

SOUTH AFRICA / JUDGMENT

Seevnarayan v Ramjathan (38751/2019) [2021] ZAGPJHC 46 (16 April 2021)

[2021] ZAGPJHC 46**COURT**

South Gauteng High Court, Johannesburg

BEFORE

PA Meyer

CASE / FILE NUMBER

38751/2019

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Source record**HIGH****COURT OF SOUTH AFRICA****(GAUTENG****DIVISION,****JOHANNESBURG)****Case****no: 38751/2019****In****the matter between:**

PRASANTH

SEEVNARAYAN Applicant

and

KUVESH

RAMJATHAN Respondent

Case

Summary: Insolvency - Provisional

Sequestration - Section 10(1) of the Insolvency Act 24 of 1936 -

Whether prima facie there

is reason to believe that it will be to the advantage of creditors of
the respondent if his estate is sequestrated, as contemplated

ins

10(c) of the Insolvency Act 24 of 1936.

JUDGMENT

MEYER J

- [1] The applicant, Mr Prasanth Seevnarayan, seeks an order that the estate of the respondent, Mr Kuvesh Ramjathan, be placed under provisional sequestration. Section 10 of the Insolvency Act 24 of 1936 (the Insolvency Act) provides that '[i]f the court to which the petition for the sequestration of the debtor has been presented is of the opinion that prima facie- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and (b) the debtor has committed an act of insolvency or is insolvent; and (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally. It is only the last-mentioned requirement that is in issue in casu.
- [2] The main object of insolvency proceedings is to benefit creditors, not one creditor or some creditors, but the general body of creditors insofar as a concursus creditorum comes into being once a sequestration order is made. A further object of insolvency proceedings is achieved insofar as creditors are protected against 'the possible greed and mendacity of other creditors.' (LAWSA Vol 12 2nd Ed para 199 with reference to Richter v Riverside Estates (Pty) Ltd 1946 OPD 209 at 223.)
- [3] In Investec Bank and another v Mutemeri and another 2010
- (1) SA 265 (GSJ) at 274-275, Trengove AJ pointed out that while the creditor's underlying motive may be to obtain payment of his debt, an applicant for sequestration in fact does not constitute proceedings for the recovery of a debt, but rather-
- '[i]ts purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally. An applicant for sequestration must have a liquidated claim against the respondent, not because the application is one for the enforcement of the claim, but merely to ensure that applications for sequestration are only brought by creditors with a sufficient interest in the sequestration. Once the sequestration order is granted, the enforcement of the sequestrating creditor's claim is governed by the same rules that apply to the claims of all the other creditors in the estate. The order for the sequestration of the debtor's estate is thus not an order for the enforcement of the sequestrating creditor's claim.'
- (Also see Naidoo v ABSA Bank Ltd 2010
- (4) SA 597 (SCA) para 4.)
- [4] The applicant and the respondent have been involved in litigation since 2011. On 17 April 2012, the applicant caused summons to be issued against the respondent to recover an amount of R4 million in respect of moneys lent and advanced to the respondent in terms of

a written loan agreement. On 18 August 2015, this court granted judgment in favour of the applicant, and the respondent was ordered to pay to him the amount of R4 million plus interest thereon at the rate of 11% per annum compounded monthly in arrears from 20 February 2011 until date of payment and costs of the action.

- [5] The respondent sought leave to appeal from the trial court against its judgment and order, which application was dismissed. He petitioned the Supreme Court of Appeal for leave to appeal, which application was also dismissed with costs on 21 January 2019. He then made application to the President of the Supreme Court of Appeal for a reconsideration or variation of the decision refusing his petition for leave to appeal to the Supreme Court of Appeal in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013, which application Justice Maya P dismissed with costs on 10 April 2019. Thereafter, the respondent approached the Constitutional Court for leave to appeal, but that application was also dismissed with costs on 29 July 2019.
- [6] The applicant caused a writ of execution to be issued against the respondent to recover the amount of the judgment debt. On 21 August 2019, the sheriff rendered a return of service stating that the writ was served on the respondent personally and that the goods listed in the inventory were attached. On 21 August 2019, the applicant's erstwhile attorneys received notice and affidavits from a Mr Mukesh Bhavan and the respondent's wife, Chandrika Marrie, claiming that they are the lawful owners of the movable assets that were judicially attached.
- [7] On 12 August 2019, the respondent's erstwhile attorneys also issued a warrant of execution in order to attach the respondent's right, title and interest in respect of his bank accounts held with FirstRand Bank Limited. On 14 August 2019, FirstRand Bank informed the sheriff that the respondent's 'Private Wealth Cheque Account' had an available balance of R124 320.71, his 'Money and Call Account' had an available balance of R90.08, and his 'Money Maximiser Account' had an available balance of R24 832.04. On 3 September 2019, the sheriff confirmed that she received payment in the amount of R149 809.57 from FirstRand Bank, which amount was then paid into the applicant's erstwhile attorney's trust account.
- [8] The warrant of execution against movables was yet again served on the respondent. On 3 September 2019, the sheriff provided a *nu/la bona* return, stating that the writ was served on the respondent personally, he declared that he had no money, property or assets with which to satisfy the warrant or any portion thereof, that the sheriff could not locate any disposable assets despite a diligent search and that the respondent confirmed that he is the owner of an immovable property situate at 45 President Way, Kelvin, which is the property in which he resides. The balance outstanding by the respondent in respect of the judgment debt remains unpaid to this day.
- [9] The applicant, therefore, has *prima facie* established that he has *locus standi* to apply for the sequestration of the respondent's estate. He is a judgment creditor of the respondent as contemplated in s 9(1) of the Insolvency Act with a liquidated claim far exceeding R100. In

execution of the judgment debt, the applicant caused two warrants of execution to be served on the respondent personally and one against his right, title and interest in his bank accounts held with the FirstRand Bank. A *nu/la bona* return was rendered in respect of the warrant of execution served upon him on 3 September 2019. It has accordingly *prima facie* been established that the respondent has committed an act of insolvency as contemplated in s 8(b) of the Insolvency Act.

'The trustee shall be entitled to any monies received or to be received by the insolvent in the course of his profession, occupation or other employment which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependant upon him, and if the trustee has notified the employer of the insolvent that the trustee is entitled, in terms of this sub-section, to any part of the insolvent's remuneration due to him at the time of such notification, or which will become due to him thereafter, the employer shall pay over that part to the trustee.'

[11] A court may not grant a compulsory sequestration order, whether provisionally or final, unless it is established that there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated. In *Lotzof v Raubenheimer* 1959 (1) SA 90 (0) at 94, Botha JP said that '[t]he expression "advantage to creditors" in s 12(1)(c) means the advantage of all the creditors or at least the general body of creditors.'

[12] In *Body Corporate of Empire Gardens v Sithole and another* 2017

(4) SA 161 (SCA) para 10, the Supreme Court of Appeal held as follows:

'The phrase "advantage to creditors" is not defined in the Insolvency Act, but if the principle of *concursum creditorum* is taken into account, it means that there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole. The requirement is fulfilled where it is established that there is reason to believe that there will be advantage to a "substantial proportion" or majority of the creditors reckoned by value. . . .

Although advantage to creditors is not a rigid concept it requires proof of a tangible benefit to the general body of creditors.'

[13] 'Reason to believe' predicates facts which engender belief that must be proved by the applicant, *prima facie* at the stage when a provisional order is sought and on a balance of probabilities when a final order is sought. (See *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (N) at 593; *Nedbank Ltd v Thorpe* (2009) JOL 24292 (KZP) para 12; *Nedbank Ltd v Groenewald* 2013 JDR 0748 (GNP) paras 36-37.) That there is reason to believe that sequestration will be to the creditors' advantage is established if there are facts proved which indicate that 'there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors': *Meskin & Co v Friedman* 1948

(2) SA 555 (W) at 559, which approach was endorsed by the Constitutional Court in *Stafford and Others v Investec Bank Ltd and others* 2015

(3) SA 1 (CC) para 45.

[14] It is sufficient if the applicant demonstrates that there is a prospect not too remote that upon a proper investigation of the debtor's affairs may result in the discovery of disposable assets for the benefit of creditors. In *London Estates* it was held that-

'[i]f no substantial estate is shown to exist, circumstances may yet establish a reasonable

prospect, a prospect not too remote, that concealed assets will be found or recovered. The mere fact that sequestration entitles investigation of the insolvent's affairs is not sufficient: there must be additional

facts

establishing that not too remote possibility. This is the approach in *Meskin's* case, which should be followed.'

[15] I am satisfied that the applicant has *prima facie* established that there is a prospect, which is not too remote, that an investigation into the financial affairs of the respondent may result in some pecuniary benefit to the respondent's general body of creditors.

[16] The respondent is employed by DELL EMC, Bryanston, in the capacity of sales manager. His income is structured in such a way that he receives a gross monthly basic salary of R140 000.00 plus a commission of R105 056.53, and standard travel allowance of R10 500.00, thus a total gross monthly income of R255 556.53. There are monthly deductions from his gross salary for income tax in the amount of R97 547.43, UIF in the amount of R148.72, Provident Fund contributions in the amounts of R9 131.96 and R6 528.67, Discovery medical aid in the amount of R5 757.50 and Vitality in the amount of R179.50. His net monthly income is R136 262.75.

[17] The respondent is a person of considerable financial means. It is hard to fathom that he has no net worth as he would like this court to believe. There is, in my view, a prospect not too remote, that concealed assets will be found or recovered upon an investigation into his financial affairs. The applicant has already found the total available credit amount of R149 809.57 in his bank accounts held at FirstRand Bank. Furthermore, from the schedule of his monthly expenses it appears that he and his family maintains a high standard of living, while the judgment debt of the applicant remains unpaid. There is also a prospect, which is not too remote, that a trustee may decide to avail himself or herself of the right to take the respondent's surplus income for the creditors. (See *LAWSA Vol 11 First Reissue* para 154.)

[18] Two luxury motor vehicles are registered in the name of the respondent: A 2017 Mitsubishi Pajero Sport 2.5D with automatic transmission (the Pajero) and a Jaguar Xf 2.2 D Premium Luxury (the Jaguar). The Pajero forms the subject matter of an instalment sale agreement with MFC (a division of Nedbank Limited) with an outstanding balance of R426 419.58 and monthly repayment

instalments of R7 644.62. The Jaguar forms the subject matter of an instalment sale agreement with Nissan Finance (a product of Wesbank, a division of FirstRand Bank Limited) with an outstanding balance of R349 948.04 and monthly repayment instalments of R7 529.66. However, no valuations of the luxury motor vehicles were produced. The luxury motor vehicles driven by the respondent and his family thus merely serve to further demonstrate the high standard of living that the respondent and his family enjoy while the judgment debt of the applicant remains unpaid.

[19] On 21 August 2019, the sheriff judicially attached the movables listed in the inventory that accompanied his return of service. However, Mr Bhavan and the respondent's wife claimed that they are the lawful owners of those movable assets that were judicially attached. Donations between spouses are permitted, subject to the provisions of the Insolvency Act (s 22 of the Matrimonial Property Act 88 of 1984), provided the donation complies with other requirements applicable. On 3 September 2019 when the sheriff again served the writ of execution on the respondent personally, he declared to the sheriff 'that he has no money, property or assets' to satisfy the writ in whole or in part. However, there is a prospect, which is not too remote, that an investigation into these claims to ownership (such as the assets and liabilities that the respondent had disclosed in his tax returns, credit applications to financial institutions, and the like) may result in some pecuniary benefit to creditors.

[20] The respondent is the owner of one immovable property described as Portion 2 of Erf 72, Kelvin, City of Johannesburg under title deed number T165190/2005 (the property) in which he and his family reside. He bought the property on 17 August 2004 for the amount of R700 000.00. A mortgage bond with number B11598/2019 was registered over the property in favour of SA Home Loans on 2 April 2019 (the bond). The outstanding balance of the loan that is secured by the mortgage bond is the sum of R1788340.80 with monthly repayment instalments of R19 436.14.

[21] Relying on a Windeed Automated Valuation Report, a LexisNexus product (the valuation report), to the effect that the property currently has an estimated value of R1 850 000.00, the applicant contends that it could be sold to the advantage of creditors. On the other hand, relying on the municipal valuation of the property in the amount of R1 465 000.00, the respondent contends that there will be no equity realised from a forced sale of the property. Furthermore, relying on *Ne/ v Lubbe* 1999

(3) SA 109 (W), he argues that the valuation report on which the applicant relies does not comply with the requirements and practice of this court to establish the value of an immovable property in insolvency proceedings.

[22] There, Leveson J said the following at 111D-112E:

'The purpose of furnishing a sworn valuation is therefore to establish the price that is likely to be realised from the sale of the property on what is called a forced sale so that it can be determined that there will be a free residue available for creditors and advantage to creditors is thereby established. A practice has therefore grown up in this Division (I cannot speak for others) whereby a sworn valuation is furnished by an expert witness, usually, as in the present case, an estate agent. He expresses an opinion with respect to the price that the property will fetch In the present case, as already mentioned, the expert is an estate agent and nothing

of evidential value is said in relation to the price that will be fetched on a forced sale. In his affidavit he states that he has inspected the property. He then notes the address, the erf number and the measurements. He details the municipal valuation of the land and the improvements. Thereafter the following appears in the document:

'General : The property is situated in a well-established suburb of Johannesburg. The property is supplied with all municipal services and is fully reticulated. The property has easy access to main roads, schools and shopping centres.

Improvement: The property is improved with a single storey dwelling, brick under iron with carpeted and tiled floors and steel framed windows. The improvements comprise of a TV lounge, separate lounge, dining room, study cum bedroom, three bedrooms, open plan kitchen, two full bathrooms, double garage, swimming pool and outdoor thatch entertainment area, servant's quarter plus toilet and shower.

The property is fully walled with a well-maintained garden.

Conclusion:

I believe a forced sale value of the property would be R290 000.'

Not a single reason is set out in the valuation as to why the sum of R290 000 is the value. In fact, the document is a bald assertion of value. The procedure adopted, in my opinion, is hopelessly inadequate. The proper approach is for the expert to furnish in evidence the detailed facts upon which the opinion is based and the reasons for forming the opinion expressed. Upon hearing the evidence the Court will come to its own conclusion, no doubt guided by the evidence.

It is not for me to lay down every facet of the evidence which must necessarily be adduced. Always relevant will be the prices paid for comparable properties in the same area at similar forced sales held at or about the same time.

Also material is the fact that the valuator has attended such sales and has personal knowledge of the prices fetched. If not able to do that, he should at least be in a position to depose to the fact that he has made an inspection of relevant title deeds in the Deeds Office and has recorded therefrom the prices fetched for similar properties under similar circumstances. Naturally, appropriate descriptions of the improvements will have to be furnished so that the value can be

assessed on a comparable basis. All that material should be recorded in the affidavit. In the present application the evidence falls far short of that. '

[23] The following is stated in the valuation report:

'The Estimated Value comes from a sophisticated statistical calculation of values from various sources including the Surveyor General Office, Deeds Office (recent sales in the area), banks and estate agents. It is a GUIDE and should be used with other available information - such as known improvements or deterioration of the property/dwelling since the last date of sale. The Safety Score is the percentage of probability that the Estimated Value is reasonable and not over-inflated. This is especially useful to a lender (i.e. a bank) to make sure the amount of the bond is reasonable for the property. A score over 70% is considered "high".

The Accuracy Score is another statistical figure that determines the probability that the Estimated Value will be within 20% of the selling price. This is especially useful for buyers and sellers of a property. A score over 60% is considered "High".

Expected High R2 060 000.00 Safety Score 85% Estimated Value R1 850 000.00 Accuracy Score 87% Expected Low R1 560 000.00 Confidential Level High'

The valuation report then sets out a 'Comparative Sales Table', which tabulates and 'shows the details of the most relevant comparative

sales', a 'Comparative Sales Map', which shows where these comparable sales are in relation to the subject property', 'Amenities', which 'list shows the places of interest and convenience closest to the property', and 'Suburb Trends', which 'graphs show the average price and total volume of sales in the suburb by Freehold and Sectional properties'.

[24] The valuation report on which the applicant relies is thus not a mere bald assertion of value and cannot be said to be hopelessly inadequate. The expected high, estimated, and expected low values of the property are derived from a sophisticated statistical calculation of values from various sources including the Surveyor General's Office, Deeds Office (recent sales in the area), banks and estate agents. The valuation report tabulates the details of the most relevant comparative sales and where those comparable sales are situated in relation to the property with graphs showing the average price and total volume of sales in the suburb by Freehold and Sectional

properties. From the valuation report it appears that statistically there is a high probability of the property being sold at the valuation amounts as reflected in the report. The improvements on the property and state of the dwelling are matters that fall within the knowledge of the respondent about which he remained silent.

[25] Furthermore, the creditors may also resolve not to sell the property by way of public auction, but rather by way of private treaty. As was said by Fourie AJA in *Swart v Starbuck and others* 2016 (5) SA 372 (SCA) para 21, 'the creditors of an insolvent estate are in law the masters of the realisation of the assets of the estate'. (Also see *Swart v Starbuck and others* 2017

(5) SA 370 (CC) para 26.) Section 80bis of the Insolvency Act provides that, at any time before the second meeting of creditors, a trustee shall, if satisfied that any movable or immovable property of

the estate ought forthwith to be sold, recommend to the master in writing accordingly, stating his or her reasons for such recommendation. The master may thereupon authorise the sale of such property on such conditions and in such manner as he or she may direct. In terms of s 82(1) the trustee of an insolvent estate shall, as soon as he or she is authorised to do so at the second meeting of the creditors of

that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct. However, if the creditors have not, prior to the final closing of the second meeting of creditors given any directions, the trustee shall sell the property by public auction or public tender.

[26] Also, even if the price realised from the sale of the property leaves no free residue available for creditors but only settles the debt (R1 788 340.80) owing to the secured creditor (SA Home Loans), the respondent will no longer be required to continue repaying the debt owing to the secured creditor in monthly instalments of R19 436.14. There will then be a prospect, which is not too remote, that an advantage to creditors may result from an increased contribution from the respondent's earnings.

[27] I am in all the circumstances of the opinion that the applicant has established that *prima facie* there is reason to believe that it will be to the advantage of creditors of the respondent if his estate is sequestrated, as contemplated in s 10(1)(c) of the Insolvency Act.

(a) The estate of the respondent is placed under provisional sequestration.

(b) The respondent and any other party who wishes to avoid the provisional order of sequestration, are called upon to advance reasons, if any, why the court should not order final sequestration of the said estate on Tuesday, 20 July 2021, at 10h00 or so soon thereafter as the matter may be heard.

(c) A copy of this provisional order must be served on:

(i) the respondent personally;

(ii) all employees of the respondent, if any;

(iii) all trade unions of which the employees of the respondent are members, if any;

- (iv) the Master of the High Court; and
- (v) the South African Revenue Service.
- (d) The respondent's costs of opposition are not to be included in the taxed costs of sequestration.

JUDGE OF THE HIGH COURT

PA Meyer

Judgment:

16 April 2021

Heard:

27 November 2020

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Prepared on 11 October 2026 · Esheria