IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No:12814/2020

(1)	REPORTABLE: Not
(2)	OF INTEREST TO OTHER JUDGES: Not
(3)	REVISED.
3 June 2022	
Date	signature

In the matter between:

ANGLOWEALTH SHARIAH {PTY) LTD **Applicant**

And

HUSSAIN ALLI ADAM **First Respondent**

SHENAAZADAM **Second Respondent**

Delivered: Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 3 June 2022.

Summary: Compulsory sequestration application. Section 10 and 12 of the Insolvency Act. The respondent alleged to be indebted to the applicant and having committed an act of insolvency. Agreement between the parties to transfer the

member's interest from another entity controlled by the respondent to the applicant was effected with the view to partially release the respondent from his obligation to the applicant.

JUDGMENT

Molahlehi J

Introduction

[1] This is an application in which the applicant seeks compulsory sequestration of the first respondent in terms of the Insolvency Act 24 of 1936 (the Act). The grounds are discussed below.

The parties

[2] The applicant is Anglowealth Shariah (Pty) Ltd, a limited liability company duly registered and incorporated in accordance with the company laws of the Republic of South Africa.

[3] The first respondent is Hussain Alli Adam, a businessman. The second respondent is married by Islamic rites to the first respondent.

[4] The respondent did not pursue the point initially raised that the jurisdiction to determine the issue in this matter lies with the High Court in Pretoria and not this Court.

[5] The other point raised by the first respondent relates to the joinder of the second respondent, the wife of the first respondent. The applicant explained that it joined the second respondent in the proceedings because it was uncertain as to the nature of the marriage regime between the parties.

[6] Having accepted that the respondents were married in terms of the Islamic Rites, the applicant did not pursue the prayer that included the sequestration of the second respondent's estate. In other words, the applicant accepted that, by definition, the marriage of the respondents was out of community of property.

[7] The applicant avers that the respondent committed acts of insolvency in terms of sections 10, and 12 read with section 8 (c) or section 8 (d) and (e) of the Act in that he has done the following:

> '9.3.1. is misapplying, removing and dissipating assets from his estate;
>
> 9.3.2. is conducting his affairs with the intent of, alternatively in a manner which would have the effect of, prejudicing his creditors or of preferring one creditor above another;
>
> 9.3.3. he has made or offered to make arrangements with his creditors for releasing him wholly or partially from his debts.'

[8] The applicant further avers that the respondent is factually insolvent, and that it would be to the advantage of the creditors for him to be sequestrated it in terms of section 10 and 12 of the Act.'

[9] The sequestration order is sought on the ground that the respondent is indebted to the applicant in the sum of R42 351 000.00, including an additional

amount of R20 million. The debts are recorded in annexures "FA1" and "FA2" respectively, attached to the applicant's papers.

Background facts

[10] In brief, the issue that gave rise to the litigation relates to the loan that the applicant made to the respondent to purchase stock for Long Island Trading 55 CC (Long Island) in its retail businesses located amongst other areas around the Eastern, Johannesburg and Pretoria West. This includes the restaurant that operates in Eldorado Park.

[11] According to the applicants, the loans were advanced to the respondent between 2015 and 2019 in R50 million.

[12] In May 2019, the respondent informed the applicant that he had been defrauded by his cousin, Ms Fouzia Mkkaddan. The cousin is said to have defrauded him in the sum of R12 million but did undertake to pay the money back. Thus, he was not able to honour his obligation to the applicant.

[13] The respondent does not deny having received the financing from the applicant. However, he contends that no conditions were set out for the funding.

[14] The respondent alleges that the applicant raised the issue of the payment of the loans only after being informed of the Ponzi scheme through which his cousin defrauded him. In the heads of argument, the respondent alleges that the applicant started harassing it (the respondent) to pay its monies without any formal demand.

[15] In support of his contention that the respondent is indebted to the applicant relies on the two agreements allegedly concluded between it and the respondent. The agreements are attached to the founding affidavit as annexures FA2.1 and FA 2.2. The terms of the agreements are summarised in the founding affidavit as follows.

> "10.1. The respondent admitted indebtedness to the applicant in the sum of R42 351 000. . .
>
> 10.2. The Respondent further acknowledged his indebtedness to the applicant in the sum of R20 000 00.00 . . .
>
> 10.3. The Respondent agreed and undertook to settle the sum of R42 351 000.00 in equal monthly instalments of R529 387.50 with effect from 30 September 2019 for a period of 80 months;
>
> 10.4. The Respondent agreed and undertook to settle the indebtedness in the sum of R20 000 000.00 in equal instalments of R250 000.00 per month for a period of 80 months from 30 September 2019.

[16] The applicant further avers that the respondent, in breach of both agreements, failed to make payment of the instalments as was required by the terms of the agreements.

[17] On 1 November 2019, and following the above-alleged breach of the agreement, the parties held a meeting, and a separate agreement was concluded between them involving the shareholding of Long Island. The essence of that agreement was that the respondent would cede fifty per cent of his member's interests to the applicant, which was R18 million. The value of the shares transferred

to the applicant was intended to settle the respondent's indebtedness to the applicant. The terms and conditions of the agreement are as follows:

"17.1. The respondent would provide keys and duplicate keys of all stores in the warehouse to me;

17.2. He would facilitate the change of banking accounts relating to the stores being operated by Long Island;

17.3. He would facilitate the introduction of suppliers and partners to me;

17.4. He would provide a detailed asset register of each store;

17.5. He would facilitate the stocktake with one Zak Vahid and identify expired goods which are to be excluded from the stock to be paid for;

17.6. He would provide all financial statements including a statement of assets and liabilities as requested, and

17.7. He would provide an updated and current tax clearance certificate in respect of the close corporation;

17.8. He would provide information as to how all stokvel money was collected, utilised and evidence as to how the stokvel was provided to the public.'

[18] According to the applicant, the purpose of the transfer of member's interest to it was to enable it to take control of Long Island and to trade the affairs of the respondent in a partial discharge of the obligations the respondent had to the applicant.

[19] In opposing the application, the respondent does not deny receiving financing from the applicant. It, however, contends that no conditions were set for the funding. As stated earlier, the respondent alleges that the applicant raised the issue

of payment of the loans only after being informed of the Ponzi scheme through which his cousin had defrauded him.

[20] The respondent concedes having signed the agreements in FA2 .1 and FA2.2. It is alleged in the heads of argument that the agreement was signed "under duress."

[21] The agreement to transfer fifty per cent of the member's interest in Long Island to the applicant in the form of set-off in the sum of R18 million is also not disputed. It is common cause that the member's interest in Long Island was transferred to the applicant.

[22] The respondent further alleges that on 21 December 2019, the applicant forcefully took possession of its general dealer stores and warehouse, including the contents therein.

[23] In addition, the respondent contended that the applicant's application should fail on the ground of the dispute of facts that had arisen consequent to the answering affidavit.

Legal principles

[24] In an application for provisional sequestration, the applicant has, in terms of section 10 of the Insolvency Act, to satisfy the following:

(a) he or she has a liquidated claim, valued at least over R100.00 hundred;[1]

[1] Section 10(a) as read with section 9(1) of the Act, which reads: "A creditor {or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the

(b) the respondent has committed an act of insolvency or is insolvent.

(c) there is reason to believe that it will be to the advantage of the debtor's creditors if his or her estate was to be sequestrated.

[25] In dealing with the requirement of the sequestration being to the advantage of the creditors, the Court in *Meskin & Co v Friedman*[2] In the Court held:

> "[T]he facts put before the Court must satisfy it 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. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the [Insolvency Act] some may be revealed or recovered for the benefit of creditors, that is sufficient".

[26] For the following reasons and considering the conspectus of the facts in this matter, I am satisfied that the applicant has satisfied the above requirements for the sequestration of the respondent.

[27] The respondent acknowledges its liability in the two settlement agreements it concluded with the applicant. These are the same agreement upon which the applicant relies on in these proceedings.

[28] The respondent states in his answering affidavit that he made payment of one instalment and then recalled it, which means no payment in breach of the agreement

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aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor." The sum of 50 pounds is the equivalent of R100 in terms of section 18 as read with section 15(2) of South African Reserve Bank Act, No. 90 of 1989.

[2] 1948 (2) SA 555 (W). at 559.

was ever made. In its version, the respondent acknowledges that he owes the applicant the sum of R62,000 351.00, which meets the threshold set out in the Act to satisfy the requirement of insolvency.

[29] In support of the contention that the respondent is insolvent, the applicant estimated the respondent's liabilities to exceed its assets. It is common cause that part of the money loaned to the respondent has been invested in the fraudulent Ponzi scheme run by the respondent's cousin. Although some of the amounts have been repaid, not all of the money used in the Ponzi scheme has been repaid.

[30] In my view, the Long Island transaction amounted to nothing but an act of insolvency on the part of the respondent. It was through this transaction that the respondent sought to be released from his financial obligations, be it wholly or partially.

[31] The contention by the respondent that this application is not suited for determination on motion proceedings because there exists a dispute of facts is unsustainable. In my view, in applying the principles set out in Whiteman t/a JW Construction v Headfour (Pty) Ltd and Another[3], the respondent has not shown that there exists a *bona fides* dispute of fact concerning the allegation that it had committed acts of insolvency and that it would not be to the advantage of the creditors for it not to be sequestrate.

[3] 2008 [3] SA371 (SCA) in paragraph 12

[32] In Payslip Investments Holdings CC v Y2K TEC Ltd[4] the Court, in dealing with the disputes about the liability of the respondent and other disputes the Court held that:

> "According to these guidelines, a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, inter alia, the strength of the respondent's case stands the prospects of viva voce evidence tipping the scales in favour of the applicant. With reference to the disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by the respondent on reasonable and bona fide grounds. In this event, it is not sufficient that the applicant has made out a case on the probabilities."

[33] In summary, the following facts, which are undisputed, support the finding that the applicant is entitled to the relief sought in the notice of motion:

(a) the applicant is a creditor of the respondent.

(b) the respondent is indebted to the applicant in the said amount exceeding R100.00,

(c) the respondent has been able to settle its indebtedness with the applicant.

(d) the debt owed to the applicant by the respondent is due and owing.

(e) the liabilities of the respondent exceed its assets, and thus it is insolvent.

(f) the respondent sought an arrangement in terms of which he was to be wholly or partially released from his indebtedness to the applicant.

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[4] 2001 (4) SA 781 (C)

[34] In light of the above, I am satisfied that the applicants pray for the case for the sequestration of the respondent in the notice of motion has been made out.

Order

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

1 The estate of the First Respondent is placed under provisional sequestration.

2 The First Respondent and any other party who wishes to avoid such an order being made final, are called upon to advance the reasons, if any, why the court should not grant a final order of sequestration of the said estate on a date to be determined by the registrar.

3 A copy of the provisional order is to be served on:-

3.1. The First Respondent, personally; alternatively and if personal service is impossible, that service be effected by publication in the Government Gazette and the Star Newspaper;

3.2. The employees, if any, of the First Respondent;

3.3. All known trade unions of which the employees of the Respondents, if any;

3.4. The Master;

3.5. The South African Revenue Service.

4. The costs of this application are costs in the sequestration of the Respondents' estate, which costs are to include the costs of two counsel, including senior counsel.

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E MOLAHLEHI J

Judge of the High Court

Gauteng Local Division, Johannesburg

Representations

For the applicant: Adv. A Botha S C

Assisted by: Adv. S J Martins

Instructed by: Shaheed Dollie Inc

For the respondent: Adv. M. Rakgase

Instructed by: Peet Du Plessis Attorneys

Date of hearing:28 February 2022

Delivery Date: 3 June 2022