THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE

Case no: 740/12

In the matter between:

JACOBUS PETRUS FOURIE N.O. **1ST Appellant**

MARIAAN BARNARDN.O. **2ND Appellant**

and

GRAHAM VERNON EDKINS **Respondent**

Neutral citation: *Fourie N.O. v Edkins* (740/12) [2013] ZASCA 117 (19 September 2013)

Coram: MTHIYANE AP, MAYA, SHONGWE, TSHIQI JJA and ZONDI AJA

Heard: **19 August 2013**

Delivered: **19 September 2013**

Summary: **Insolvency – circumstances under which a court can exercise its discretion in terms of s 20 (1)*(c)* of the Insolvency Act 24 of 1936 for or against the stay of execution, where the sheriff sold immovable property in execution of a judgment to a purchaser prior to the judgment debtor publishing a notice in terms of s 4 (1) of the above Act of his/herintentionto apply for the sequestration of his/her estate and prior to the registration of the transfer into the name of the execution purchaser: Exceptional circumstances must be pleaded to persuade the court to validate the deed of sale and transfer of the property.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Moshidi J sitting as court of first instance):

The appeal is upheld with costs including costs of two counsel where so employed

The order of the court a quo is set aside and substituted with the following:

'The application is dismissed with costs.'

JUDGMENT

SHONGWE JA (MTHIYANE AP, MAYA, TSHIQI JJA and ZONDI AJA concurring)

[1] The central question in this appeal concerns circumstances in which a court couldexercise its discretion in terms of s 20(1)*(c)* of the Insolvency Act 24 of 1936 (the Act), to stay the execution where a sheriff sold immovable property in execution of a judgment to a purchaser, pursuant to a sale concluded prior to the judgment debtor (Insolvent) applying for the sequestration of his/her estate and prior to the registration of the transfer of the property into the name of the execution purchaser.

[2] It would be expedient at this stage to deal with the factual matrix, which isnot in dispute between the parties.

[3] On 18 February 2010 ABSA bank (the registered bond holder) obtained judgment against Mr Talent Mthethwa (the judgment debtor and registered mortgagor) and owner of Erf 64, The Hill Township, situated at 50 Ben Adler Road, The Hill, Johannesburg, held in terms of deed of transfer T 3137/09 (the property),in terms ofwhich, inter alia, the property was declared specially executable.

[4] On 3 August 2010 the property was sold in execution by the sheriff (as seller) to the respondent (who, for convenience, I shall refer to as Edkins) for the sum of R530 000 (five hundred and thirty thousand rand). The registered mortgage bond over the property was the sum of R1 100 000 (one million one hundred thousand rand). After signing the conditions of sale, Edkins complied with all his obligations in terms of the conditions of sale and, inter alia, guaranteed the full purchase price.

Edkins instructed his attorneys, on the same day, to proceed with the necessary registration of the transfer of the property into his name.

[5] On 6 August 2010 the judgment debtor's attorneys published a notice of the surrender of his estate in terms of s 4(1) of the Act in the Government Gazette and the local newspaper. The notice indicated that the insolvent intended applying to the North Gauteng High Court on 3 September 2010 for the acceptance of the voluntary surrender of his estate. Indeed on 3 September 2010, the court accepted the voluntary surrender and placedhis estate under sequestration.

[6] On 2 August 2011 (and not 3 September 2011 as indicated in the founding affidavit), the appellants (trustees) were appointed as provisional trustees in the insolvent estate.

[7] At all material times, Edkins and the sheriff were completely unaware of the notice by the insolvent to apply for the surrender of his estate, nor were they aware of the acceptance thereof. It is also common cause that when the sale was concluded with the sheriff, it was prior to the publication of the notice in terms of s 4(1) of the Act.

[8] When Edkins' attorneys approached the Registrar of Deedswith the mandate to proceed with the registration of the transfer, they were informed that in terms of the Registrar's resolution 54/2009 if a debtor is sequestrated afterthe sale in execution, the sheriff is prevented from transferring the property into the name of the purchaser. In light of the Registrar's resolution, Edkins felt aggrieved and opined that he had no option but to approach the court for an appropriate relief.

[9] Edkins decided to launch an application against the Registrar of Deeds (Johannesburg), the Master of High Court (Johannesburg), the two appellants, ABSA bank and the sheriff (Johannesburg) first asking for a declaratory order validating the sale agreement of 3 August 2010 between the sheriff and himself, and secondly that the Registrar be directed to register the transfer of the property into his name. He did not ask for costs against the respondents a quo, save only in the event that theyopposed the relief sought.

[10] The court a quo granted the relief as prayed for and found that the sale agreement was concluded before the publication of the notice of surrender, which finding suggests that it was therefore a lawful sale which did not conflict with the provisions of s 5(1) of the Act. It reasoned that the insolvent knew that ABSA had foreclosed on the loan and that there was the pending sale in execution, but deliberately waited until after the sale to publish his intention to surrender his estate. It foundfurther that the insolvent had no authority over the property and that the appellant had no right to prevent the transfer of the propertyinto the name of Edkins. This appeal is before us with leave of the court a quo.

[11] It is clear from the papers that the application in the court a quo waspremised on the provisions of s 5(1) of the Act, which read as follows:

'After the publication of a notice of surrender in the *Gazette* in terms of section four, it shall not be lawful to sell any property of the estate in question, which has been attached under writ of execution or other process, unless the person charged with the execution of the writ or other process could not have known of the publication: Provided that the Master, if in his opinion the value of any such property does not exceed R5 000, or the Court, if it exceeds that amount, may order the sale of the property attached and direct how the proceeds of the sale shall be applied.'

[12] In my view the provisions of s 5(1) of the Act envisage a situation where the sheriff (who is the one charged with the execution of the writ) or the insolvent debtor, or any person for that matter, is prohibited from selling any property of the estate after publication, unless he could not have known of the publication. The purpose of the section is to protect creditors against anyone, including the insolvent debtor, from dissipating the assets of the estate. Section 5(1) is irrelevant to the facts of this case as the sale, although the execution thereof was incomplete, took place before the publication. One can safely deduce from the founding affidavit that Edkins had been advised that the execution of the sale was finalized before the publication, notwithstanding the fact that transfer of the property had not taken place. The signing of the deed of sale, per se, and the compliance with the conditions of sale are insufficient to complete the execution of the sale.

[13] The nub of this appeal is, in my view, that upon sequestration of a debtor's estate, which estateincludes all his/her property, including property under attachment or the proceeds thereof which are in the hands of the sheriff, first vest in the Master and thereafter in the trustees upon their appointment. This includes immovable property sold in execution but not yet transferred at the date of sequestration. (See *Simpson v Klein NO* 1987 (1) SA 405 (W) at 408E-H; *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 at 558-559; *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central; Schoerie NO v Syfrets Bank Ltd* 1997 (1) SA 764 (D) at 772C-I; and *Shalala v Bowman NO* 1989 (4) SA 900 (W) at 905E-G.)

[14] Of relevance in this regard is s 20(1)*(c)* and (2)*(a)* of the Actwhich reads as follows:

'20(1)The effect of the sequestration of the estate of an insolvent shall be –

(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;

(b) …

(c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs;

(d) …

(2) For the purposes of subsection (1) the estate of an insolvent shall include-

*(a)*all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment;

(b) ….'

[15] The meaningand effect of s20(1)*(c)* read with subsec (2)*(a)* is that as soon as the sheriff becomes aware of the sequestration of the debtor's estate, he is duty bound or enjoined by operation of law to stay the execution, unless the court otherwise directs. Subsection 2*(a)* deals with what constitutes the property of the insolvent at the date of the sequestration. The effect of subsec (1) is to confer the power or control(and not ownership) of the property on the Master and subsequently the trustee and to dispossess or remove control of the property from the sheriff unless the court otherwise directs. This simply means any interested party (including

the execution purchaser) may approach the court to direct otherwise. Logically the interested party must place facts before the court to persuade it to direct otherwise.

[16] I now turn to the facts of this case. When Edkins approached the court a quoseeking registration and transfer of property into his name he relied on s 5(1) of the Act, which in my view is irrelevant as I indicated earlier. In my view Edkins should have approached the court in terms of s 20(1)*(c)* and seek an order moving the court to direct that the transfer into his name should be proceeded with, notwithstanding the supervening voluntary surrender of the insolvent estate.

[17] Edkins' counsel argued that s 20(1)*(c)* does not assist the appellant, but conceded that it was for Edkins to move the court to direct that the execution, culminating in the property being transferred into his name be proceeded with. He further argued that Edkins had succeeded on a balance of probabilities to persuade the court to direct otherwise. In my view Edkins failed to place facts before the court a quo to persuade it to direct otherwise than stay the sale in execution. In *Master of the Supreme Court v Nevsky*1907 TS 268 Innes CJ concluded that:

'The determining considerations are that the proceeds are not likely to be sufficient to satisfy the two bonds, and that there is nobody likely to be benefited by holding over the sale.'

My considered view is that any interested party must show that it would be in the interests of the body of creditors *(concursuscreditorum)* to direct otherwise than staying the execution sale. For example in this case ABSA bank has a bond over the property of R1 100 000 (one million one hundred thousand rand) and Edkins bought the property for only R530 000 (five hundred and thirty thousand rand) which is almost half of the bond held by ABSA bank. Edkins failed to place before the court a quo any valuation of the property, and also failed to mention if there were any other creditors of the insolvent estate. Failure to place all these facts before court was detrimental tohis case bearing in mind that the onus rested on him. However, in exceptional circumstances and only if the interest of the other creditors of the estate will not be adversely affected, the court has the authority to order the sheriff to proceed with the sale and registration of the property into the name of the execution purchaser. (see*UnieSpoorwegOnderlingeBegrafnisgenootskap v Druker, NO* 1961 (1) SA 266 (W) at 268C-D.

[18] It is important to emphasize that ownership of attached immovable property does not pass during the sale in execution, but upon formal registration of transfer to a purchaser (see *Simpson's* case (supra)). The effect of the sequestration in terms of s 20(1)*(a)* is to divest the insolvent of his estate not his/her ownership, ownership remains with the insolvent debtor but the control vests in the Master. The court a quo mentioned s 20(1)*(c)* but did not deal with the effects of the supervening sequestration. It may probably be because the application in the court a quo was couched on the basis of s 5(1),it unfortunately created the erroneous impression on the court a quo that the application turned solely on the provisions of s 5(1).

[19] The appellant argued that the court a quo misdirected itself because it did not deal with the substitution of a *pignusjudiciale*by a *concursuscreditorum*and consequently the effect of s 20(1)*(c)* of the Act thereon. The appellant further contended that the court a quo relied heavilyon the unreported judgment of *De Jager NO v Balju van die Hooggeregshof, Bloemfontein - Wes*(407/2010) [2010] ZAFSHC 90 (4 June 2010) which judgment does not concern a supervening sequestration and is therefore distinguishable and in factirrelevant to the facts of this case.I agree with this submission.

[20] I therefore conclude that upon publication of a notice in terms of s 4(1) of the Act, the provisions of s 20(1)*(c)* and (2)*(a)* immediately come into operation. The effect thereof is that control of the insolvent estate vests in the Master until a trustee has been appointed and thereafter the estate will vest in the trustee. Ownership,however remains with the insolvent debtor. (See *Liquidators Union, Simpson, Shalala* etc. supra.) Once a *concursuscreditorum* has been established nothing may be done by any creditor to alter the rights of the other creditors. (See *Walker v Syfrets NO* 1911 AD 141 at 160; *Taylor & Steyn NNO v Koekemoer* 1982 (1) SA 374 (T).) At once the rights of the general body of creditors have to be taken into consideration. In other words, no transaction can then be entered into with regard to estate mattersby a single creditor to the prejudice of the general body of creditors. The *bona fides* of the creditors or execution purchaser is irrelevant, so is the *mala fides* of the insolvent debtor.

[21] For the reasons given above the appeal stands to be upheld.

[22] In the result the following order is made:The appeal is upheld with costs including costs of two counsel where so employed. The order of the court a quo is set aside andsubstituted with the following:
'The application is dismissed with costs.'

J B Z SHONGWE
JUDGE OF APPEAL

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