IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 5399/2011

DATE: 25 OCTOBER 2011

In the matter between:

INVESTEC BANK LIMITED	1st Applicant
PRIVATE RESIDENTIAL MORTGAGE (PTY) LTD	2nd Applicant
and	
MSINGATHI MLISANA	1st Respondent
BONGISA MLISANA	2nd Respondent

J U D G M E N T

BOZALEK, J:

18 October 2011 was the opposed return date of an order for the provisional sequestration of the joint estate of the first and second respondents, who are married to each other in community of property. Both respondents opposed the granting of a final order and were represented by the first

respondent, an advocate who runs a legal consultancy. First respondent raised a number of points, both technical and substantive, but did not press all of them in argument. I will nevertheless attempt to deal with all the points raised in his heads of argument.

Briefly, the background to this matter is that from approximately mid-2010 onwards, first respondent fell into arrears with his repayments to the first applicant, being his bank, and the second applicant, a subsidiary company of the first applicant to which first applicant ceded its right, title and interest in the loan agreement and mortgage over respondents' fixed property. First respondent fell into arrears in respect of the three accounts he holds with first applicant, namely his private bank or credit card facility, his bond account in respect of the family home in Milnerton and, finally, an account relating to the first respondent's purchase of a vehicle by way of an instalment sale agreement.

Faced with these financial difficulties, the first respondent approached a debt consultant who, on his behalf, applied for debt review. That process has reached no conclusion in the form of a court order, but certain of the first respondent's creditors, first applicant being a notable exclusion (and second applicant for that matter), have apparently accepted reduced

regular monthly payments from the first respondent. The applicant obtained a provisional order of sequestration against the respondents on 1 April 2011 on an unopposed basis. The respondents subsequently filed answering affidavits to which the first and second applicants replied.

I deal firstly with the technical or *in limine* points raised by the respondents. The respondents contend that because the application was not properly served on them, the provisional order was granted per *incuriam*. The application set down for 22 March 2011 was served by a candidate attorney on 16 March 2011 on the respondent's daughter, being someone over the age of 16 years, at respondents' residence. She indicated that she would furnish the respondents with the application on their return home that evening.

From the Bar, the first respondent advised that he and his wife only returned from out of town on the weekend preceding Tuesday 22 March and did not attend court on that day or take any steps to oppose the application. They heard nothing further from the applicants until served with the provisional order on 12 April. Although this was short service, the facts remains that the respondents were aware of the proceedings, but initially chose not to do anything about them. When the matter was called in court on 22 March, the presiding judge,

Blignault, J, called for additional written submissions from the applicants on the alleged act of insolvency relied upon.

In effect, Blignault, J reserved judgment, which he ultimately delivered on 1 April, granting a provisional order of sequestration against the respondents. The respondents complain that they received no notification from the applicants of the postponement on 22 March, but there was none and, in any event, it is not open to the respondents to evince a somewhat passive attitude to the sequestration proceedings served upon them, yet expect to be notified at every turn by the applicants of developments in the matter.

Although it would have been preferable if personal and more timeous service had been effected on the respondents, I do not consider that, in the circumstances of this matter, this was necessary or that these shortcomings should stand in the way of a final order since to do so would be to elevate form over substance. In any event sequestration proceedings are generally brought as a matter of some urgency, well certainly those sequestration proceedings other than friendly sequestrations. First respondent raised certain other more minor technical points in his answering affidavit, but they are without substance and were not pursued by him in argument.

Turning to the respondent's substantive defences, they are as

follows. Firstly, the first respondent alleges that applicant extended credit recklessly to the first respondent in 2007 by failing to inquire as to how long the first respondent would be employed by his employer, in which event it would have learnt that he was only on a five year contract. These contentions, skimpy and unconvincing as they are, were not even made in the first respondent's answering affidavit and they do not need to be addressed as a result.

The second substantive point raised by the first respondent is that a sequestration order will produce no benefit to creditors, this allegation being based on an argument that a forced sale of his fixed property will produce substantially less than if the first respondent sells the property in due course or what the creditors will receive upon a possible debt rearrangement. However, it is also the first respondent's case that he has net assets to the value of R1 338 000,00 with the result that the sale of his fixed property, even if it does not fetch the price or value which the first respondent places on it, will go a long way to satisfying the second respondent's secured claim. To the extent that it does not, the second respondent and other creditors will be concurrent creditors, likely to have most, if not all of their claims met.

First respondent appears to confuse the concept of advantage

to creditors with the concept of the most advantageous offer to creditors, seen from his perspective. I am, therefore, satisfied that a final sequestration order would provide a substantial advantage or benefit to creditors.

The further two requirements to be met by an applicant before a court exercises or considers exercising its discretion as to whether to grant a final order of sequestration, are that the applicant establishes that it has a claim within the meaning of the Act and that the respondents have committed an act of insolvency. The applicants' case is that the first applicant has two claims against first respondent and thus second respondent, firstly for R28 523,18 for monies lent in advance to the first respondent in respect of his private bank account or credit card facility; secondly, R125 878,12 for monies lent and advanced in respect of an instalment sale agreement, the arrears amounting presently to some R27 000,00.

Their case is further that the second applicant has a claim for the full sum due and owing in respect of the loan agreement underlying the bond, namely R2 443 000,00 odd, the arrears alone amounting to some R214 793,65. The defence raised by the respondent in relation to this requirement is that the applicants fail to make out any case that the respondents were in arrears in respect of their various obligations in their

founding papers, only making out their case, impermissibly, in their replying papers.

It is correct that the applicants initially stated that the first respondent was not, at that stage, in arrears with his monthly payments in respect of his private bank account. They stated, quite clearly, however, that first respondent was in arrears in respect of his obligations on his remaining two accounts the bond account and the instalment sale account, and it furnished certificates setting out precisely what the first respondent's indebtedness was in respect of these two accounts, as required by the term of the agreements relating to these liabilities.

By the time that the applicants filed their replying papers, five months later in August 2011, the amount of first respondent's indebtedness had obviously changed. Not only had his arrears on the bond and instalment sale accounts grown, but notwithstanding several payments he had made to the first applicant, he was in arrears on his credit card of private bank account as indicated by the figures I set out earlier. Inasmuch as the first respondent has chosen to ignore his indebtedness in respect of the bond and instalment sale accounts and concentrate only on the initial position relating to his private bank account, there is clearly no merit in his argument that the applicants only made out their case in their replying papers.

The balance of the defences raised by the first respondent turn around his denial that the applicants have established an act of insolvency on his part. The applicants rely in this regard upon a regulation 17.1 notification sent to it and other creditors in terms of section 86(4)(b) of the National Credit Act by the first respondent's debt counsellor on 21 January 2011 advising that first respondent had applied for debt review. First respondent contends that the notification in question is not "notice in writing to any one of his creditors that he is unable to pay his debts", as required by section 8(g) of the Insolvency Act and he seeks to rely on the distinction between being unwilling and being unable to pay one's debts.

Clearly the notice in question was given by his debt counsellor on his behalf, presumably duly authorised to do so. A similar situation arose in FirstRand Bank Limited v Evans 2011 (4) SALR 597 (KZD) where Walls, J, as he then was, analysed the nature and effect of such a notice, bearing in mind that the purpose of debt review is to seek a declaration that the debtor is "over-indebted" as defined by the National Credit Act. The learned judge held at page 602d that:

> "It follows from this statement of what constitutes over-indebtedness for the purposes of the NCA, that

> a debtor who informs his creditor that he has applied for, or he is under debt review, is necessarily informing the creditor that he is over-indebted and unable to pay his debts."

Although this may often be the case, in my view this conclusion may, with respect, be too broadly stated. Such a debtor may well be able to meet his obligations, but for his or her own reasons is seeking a relaxation of the terms of his or her obligations. Moreover, there is a distinction between believing one is over-indebted or contending one is over-indebted and a determination that one is in fact in such a position. Be that as it may, Wallis, J went on to state as follows at page 602, paragraph 14, and page 603, paragraph 16:

> "The proper approach to adopt in determining whether a letter such as this 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 in the position of the creditor receiving the letter. In construing it, the knowledge that the creditor would have of the debtor's circumstances must be attributed to the reasonable reader."

Paragraph 16:

> "The most pertinent fact known to FNB at the time it received this letter, was that Mr Evans was significantly in default of his obligations under both the bonds and the loan agreement. The letter would have said to them that, cumulatively, Mr Evans' debts were such that he could not, as situated at present, pay them in accordance with his commitments. The FNB is clearly familiar with the terms of the NCA and the basis upon which a debtor is entitled to seek debt review. To be told by Mr Evans that he had done this would unequivocally have conveyed that he was unable to repay the amounts he had borrowed from the bank in accordance with his contractual undertakings."

I am in respectful agreement with the earned judge's analysis and with his conclusion that the appropriate time to construe the notice is at the time of its being given. Applying this approach in the present matter, applicants would have received the first respondent's notification at a time when he owed some R67 000,00 on his credit card facility, was in arrears on the instalment sale agreement in an amount of R10 420,00, i.e. three months instalments, and was more than

R150 000,00 in arrears approximately on his bond account. Furthermore as a result of his defaults, the first respondent was indebted to either the first or the second applicant in a total sum exceeding R2.5 million.

Against this background the applicants were, in my view, fully justified in construing this regulation 17.1 notification as notice that the first respondent was unable to pay his debts. Finally in regard to this element of the applicants' case, first respondent contends that he has discharged the onus of showing that the debt or debts on which the application for sequestration is based, is disputed on *bona fide* and reasonable grounds, with the result that the sequestration proceedings are inappropriate to establish the existence of the debt. This argument rests upon the submissions made by the first respondent relating to his not being in arrears on any of his accounts when the sequestration proceedings were launched.

As I have indicated previously, however, in making these submissions the first respondent ignored or overlooked his indebtedness to the applicants in respect of the instalment sale agreement and the bond agreement and thus his contentions in this regard are without merit. The balance of the arguments made by the first respondent concern his

contention that the applicants have acted and are acting in bad faith in not accepting the debt rearrangement proposals made on his behalf. As such they fall to be considered when the court exercises its general discretion whether or not to grant a sequestration order, applicants having satisfied the formal requirements therefor.

Linked to the first respondent's arguments in this regard is the suggestion, if not the allegation, that the applicants have been refusing to accept payments which the first respondent has sought to make in respect of his accounts since the institution of the sequestration proceedings. In this regard, however, the parties reached agreement at the hearing that all such payments had been received and credited by the applicants, in the first place, to the first respondent's private bank account, and that the figures relied upon by the applicants in relation to the first respondent's indebtedness to them are indeed correct and have taken such payments into account.

In short, the applicants' position in relation to the debt rearrangements proposals made on behalf of the first respondent were that these were unacceptable. I note that the proposal envisaged first respondent making a monthly payment of some R19 500,00 in respect of obligations towards the applicants totalling approximately R27 000,00 per month.

Although the applicants were not prepared to accept such terms, there was nothing to prevent the first respondent or his debt counsellor from making such payments. It would appear that this was not done, however, although the first respondent continued to make irregular payments which were utilised by the first applicant to service primarily first respondent's private bank or credit card facility. This failure to make such proposed payments must count against the first respondent when the court exercises its discretion as whether to grant a final order.

Simply because the applicant did not accept the first respondent's initial proposals, does not in itself indicate that they failed to take part in the debt review process in good faith as required by section 86(5) of the NCA. In any event, on 30 November 2010 the applicants gave notice by way of registered letter to the respondents in terms of section 129(1) of the NCA, that they were in breach of their obligations in respect of each of the three accounts held with the bank and the second applicant, and advising the first respondent of his rights in terms of the NCA and its rights to approach a court to enforce the agreements.

This being so, the debt review relating to those agreements was thereafter excluded and questions of good faith

participation in the process do not even arise. See Nedbank Limited v National Credit Regulator 2011 (3) SALR 581 (SCA) at 590g.

The principles in terms of which the court will exercise its discretion to grant or withhold a sequestration order upon proof of the statutory requirements were summarised in the following passage from the judgment of Roper, J in Millward v Glaser 1950 (3) SA 547 (W) at 553-554:

> "The discretion of the court is, however, not to be exercised lightly and where an act of insolvency has been proved the onus upon the debtor who wishes to avoid sequestration is a heavy one... I agree with respect with the observation of Broome, J in Port Shepstone Fresh Meat and Fish Company (Pty) Limited v Schultz (supra), that where the petitioning creditor has proved an act of insolvency and reason to believe that sequestration will be to the advantage of creditors, 'very special considerations' are necessary to disentitle him to his order."

Given the scope and purpose of the NCA, it is likely that realistic and *bona fide* debt re-arrangement proposals or debt re-arrangement orders may increasingly move courts to refuse

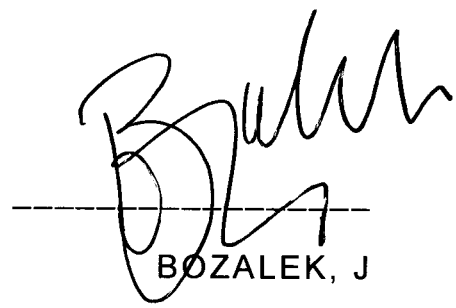
sequestration orders in favour of such proposals which allow the debtor to survive financially whilst not unduly prejudicing creditors. In the present case, however, I do not consider that special considerations exist such as to warrant the court exercising its discretion in favour of the first respondent.

Firstly, the first respondent is substantially in arrears in his obligations on both the instalment sale agreement and bond agreements. It would appear that at best he is able to service his current account or credit card facility and little more. Although the first respondent proposed a regular monthly payment of R19 500,00, he did not meet this commitment and in fact has been favouring other creditors, who accepted his proposals, above the applicant by making regular payments to such creditors but excluding the applicants.

First respondent's justification for this failure to make payment, namely the applicants' alleged failure to accept payments (as opposed to its refusal to accept first respondent's debt re-arrangement proposals), has been shown to be unfounded. There is no indication, furthermore, that the formal debt review process has reached the stage where a court hearing is imminent or even foreseeable. Finally, although the first respondent has had ample opportunity to sell the encumbered property since the sequestration proceedings

commenced, he has not been able to do so.

In the circumstances I consider that the applicants are entitled to a final order of sequestration. **IN THE RESULT, THE PROVISIONAL ORDER OF SEQUESTRATION MADE ON 1 APRIL 2011 IS MADE FINAL**.



BOZALEK, J