

REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 3869/2010

In the matter between:

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK

Applicant

and

RAJENDARAN NARAINSAMY NAIDOO

(ID NO:., married out of

Community of property to VANEETHA MOODLEY)

Respondent

Delivered:

7 December 2010

JUDGMENT

HUGHES-MADONDO AJ

In these motion court proceedings the applicant seeks an order sequestrating the respondent.

Section 10 of the Insolvency Act, No. 24 of 1936 provides as follows:

If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facia-

- a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection 1 of section 9; 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 the creditors of the debtor if his estate is sequestrated,

it may make an order sequestrating the estate of the debtor provisionally.

The salient background facts which are relevant to the adjudication of the application are briefly outlined below.

On 13 August 2008 the respondent bound himself in favour of the applicant, as surety for and co-principal debtor jointly and severally with Tiger Steel and Trading (PTY) Limited ('Tiger Steel'). Tiger Steel failed to make payment in respect of its indebtedness to the applicant and judgment was granted on 2 December 2008 in the amount of R3 706 908, 31. Subsequent to judgment a payment of R2 595 091, 30 was received and the indebtedness of Tiger Steel was reduced to R1 111 817, 09. On 8 April 2009 Tiger Steel was liquidated and on 29 May 2009 Russell Hockley, a co-surety with the respondent, was sequestrated.

A warrant of execution was issued and served on the respondent. The sheriff however

issued a *nulla bona* return. The applicant makes out a case that the respondent informed the sheriff that 'it was impossible to pay the amount claimed or any sum'. Further, that the respondent informed the sheriff that all the assets of the address reflected for service belonged to his wife, to whom he was married out of community of property.

No further payments have been made.

The applicant alleges that the respondent along with his wife is a joint co-owner of the immovable property described as Erf. 6 Cato Manor. In addition he is the sole director and shareholder of Ted Naidoo Incorporated and Tiger Steel Engineering (Pty) Ltd. Further that he along with his wife are trustees of the Ted Naidoo Incorporated Trust.

The applicant caused two section 65A proceedings to be held at Durban Magistrates Court in 2009. At one of these proceedings the respondent submitted a statement of his assets and liabilities. From the statement it was evident that he was indeed insolvent.

What also emerged from these proceedings was that the respondent was capable of drawing an amount of R50 000.00 from Ted Naidoo Incorporated. This was an accounting practise of which he was the sole director. The respondent however alleges that these drawings are used to discharge the liabilities of the aforesaid company.

The respondent also produced an income statement and balance sheet of Ted Naidoo

Incorporated. The balance sheet reflected drawings as R89 253.13 and reflected that debtors owed the company an amount of R239 476.60.

The respondent and his wife owned and sold a unit at 112 Lynhurst Estate to the Ted Naidoo Incorporated Trust. Both he and his wife are the only trustee's of the aforesaid trust. The purchase and sales agreement in respect of the alleged sale was not put up at the section 65 enquiry and neither was it furnished to this court. In his papers before this court the respondent purports to put up the purchase and sales agreement.

In his replying affidavit he states that the money generated from the sale of the unit was *paid to me* was and was used to discharge a substantial amount of Tiger Steel's liabilities which included the applicant.

It is gleaned of the papers that the respondent is a 40% benefactor of the Vani Moodley Family Trust.

The Ted Naidoo Incorporated Trust has two benefactors. These are listed as the Vani Moodley Family Trust holding 50%, whilst the sequestrated Ted Naidoo Family Trust holds the other 50% shares.

In essences, the Vani Moodley Trust is the sole benefactor of the Ted Naidoo Incorporated Trust as the Ted Naidoo Family Trust is sequestrated.

On the respondents version the property at 112 Lynnhurst Estate was sold to the Ted Naidoo Incorporated Trust. Therefore the respondent is a 40% benefactor of the assets of

the Ted Naidoo Incorporated Trust, via his 40% share in the Vani Moodley Trust. This means that the respondent will receive a 40% share if the aforesaid property is sold. However in the respondent's paper he alleges that he will not benefit. But when I examine the maze he has created by the various trusts it turns out that he is indeed a 40% beneficiary.

The respondent makes mention that he is liable for the debts incurred by Ted Naidoo Incorporated as he is surety and sole director. The debtors however have at this stage only issued summons against Ted Naidoo Incorporated and not against the respondent in person. Thus at this stage, he cannot claim the company's debts as his personal liabilities- see of section 53(b) of the Companies Act 61 of 1973.

The respondent states that he together with the Ted Naidoo Family Trust (which has been sequestrated), purchased shares for the sum of R 485 133.88, from Syd Naidoo N.O. Further, that both had consented to judgment being taken against them for the aforesaid sum. This indicates to me that no payment was made for the purchase of the shares from Syd Naidoo N.O. No purchase and a sale agreement were put up by the respondent to show exactly how many shares were purchased and what the terms and conditions were.

The applicant has pointed out that if you look at the consent carefully it is subject to ‘*only being enforced (7) days from date upon which payment is due to the plaintiff and my/our default of such payment as set out in a certificate by the plaintiff*’ .

It is noted that the consent is dated the 10 November 2008. As yet there has been no evidence advanced that the respondent or the sequestrated Ted Naidoo Family Trust has defaulted with their payments. It is therefore evident that the respondent still owns his share purchased from Syd Naidoo N.O.

A further dimension to the respondent's woes is that summons was issued and served on the respondent for services rendered to him on 30 April 2009 in respect of a horse that he purchased. In his papers he states that the initial debt was R80 000.00, however the summons in question is only for R42 689.47. No explanation has been advanced as to how the debt was reduced. This indicates that the respondent surely reduced the debt.

Mr Harrison argued that the applicant had failed to comply with section 9 (4) (A) (b) of the Insolvency Act. In terms of the aforesaid section an affidavit was to be filed by the applicant setting out the manner in which section 9 (4) (A) (a) had been complied with, that is, service on a trade union, employees, South African Revenue Services and the respondent. It is evident from the papers before me that the notice of motion in respect of this application was served on the relevant parties. This amounts to substantial compliance with section 9 (4) (A) (b). In my view this is sufficient to allow this Court to preside.

The issue in these proceedings is whether *prima facie* the facts before me, there is reason

to believe that it will be to the advantage of the creditors that the respondent's estate be sequestrated.

Roper J, in *Meskin & Co. v Friedman* 1948 (2) S.A 555 (W) at 559 "...the 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 an enquiry under the Act some may be revealed or recovered for the benefit of the creditors, that is sufficient...". [My emphasis in italics]

The approach in *Meskin* was adopted in *London Estates (Pty) Ltd v Nair* 1957 (3) DCLD 591 @593A - 'the mere fact that sequestration enables investigation of the insolvent's affairs is not sufficient: *there must be additional facts establishing not too remote possibility*.' [My emphasis in italics]

On examination of the facts set out above it is evident that there are prospects, which are not remote, indicating that some pecuniary benefit will result for the applicant and creditors, if the respondent is sequestrated. It's evident that the respondent is still a 40% benefactor of the property at 112 Lynnhurst Estate. He still owns shares that he purchased from Syd Naidoo N.O. He is sole director of Ted Naidoo Incorporated who have debtors whom owe the company an amount of R239 476.60. He also draws an

amount of R50 000.00 from Ted Naidoo Incorporated. This indicates that the company is still viable and is an asset.

The facts on a whole show that there is not a too remote prospect, that as a result of investigation, assets other those mentioned above may be found or recovered to the pecuniary benefit of the applicant and other creditors.

Prime facie the facts there is reason to believe that the sequestration of the respondent will be to the advantage of the creditors.

The order I make is as follows:

1. That the estate of Rajendaran Narainsamy Naidoo, an adult businessman, identity number 590226 5118 085, with date of birth 26 February 1959, be and is hereby placed under provisional sequestration in the hands of the Master of the High Court, Pietermaritzburg.
2. The *Rule Nisi* do issue, calling upon the respondent and any other interested party to show cause, if any, before this Honourable Court on **28 January 2011 at 9.30 am** or so soon thereafter as the matter may be heard, why the estate of the

respondent should not be finally sequestrated.

HUGHES-MADONDO AJ

APPEARANCES:

Counsel for the applicant: Mr. A. Camp

Attorneys for applicant: J. M. S. INC c/o GAVIN PRICE ATTORNEYS

Counsel for the respondent: Mr. G. Harrison

Attorney for respondent: EBRAHIM AMEER

Heard on: 28 October 2010

Delivered on: 7 December 2010

