

SOUTH AFRICA / JUDGMENT

Otto Krause Inc v Brandt and Another (74191/13) [2015] ZAGPPHC 11 (27 January 2015) [2015] ZAGPPHC 11

COURT

North Gauteng High Court, Pretoria

BEFORE

P D Moseamo

CASE / FILE NUMBER

74191/13

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE NO. 74191/13

DATE: 27 JANUARY

2015

In the matter

between:

OTTO KRAUSE

INC.....APPLICANT

And

HEINRICH JOHAN

BRANDT.....RESPONDENT

ABSA BANK

LTD.....INTERVENING

CREDITOR

JUDGMENT

MOSEAMO AJ

- [1] The respondent was provisionally sequestrated on the 18th February 2014. The return date was extended to enable the intervening creditor, ABSA, to file application to intervene and opposing papers. On the 19th June 2014 the intervening creditor brought an application in which it sought the leave to intervene in the sequestration proceedings brought by the applicant and the dismissal of the application for sequestration.
- [2] At the hearing of this matter the parties addressed the court on the preliminary point regarding the fact that the intervening creditor's affidavit was not properly commissioned. The intervening creditor handed up the original application with an affidavit that was properly commissioned. The applicant indicated that they are not proceeding with their preliminary point and the main application can proceed. I accepted the affidavit and directed the parties to proceed with the main application.
- [3] Application to intervene is not opposed. I am satisfied that the intervening creditor has a real interest in the proceedings. Application for leave to intervene should therefore succeed.
- [4] The intervening creditor opposes the sequestration on the following grounds: (a) the respondent is not factually insolvent as he owns realizable property sufficient to satisfy the applicant's claim; (b) the sequestration will not be to the advantage of creditors; (c) the applicant has failed to comply with certain formal requirements prescribed by the Insolvency Act; (d) the applicant and respondent do not appear to be acting at arms-length and the application is a "friendly sequestration".
- [5] Applicant contends that the magistrates court ruled that the respondent is over indebted and a rearrangement proposal was made an order of court. The respondent has committed an act of insolvency as he gave notice in writing to the applicant that he is unable to pay his debts. Applicant contends that the sequestration will be to the advantage of creditors. Further that there are no reasons provided by the intervening creditors why the provisional sequestration should not be made final.
- [6] It is submitted on behalf of the intervening creditor that the applicant has not exhausted all its remedies inter alia obtaining judgment and execution against the movable assets of the respondent. It is contended that this is a friendly sequestration based on a simulated transaction between the parties with the sole purpose of putting an end to the respondent's financial obligations.
- [7] Section 12 of the Insolvency Act 24 of 1936 provides that the court may sequester the estate of the debtor if at the hearing pursuant to a rule nisi the court is satisfied that (a) the petitioning creditor has established against the debtor a liquidated claim for not less than R100; (b) the debtor has committed an act of insolvency or is insolvent; (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated.

Subsection 2 provides that if the court is not so satisfied it shall dismiss the petition for the sequestration of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die.

Has the creditor established against the debtor a liquidated claim for less than R100?

- [8] The applicant's claim is based on an untaxed attorney-and-own-client bill of costs. It is submitted on behalf of the intervening creditor that the applicant's claim does not constitute liquidated claim.
- [9] The intervening creditor referred to a number of cases where the court stated that an untaxed bill of costs is not a liquidated claim. In particular the case of *Tradoux v Kellerman* 2010 (1) SA 160 (C) where the court held that 'a liquidated amount in money is an amount which is either agreed upon or which is capable of "speedy and prompt ascertainment" or, put differently, where ascertainment of the amount in issue is a 'mere matter of calculation'...
- [10] In Hockley's law of insolvency 9th edition at 34 an untaxed attorney and client bill of costs is an unliquidated claim. The authors referred to the case of *Simpson & Liesching v Van Breda* 1930 CPD 195 in this regard.
- [11] There also appears to be a long list of authorities in support of the fact that an untaxed attorney and client bill does not constitute a liquidated claim.

In Hockley's insolvency law at 43 it is stated that 'sequestration is, in a sense, merely an elaborate means of execution and because of its costs an expensive one too'. In my view then the costs due to the applicant should have been taxed by the taxing master or agreed to in writing by the respondent in a fixed sum. See Uniform Rule 45(2)

Has the respondent committed an act of insolvency alternatively is the respondent insolvent?

- [12] It is common cause that the respondent admitted in writing in an email to the applicant that he is not in a position to pay his debt. The intervening creditor sought to support its contention that the transaction was a simulated transaction but this is not based on any proven facts. I am satisfied that the respondent committed an act of insolvency in terms of section 8(g) of the Insolvency Act 24 of 1936 as amended.

Whether there is reason to believe that the final sequestration order will be to the best interest of the creditors?

- [13] Before a court can grant a final order of sequestration it must be satisfied that there is a reason to believe that such sequestration will be to the advantage of creditors. Even where an act of insolvency has been committed, the court cannot grant a final sequestration order if the applicant does not discharge the onus on it to establish that there is reason to believe that sequestration will be to the advantage of the creditors.

- [14] It is submitted on behalf of the applicant that the sequestration of the respondent will be to the advantage of the creditors while the intervening creditor denies this.
- [15] The general method used in assessing whether there is reason to believe that the sequestration will be to the advantage of the creditors is to (a) make an allowance for the anticipated costs of sequestration and then
- (b) determine if there is reasonable prospect of an actual payment being made to each creditor who proves a claim.
- [16] The applicant sets out the respondent's financial position in its founding affidavit to be as follows: (a) immovable property with its forced sale value as R 2 700 000 and market value of R 3 250 000; (b) movable property, two motor vehicles, Isuzu valued at R 87 200 and Dodge valued at R 137 700. The applicant gives an estimate of the respondents' liabilities as R 3 200 000. He then makes an allowance for administrative costs in the sum of R 103 490. The applicant then contends that the creditors will receive a benefit of R 0.39 in the rand.
- [17] In disputing that the sequestration of the respondent will be to the advantage of the creditors, the intervening creditor submitted that the respondent is indebted to the intervening creditor alone in the sum of R 3 302 479.49 and since the total amount owing to creditors was as at August 2012 R 3 200 000 there will be no dividends to creditors.
- [18] In disproving the above the applicant submitted that the amount of liabilities in the amount of R3 200 000 was based on the information contained in the debt restructuring order of August 2012. It was contended on behalf of the applicant that the plaintiff has in all probabilities paid 15 installments towards his liabilities. Further that approximately R183 300 was allocated to the intervening creditor. I however find that the above is based on speculation and conjecture. It does not address the intervening creditor's contention that the respondent is indebted to the intervening creditor in the sum of R3 302 479.49.
- [19] The onus of establishing advantage to creditors remains on the sequestrating creditor throughout even where it is clear that the debtor has committed an act of insolvency. See Hockley's Insolvency Law at 45
- [20] I am not satisfied that the respondent's sequestration will be to the advantage of creditors.

In the result I make the following order:

1. Leave is granted to ABSA Bank Limited to intervene in this application;
2. The Rule Nisi granted on the 14th February 2014 is discharged;
3. The applicant is ordered to pay the intervening party's costs of the application.

P D MOSEAMO

ACTING JUDGE OF THE HIGH COURT

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