

SOUTH AFRICA / JUDGMENT

## Body Corporate Of Calswald Crest v Mbatha (94948/2015) [2019] ZAGPPHC 39 (22 February 2019) [2019] ZAGPPHC 39

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Mosopa

CASE / FILE NUMBER

94948/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 94948/2015

22/2/2019

In the

matter between:

THE  
BODY CORPORATE OF CALSWALD CREST  
APPLICANT  
And  
SIFISO  
MBATHA  
RESPONDENT

ID NR:

[....]

**JUDGMENT**

MOSOPA AJ

**INTRODUCTION:**

1. This is an application for final sequestration of the estate of the Respondent and that his estate be placed in the Master of the High Court.
2. The estate of the Respondent was placed under provisional sequestration on the 2 May 2017 with the return date of 12 June 2017. The matter was then opposed by the Respondent and the matter was eventually set down for hearing on the opposed motion court roll of the 08th October 2018.
3. On the 09th of October 2018 counsel appearing on behalf of the Respondent indicated that the Respondent intends applying for the postponement

of the matter. The matter was stood-down to the 11th of October 2018 to allow the Respondent to file a substantive application in support of postponement application. On the 11th of October 2018, I heard an application for a postponement and dismissed such application with costs with full reasons and allowed

the matter to proceed.

**FACTUAL****BACKGROUND**

4. The Applicant in this matter is a body corporate established in terms of section 36 of the Sectional Titles Act, 95 of 1986 with its primary objective to attend to the management of the sectional title scheme known as Carlswald Crest established under scheme number SS1219/2007.
5. The Respondent is the joint registered owner of units 19, 21, 23, 25, 44, 46 and 48 in the sectional title development known as Carlswald Crest.
6. The Applicant's duties as defined by the Act, is to collect levies from members on a monthly basis, such as the Respondent, to be used for payment of the Applicants' financial obligations. The levy imposed on the Respondent at that time was an amount of R1, 296, 00 per month.
7. Despite being the joint registered owner of the above mentioned units, this application is only directed to the Applicant and the Applicant contends that it will be a waste of legal fees to bring separate

application for the sequestration of all of the individual estates.

8. Since the Respondent became a member of the Applicant on 09th November 2017 several summonses were issued against him for the recovery of the arrear levies and the Applicant subsequently obtaining default

judgments against the Respondent for not defending such claims. The Applicant avers that the Respondent currently owes the Applicant more than R386, 000, 00 and such amount will increase on monthly basis if the Respondent fails to pay his monthly levies.

9. Several attempts by the Sheriff to execute the warrant did not materialise.

On the 4th of October 2014, the Sheriff returned a nulla bona. after the Respondent was served with warrant of execution under case number 38093/2019 and the Respondent indicated to the Sheriff that " No I do not have any immovable property which is executable" and the Sheriff reported that " No movable property/disposable assets in terms of Section 68 were pointed out, nor could any be found by me after a diligent search and enquiry at a given address".

#### LEGAL PRINCIPLE

10. Section 37 of the Sectional Titles Act, 95 of 1986 ("Act") provides, "Functions of Body Corporate ;
  - (1) A body corporate referred to in section 36 shall perform the functions entrusted to it by or under this Act or the rules, and such functions shall include;
    - (a) To establish for administrative expenses a fund sufficient in the opinion of the body corporate for the repair,

upkeep, control, management and administration of the common property (including reasonable provision for future maintenance and

repairs), for the payment of water and taxes and other local authority charges for the supply of electric current, gas, water, fuel and sanitary and other services to the building or buildings and land, and any other obligation of the body corporate;

- (b) To require owners, whenever necessary, to make contributions to such fund for the purpose of satisfying any claims

against the body corporate, provided that the body corporate shall require the owner or owners of a section or sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by the rules made under the Sectional Titles Act, 1971 (Act No. 66 of 1971), to make such additional contributions to the fund as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs.

- (c) To determine from time to time the amounts to be raised for the purpose of the aforesaid.

(d) To raise the amounts so determined by levying contributions on the owners in proportion to the quotas of the respective section".

11. Section 8 of the Insolvency Act, 24 of 1936 (as amended), deals with acts of insolvency and provides:

"A debtor commits an act of insolvency

- a. If he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debt;
- b. If a court has given judgment against him and he fails, upon the demand of the officer whose duty is to execute that judgement, to satisfy it or indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by, that officer that he has not found sufficient disposable property to satisfy the judgment;
- c. If he makes or attempt to make any disposition of any of his property which has or would have the effect of prejudicing the creditors or preferring one creditor above another;
- d. If he removes or attempts any of his property with intent to prejudice his creditors or to prefer one creditor above another;
- e. If he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;
- f. If after having published a notice of surrender of his estate which has not elapsed or been withdrawn in terms of section 6 or 7, he fails to comply with the requirements of subsection (3) of section 4 or lodge, in terms of that subsection, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as a date on which such application to be made;
- g. If he gives notice in writing to one any of his creditors that he is unable to pay any of his debts;
- h. If, being a trader he gives notice in the Gazette in terms of subsection (1) of section 34, and is thereafter unable to pay all his debts".

12. Section 12 of the Insolvency Act, provides;

- (1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that-
  - (a) The petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section 9, and
  - (b) The debtor has committed an act of insolvency or insolvent, and

- (c) There is a 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.
13. It is trite law that the onus of satisfying the above mentioned requirements as stated out in section 12 rests with the Applicant, (see *Braithwaite v Gilbert* 1984 (4) SA 717 0N at 718).
14. In *Richter v Riverside Estate (Pty) Ltd* 1946 OPD 209 at 223 the court observed, "insofar as sequestration procedure in accordance with the Insolvency Act is relevant, it must be taken into consideration that the main object of insolvency proceedings is to benefit creditors, not one creditor or some creditors but the general body of creditors.

Insofar *concursum creditorium* comes into being once a sequestration order is made, a further object of insolvency proceeding is achieved insofar as creditors are prosecuted against the possible greed and mendacity of other creditors".

15. If an Applicant's claim is bona fide disputed by the Respondent on reasonable grounds an application for a sequestration or winding up order cannot succeed. In terms of the so-called *Badenhorst Rule* (*Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346(T) at 347 H-348 C) accepted by the Appeal Court in *Kalil v Decotex Loccit*, the Respondent must show the existence of a bona fide dispute on reasonable grounds. Corbett AJ (as he was then) put it as follows "consequently where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the court will refuse a winding up order. The onus on the respondent is to show that it is not indebted to the applicant it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds".

## DISCUSSION

16. As already alluded before, the Applicant to be successful in this kind of proceeding must establish the following:

16.1 That it has a claim against the Respondent

16.2 The Respondent has committed an act of insolvency, and

16.3 It will be to the advantage of the creditors of the Respondent's estate if sequestrated.

17. The Applicant listed a long list of summonses under different case numbers instituted against the Respondent for the recovery of arrear levies. The Respondent denies ever receiving such summonses. However the fact of the matter is that various default judgements were obtained against the Respondent under various case number. Warrant of execution was issued which led to the Sheriff returning a *nulla bona*, notably the return of the 4th of October 2014 .

18. The Respondent does not deny ever defaulting on his obligation against the Applicant but contends that he has settled his outstanding debts to the Applicant. However the Applicant's contention is that the Respondent owes it an amount in excess of R386, 000, 00 which will increase on monthly basis if the Respondent continues not to pay his levies.
19. It appears from the Respondent's contention , he does not deny liability to the Applicant, but contents that he owes far less than what the Applicant is alleging what he owes. To this end the Respondent required an indulgence to supplement his papers to put certain amounts in dispute.
20. The Respondent further contended that, due to the fact that the units he co-owns are bonded, banks should have been served with the application.
21. Mr Vaster in argument referred me to the decision of *Suiwer Motors v Molobane* 1961 (1) SA 759 (W) at 761, where it was held that bonded immovable property does not constitute realisable property for sequestration proceedings. He then further contended that there was no need to serve the banks with this application.
22. I am of a considered view that a claim against the Respondent was made by the Applicant.
23. Turning now to the second leg of the requirement, i.e. whether the Respondent has committed an act of insolvency, in terms of section 8 (of the Insolvency Act), the following is for consideration;
  - 23.1 The Applicant issued a warrant of execution against the Respondent in the Pretoria Magistrates Court under case number 38093/2014. The Respondent was personally served with the warrant of execution by the Sheriff and he demanded payment from the Respondent. The Respondent informed the Sheriff that, he has no immovable property which is executable.
  - 23.2 Based on this information received personally from the Respondent, the Sheriff noted the following "this is to certify that on the 04th of October 2014 at 08h55 at Casa Blanca, Van Heerden Street, Halfway Garden, the amount of R 7,3311,61 in satisfaction of his warrant and my costs, has been demanded from Sfiso Mbatha, who informed me that he has no money, property or assets inter alia, wherewith to satisfy the said warrant or any portion thereof in terms of section 66 (1) (a). No movable property/disposable assets in terms of section 66 were pointed out, nor could any be found by me after a diligent search and enquiry at the given address".
  - 23.3 This was not as a result of the Sheriff satisfying himself that there is no executable property, but such information was voluntarily given to the Sheriff by the Respondent.
24. The Respondent further stated in his answering affidavit that he is paying debts owed to the financial lender despite being indebted to the Applicant. This is further act of insolvency by the Respondent in terms of section 8 (c), in that the Respondent prefers other creditors above others.

25. The Respondent cannot make prompt monthly payments of the levies which resulted in him failing in arrears.
26. It is also not in dispute that other creditors apart from the Applicant have obtained judgments against the Respondent who ironically happens to be the Body Corporates is a clear sign that the Respondent is factually insolvent. It is therefore my considered view based on the above, that the Applicant committed an act of insolvency.
27. Turning to the last requirement, i.e that it will be to the advantage of the Respondent's creditors if his estate is sequestrated, the following are of importance:
- 27.1 In *Markin & Co v Friedland* 1948 (2) SA 555 (W) at 559 Roper J observed; "In my opinion, the facts put before the court must satisfy it that there is a reasonable prospect, not necessary 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 enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient".
28. The financial position of the Respondent is not known, what is before me is the undisputed fact that the Respondent is gainfully employed.
29. It is clear that the Respondent has other creditors apart from the Applicant and some have already obtained judgment against the Respondent.
30. I am therefore of a view that the general body of creditors of the Respondent will benefit if the estate of the Respondent is sequestrated. It is for those reasons that this application must succeed.

## ORDER

31. I therefore make the following order;
1. The rule nisi dated 02 May 2017 is hereby confirmed.
  2. The estate of the Respondent is finally sequestrated and placed in the hands of the Master of the High Court.
  3. The respondent is ordered to pay the costs of the application.

M.J MOSOPA

ACTING JUDGE OF THE HIGH COURT

PRETORIA HIGH COURT

## APPERANCES

For Applicant: Adv Voster

Instructed by: E Y Stuart Incorporated

For the Respondent/: Adv Strauss

Instructed by: Scholtz Attorneys

Date of Hearing: 11 October 2018.

Date of Judgment:

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Prepared on 10 October 2026 · Esheria