision in *Meskin & Co v Friedman*[13] where Roper J held the following:

> 'What is the nature of the "advantage" contemplated in these two sections? Sequestration confers upon the creditors of the insolvent certain advantages. . .which, though they tend towards the ultimate pecuniary benefit of the creditors, are not in themselves of a pecuniary character. Among these is the advantage of full investigation of the insolvent's affairs under the very extensive powers of enquiry given by the Act. In *Awerbuch, Brown & Co v Le Grange* (1939 OPD 20), it is suggested that this right of inquisition is in itself an advantage such as referred to in the sections, so that it is sufficient to make out a reasonable case for enquiry without showing that any material benefit to the creditors is likely to result from the investigation. With great deference I venture to think that this states the position more favourably to the petitioning creditor than is justified by the language of the sections. 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 the creditors. The right of investigation is given, as it seems to me, not as an advantage in itself, 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 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 an enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient. . . .'

---

[12] *Meskin & Co. v Friedman* 1948 (2) SA 555 (W) at 558-559*; Stratford & others v Investec Bank Ltd & others* 2015 (3) SA 1 (CC) para 45; *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D).

[13] 1948 (2) SA 555 (W) at 558-559.

[31] *Meskin's* case was cited with approval by the SCA.[14]

[32] Having regard to the contents of the answering affidavit as well as the investigation conducted by the applicant which is evident from the supplementary affidavit, in my view, the applicant has shown it will be to the advantage of creditors for the respondent's estate to be sequestrated. All the moreso in light of the authorities which I have referred to above.

[33] It is for these reasons that a provisional order of sequestration was granted.

_____

HENRIQUES J

[14] *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership & others* 2006 (4) SA 292 (SCA).

Case Information

Date of argument	:	17 February 2017
Provisional Order of sequestration issued	:	17 February 2017
Reasons for judgment delivered	:	03 March 2017

Appearances

Counsel for Applicant	:	Mr C Roux
Instructed by	:	RC Christie Incorporated c/o Jeff Bloch & Associates 403 Kingsfield Place 30 Joe Slovo (Field Street) Durban 4001 (T) 011-452 7701 (F) 011-452 7709 Ref: Mr Christie/CS/A834
Counsel for Respondent	:	Adv. N. N. Deoduth
Instructed by	:	Atisha Ghela Shop 11, Royal Palm 6 Palm Boulevard Umhlanga Ridge (T) 031-568 1759 (F) 086 539 2479 Ref: AG/C007 c/o Messenger King Durban