

SOUTH AFRICA / JUDGMENT

Bethlehem Technologies London Limited v Deyssel (33815/05) [2006] ZAGPHC 127 (2 October 2006)

[2006] ZAGPHC 127

COURT

High Courts - Gauteng

BEFORE

Pelser AJ

CASE / FILE NUMBER

33815/05

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Source record**IN THE HIGH COURT
OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION)**

DATE:	2/10/06
	Case number: 33815/05
	In
the matter between:	BETHLEHEM TECHNOLOGIES LONDON LIMITED Applicant and ALBERTUS JOHANNES BAREND DEYSEL Respondent

JUDGMENT

Pelser AJ:

1.

This is the extended return day of an application for the sequestration of the respondent.

On 26 May 2006 this court granted a provisional sequestration order and a rule nisi calling upon the respondent to show

cause why his estate should not be finally sequestrated.

2.

The application is based upon an act of insolvency in terms of Section 8(g) of the Insolvency Act, No. 24 of 1936 (as amended) ("the Insolvency Act" which provides that:

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"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".

The alleged notice in writing is a letter which the then attorney of the respondent wrote to the attorney of the applicant on 10 August 2005.

The applicant emphasizes the following passage from such letter as reflecting the notice of inability to pay a debt of R5 million allegedly due, owing and payable to the applicant:

"4.

It is in the spirit of the aforesaid that our client proposes the following:

4.1

Our client accepts that there is an amount of R5 000 000,00 which is due to be paid to Melvill and/or BTL London;

4.2

That in terms of the settlement agreement signed by the parties, the amount is payable on or before the 16th August 2005;

4.3

Our client, as your clients are no doubt aware, is currently unemployed and has no business or trading opportunities in which to affect payment of the sum of R5 000 000,00 to your client;

4.4

Our client subsequent to his resigning as a director of BTL and subsequent to the settlement agreement being concluded during this period has attempted to establish a venture with a third party, the result will be that if this venture comes to fruition, our client will be in a position to liquidate the amount of R5 000 000,00 due to Melvill/BTL together with interest at the rate of 15,5% per annum as from 17 August 2005 to date of payment."

The applicant contends that such debt arises from a settlement agreement (specifically clause 1.12 thereof) concluded on 18 April 2005

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in terms whereof the respondent undertook to effect payment of R5 million to the applicant.

The applicant goes further by pointing out that on the evidence of the respondent, the respondent is factually insolvent in that his liabilities exceed R55 million whereas the only asset he has is an interest in a BMW motor vehicle which is financed. On behalf of the respondent it was indeed argued that there is no pecuniary advantage to creditors in sequestrating the respondent.

In my opinion there can be no doubt that the respondent is factually insolvent. Mr Suttner SC on behalf of the applicant urged me to take such fact into account in exercising my discretion whether to grant a sequestration order or not.

Mr Suttner SC furthermore directed my attention to the following paragraph from the letter of 10 August 2005:

"5.

Our client would undertake as part of its proposal to your client, the following:

5.1

That from the proceeds which our client received from his venture, of which your client is aware of, 50% of the amount which our client would receive would be paid to your client in reduction of the debt of R5 million;

5.2

This scenario would proceed until the capital amount together with interest was liquidated in full;

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5.3

Our client would then assist your client (BTL) London/Melville with whatever assistance our client may give, in resolving any issue outstanding with Telkom and your client, as well as resolving issues which may have arisen with Mafulong as well;"

Mr Suttner SC argued that such proposal constitutes an act of insolvency within the ambit of Section 8(e) of the Act in that it offers to make an arrangement with a creditor of the respondent releasing him partially from his debts.

Mr Burman SC on behalf of the respondent opposed the relief sought on the basis that there is no deed of insolvency and that sequestration of his estate will not be to the benefit of the respondent's creditors.

It is apposite to deal with the various aspects raised by the respondent seriatim.

In his heads of argument Mr Burman SC initially drew my attention to the fact that the letter of 10 August 2005 was addressed without prejudice. He during the argument of Mr Suttner SC abandoned such point.

The respondent contends that in concluding the settlement agreement

the respondent had no intention of assuming any monetary obligation towards the applicant or any other entity. The only thing the respondent intended to convey is that he is prepared to facilitate recovery of the

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amount of R5 million. The respondent contended that there was no reason for him to have assumed liability towards the applicant or any one else.

Mr Burman SC submitted that the applicant would not understand the letter of 10 August 2005 as a notice that the respondent is unable to pay his debt. Mr Burman SC further submitted that by reason of the fact that it reflects Melvill alternatively BTL as the creditor there cannot be an unequivocal indebtedness.

During argument I asked Mr Burman SC to indicate who the indebted party is if not the respondent. Mr Burman SC answered that a company by the name Orion Telecom Investment Holdings (Pty) Ltd ("Orion") (whose role in the circumstances leading to the deed of settlement was extensively argued by Mr Burman SC) was the indebted party.

I cannot accept such suggestion by Mr Burman. The fact of the matter is that Orion was not a party to the settlement agreement of 18 April 2005.

As regards the fact that the letter of 10 August 2005 refers to Mellvill in the alternative to the applicant I am of the opinion that it does not take the respondent anywhere.

Mr Mellvill favoured the applicant with supporting evidence in the present application and did not claim to be

the creditor on any basis. In paragraph 8.1.6 of the answering affidavit the respondent indeed reflects the indebtedness as towards the applicant.

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I am not convinced by the argument that the letter of 10 August 2005

was an attempt to find a commercial solution to a dispute not a deed of insolvency. In clause 1.12 of the settlement agreement is it recorded as

follows:

"Deysel shall deliver all documentation held by him either directly or through Evan Scop Incorporated relating to Orion Telecommunications, and shall arrange for Evan Scop Incorporated to transfer to a nominated trust account the R5 000 000,00 (five million rand) deposit paid into the trust account for Evan Scop Incorporated, intended by BTL London as a deposit for the Orion transaction; alternatively, these funds are to be paid to BTL London within 120 days, and pending payment, Deysel shall register a covering bond over immovable property in favour of BTL London, to secure the debt. Deysel shall take immediate steps to register the bond, and shall pay all costs consequent upon the registration of the bond;"

Such wording is clear and unambiguous.

The clear and unambiguous terms of clause 1.12 was accepted by the respondent's then attorneys.

I find the argument on behalf of the respondent unconvincing. I point out that the obligation to pay the R5 million that is reflected in clause 1.12 of the settlement agreement is not conditional upon the respondent receiving such amount of money from Orion. In my opinion the letter of 10 August 2005 is a clear notice that the respondent is unable to pay his debt. The debt is all the more clear when the factual context, including the settlement agreement, is taken into account. It cannot be understood as anything else.

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The respondent furthermore asserted that the sequestration of his estate will not benefit his creditors.

Section 12(1) of the Insolvency Act provides:

"If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that:

(a)

(b) (c)

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

it may sequester the estate of the debtor."

The court need not be satisfied that sequestration will be to the advantage of creditors. The court only has to find that there is reason to believe that it will be to the advantage of creditors.

Also, the benefit of an enquiry is not in itself an advantage to creditors.

It is not necessary to demonstrate that an enquiry will yield the benefit.

What is required is a demonstration of a prospect, not a likelihood, that some advantage may accrue to creditors as a result of the respondent's sequestration.

Less proof is required in the case of sequestration by a creditor than in the case of a so-called "friendly sequestration".

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"Taking that passage as my starting point, it will be seen that in the case of an armslength transaction a sequestrating creditor does not have to set out in its founding affidavit the detail and intensity of averments required when the nature of the claim is under scrutiny as required by Nicolas J in the Klemrock case, although a proper case should always be made out. It will be sufficient if the creditor in an overall view of the papers can show, for example, that there is reasonable ground for coming to the conclusion that upon a proper investigation by way of an inquiry under Section 65 of the Act a trustee may be able to unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors."

Dunlop Tyres (Pty) Ltd v Brewitt, 1990(2) SA 580 (W) at 583FG.

The applicant has argued that a benefit to creditors on the basis discussed above flows from a series of facts reflected in the papers before me.

Firstly the applicant demonstrated the association of the respondent with eight companies and a close corporation. The applicant has also demonstrated the respondent's association with a trust. In general a company, a close corporation and a trust is created for a reason, namely as vehicle to conduct a business or hold an asset. Usually a registered company has a value in itself. It costs thousands of rands to register and incorporate a company.

Registered companies are capable of being sold for the benefit of creditors. Companies with assessed losses for income tax purposes are valuable vehicles for the owners of businesses with high income tax exposure. The respondent in the answering affidavit testified that two of the above companies have been liquidated. He does not state whether he is a creditor of either of

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those, what stage the liquidations have reached or whether dividends have accrued or are likely to accrue in his favour. To my mind an

investigation by a trustee holds out a serious prospect of a benefit to the respondent's creditors. In the case of one company the respondent sold his shares in 2003. The respondent does not state the terms upon which he sold his shares, more particularly the price and the manner of payment. I am of the view that it raises reason for investigation with a serious prospect of benefit to the creditors.

Mr Suttner SC argued that the relationship between the respondent and the ABD Family Trust warrant an investigation.

Even though the

beneficiary is his child the respondent considered himself entitled to register a mortgage bond in favour of the applicant over the trust's property as is reflected in clause 1.12 of the settlement agreement. I am of the opinion that an investigation to ascertain whether the principal asset of the trust is in fact one that rightly belongs to the trust is warranted. It may well be that a proper investigation reveals that such asset falls to be returned to the estate of the respondent.

The

respondent has refrained from taking the court into his confidence in respect of the date of acquisition, the value at which the property was acquired and/or transferred to the trust, the identity of the person who has paid and the identity of the sureties, if any, for the liability of the trust.

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The respondent demonstrated that there is equity of at least

R400 000,00 in the immovable property of the trust. The respondent did not explain why, if that was the amount of the equity, he was in a position to undertake to register a bond for R5 million. In this regard I take into account that a trust will not be allowed to register a bond over its property without a surety.

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Telecommunications (Pty) Ltd. Apart from the companies already dealt with this is another potential source of a benefit to creditors.

Mr Burman SC on behalf of the respondent has argued that there was no attempt by the applicant to pierce the corporate veil. I am of the opinion that it is in the nature of an armslength application that the applicant will not at this stage be able to do so. For that reason I am of the opinion that such failure is not fatal to the applicant's case.

After criticism by the applicant in the replying affidavit as well as in applicant's heads of argument at the provisional order stage of the failures of the respondent, the respondent has delivered a supplementary affidavit purportedly to clarify the original answering affidavit.

Such affidavit was sworn to on 21 August 2006.

The

respondent annexed to such supplementary affidavit, a statement which he described as "the latest statement" from BMW Finance.

Such

statement goes only as far as 5 July 2006.

It is not clear what

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happened on 5 August 2006, which was 16 days before the delivery of the supplementary affidavit. The statement reflects that the respondent made a payment of R15 758,00 to BMW Finance on 5 June 2006. That was ten days after the provisional order. If the respondent is pennyless it is not clear on what basis the luxury vehicles is financed. There is a patent possibility that a creditor, BMW Finance, is preferred over other creditors.

There are other avenues for pursuit by a trustee. There is no doubt that the respondent has had a massive business interest. I am satisfied that the applicant has set out sufficient facts for this court to have reason to believe that it will be to the advantage of creditors if the respondent's estate is sequestrated.

The applicant has satisfied me on a balance of probabilities that the three requirements of Section 12 of the Act has been met.

Mr Burman SC submitted that even in such circumstances I should exercise my discretion against confirming the rule by reason of the fact that:

35.1.

The applicant's case on the alleged indebtedness and the act

of insolvency is weak;

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35.2.

The applicant's case on the benefit to creditors is particularly weak; and

35.3.

The real reason why the application has been brought is to remove

the

respondent

as

a

competitor

in

the

telecommunications industry.

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I am of the opinion that by reason of the factual insolvency of the respondent and the attempt to have an arrangement with creditors I should exercise my discretion against the respondent.

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I make the following order:

37.1.

The rule nisi issued on 26 May 2006 is confirmed;

37.2.

The estate of the respondent is finally sequestrated;

37.3.

The costs of the application, including the costs of senior

counsel, shall be costs in the sequestration.

Q PELSER AJ

27 September 2006

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