IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 16865/17

(1)REPORTABLE: NO	
(2)OF INTEREST TO OTHERS JUDGES: NO	
(3)REVISED	
01 MARCH 2019	_____
DATE	SIGNATURE

In the matter between:

LARA WENDY DAVIES	**Applicant**
and	
TW VAN DEN HEEVER N.O	**Respondent**

Summary: Application in terms of section 21 of the Insolvency Act 24 of 1936. Husband in a marriage out of community of property sequestrated. Property of the wife vested in the trustee. The applicant applies to have her estate released from the insolvency proceedings.

JUDGEMENT

Molahlehi J

Introduction

[1] The applicant, Mrs Davis, who is married out of community of property to Mr Davis seeks an order in terms of section 21 (1) of the Insolvency Act, [1] (the Act) to have a portion of the estate which, she contends belongs to her, released from her husband's insolvent estate.

[2] The proceedings were instituted following the order which sequestrated the estate of Mr Davies (the insolvent) on 19 April 2016 under case number 45769/2014. The applicant and her insolvent husband married out of community of property on 3 April 1998 in terms of the Matrimonial Property Act,[2] which marriage still subsists. The estate was finally sequestrated on 19 April 2016.

[3] Following the sequestration of the estate, Mr TW Van Der Heerver of D &T trust (Pty) Ltd was appointed the trustee of the insolvent estate under the Master of the High Court's reference number G284 4/2016.

[4] On 27 February 2017, the applicant was served with notice in terms of section 21 (5) of the Act. In terms of the notice, the trustee informed the applicant that he

[1] Act 24 of 1936
[2] Act 88 of 1984

intended to realise the matrimonial home situated at […] S. Street, Oaklands (the Oaklands property) in terms of section 21 (3) of the Act. This is the property which the applicant claims ownership thereof and thus contends should be released from the insolvent estate.

[5] The applicant's case is that the above property with its contents should be released from the insolvent estate because it belongs to her and not the insolvent.

[6] According to the applicant the property was purchased from the proceeds of another property which she previously owned at ERF number […] Abbotsford. She sold that property for R4.1million and then bought the property at Oaklands for the sum of R5 500 000, 00.

[7] In contending that the property was always intended to be hers, she relies on the Windee and the Transfer Deed.

[8] During July 14 July 2011, Romicon Construction CC effected renovations to the property at the cost of R1 957 760.33. The value of the contents of the property which the respondent seeks to realise is R2 597 043.43. The total value of the property which the respondent seeks to realize, according to the applicant is the sum of R 10 034 803.80.

[9] In brief, the applicant contends that she purchased the property together with its contents in her capacity and it is for that reason that the property and its contents need to be released from the insolvency proceedings.

<u>The respondent's case</u>

[10] Mr Van der Heever, the insolvency practitioner, deposed to the answering affidavit in support of the respondent's case. He confirms the order made in favour of ABSA Bank Limited against the insolvent in the sum of R15 414 597, 66 during September 2009.

[11] Following the above order, ABSA instituted provisional sequestration proceedings against the insolvent during February 2016, which was finally, as stated above, confirmed on 19 April 2016.

[12] The essence of the respondent's case is that the insolvent and the applicant have colluded to prejudice creditors and potential creditors of the insolvent.

[13] The allegation of collusion between the insolvent and the applicant is alleged to have arisen in the following circumstances:

a) All bond payments in respect of the Abbotsford property and the Oaklands property were paid for by the insolvent.

b) Payment for the Oakland's property was paid from monies obtained by the insolvent from an entity known as Delta Forklifts and his monthly salary which was paid into the applicant's account.

c) The applicant received R600 000.00 from Delta and two other amounts from the insolvent's account on 3 December 2015 in the sums of R120 000 and R50,000.00.

d) The invoices for the payment of renovations done at Oaklands property, issued by Romicon Construction were issued to the insolvent and further that payment on the renovations does not reflect on the applicant's bank statement.

e) The insolvent's mother advanced money to the applicant which in reality was on behalf of the insolvent.

f) The applicant's affairs, including running both of their bank accounts were attended to by the insolvent.

g) The applicant could not have afforded the payment for the properties from the salary she received as a teacher including the fact that she ceased teaching in 2000 when she opened the business of arranging children's parties.

h) Specific contents of the Oaklands property were supplied by David Muirhead and Association at the costs of R61 000.00 and R23,000.00 paid for by the insolvent.

i) The insolvent signed the contract for the architectural alterations and additions to the Oaklands property.

[14] The respondent also relied on the answers made during the section 152 inquiry. In addition to all the other points made about the inquiry, the respondent placed emphasis on the fact that the applicant failed to attend the inquiry. It is common cause that despite the subpoena the applicant did not attend the enquiry but submitted a sick note from a doctor which she relied on as an explanation of why she could not participate in the inquiry. It was alleged based on what was said by the insolvent at the investigation that she, however, was still able to lead a "normal life," of attending at shopping malls and restaurants.

[15] The other issue raised by the respondent is that the applicant failed to disclose certain facts in her application such as monies from a business venture with

Delta Forklifts and also the salary of the insolvent which was paid into her account salary, during December 2013, in the amounts of R120 000,00 and R 50 000,00.

[16] The respondent further submitted that Romani Construction which carried out the renovations at Oaklands property was paid R554 223, 58 in cash. The instruction to renovate the property was made by the insolvent. There are other amounts allegedly paid to Romani CC which were not paid from the applicant's bank account.

[17] There are also other items in the Oakland's property in the sums of R61 000.00 and R23 000.00 purchased from David Muirhead which were paid for by the insolvent.

[18] As indicated above this application is made in terms of s 21(1) of the Act which provides that the effect of sequestration of the separate estate of one of the spouses married out of community of property shall upon the appointment of a trustee, vest in the trustee. This means that the separate estates of the solvent spouse vests in the trustee in the same way as that of the insolvent spouse.

[19] Following his appointment, the trustee notified the applicant of his intention to realise the Oakland property and its contents in terms of s 23 (1) of the Act.

[20] In terms of s 21 (2) of the Act the trustee is obliged to release the property of the solvent spouse upon proving that:

a) The solvent spouse acquired the property during the marriage to the insolvent spouse by a title valid against the creditors of the insolvent spouse or;

b) To be safeguarded in favour of a solvent spouse by s 28 of the Act or by the Insurance Act of 1923;

c) To have been acquired with any such property belonging to the solvent spouse or with the income or proceed thereof.

[21] The onus in proceedings of this nature, as stated in *Beddy No v Van der Westhuizen,* [3] is for the solvent spouse to show that the true transaction that resulted in the acquisition of the property in question was valid and conferred a valid title on him or her. In other words, the solvent spouse in seeking to have an estate released from the insolvency proceedings has to demonstrate the true validity of her title and its validity against creditors of the insolvent. Put in another way the solvent spouse has to show that the transaction (s) under which she acquired the property was not simulated, or designed to defeat the rights of creditors.[4]

[22] Once the solvent spouse has discharged the onus of showing that the property in question was not acquired by improper methods intended to prejudice the creditors, the trustee is obliged to release such property from the insolvency proceedings. The property would, in other words, have been acquired by the solvent spouse through her or his resources during the marriage and such acquisition would have vested on his/her a valid title against the creditors of the insolvent spouses.[5]

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[3] [199] 3 All SA 227 (A)

[4] See Rends v Gutman N.O. & others 2003 (1) SA 93 (C) at 97G; Beddy N.O. v van der Westhuizen 1999 (3) SA 913 (SCA) at 916H to 917F; Snyman v Rheeder 1989 (4) SA 496 (T) at 505H to 506A; Coetzer v Coetzer 1975 (3) SA 931 (E) at 936A

[5] See Kilburn v Estate Kilburn 1931 A.D. 501 at 507 to 508

Evaluation

[23] As stated above, the respondent opposed the applicant's application on the basis that an inference should be drawn from how the applicant and the insolvent conducted their affairs and that in doing so they colluded to prejudice creditors and or potential creditors of the insolvent. The contention is partly based on the manner which the insolvent and the applicant conducted their financial affairs. He placed emphasis more particularly on the fact that the two parties utilise the same bank account and the fact that payment of the applicant's properties was done by the insolvent.

[24] There seemed to be no dispute as to the sources of payments for the Oaklands property, together with its renovation. The payments were effected in the following manner:

a) The proceeds of aborts for the property, in the sum of R3 050 000.00;

b) The first Ned Bank mortgage found in the sum of R2 505 700.00;

c) The second Ned Bank mortgage bond in the sum of R 1 500 000.00 and;

d) Cash payment of R 554 223.57.

[25] It does also appear from the above that the first payment for the Oaklands property came from the proceeds of the previous property, which was owned by the applicant – Abbotsford property and the two mortgage bonds obtained from Nedbank.

[26] The remaining issue is whether the insolvent or his mother made the balance of the payment for the property. The version of the applicant is that the loan was made to her by the insolvent's mother.

[27] The insolvent’s mother indicated during the inquiry that she loaned money to the applicant without inquiring as to what it was for and that it was not in writing. The applicant told her that she would repay the money upon the sale of the Oaklands property.

[28] Having regard to the papers before this court I find no basis to reject the version of the applicant that the loan was made to her by the insolvent’s mother.

[29] The inference sought by the respondent that the loan made to the applicant was effectively made to the insolvent is in my view far-fetched and stands to be rejected.

[30] The proposition that the alleged collusion between the two should be inferred from the fact that the payment of the bond was effected by the insolvent is unsustainable. There is in this respect, no principle that parties married out of community of property cannot support each other in the running of the family affairs and also each other's affairs during the marriage.

[31] In concluding that there was no collusion to prejudice the creditors consideration has to be given to the fact that the antenuptial contract was concluded in April 1988 and the sequestration of the insolvent took place in February 2016.

[32] It has not been disputed that since the time of the marriage the insolvent has been fully involved in assisting the applicant with the running of the affairs of her

estate. There is no evidence that the insolvent's involvement from the beginning of the marriage with the affairs of his wife was done in anticipation of insolvency.

Failure to attend the inquiry by the plaintiff

[33] As indicated earlier in this judgment the respondent contended that an adverse inference should be drawn against the applicant for failing to attend the inquiry and answer questions about the property she claims should be released from the insolvent estate. The inquiry was conducted in terms of s 152 of the Act, and the relevant portion thereof provides as follows:

> "If at any time after the sequestration of the estate of a debtor ... the Master is of the opinion that the insolvent ... is able to give any information which the Master considers desirable to obtain ... he may by notice in writing delivered to the insolvent ... summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice ... and to furnish the Master or the officer before whom he is summoned to appear with all the information within his knowledge concerning the insolvent or considering the insolvent's estate or the administration of the estate."

[34] The authorities are in agreement that the inquiry in terms s 152 of the Act is simply an investigative procedure which does not envisage a finding or determinative of a person's rights.[6] This being the case I find no basis to draw a negative inference for the non-attendance of the inquiry by the applicant. In any case, even if I were wrong in this regard, I would still not have made the

[6] See Nedbank Ltd v The Master of the High Court, Witwatersrand Local Division, and Others 2009 3 SA 403 (WLD); Roux v Die Meester en 'n Ander 1997 1 SA 815 (T) at 824B-C; Podlas v Cohen & Bryden NNO and Others 1994 4 SA 662 (T)

inference because there is insufficient information to determine whether the applicant's absence was wilful. The report before this court is that she produced a medical certificate as an excuse for not attending the hearing. There are no details as to what the sick certificate said. There is also no information that she was warned of the consequences of her failure to attend despite her health condition.

[35] In light of the above analysis, I find that the applicant has made out a case for the relief sought, and accordingly the application stands to succeed.

Order

[36] In the premises the following order is made:

1. The respondent is ordered to release the property situated at […] S. Street, Oaklands, Johannesburg and its contents from the insolvency proceedings instituted against the insolvent in terms of section 21 (4) of the Insolvency Act 24 of 1936.
2. The respondent is to pay the costs of these proceedings.

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E Molahlehi

Judge of the High Court,

Johannesburg

Representation

For the Applicant: Adv O Ben-zeev

Instructed by: Kokkoris Attorneys

For the Respondent: Adv JL Kaplan

Instructed by: Ian Levitt Attorneys

Heard: 19 November 2018

Delivered: 01 March 2019