

SOUTH AFRICA / JUDGMENT

Odendaal v Nomoredebt Trust and Others (63675/2018) [2019] ZAGPPHC 36 (8 February 2019) [2019] ZAGPPHC 36

COURT

North Gauteng High Court, Pretoria

BEFORE

Stoop

CASE / FILE NUMBER

63675/2018

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE

(2)

OF INTEREST TO OTHER JUDGES

(3)

REVISED.

CASE

NO: 63675/2018

8/2/2019

In the

matter between: ESTER
 ODENDAAL
 (ID:
 [...])
 APPLICANT
 and
 NOMOREDEBT
 TRUST
 REGISTRATION
 NUMBER: IT1934/11)
 FIRST RESPONDENT
 JACQUES
 CILLIERS OOENOAAL N.O
 (ID:
 [...])
 (IN
 HIS CAPACITY AS TRUSTEE OF THE
 NOMOREDEBT
 TRUST)
 SECOND RESPONDENT
 ELRYN
 FOUCHE N.O
 (IN
 HER CAPACITY AS TRUSTEE OF THENOMOREDEBT
 TRUST)
 Third Respondent

JUDGMENT

STOOP AJ

1. This is an application for the sequestration of the Nomoredebt Trust 'the Trust') who is cited as the First Respondent. The Second and Third Respondents are the Trustees of the Trust. The Applicant does not seek relief against the Second and Third Respondents and she joined them as Respondents for the sole purpose of notifying them of the application.
2. On 18 October 2018, the Applicant obtained a provisional sequestration order against the Trust and the Applicant now seeks confirmation of that order. The application is unopposed.
3. The crisp question that arises in this matter is whether a sequestration order may be granted against a trust under circumstances where the sequestration order is not sought against the trustees in their capacities as such rather against the Nomordebt Trust which is the registered name of the Trust.
4. In terms of Section 9(1) of the Insolvency Act, Act 24 of 1936, a creditor (or his agent) may apply for the sequestration of a the estate of the debtor. 'Debtor' is defined as follows in section 2 of the Insolvency Act 24 of 1936:

"debtor', in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or a partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies."

5. The question is not whether a Trust is a debtor in the usual sense of the word. That question was answered by the Full Court in *Magnum Financial Holdings (Pty) Ltd (in Liquidation) v Summerly and Another* NNO 1984 (1) SA 160 (W) at 1638-C where it was held that a trust is "a debtor in the usual sense of the word", and accordingly susceptible of sequestration in terms of the Insolvency Act. In that matter, the sequestration order was sought against the sole trustees of the Summerly Family Trust and the issue the Court had to consider was whether a trust could be sequestrated or rather be liquidated in terms of the Companies Act 61 of 1973. Nestadt J followed the reasoning of MURRAY CJ (QUENET J concurring) in *Ex parte Milton* NO 1959 (3) SA 347 (SR) and held that it was competent for the Court to accept the surrender as insolvent of an administrative trust created by contract.
6. In *Ex parte Milton* NO the trustee of the Milton Children Trust applied for the voluntary surrender of the estate of the trust. The Court held that even if the trust did not, strictly speaking, possess a distinct legal persona, it fell within the definition of "debtor" and could be described as a debtor "in the usual sense of the word". It could, through its trustee, borrow money and, as the owner of property, incur liability, inter alia, for rates and taxes. Creditors could look to the trust property for satisfaction of their claims and it was impossible to secure a concursus creditorum by sequestrating the estate of either the donor or the beneficiaries or the personal estate of the trustee.
7. In the present application, the Applicant does not seek the sequestration of the trustees in their capacities as such. What is sought, is a sequestration order against the Nomoredebt Trust which is the name given to the Trust. In *BOE Bank Ltd (formerly NBS Boland Bank Ltd) v Trustees, Knox Property Trust* [1999] 1 All SA 425 (D), McCall J stated as follows (at 434h - i):

'However, whatever its true legal nature may be, both our common law and our legislation have recognised the existence of an arrangement whereby assets and liabilities are vested in a trustee or in trustees. This arrangement is, in everyday parlance referred to as a trust and individual trusts are often given a name in the deed conferring the trust property, and the powers to administer it, on the trustee or trustees.'

8. In *BOE Bank* the court had to determine whether the principal debtor, for which a defendant had bound himself as surety, was sufficiently identified when referred to as a trust. That question was answered in the affirmative as follows (at 436f - g):

'It may well be that it would have been more correct to describe the principal debtor as the named Trustees, in their capacity as Trustees of the Trust or as the Trustees for the time being of the Trust. Certainly, as appears from Rosner's case . . . where there is litigation against a trust, the trustees in their representative capacity and not the trust, as such ought to be cited.'

That however, is not the end of the matter because it is clear that . . . the identity of the creditor, the surety and the principal debtor must be capable of ascertainment by reference to the provisions of the Deed of Trust, extrinsic evidence'

9. BOE Bank was expressly approved by the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Swanepoel* NO 2015

(5) SA 77 (SCA).

10. The reference to Rosner's case in *BOE Bank*, is a reference to *Rossner v Lydia Swanepoel Trust* 1998

(2) SA 127 (W). In that matter, Goldstein J (with whom Malan J agreed), referred to *Mariola and Others v Kaye-Eddie* NO and *Others* 1995 (2) SA 728 (W) at 731C-F where the following was stated:

·'a trust is not a legal persona but a legal institution, sui generis. The assets and liabilities of a trust vest in the trustee or trustees. The trustee is the owner of the trust property for purposes of administration of the trust, but qua trustee he has no beneficial interest therein.... Unless one of the trustees is authorised by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when action is instituted against a trust. ... In legal proceedings trustees must act *nomine officii* and cannot act in their private capacities.'

11. In my view, the above also apply in the case of the sequestration of a trust. Where a trust is sequestrated, the debtor in the usual sense of the word is the trust, duly represented by the trustee(s) who ought to be cited in his/her/their capacity(ies) as such (also see *Gross and Others v Pentz* [1996] ZASCA 78; 1996

(4) SA 617 (A) at 625F-G).

12. In the *Rosner*-case, the Court held that the citation of a trust which is not a persona, may be amended to reflect the trustee. In the present matter, the Applicant did not seek to correct the wrong citation of the Trust. Had she done so, the outcome of this application might very well have been successful.

13. Applicant is not entitled to final relief as a result. The provisional order is discharged. No order is made as to costs.

ORDER:

The provisional sequestration order is discharged. No order is made as to costs.

BC STOOP AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 12 December 2018

APPEARANCES:

For the Applicant: Adv R P Loibner

Instructed by:

HERMAN ESTERHUIZEN SMALMAN ATTORNEYS

Pretoria

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