

SOUTH AFRICA / JUDGMENT

Grobank Limited v Georgiou (1105/2020)

[2021] ZAECPEHC 48 (19 August 2021)

[2021] ZAECPEHC 48**COURT**

Eastern Cape High Court, Port Elizabeth

BEFORE

Govindjee

CASE / FILE NUMBER

1105/2020

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO.: 1105/2020

In the matter between:

GROBANK LIMITED APPLICANT

and

YVETTE GEORGIOU RESPONDENT

(ID NO.:)

DATE OF BIRTH: [.....]

REASONS

FOR JUDGMENT

GOVINDJEE AJ

Background

[1] The applicant sought an Order confirming the rule nisi issued by Gqamana J on 16 March

2021. The applicant previously launched an application, which was opposed, for the provisional sequestration of the respondent's estate. Gqamana J, having summarized the essential facts in the matter, ordered, inter alia, as follows:

- (a) The respondent's estate was placed under provisional sequestration in the hands of the Master of the High Court, Port Elizabeth.
- (b) A rule nisi was issued calling upon the respondent and all other interested parties to show cause before Tuesday 20 April 2021 why the estate of the respondent should not be finally sequestrated and be placed in the hands of the Master of the High Court, Port Elizabeth.
- (c) That the order be served by:
 - i. the sheriff on any of the employees of the respondent in terms of section 9(4A)(a)(ii) of the Insolvency Act, 1936[1] ('the Act');
 - ii. delivery thereof to the South African Revenue Services;
 - iii. one publication in English in 'The Herald' and one publication in Afrikaans in 'Die Burger' newspapers; and
 - iv. registered post to any of the respondent's creditors.

[2] The matter was subsequently postponed and the rule nisi extended for receipt of the sheriff's returns of service. The applicant alleged that the respondent was indebted to it personally

and by way of signed suretyships in the sum of R35 391 755,49, consisting of:[2]

- (a) Home loan agreements – R16 703 882, 19
- (b) Lease and instalment sale agreements – suretyships in respect of River Street Trust ('the Trust') – R6 265 966,74
- (c) Home loan agreements – suretyships in respect of the Trust – R9 585 633,27; and
- (d) Art Holdings (Pty) Ltd ('Art Holdings') – suretyship – R3 320 396,88.

[3] The respondent is also surety to Art Holdings in respect of its liability to Absa Bank in the amount of R4 200 000,00. Art Holdings was wound up on 25 August 2020.

[4] The applicant estimates the market value of the respondent's assets to be R25 000 000.00, so that her liabilities exceed her assets by an amount in excess of R14 000 000. It is alleged that the applicant is factually insolvent, and that creditors may expect to receive approximately 62 cents in the rand so that there is an advantage to creditors.

- [5] The respondent elected not to apply to file a further affidavit, instead relying on the answering affidavit filed prior to the issued rule nisi, as well as an argument based on submissions raised at the hearing for the provisional sequestration of the respondent. An order confirming the rule nisi was granted on 29 July 2021. The reasons for that order follow.

Grounds for opposition

- [6] The respondent opposed the application for sequestration on the following grounds:
- (a) The applicant failed to comply with all the provisions of section 9 read with section 10 of the Act.
 - (b) The applicant failed to comply with section 11 of the Act, in that the provisional order had not been duly served in accordance with this section of the Act.
 - (c) The applicant did not satisfy the requirements for sequestration on a balance of probabilities.
- a) Sections 9 and 10 of the Act
- [7] The respondent submitted that the applicant failed to show on a balance of probabilities that it had the necessary locus standi to launch the application for sequestration. This is based on the applicant having entered into agreements with the South African Bank of Athens, as opposed to the applicant. The respondent suggests that the applicant failed to comply with section 54 of the Banks Act, 1990 ('the Banks Act') and should have made averments in respect of the Minister of Finance's consent to a transfer of assets of a bank in terms of that legislation.
- b) Section 11 of the Act
- [8] The respondent argued that the provisional order of sequestration was not served in accordance with section 11 of the Act and that she only became aware of the provisional order of sequestration when an estate agent visited one of her properties. Notice ought to have been given to the respondent personally and, furthermore, no notice was given to any of the respondent's employees. In addition, the Practice Directives for the Division require an explanation on affidavit in

the event of delayed service of a provisional order.[3]

- c) Respondent's insolvency
- [9] The respondent denies having committed any act of insolvency, or that her liabilities exceed her assets. This argument is premised on the respondent counting her assets together with that of the Trust, on the basis that the assets and liabilities within the Georgiou group of companies are closely linked to the respondent so that they should be regarded as a composite.

[10] The respondent also argues that it would not be to the advantage of the general body of creditors for the respondent's estate to be sequestrated. No other creditor had taken any legal action for purposes of enforcing any claim against the respondent, and the applicant could have executed its claim against the respondent without reverting to an application for sequestration. Furthermore, so the argument goes, the applicant refused to allow the respondent to sell immovable properties which served as security for the applicant's claim, when this would have reduced any amount due and payable to the applicant. Finally, it is suggested that the applicant obtained judgment against the respondent without her being given notice in accordance with the provisions of the National Credit Act, 2005,[4] and / or without her being given any reasonable opportunity to convince the court not to grant judgment, so that the balance of probabilities favour the respondent.

Analysis

[11] The legal position in respect of the granting of a final sequestration order is well known. A court may grant such an order on the return day of the rule nisi if satisfied that:[5]

(a) The sequestrating creditor has established against the debtor a claim entitling it to apply for the sequestration of the debtor's

estate; and

(b) Either the debtor has committed an act of insolvency, or the debtor is insolvent; and

(c) There is reason to believe that it will be to the advantage of creditors if the debtor's estate be sequestrated.

[12] The onus rests on the sequestrating creditor to prove the satisfaction of these requirements on a balance of probabilities. Even if the court is satisfied that a proper case has been made out, it still has a discretion either to grant or refuse a final sequestration order. The mere fact that the court granting a provisional order has already held that an act of insolvency was *prima facie* committed by the respondent, or that the respondent was *prima facie* actually insolvent does not absolve the court on the return day to satisfy that these requirements have in fact been established on a balance of probabilities, before a final order may be granted.[6]

Locus standi

[13] The applicant bears the duty to establish its locus standi to launch the application. The respondent admits that the applicant is a public company duly registered and incorporated with limited liability, trading *inter alia* as bankers and credit providers in terms of the provisions of the Banks Act, 1990[7] and National Credit Act, 2005.[8] The founding affidavit confirms that the applicant was formally known as The South African Bank of Athens Limited.[9] The applicant's name was changed on 29 March 2019 and it carries on business

as a commercial Bank.[10]

[14] Importantly, a Certificate of Change of Name is attached to the founding affidavit (and marked as Annexure 'JV1'), dated 29 March 2019. That Certificate (numbered LB0014) contains the stamp and signature of the Chief Executive Officer of the South African Reserve Bank Prudential Authority. It certifies that 'The South African Bank of Athens Limited has, in terms of section 56(5) of the Banks Act 94 of 1990, changed its name to GroBank Limited and that the new name has been entered in the register of banks'.[11]

[15] The respondent states in her answering affidavit that 'The South African Bank of Athens was purchased by Gro Capital Holding Limited, of which the name was changed to Grobank Ltd during April 2019...Basically, Applicant became a vehicle for Afgri Group Holdings, which was focussed on the agricultural sector and as a result Applicant turned from the traditional business to the agricultural sector, which of course did not correspond (to) the interests of the Georgiou Group...'.[12] The respondent further admits the contents of the relevant paragraphs of the applicant's founding affidavit, but denies '...

that applicant is entitled to claim in terms of any of the agreements concluded with South African Bank of Athens Limited'.[13] The respondent also comments in her answering affidavit on the lateness of the publication of the applicant's financial results and indicates that 'it is incredibly difficult to form a view on the capital stability of the bank...'

[16] Without seeking leave to file a supplementary affidavit, the respondent filed a 'supplementary note' regarding this issue, attaching copious sections of the Banks Act, 1990. This note clarifies that the locus standi issue is based on the applicant's purchase of Bank of Athens. Relying on section 54 of the Banks Act, the respondent now suggests that the applicant was obliged to have averred that ministerial consent had been obtained, failing which the only inference to be drawn is that consent was not obtained. The respondent's heads of argument and argument in court centred on this suggestion.

[17] This argument cannot be accepted. Section 56(4) of the Banks Act provides that 'A bank shall within 21 days of the registration by the Commissioner of...a change of its name, furnish the Authority with a certified copy of the special resolution which sets out the...change of name.' Upon receipt, and following payment by the bank concerned of the prescribed fee, '...the Authority shall ... in the case of a special resolution relating to a change of name,

change the name of the bank concerned in the register of banks, and issue to the bank concerned a certificate of such change of

name.'[14]

[18] The applicant has succeeded in establishing its standing and the production of the Certificate of Change of Name, incorporating reference to section 56(5) of the Banks Act, confirms the validity of the name change and entry of the new name in the register of banks, replacing 'The South African Bank of Athens Ltd'. This suffices for purposes of establishing the applicant's entitlement to claim in terms of agreements concluded by 'The

South African Bank of Athens' with the respondent. There is no legal basis, either on the papers or by virtue of any cited authority, for the suggestion that the applicant was required to do more in respect of proving aspects of a suggested 'amalgamation' or 'merger' or 'arrangement' referred to in chapter 5 of the Companies Act, 2008[15] and involving a bank as one of the principal parties.[16]

Service

[19] Section 11(2) of the Act provides for court direction in the event that a debtor has been absent during a period of time from his or her usual place of residence and business. The court may direct that it is sufficient service of the rule if a copy is affixed to an outer door of the court building, and published in the Gazette, or may direct some other mode of service. The clear suggestion is that personal service on the debtor is typically required.[17]

[20] The purpose behind this requirement is to ensure, as far as possible, that a respondent receives notice of the proceedings against her.[18] In this case the respondent filed a notice of opposition on 31 July 2020 and substituted her attorneys of record on 21 September 2020, choosing her attorney's address for purposes of service.[19] Opposing papers were filed and counsel briefed to argue the application for provisional sequestration and the proceedings on the

return dates.[20] It is clear that the respondent was aware of the rule nisi that was issued, having served and filed a 'Request for Reasons' on 13 April 2021.[21] While the rule was not served on the respondent, it was certainly brought to her notice.[22] Failure to apply the strict letter of the law has caused no prejudice[23] and good cause has been shown for non-compliance, justifying condonation.[24]

[21] In terms of section 11(2A) of the Act:

'A copy of the rule nisi must be served on –

- a) any trade union referred to in subsection (4);
- b) the debtor's employees by affixing a copy of the petition to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition; and
- c) the South African Revenue Service.

[22] Section 11(4) of the Act provides that 'For the purposes of serving the rule nisi in terms of subsection (2A), the sheriff must establish whether the employees are represented by a registered trade union and determine

whether there is a notice board inside the employer's premises to which the employees have access.'

[23] It is apparent that service on the respondent's employees was effected by the sheriff on 8 April 2021, by affixing to the outer door of the place of business.[25] The sheriff noted that he was unable to find any employees of the respondent. This accords with the applicant's unanswered

averment that it has no knowledge of the respondent having any employees at all.[26] It must therefore be accepted that there is no representative registered trade union involved. As such, there has been substantive

compliance with the section 11 service requirements in respect of the respondent's employees.

[24] Insofar as non-compliance with Practice Directive 13(b) is concerned, an affidavit from a correspondent attorney for the applicant was submitted, seeking condonation for non-compliance. The deponent confirms that service and publication of the provisional sequestration order was attended to during the period 30 March 2021 and 9 April 2021.[27] In fact, service and publication of the provisional sequestration order should have taken place on or before 31 March 2021. The

reasons

advanced for condonation are that the attorney was not notified that the provisional sequestration order was to be handed down on 16 March

2021. The court order was only uplifted by the firm's messenger on 23 March 2021 and the attorney erroneously assumed that service and publication had to take place within 10 days of receipt of the order. There can be no prejudice to the respondent in condoning the minimal delay in effecting service and publication of the provisional order. The affidavit submitted satisfies the requirement of Practice Directive 13(b) and I am satisfied that good cause has been demonstrated for non-compliance with the stipulated timeframe to be condoned.

Respondent's insolvency

[25] The respondent concluded various home loan agreements with the South African Bank of Athens Limited between 2015 and 2019, in terms of which different sums of money were loaned and advanced to the respondent. The respondent also signed deeds of suretyship binding herself as surety and co-principal with the Trust and Art Holdings International. The terms and conditions of the relevant agreements included an obligation to pay monthly instalments to the applicant.[28] In the event of default, the applicant had an option to either claim immediate repayment of the full outstanding balance, or to terminate the agreement(s). In that event, all amounts owing to the applicant became payable in full. Following default on the part of the respondent, the Trust and Art Holdings, the Applicant gave notice in terms of section 129 of the National Credit Act, 2005. The agreements were cancelled when the arrears were not paid.

- [26] The respondent is personally, and by virtue of the signed suretyships, jointly and severally liable with the Trust and Art Holdings for the debt owed to the applicant.[29] All the credit agreements concluded by the respondent personally or as co-principal debtor contain provisions that a certificate of balance shall serve as proof of the balance owing and that it is due and payable, unless the contrary is proved. The amounts that the applicant contends are due and payable by the respondent personally and by virtue of signed suretyships have been verified by certificates of balance. I am satisfied on a balance of probabilities that the applicant has succeeded in demonstrating due and payable liquidated claims against the respondent.
- [27] It is also readily apparent from the papers that the applicant has succeeded in demonstrating that the respondent's liabilities exceed her assets, so that she is factually insolvent, thereby complying with the second requirement for final sequestration.[30] The schedule provided by the respondent seeking to refute this[31] does so by including the assets and liabilities of the Trust. The invitation to view the respondent's financial position together with the Georgiou group of companies, and the Trust in particular, to avoid sequestration, must be refused, being devoid of a legal underpinning.
- [28] I am also satisfied that the applicant has succeeded in demonstrating that there is reason to believe that it will be to the advantage of creditors of the respondent if her estate is sequestrated. The evidence establishes, on a balance of probabilities, that the respondent owns substantial assets.[32] This should be sufficient to ensure that it will be advantageous to the general body of creditors to sequester the respondent to obtain some pecuniary benefit to the creditors as a body. The applicant therefore succeeds in establishing the third requirement for final sequestration on a balance of probabilities.
- [29] Finally, the vague suggestions that this enquiry is somehow impacted by the inaction of other creditors, or that the applicant could have proceeded differently in accommodating the respondent, appear to me to be unmerited, as are the submissions related to the National Credit Act, 2005 and the events prior to the granting of default judgment. I am satisfied that the applicant has met the requirements of section 12(1) of the Act and that a discretion should be exercised to order the confirmation of the rule nisi, so that the respondent's estate is sequestrated.

Order

[30] It is ordered:

1. That the rule nisi be and is hereby confirmed.

A GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant

: Adv K D Williams

Instructed by

: K G Tserkezis Inc

For the Respondent : Adv J T Benade

instructed by

: Jacques van Niekerk Attorneys

Heard on

: 29 July 2021

Order issued

: 29 July 2021

Reasons delivered on : 19 August 2021

[1] Act 24 of 1936.

[2] Par 684 of the founding affidavit, et seq.

[3] Rule 13(b) of the Joint Rules of Practice for the High Courts of the Eastern Cape Province provides that provisional sequestration orders should be served and published in an appropriate newspaper within 10 court days of it being granted. In the event of such order not having been served or published within that time, an explanation on affidavit for the delay is required.

[4] Act 34 of 2005.

[5] Section 12(1) of the Act.

[6] See E Bertelsmann et al Mars: The law of insolvency in South Africa (10th Ed) (2019) p148.

[7] Act 94 of 1990.

[8] Act 34 of 2005.

[9] Para 5 of the Founding Affidavit.

[10] Para 6 of the Founding Affidavit.

[11] P 175 of the indexed record ('the Index').

[12] Paras 14 and 15 of the Answering Affidavit.

- [13] Paras 50, 50.1 of the Answering Affidavit.
- [14] Section 56(5)(a) of the Banks Act.
- [15] Act 71 of 2008.
- [16] In terms of s 54 of the Banks Act. The comments of Gqamana J in this regard may also be noted, in particular that the matter has been raised in an obscure manner without appearing in the answering affidavit, and that the argument is disingenuous if one has regard to all the facts and evidence herein: at paras 10, 11 of the provisional sequestration judgment.
- [17] Bertelsmann at p139.
- [18] Bertelsmann at p 139, 140.
- [19] Index pp 1324-1325; 1352-1353.
- [20] The matter was postponed on the original return date on 28 April 2021.
- [21] Index pp 1743-1744.
- [22] See *Skordis v Nissiotis* 1955 (1) SA 395 (N) at 396H.
- [23] Bertelsmann at p 141.
- [24] Rule 27(3) of the Uniform Rules of Court.
- [25] Index p 1750.
- [26] Para 719.2 of the Founding Affidavit.
- [27] Index p 1747-1749.
- [28] The standing of the applicant to claim against the respondent based on these agreements has already been addressed.
- [29] It might be added that court orders, now subject to a pending application for leave to appeal, were granted by Goosen J against the respondent and the Trust in terms of which they were ordered to pay the amounts due in terms of the relevant credit agreements.
- [30] See Index pp 153-170, 1476-1479, and 1572-1575.
- [31] Paras 151, 152.2 of the Answering Affidavit read with annexure 'YG22' at pp 1528-1532 of the Index. In other instances, the respondent furnishes a denial to the applicant's averments without furnishing sufficient details to substantiate the response: see, for example, para 157.1 of the Answering Affidavit.
- [32] Para 678-680 of the Founding Affidavit read with para 152.1 of the Answering Affidavit.

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