

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Weidman N.O and Others (31/2020) [2020] ZAFSHC 267 (26 March 2020) [2020] ZAFSHC 267

COURT

Free State High Court, Bloemfontein

BEFORE

N.S. Daniso

CASE / FILE NUMBER

31/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case

number: 31/2020

In

the matter between:

NEDBANK
LIMITED
Applicant
And
WERNER
JACOBUS WEIDEMAN N.O
First Respondent
REINETTE
WEIDEMAN N.O
Second Respondent
JOSEPH
JOHANN SAUNDERS NO.
Third Respondent
HEARD

ON:

12 MARCH 2020

JUDGMENT**BY: DANISO, J****DELIVERED ON: 26 MARCH 2020**

- [1] This is an opposed application for the provisional sequestration of the estate of the trust known as Rorich's Hoop. The respondents are the trustees for the time being of Rorich's Hoop Trust.
- [2] The following issues are generally of common cause: The applicant is a commercial bank and one of the creditors of the respondents. The respondents' indebtedness to the applicant is for an amount of R114 141 801.79 as of 19 December 2019 which arises from a facility agreement, a written contract of suretyship agreement for the obligations of the trust Anglo Fertilizer (Pty) Ltd, five separate instalment sale agreements and two written contracts of suretyship for the obligations of the trusts Sunset Beach Trading CC, Welgeval and Anglo Fertilizer (Pty) Ltd.
- [3] The said credit agreements are secured by a notarial general covering bond concluded by the parties on 24 October 2018[1] and in terms of the said bond certain acts of breach of any agreements that the respondents are a party to triggers the immediate

repayment of the respondents' indebtedness to the applicant, viz; On 12 July 2019 a judgment was granted against Rorich Hoop Trust in the amount of R2 618 003.29 together with interest and costs, the trust failed to satisfy the judgment as a result on 27 September 2019 the trust's assets were attached by the sheriff, furthermore, Sunset Beach Trading CC one of the trust security providers is no longer conducting business due to liquidation and about R10 000 00.00 worth of Rorich Hoop Trust's assets have been disposed of by way of voluntary auction.[2]

- [4] Before dealing with the issue to be considered in this matter there were preliminary issues raised in the affidavits. The respondents sought condonation for the late filing of the answering affidavit. There was also an objection to the court's jurisdiction, the validity of the consent form for perfection. The respondents also applied for the referral of the matter to oral evidence. On the other side, the applicant sought an order for striking out certain averments in the respondents' answering affidavit.
- [5] At the hearing of the matter the respondents abandoned their objections except for the request that the matter be referred to oral evidence while the applicant abandoned the application to strike out. The only issues which remained for determination were the application for the referral of the matter to oral evidence and the unopposed application for condonation. By agreement between the parties and for convenience sake the applications were heard contemporaneously with the merits of this application.

- [6] It was the applicant's case that the respondents are indebted to the applicant in the sum of R114 141 801.79 of which R104 878 956.96 is due and immediately payable. The applicant relies on s 8 (c) and 8 (d) of the Insolvency Act[3], on the basis that the respondents have been dissipating the assets of the trust to either prejudice or prefer one creditor above the other creditors.
- [7] In terms of s 10 of the Insolvency Act 24 of 1936 the applicant needs to satisfy the court on a prima facie basis that:-
- 7.1. The applicant has a claim against the respondents;
- 7.2. The respondents have committed an act of insolvency or are in fact insolvent; and
- 7.3. There is reason to believe that it will be to the advantage of creditors if the respondents' estate is sequestrated.
- [8] Now I turn to consider whether the three requirements elucidated above herein have been established by the applicant in the context of this matter.
- [9] The respondents' opposition of the application is premised on the ground that there are factual disputes pertaining to the amounts owed by the respondents and the surrounding circumstances. The figures referred to by the applicant are not correct and the debt is not yet due. It was also asserted by the respondents' counsel that the estate of the trust is vast, a forensic audit can assist by putting into perspective the accurate state of the assets and the liabilities of the trust. These issues cannot be resolved on the affidavits but by way of oral evidence, the court must therefore refer this application for hearing on oral evidence.
- [10] Mr van der Merwe who appeared for the applicant submitted that it was not necessary for the applicant to aver the exact amounts, the fact that the respondents concede the indebtedness is sufficient for the applicant to bring these proceedings. The debt has become due pursuant to the respondents' breach of the terms of the notarial general covering bond.
- [11] He further argued that the respondents are insolvent, their assets valued at R22 050 000.00 are exceeded by their liabilities of R158 439 603.03. They are unable to pay the debts of the trust hence there is a judgment for R2 618 003.29 which was not satisfied resulting in the sheriff attaching the assets of the trust. One of the security providers, Sunset Beach Trading CC has been placed under liquidation for failing to service its debts.
- [12] Mr van der Merwe contended that there are no feasible assets which can be realised to settle the debts of the trust. A whopping R10 000 000.00's worth of its assets have already been disposed of by way of public auction. There is no evidence provided with regard to the value of the remaining assets. The postponement for hearing on oral evidence will not take this matter anywhere. The respondents have already embarked on a process of dissipating the assets of the trust, selling them off to pay other creditors while siphoning and channelling the funds into the accounts of the first and second respondent's son.

- [13] I'm in agreement. The provisions of the notarial general covering bond which trigger the immediate payment of the debts are not disputed therefore the respondents' averment that the debt is not due is a fallacy. Certificates of balance evidencing the nature and the amounts of the respondents' indebtedness were attached on the founding affidavit. The respondents' defence to the debt is therefore not bona fide. I'm satisfied the applicant has established a prima facie case against the respondents.
- [14] The respondents' inability to pay the debts of the trust is demonstrated by the adverse court judgment, the voluntary sale of its assets in an auction and the liquidation of one of its security providers, Sunset Beach Trading CC. The applicant's allegation that the assets of the respondents are exceeded by the liabilities has not been rebutted by any evidence. On the respondents' own version a forensic audit is required to determine the financial position of the trust.
- [15] Applications for the referral of a matter to oral evidence can only be granted in exceptional circumstances. In *Kalil v Decotex (Pty) Ltd & Another* 1988
- (1) SA 943 (A) Corbett JA held at 979 B:-
- "Where on the affidavits there is a prima facie case in favour of the applicant, then, in my view, a provisional order of winding-up should normally be granted, and, save in exceptional circumstances, the Court should not accede to an application by the respondent that the matter be referred to the hearing of viva voce evidence. This does no lasting injustice to the respondent for he will on the return day generally be given an opportunity, in a proper case and where he asks for an order to that effect, to present oral evidence on disputed issues..."*
- [16] On the facts germane to this matter I have found no exceptional circumstances justifying the referral to oral evidence instead, I'm of the view that in postponing the matter I will be delaying the inevitable. The respondents are insolvent.
- [17] The offering of the proceeds of the sale from their assets sold in execution to some of the creditors leaving others in the cold implies not only that the respondents have no available funds to pay their debts but also that they are preferring one creditor to the other.
- [18] The requirements of s 8 (c) and (d) have been satisfied. There are no exceptional circumstances warranting the court applying its discretion in the respondents' favour. The sequestration of the respondents will be to the advantage of the creditors as the trustees will bring about a convergence of all the assets and liabilities of the trust to ensure a fair distribution to the creditors.
- [19] I now turn to deal with the application for condonation. Pursuant to the respondents indication of their intention to oppose the application it was agreed between the parties that the respondents' answering affidavit was to be filed by the 17th February 2020. The affidavit was only delivered on 19 February 2020.

- [20] It was the respondents' case that first respondent was only able to consult his attorneys on 10 February 2020 due to the fact that he had been unwell. The first respondent suffered a heart attack on 10 January 2020 immediately after he was served with the papers relating to the proceedings. On 17 January 2020 he underwent a heart surgery and was booked off till 28 February 2020. Due to the fact that the applicant had placed a freeze on the respondent's account, the respondents were not able to provide their attorneys with the bank statements, the statements were ultimately provided to the respondents on 14 February 2020. The respondents' answering affidavit was only finalized on 17 February 2020.
- [21] I'm satisfied that the explanation for the delay has been fully and sufficiently given and there is no prejudice to the applicant. The affidavit was merely two days late, the delay was not excessive. It would be in the interests of the administration of justice and the applicant as well that this matter is finalized. I am therefore inclined to condone the late filing of the respondent's answering affidavit.
- [22] Taking into consideration all facts of this matter I'm satisfied that there is good reason to place the respondents under provisional sequestration.
- [23] In the premises, the following order is granted;
- (1) The late delivery by the respondent of its answering affidavit is condoned. I make no order in respect of costs.
 - (2) The application to refer the matter for oral evidence is dismissed and a provisional sequestration order returnable on 30 April 2020 is granted as per the draft order attached hereto marked as "X".

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicant: Adv. M.P. van der Merwe (SC)

Instructed by:

Symington & De Kok Attorneys

BLOEMFONTEIN

Counsel on behalf of Respondents: Adv. A.M. Viviers

Instructed by:

Thereon, Jordaan & Smit Inc

C/O Callis Attorneys

[1] Annexure FA4 of the founding affidavit.

[2] Clause 7.1.2, 7.2.5 & 7.2.6 *ibid*.

[3] 24 of 1936.

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