

SOUTH AFRICA / JUDGMENT

MooiKloof Ridge Home Owners Association v B[...] and Another (3907/ 2019) [2020] ZAGPPHC 754 (4 November 2020) [2020] ZAGPPHC 754

COURT

North Gauteng High Court, Pretoria

BEFORE

E M Kubushi

CASE / FILE NUMBER

3907/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

4-11-2020

Case Number: 3907/

2019

In

the matter between:

MOOIKLOOF
RIDGE HOME OWNERS ASSOCIATION
APPLICANT
and
S[....]
S[....] B[....]
FIRST RESPONDENT
IDENTITY
NUMBER: [....]
MARRIED IN
COMMUNITY OF PROPERTY TO G K B[....]
G[....]
K[....]
B[....]
SECOND RESPONDENT
MARRIED IN
COMMUNITY OF PROPERTY TO S S B[....]

JUDGMENT

KUBUSHI, J

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.

INTRODUCTION

[1] The applicant, Mooikloof Ridge Home Owners Association, is a Homeowners Association tasked with the duty to raise and collect levies from its members in terms of its Articles of Association and applicable legislation. In terms of the Articles of Association of the applicant its members are required to pay monthly levy contributions in respect of the Home Owners Association and the Body Corporate. The levy contributions are payable monthly in advance as well as interest on the arrears at a rate determined by the Prescribed Rate of Interest Act 55 of 1956. The current monthly levy contributions are in an amount of R417 for the Home Owners

Association and R1 352 for the Body Corporate. Thus, each member of the applicant must on a monthly basis pay an amount of R1 765 towards the said levy contributions.

[2] The first and second respondents are registered co-owners of one of the properties in the estate that falls within the boundaries of the applicant. The first and second respondents were married to each other in community of property and have since divorced. They, nonetheless, remain both liable as co-owners for the payment of the levies as the property is still registered in their respective names.

- [3] It is alleged by the applicant that the first and second respondents fell in arrears with the payment of their levies and the applicant obtained two judgments against the first and second respondents, respectively, in the magistrate's court. The one judgment was for arrears in regard to the levy contributions to the Home Owners Association and the other judgment was for arrears for levy contributions to the Body Corporate. The applicant further alleged that the first and second respondents, even after the said judgments were granted, continued to be in arrears with their levy contributions.
- [4] At the time of launching this application it is alleged that the first and second respondents were in arrears with their levy contributions to the Home Owners Association in the amount of R90 3030, 69. They were also in arrears with the levy contributions towards the Body Corporate in the amount of R91 300, 51. As at the date of hearing of this application, it is alleged that the arrears amounted to R510 000, being R184 000 in arrear levies including charges, legal fees and interest. In terms of Article 6.4 of the applicant's Articles of Association, any legal proceedings against any member for the enforcement of any of the rights of the applicant, the applicant shall be entitled to recover all legal costs so incurred from the member concerned, calculated as between attorney and own client.
- [5] The applicant has as a result of the continued failure by the first and second respondents to pay the levy contributions and the arrears thereto, approached court for the sequestration of their respective alleged insolvent estates. It is alleged, in the application, that the first and second respondents, have committed acts of insolvency as envisaged in section 8 (a) , (b) and (c) of the Insolvency Act No 24 of 1936 ("the Insolvency Act").
- [6] As is trite, an act of insolvency is a statutory concept which obviates the necessity of proving actual insolvency. Consequently, the first and second respondents are said to have failed to satisfy the judgment debts obtained against them and have evaded the sheriff to give effect to the writs of execution in respect of the said judgment debts. These according to the applicant, are two independent deeds of insolvency.
- [7] The said section 8 of the Insolvency Act provides as follows:

"8. Acts of insolvency

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 debts;
- (b) if a Court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to 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 attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another; . . ."

DISCUSSION

- [8] In determining whether the first and second respondents should be sequestrated, I must first determine whether or not the first and second respondents committed the said acts of insolvency.

The alleged act of insolvency in terms of section 8 (a) of the Insolvency Act

- [10] The first respondent is said to have committed an act of insolvency by evading contact with the sheriff for servicing the notice of motion (re sequestration application) on him. Whereas the second respondent is said to have committed an act of insolvency in that she has absented herself from the property where service of the writs of execution was to be affected, with intent to evade or delay the payment of her debts. It is submitted that the first and second respondents have been evading the sheriff as is evident from the various tracing reports read with the relevant sheriffs returns of service (about three of them in each case) to have the warrants of execution served and executed.

- [11] The first respondent cannot be said to have committed an act of insolvency by evading service upon him of the notice of motion. The evidence on record indicate that the first respondent does no longer reside at the address where the attempted service of the process was made. The applicant argues that although it appears from the respondents' opposing affidavit that the first respondent has changed his residential address, no written instruction has been received that the first respondent has elected to change his residential address. This argument is not sustainable because the tracer has provided the applicant with the first respondent's address of employment where the service of the notice of motion could have been effected.

- [12] The second respondent has in her opposing affidavit admitted that she is residing at the same property where the sheriff has been unsuccessful in executing the warrants of execution issued against her to satisfy the judgment debts. The returns of service state in no unclear terms that the service could not be effected because the second respondent could not be located at the given address.

- [13] Section 43 (2) of the Superior Courts Act[1] determines that the return of the sheriff or deputy sheriff of what has been done upon any process of a court shall be prima facie evidence of the matters therein stated. As per the deputy sheriffs return, the prima facie evidence is that the second respondent could not be located at the given address.

- [14] In *Hassan & Another v De Villiers Berrange*,[2] the Supreme Court of Appeal held as follows:

"Both subsections 8 (a) and (d), in setting out acts of insolvency, refer to an intent on the part of the debtor. In case of section 8 (a) the intent is one to evade or delay the payment of debts, ... The test of intention on the part of the debtor is a subjective one . . . Intention is established by a

process of inferential reasoning and is not dependent upon the mere ipse dixit of the debtor who may well deny that he has any such intention. A court, in considering whether there was such an intention is required to weigh up all the relevant facts and circumstances in order to determine what, on the probabilities, was the "dominant, operative or effectual intention in substance and in truth" of the debtor."

- [15] The facts established is that the deputy sheriff has on several occasions attended at the second respondent's place of residence to serve the warrants of execution and that on all those occasions he did not find anyone at the premises; in particular, that the second respondent was not at home. These are the relevant facts from which an inferential reasoning can be made. On the basis of these proven facts, an inference cannot be made that the second respondent is evading service let alone that she is evading service with the intention to evade or delay the payment of her debts.
- [16] In that sense, the applicant's submission that the second respondent has been evading service of the writs of execution is, to me, pure conjecture and speculation and is unsubstantiated, when taken in the light that it is evidently clear that as per the returns, the second respondent could not be located at the premises. The second respondent states in her answering affidavit that at the time the deputy sheriff visited the premises, she was at work. This evidence is unchallenged. A possibility that the deputy sheriff might have attended to the property whilst the second respondent was not there, cannot be excluded under the circumstances.
- [17] That sequestration proceedings based on an inadequate or defective return may prove abortive is clear from the decisions of our courts which have held that an applicant must stand or fall by the return upon which he relied.

The alleged act of insolvency in terms of section 8 (b) of the Insolvency Act

- [19] The evidence indicates that warrants of execution were issued to attach the first and second respondents' movable assets, in an attempt to satisfy the two judgment debts. The warrants of execution could not be executed because the first and second respondents could not be located at the given address of service. A tracer was appointed to trace their whereabouts and provided the applicant with the first respondent's employment address. The address provided for the second respondent was the residential address.
- [20] The deputy sheriff is said to have attended to the first respondent at his place of employment and demanded payment of the judgment debts personally from the first respondent. The first respondent is said to have informed the deputy sheriff that he has no money or disposable assets or property whereby the warrants could be satisfied. As the warrants of execution could not be executed the deputy sheriff rendered nu/la bona returns of service in respect of both warrants of execution.

- [21] As already stated, in terms of section 8 (b) of the Insolvency Act, a debtor commits an act of insolvency if a court has given judgment against him and he fails, upon demand of the officer whose duty it is to execute that judgment, to satisfy it or to 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. It follows therefore that, the first respondent having not been able to satisfy the judgment upon demand by the deputy sheriff, and as further envisaged in section 8 (b) of the Insolvency Act, would have committed an act of insolvency.
- [22] Same, however, cannot be said of the second respondent. It is common cause that the sheriff had, to date of launching the application, not been able to effect service of the warrants of execution on the second respondent. It can, therefore, not be said that the second respondent has not been able to satisfy, upon request by the sheriff, the two judgments granted against her.
- [23] The applicant submits that to date of launching the application, and despite service of the warrants on the first respondent personally, the first respondent has failed to effect payment of the judgment debts. There has, also, been no material alteration to the financial position of the first respondent.
- [24] That the first and second respondents have not satisfied the judgment debts which has resulted in them owing the applicant a substantial amount as indicated in the applicant's heads of argument, is not the test. What is required by the subsection is for the applicant to establish that the first and second respondents did not satisfy the judgment debt on demand by the sheriff or indicate, to the sheriff, sufficient disposable property to satisfy the judgment debt or that the sheriff did not find sufficient disposable property to satisfy the judgment debt.
- [25] Failure to satisfy the warrant on demand, on its own, does not amount to an act of insolvency. For it to amount to an act of insolvency, it must be accompanied by a failure by the debtor to point out sufficient disposable property to satisfy it; or failure by the officer charged with the execution of the judgment to find sufficient disposable property to satisfy the judgment. It is only where the first act does not apply because personal service of the warrant could not be effected on the debtor, that the second act may be committed.[3]
- [26] An act of insolvency once performed is conclusive proof that the debtor is insolvent. However, it is the first respondent's contention that he is not insolvent whereas the applicant insists that he is insolvent by reason of the fact that he has not been paying his levy contributions and as such his debt has spiraled out of control. The question, therefore, is whether the first respondent's estate is insolvent.
- [27] The question of whether a debtor's estate is insolvent or not was put as follows by the court in *OBC Distribution Centre (Pty) Ltd t/a OBC Cold Storage v Correia and Another*,[4]

"[4] This brings me to the central issue to be decided: has it been proven, at least prima facie, that the respondents' estate is insolvent? One may seek to establish factual insolvency either directly by adducing evidence of the debtor's liabilities and of the market value of his assets at the date of the application, or indirectly by providing evidence of circumstances indicative thereof, e.g., the fact that debts remain unpaid, or that the debtor has sought a moratorium or that he has endeavoured to compromise with his creditors (Meskin: Insolvency Law. par 2.1.3). However, a Court must be cautious to infer insolvency from such circumstances. As was pointed out in *Comer Shop (Pty) Ltd v Moodley* 1950

- (4) SA 55 (T) at p 60 the inability to pay a debt should not be taken out of its context, for it may be "consistent with a state merely of temporary financial embarrassment" or due to "commercial insolvency" in circumstances where a debtor's liabilities do not exceed the value of his assets."
- [28] It is trite that the legal test for insolvency is namely, whether or not the debtor's liabilities, fairly estimated, exceed his assets, fairly valued.[5] It is also trite that in compulsory sequestration, the creditor bears the onus of satisfying the court that the requirements are met.
- [29] The first and second respondents rely on the settlement agreement forming part of the decree of divorce to indicate the assets in the respondents' respective estates as an indication that the second respondent's assets are more than his liabilities. According to the said settlement agreement the property awarded to the first respondent is: the property situated within the boundary of the applicant (the house) and a BMW 428i motor vehicle which the first respondent contends is worth R550 000. The value of the house is not set out in the respondents' answering affidavit. The house was valued by the applicant in October 2018. According to the valuator, the property, as at October 2018, had a forced sale value of R600 000 of which a true half value is R300 000 and a market value of R800 000. The only amount indicated by the applicant as a debt owed by the respondents is R510 000. As appears from the Windeed attached to the applicant's papers the respondents own two immovable properties. The value of the other property is unknown. The other creditor that the applicant seems to be aware of is ABSA bank which has a mortgage bond over the property. The amount still owed to the bank is unknown. Therefore, on the basis of the market value of the property, which possibly has increased, there is no indication that the first respondent's liabilities exceed his assets.
- [30] As is trite, where the applicant seeks to establish advantage to creditors by relying on the residue between immovable property valued as aforesaid and the amount outstanding on a mortgage bond registered over the immovable property, proof of the amount outstanding on the mortgage bond at the time of the launching of the application is required. In this instance, the outstanding amount on the mortgage bond was not provided.

- [31] Furthermore, the requirement is that the court must be satisfied that there is reason to believe that the sequestration will be to the advantage of creditors. If, the applicant's argument, that the liabilities of the first respondent exceed his assets, is to be accepted, without an indication of the value of the amount still owed to ABSA, it cannot be reasonably assessed whether the sequestration will be to the advantage of creditors. The onus is on the applicant who must show that the creditors are actually going to get some money from the sequestration and not just a negligible dividend.
- [32] If the nulla bona return is not a recent one, like in this instance, there must be an allegation supported by facts that the debtor's position is unchanged.[6] There are no facts on record to sustain this allegation particularly in the light of what is elucidate in the paragraphs above.

The act of insolvency in terms of section 8 (c) of the Insolvency Act

- [34] Without proof that the respective liabilities of the first and second respondents exceeds their respective assets, it cannot be concluded that the agreements the first and second respondents have entered into with their creditors is a further act of insolvency which points to the fact that other creditors are favoured over the other. The applicant has also not been able to establish that the sequestration of the respective estates of the first and second respondents will be to the advantage of creditors.

CONDONATION

- [35] It is common cause that the answering affidavit of the first and second respondents has been filed out of time. The first and second respondents have applied for condonation to be granted leave to file out of time which is opposed by the applicant.
- [36] I am inclined to grant the condonation on the basis that, although the first and second respondents have not been able to provide a proper explanation for their delay, they have good grounds of defence as indicated above.

POINTS IN LIM/NE

- [37] For the conclusion that I have reached on the merits of the application, I find it not necessary that I deal with all the points in limine raised by the first and second respondents.

CONCLUSION

- [38] It is therefore my conclusion that the applicant has not succeeded to establish that the first and second respondent have committed acts of insolvency as envisaged in section 8 (a), (b) and
- (c) of the Act; that the first and second respondents' respective estates are insolvent; and that the sequestration of the respective estates of the first and second respondents will be to the advantage of creditors.
- [39] The application, as such, stands to be dismissed.

COSTS

[40] The first and second respondents as the successful parties, are entitled to the costs of the application on an opposed basis.

ORDER

[41] The application is dismissed with costs.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Appellant's Counsel

: Adv. F C Lamprecht

Appellant's Attorneys

: Kircaldy Pereira Inc.

1st & 2nd Respondent's Representative : Mr. N D Malale (Attorney)

1st & 2nd Respondent's Attorneys : Pillay Thesigan Inc.

Date of hearing

: 18 AUGUST 2020

Date of judgment

: 04 November 2020

[1] Act No. 10 of 2013.

[2] 2012 (6) SA 329 (SCA).

[3] MOODLEY v HEDLEY 1963 (3) SA 453 (N) at 455 .

[4] (12381/14) [2014] ZAGPPHC 743 (23 September 2014).

[5] Venter v Volkskas 1973 (3) SA 175 (T) 179.

[6] Rodrew (Pty) Ltd v Rossouw 1975 (3) SA 137 (0) at 139.

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