

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 34744/2022

DOH 6 MARCH 2023

- 1.REPORTABLE: **NO**/YES
2.OF INTEREST TO OTHER JUDGES: **NO**/YES
3.REVISED.

.....**29 MARCH 2023**

JULY 2021
SIGNATUREDATE

In the matter of:

THE BODY CORPORATE OF MIONETTE

Applicant

and

STEPHINA LEKGANYANE

Respondent

JUDGEMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 29 MARCH 2023

Bam J

A. Introduction

1. This is the return day of the extended provisional order of sequestration issued by this court on 30 August 2022. The question to be answered is whether the applicant has met the requirements of section 12 (1) of the Insolvency Act¹ (the Act). In the event of a positive answer to the question, a further question is whether this court, on the facts before it, should exercise its discretion and confirm the order. Argument was heard on 6 March 2023, wherein the applicant contended for a final order. It was following argument that I exercised my discretion against issuing a final order. I was not persuaded that the sequestration will be to the advantage of the general body of creditors. I begin with the respondent's case for condonation.

B. Condonation

2. The respondent avers that she was present in person at court on 30 August when the provisional order was granted but she was precluded from participating as she had filed no opposing papers. Her attorneys at the time had withdrawn as they had not been placed in funds. She states that she had no intention to disregard the rules

¹ Act 24 of 1936.

but her dire financial situation caused her to be without legal representation. Indeed, her affidavit maps out the history of various attorneys placing themselves on record, only for them to later withdraw. Her opposing affidavit was prepared only in October, after she had managed to raise some funds. The test whether to grant condonation is espoused in *Aurecon South Africa (Pty) Ltd v City of Cape Town* (20384/2014) [2015] ZASCA 209 (9 December 2015) at paragraph 17:

‘The question then is whether the City made out a case for such an extension. Whether it is in the interests of justice to condone a delay depends entirely on the facts and circumstances of each case. The relevant factors in that enquiry generally include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the reasonableness of the explanation for the delay which must cover the whole period of delay, the importance of the issue to be raised and the prospects of success.’

3. The explanation proffered by the respondent is reasonable. I conclude that it is in the interests of justice to grant condonation. It is now appropriate to introduce the parties. The applicant is the Body Corporate of Mionette, a sectional title scheme established in terms of the Sectional Titles Act,² read with the Sectional Titles Management Act³. The respondent, Ms Stephina Lekganyane, an adult female and a member of the applicant by virtue of being the owner of unit 12 in the scheme.

C. Background

4. The procedural background is as follows: After the respondent had obtained an allocator in the amount of R 103 914, in February 2022, it sued out a warrant of

² Act 95 of 1986.

³ Act 8 of 2011.

execution. On or about 25 February 2022, when the sheriff served the warrant upon the respondent, she personally informed the sheriff that she has no disposable assets to satisfy the amount of R 103 914, nor could the sheriff identify any disposable assets that could satisfy the amount, leading to the return of a *nulla bona*. It is common cause that in the lead up to the filing of the present application, the respondent, through her then legal representatives, sought to make arrangements to pay her indebtedness to the applicant by way of instalments, suggesting that she could not pay the full amount then demanded. In short, it is common cause that the respondent has committed acts of insolvency in terms of section 8 (b) and (g) of the Insolvency Act⁴, the Act and that the respondent is a creditor with a liquidated claim of more than R 100.00

D. The law

5. Section 12 (1) of the Act, which deals with final sequestration or dismissal of a petition for sequestration reads:

‘(1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that-

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine;
- (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 sequester the estate of the debtor.

(2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration.’

⁴ Act 24 of 1936.

6. In *Amod v Khan*⁵ the court said:

“... unless the court is satisfied upon the three points mentioned in section 12 (1), it is bound to dismiss the petition and to set aside the provisional order in any case in which the proof and postponement are not matters for consideration.

This means, in my judgement, that the onus of satisfying the Court upon the three points is upon the petitioner.... It is equally clear in my opinion, that even if the Court is satisfied upon the three points, it still has a discretion to grant or refuse the final order. I say that because the section enacts that if the Court is satisfied ‘it may sequester the estate of the debtor.’”

7. Elaborating on the question of advantage to creditors, the court in *Trust Wholesalers & Woolens (Pty) Ltd v Mackan*⁶ noted:

‘In other words, I think the decision is one of fact to be based by the Court upon inferences from the facts at its disposal, ...’ ‘In the second place it seems clear that it is for the petitioner to satisfy the Court that there is reason to believe that the creditors will derive advantage from the sequestration, and I venture to think that what the petitioner has thus to show is that, on the facts before the court, there is a reasonable likelihood that sequestration will yield, at least, a not negligible dividend.’ At 112 D: ‘As I interpret section 12 (1) (c), its effect is that, when the petitioner has discharged the onus of satisfying the Court upon the matters mentioned in the subsections (a), (b) and (c), the Court may, not must, finally sequester the estate of the debtor. This means, as I understand it, that the Court is then possessed of a discretion to be [judiciously] exercised.’

8. In *Stratford and Others v Investec Bank Limited and Others*⁷, the court elaborates on what advantage means:

‘[44] The meaning of the term “advantage” is broad and should not be rigidified. This includes the nebulous “not-negligible” pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or “not-negligible” benefit in the context of a

⁵ 1947 (2) SA 432 (N), at page 435.

⁶ 1954 (2) SA (N) 109 at page 111, at paragraph F-G.

⁷ (CCT 62/14) [2014] ZACC 38; 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC) (19 December 2014), at paragraphs 44-45 .

hostile sequestration where there could be many creditors is unhelpful. Meskin et al. state that

“the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor’s predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order.”

[45] The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in *Friedman*. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment except through sequestration; or that some pecuniary benefit will result for the creditors.’
(Footnotes omitted)

E. Analysis

9. Substantiating its case of on a belief that the sequestration will be to the advantage of the general body of creditors, the applicant pointed to the only asset known to be owned by the respondent at this stage, which is the immovable property described as unit 12 in the applicant’s Sectional Title Scheme. The applicant referred to the automated valuation report generated by Lightstone, dated 29 March 2022. The report records sales around the scheme and the amounts for which the various units were sold. There are three values set out in the report, namely, the ‘expected high’ of R 600 000, the ‘expected low’ of R 420 000 and what is described as the expected price of R 540 000. The municipal valuation is recorded as R 445 000. Further contained in the report is the accuracy score of 78% and safety score of

70%. The applicant adds that a liquidator [more appropriately, a trustee] will be in a position to pursue various leads and impeach whatever transactions are liable to be set aside, such as collusive dealings and other doubtful transactions, the substratum of which may be susceptible to attack. The very step of issuing a sequestration order, says the applicant, will put an end to the deterioration of the respondent's estate. In short, the applicant says it has met the requirements of section 12 (1) (c).

10. The respondent is opposing the grant of the final order on the basis that the sequestration will not be to the advantage of creditors. But there is more that emerges from the respondent's affidavit. It is inextricably intertwined with the long history of the parties' litigation, which the applicant touches on in its founding affidavit, including litigation between the applicant and third parties, concerning the immovable property owned by the respondent. For present purposes, it is not necessary to set out everything but a high level exposition will suffice. The respondent avers that from about 2007, she fell victim to a scam perpetrated by Brusson Finance (Pty) Ltd (Brusson). In *Absa v Moore* 2015 ZASCA 171, 2016 SA 97, the Supreme Court of Appeal set out the *modus operandi* of Brusson. Very briefly, Brusson targeted owners of unencumbered homes who could not borrow from traditional finance houses because they were blacklisted. Although the actual transaction through which the fraud would be perpetrated differed from person to person, the general result was that the victims, out of a transaction they understood as borrowing and using their homes as security, would later realise that their homes had been transferred to a third party, with whom they had no dealings. As a

consequence, the courts condemned the Brusson scheme as a fraud and the transfers of the victims' homes to the various third parties were said to be null and void, *ab initio*. Brusson went into liquidation during or about 2010.

11. At the time of hearing argument for the final order, the respondent's home was still registered in the name of one Raymond Maphaphu. The Lightstone valuation annexed to the applicant's papers demonstrates that Maphaphu had purchased the property from a Shumani Nethengwe. Both affidavits suggest that it took an order issued by this court in 2017, to undo the fraud. The undoing of the fraud through the order issued by this court was followed by several applications launched by the applicant for declaratory orders. One such order was granted in September 2020 per Avvakoumides AJ, affirming that, since 2001, the applicant remained the owner of the property, notwithstanding the invalid transfers to Nethengwe and later to Maphaphu.

12. The court further made it clear that whether the applicant would be able to establish its claim against the respondent was a matter to be determined in future proceedings. In January 2021, armed with the declarator, the applicant launched action proceedings for a monetary judgement of about R 690 204, including interests and costs. The papers annexed to the applicant's papers suggest that pleadings may have closed by the time the applicant turned to launch the present proceedings. Responding to the respondent's point *in limine of lis alibi pendens*, the applicant says, *inter alia*:

'The applicant cannot be faulted for keeping the action proceedings in abeyance in

circumstances where the respondent acknowledged that she is unable to pay her debt. To incur legal costs in circumstances where there is no prospect of the applicant recovering same from the respondent would constitute a breach of the applicant's trustees' fiduciary duties.'

13. Coming back to the present, the Constitutional Court in *Stratford* says the test must not be rigidified. It says that after making allowance for the costs, the court must examine, based on the information at its disposal, whether there is a reasonable prospect of payment of creditors, however small it may be. With regard to the Lightstone automated valuation, the court is unable to make anything of the report on its own, without an affidavit. How the projected high, low and expected price were arrived at is not explained. What comes across from perusing the report is that these numbers are statistically driven. It also appears that since the report was first provided to court when the provisional order was granted, nothing more was done by way of procuring an expert to express their opinion on how the figures were arrived at. In my considered view, there are several challenges that arise with regard to the expected prices projected in the report. I mention some of those challenges below:

13.1 Firstly, the report says nothing about the slumping economy and the pressure exerted on property prices. In this division, for example, it is not infrequent for courts to entertain variation applications, in terms of Rule 46 (9), to revise downwards, reserve prices of properties to be sold in execution, which prices are already significantly low, compared to the real prices of the immovable properties. The applications for variation are brought so as to aid sales and they occur in

virtually every unopposed motion roll. Sometimes, after the first revision, further applications are brought to further revise the reserve price or even forgo it altogether.

13.2 Secondly, in forced sales, there is no time to wait for markets to correct prices. The property is sold to the highest bidder, whatever that bid might be.

13.3 Thirdly, when one factors in the myriad risks that are ever present in forced sales, it is not difficult to appreciate that the values projected in the report may be overly optimistic. Those risks include:

(i) The fact that the purchaser is not guaranteed vacant possession. This means bidders must factor the risk of litigation into their bidding prices. It is also not uncommon for a successful bidder to pay out a significant sum to assist the occupant/s with alternative accommodation, just to obtain vacant possession.

(ii) Then there are further risks pertaining to the question of approved building plans and the certificate of occupation. It is not uncommon for purchasers to purchase property in an auction, only to find that some part of the structure had not been approved by the municipality, in terms of the Building Standards Act.

(iii) To obtain a rates clearance certificate from the City of Tshwane, the purchaser will have to pay the outstanding rates, which are currently estimated at about R 28 000.

(iv) Nowhere in the automated report is the condition of the property described. Even where the condition of the property is described, there is always

the risk of latent defects that the purchaser must deal with. These are just some of the risks that bidders invariably build into their bids to mitigate risk. These in turn put pressure on the ultimate price the property may sold for.

14. There is no dispute that the respondent is a salary earner from the government. There was no evidence at the time of granting the provisional order nor was there any at the time of hearing argument for the final order suggesting any suspicious transactions that may be liable to be set aside. There was also no evidence that the respondent had ever dabbled in a trade or had access to commissions flowing from the nature of her work. Both affidavits confirm that the respondent has been blacklisted and has no access to credit. This may have been the reason she was caught in the Brusson fraudulent scheme in the first place.

15. A careful analysis of the points discussed in this judgement shows a very dim picture regarding the price that may be achieved from the auction. When one adds to that picture the costs of sequestration and the amount due to the City of Tshwane, the prospect of a payment to creditors cannot be found. Upon adding the applicant's claim, which is said to stand well in excess of R 1 million, without taking into account any other creditor, including those who had blacklisted the respondent, it is not difficult to conclude that the applicant's reason to believe that the sequestration will be to the advantage of the creditors is without merit. There is simply no reasonable prospect that there may be any payment to creditors. What does become vivid, after taking into account all the matters discussed in this judgement, is the prospect of exposing creditors who prove their claim to a

contribution to costs. This was my basis for concluding that the belief that the sequestration will be to the advantage of the creditors is not rational; hence I exercised my discretion against granting the final order.

F. Closing remarks

16. The respondent accuses the applicant of litigating oppressively against her, with a view to bankrupting her through legal costs. My comments do not necessarily determine the respondent's claims nor would it be appropriate to do so in these proceedings. The applicant is aware that its claim of levies and all the other charges against the respondent is being challenged on the basis of prescription. The point dealing with prescription was adumbrated in the declarator proceedings in September 2020, as is apparent from the judgement arising from those proceedings. Prescription was raised as a special plea in the action. It has been raised even in these proceedings. The applicant is further aware of the challenge by the respondent regarding legal costs, which to me appear not to have been taxed at any stage. The respondent refers in her affidavit to an annexure, LS8, being an order issued by this court in January 2016, awarding the applicant costs of sequestration and a series of other costs against Raymond Maphaphu and another. It appears the applicant now seeks to recover those costs from the respondent, at least to the extent that the applicant's letter of 2 October 2020 seeks to recover costs pertaining to the 'main sequestration' against the respondent, even though there were never prior sequestration proceedings brought against the respondent.

17. The comments, as I had said, in no way determine the claims made by the

respondent. However, in order not to be seen as shackling the respondent's ability to refute the applicant's claim, a process that lends itself to proper ventilation of the correct quantum of the applicant's claim is necessary. In that way, the applicant will finally face the respondent's defence of prescription head on, including the correct quantum of the applicant's legal costs. It is not enough for the applicant to contend that prior to the Prescribed Management Rules of 2011, which came into operation in 2016, there was no legal requirement on it to tax costs.

G. Order

18. I make the following order:

1. The rule *nisi* is discharged and the applicant's case is dismissed with costs.

N.N BAM (Ms)

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA

APPEARANCES:

APPLICANT'S COUNSEL:

Adv. J.C Prinsloo

Umhlanga Rocks Chambers

Instructed by:

Theron and Henning, Pretoria

RESPONDENT'S COUNSEL:

Adv. L.M Maake

Instructed by:

Malale Nthapeleng Attorneys

Monument Park, Pretoria