

SOUTH AFRICA / JUDGMENT

Nedbank v Andrews and Another (240/2011) [2011] ZAECPEHC 29 (10 May 2011)

[2011] ZAECPEHC 29

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Nepgen

CASE / FILE NUMBER

240/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

CASE NO: 240/2011

DATE HEARD: 19 April 2011

DATE DELIVERED: 10 May 2011

In the matter between

NEDBANKApplicant

And

JON GAVIN ANDREWSFirst Respondent

VICKY ANDREWSSecond Respondent

JUDGMENT

NEPGEN J

- [1] This is an application for the provisional sequestration of first respondent. The application was initially brought against first respondent and second respondent, who are married to each other out of community of property, but the applicant has since withdrawn the application against second respondent. The application is opposed by first respondent.

[2] It is common cause that first respondent is indebted to the applicant in the following amounts:

R 972 065.37 in respect of an agreement of loan (first respondent's liability for this indebtedness is joint and several with that of second respondent).

R 168 418.38 in respect of a deed of suretyship.

R 39 391.40 in respect of an outstanding credit card facility.

R 8125.63 in respect of an overdraft on his current account.

The aforesaid indebtedness of first respondent is currently subject to a re-arrangement in terms of section 87 of the National Credit Act, No 34 of 2005 (the Act). There is a further amount which the applicant alleges first respondent owes to it, but this is disputed by first respondent. It was in respect of this amount that first respondent sought leave to file further affidavits. This was not opposed by the applicant and leave to file these affidavits was granted. Nothing further need be said about this alleged indebtedness as it was accepted, during argument, that this alleged indebtedness was to be excluded for purposes of deciding whether or not to grant the relief sought by the applicant.

[3] In its founding papers the applicant sought to rely on three grounds for the sequestration of first respondent, namely, firstly,

an alleged act of insolvency in terms of section 8 (g) of the Insolvency Act, No 24 of 1936; secondly, an alleged act of insolvency in terms of section 8 (e) of the aforesaid act; and, thirdly, the alleged actual insolvency of first respondent. When the matter came before me Mr Scott, who appeared on behalf of the applicant, informed me that the applicant was not relying on the alleged acts of insolvency, and that the only ground upon which it relied for the relief it sought was the alleged actual insolvency of first respondent. Despite this, I consider it necessary to refer, albeit briefly, to the applicant's contentions as set out in the founding papers regarding the aforesaid alleged acts of insolvency as well as the alleged actual insolvency of first respondent. I consider this necessary because of the submissions made on behalf of the applicant in respect of the alleged insolvency of first respondent.

[4] Applicant's contention was that by applying for and being placed under debt review first respondent gave notice in writing to the applicant and other creditors that he was unable to pay his debts, thus committing an act of insolvency in terms of section 8 (g) of the Insolvency Act; and that the re-arrangement of first respondent's debts constituted a further act of insolvency as envisaged by section 8 (e) of the aforesaid act. The allegations made by the applicant in this regard, as well as the allegations relied upon insofar as the alleged actual insolvency of first respondent is concerned, are set out in a single paragraph in the founding affidavit. This paragraph reads as follows (the reference to respondents is due to the fact that it was initially sought to obtain relief against both first and second respondent):

“The Respondents have committed an act of insolvency by applying for, and being placed under debt review. In this regard, I annex hereto, marked annexure “L” a copy of the court order for debt re-arrangement granted in terms of the National Credit Act with regard to the Respondents on the 9th June 2010, and of the documents relating thereto..... As will, with respect, appear therefrom, and as envisaged in section 8 (g) of the Insolvency Act, the Respondents gave notice to various of their creditors, including the Applicant, to the effect that they are unable to pay their debts. In addition, I respectfully submit that the re-arrangement of the Respondents’ debts, constitute (sic) a further act of insolvency committed by the Respondents, being that envisaged in section 8 (e) of the Insolvency Act. In addition, I respectfully submit that, it is plain from annexure “L” hereto that the Respondents are factually insolvent, that they cannot pay their debts, that the value of their assets, fairly valued is less than the amounts owed by them, and that

they are, accordingly, factually insolvent.”

- [5] In responding to these allegations first respondent, in his opposing affidavit, contended that the applicant was not entitled to rely on the proceedings in terms of the Act as constituting acts of insolvency. As stated above, when the matter came before me it was no longer sought to rely on the alleged acts of insolvency, and it is therefore unnecessary to refer to the contentions advanced by first respondent in this regard. All that need be stated, in summary, is that first respondent dealt at length with the applicant’s participation in the debt review application and also the fact that the applicant had applied for a rescission of the debt re-arrangement order, which application was unsuccessful. First respondent did not deal specifically with the allegations made in the last sentence of the paragraph referred to above.
- [6] The only reference in the founding papers to first respondent’s assets are to be found in paragraphs 14 and 15 thereof. In paragraph 14 the applicant sought to establish that it would be to the benefit of the creditors of first respondent and his wife if they were sequestrated. In this regard the applicant mentioned that first respondent was a 50% member in a close corporation which owned fixed property in Port Elizabeth. Without going into any detail, it was stated that the property had been sold and that out of the nett proceeds an amount of “approximately” R 322 875.00 would be due to first respondent and would be available for distribution amongst his creditors. In paragraph 15 of the founding affidavit the applicant dealt with the security it had for the amounts due to it, and referred to three mortgage bonds which had been registered over an immovable property in Lorraine, Port Elizabeth. The applicant annexed a valuation of the property, which indicated that it was worth R 850 000.00.
- [7] Nowhere in the papers is it stated that the two assets referred to are the only assets first respondent has. In fact, this is not even suggested. What does appear from paragraph 14 of the founding affidavit is that it was never the intention of the applicant to contend that these were the only assets belonging to first respondent, for one finds, immediately prior to the applicant mentioning that first respondent is a 50% member in the close corporation, the words “apart from such other assets as they may have” (referring to both respondents).

- [8] Mr Scott contended that the assets referred to were the only assets known to the applicant. Again, this is not stated, nor is it even suggested. The statement I have referred to indicates clearly that the applicant does not consider these two assets to be the only assets first respondent has.
- [9] It was further contended that because first respondent did not deny the allegation in paragraph 12 of the founding affidavit that he was factually insolvent, this statement must be accepted as being correct. I disagree. What the final sentence in paragraph 12 of the founding affidavit states is that “it is plain from annexure “L” hereto” that the respondents are factually insolvent. The said annexure, which as I have indicated deals with the proceedings in terms of the Act, does not in any way reflect actual insolvency on the part of first respondent. In fact, the documents annexed do not even mention the assets of first respondent nor, for that matter, of second respondent. It seems to me that what the applicant intended to convey in the sentence under discussion was that because first respondent and his wife had applied for debt review this indicated that they were unable to pay their debts and were therefore insolvent. As the annexure does not indicate actual insolvency I do not consider that any inference whatsoever can be drawn from the failure on the part of first respondent to have denied that he was factually insolvent.
- [10] In order to establish insolvency it must be shown that the liabilities of first respondent, fairly estimated, exceed the value of his assets, fairly valued (see *Ohlsson’s Cape Breweries, Ltd vs Totten*, 1911 TPD 48 at p50). The onus of proving this, at this stage *prima facie*, rests upon the applicant and is discharged on a balance of probabilities; see generally *Meyer & Kie. vs Maree*, 1967 (3) SA 27 (T) at p30 D – H. In the present instance there has been no attempt whatsoever by the applicant to list all the assets of first respondent. Accordingly, it serves no purpose to refer to the value of the only two assets mentioned; to state that first respondent’s liabilities exceed the value of those two assets; and to contend further that this indicates actual insolvency

on the part of first respondent. In these circumstances it cannot be said that the applicant has succeeded in establishing actual

insolvency on the part of first respondent. This being so, the applicant is not entitled to the relief it seek.

[11] The application is dismissed, with costs.

J J NEPGEN

JUDGE OF THE HIGH COURT

Appearance:

For the plaintiff: Mr Pretorius, instructed by Greyvensteins Attorneys

For the defendant: Mr Scott, instructed by Roland Meyer & Co

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