FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 3688/2015

In the matter between:-

SENWES LIMITED Applicant

and

SUSSANNA JOHANNA HERMINA KRUGER N.O. 1st Respondent

CHARLOTTE KONIG N.O. 2nd Respondent

WILHELM MICHAEL KONIG N.O. 3rd Respondent

(In their capacities as trustees of the

ERFPACHT BOERDERY TRUST, IT1058/03)

AFRIKAANSE PROTESTANTSE KERK (HOOPSTAD) Intervening Creditor

CORAM: PLOOS VAN AMSTEL, J

HEARD ON: 4 FEBRUARY 2016

DELIVERED ON: 11 FEBRUARY 2016

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[1] This matter came before me on the extended return day of an order for the provisional sequestration of the Erfpacht Boerdery Trust. The applicant, Senwes Ltd, sought a final sequestration order while the trustees of the trust asked me to discharge the

provisional order. I shall refer to them collectively as 'the trust'. An intervening creditor, the Afrikaanse Protestantse Kerk (Hoopstad), opposed the confirmation of the provisional order in its papers but supported it when the matter was argued before me.

[2] There was also an application by the trust for certain parts of the applicant's replying affidavit to be struck out, alternatively for a further affidavit to be received from the trust in order to deal with what it contended was new matter in the replying affidavit. By agreement the application to strike out was not pursued and I allowed the delivery of a further affidavit by the trust.

[3] The first issue that I need to deal with relates to the applicant's *locus standi*. It claims to be a creditor of the trust and therefore entitled, in terms of s 9(1) of the Insolvency Act[1], to apply for the sequestration of its estate. The averment in the founding affidavit that the trust is indebted to the applicant in an amount of R5 937 965 together with interest from 1 July 2015 was admitted in the trust's answering affidavit. There was no challenge by the trust on the papers to the applicant's *locus standi* as a creditor. There was such a challenge on the papers by APK, but it was abandoned before the hearing in additional heads of argument. Counsel for the trust nevertheless sought to persuade me that on the papers as a whole the applicant does not have *locus standi* as it is not a creditor of the trust. I have considerable doubt whether it is open to the trust to raise this point in argument as it was not in issue between it and the applicant on the papers. On the contrary, the trust admitted on the papers that the applicant was a creditor. The

[1] Insolvency Act 24 of 1936

point in any event appears to me to be without substance. It was based on the fact that the applicant ceded its claims against production debtors to Absa Bank in 2008 *in securitatem debiti*. However, in 2013 the applicant obtained a judgment in this court against the trust for payment of a substantial amount and an order for costs. In 2014 it obtained a second judgment against the trust, also for a substantial amount, and an order for costs. The judgments were granted pursuant to settlement agreements which were made orders of court by agreement, and the applicant is entitled to enforce those judgments. The costs have been taxed and remain unpaid. The applicant therefore qualifies as a creditor as contemplated in s 9(1).

[4] The basis on which the applicant seeks the sequestration of the trust is that it committed acts of insolvency and, in addition, that it is factually insolvent. I deal firstly with the alleged acts of insolvency.

[5] The first is a *nulla bona* return, which the applicant contends is an act of insolvency as contemplated in s 8(b) of the Act. It related to a writ of execution for an amount of R4 461 575, interest and costs. The sheriff served the writ on the third respondent personally. Service on the other two trustees was effected by service on the third respondent, who is the husband and son-in-law of the other two, respectively. Neither the validity nor the effectiveness of the service was challenged in the papers or before me in argument. It was in fact admitted in the trust's answering affidavit that service on the other two trustees was effected by service on the third respondent. According to the return of service

the sheriff demanded payment of the amount owing on the writ, in response to which the third respondent informed him that the debt could not be paid and that the trust did not own assets or property which was available for attachment in satisfaction of the writ. He consequently rendered a *nulla bona* return. Counsel for the trust submitted that the sheriff knew about immovable property that the trust owned, and that certain farms are referred to in both the writ and the return of service. I agree with counsel for the applicant and APK that this is beside the point. Where the debtor is served with a writ of execution and fails to satisfy the judgment or to indicate to the sheriff disposable property sufficient for that purpose, then he commits an act of insolvency. There is no duty on the sheriff to endeavour himself to find sufficient disposable property to satisfy the judgment where he had been informed by the debtor that there are not sufficient such property.[2] In **Dicks**[3] Holmes J referred to **Estate Logie**[4] where the Appellate Division held that a debtor commits an act of insolvency under s 8(b)[5] if the writ is presented to him and he neither satisfies it nor points out sufficient disposable property to satisfy it; and that the concluding words of the section, namely "or if it appears from the return made by such officer that he has not found sufficient disposable property" do not apply where a debtor is personally served with the writ and neither satisfies it nor points out sufficient disposable property. Holmes J said[6] the position is that section 8(b)[7] refers to two acts of insolvency. The first arises where the writ is presented to the

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[2] Meskin, Insolvency Law 2-6(7); **Dicks v Marais** 1952 (3) SA 165 (NPD)
[3] **Dicks v Marais** 1952 (3) SA 165 (NPD) at 168
[4] **Estate Logie v Priest** 1926 AD 312
[5] Of the Insolvency Act 1916.
[6] At 168E-F
[7] Of the 1936 Act.

debtor and he fails, upon demand of the officer in question, to satisfy the judgment or to indicate disposable property sufficient to satisfy it. The other act of insolvency arises where the debtor is not present or presented with the writ, but the officer fails to find sufficient disposable property to satisfy the judgment, and makes a return to that effect.

[6] After I reserved judgment I invited counsel to make submissions as to whether the conduct of the third respondent when the writ was served on him could constitute an act of insolvency, having regard to the fact that the writ was not served personally on the other two trustees. Counsel for the trust submitted, with reference to **O'Shea**[8], that one of several trustees cannot commit an act of insolvency on his own. He also referred me to other cases in support of the principle that trustees have to act jointly. **O'Shea** is distinguishable on the facts. In that case a trustee was subpoenaed to give evidence in an enquiry concerning a company in liquidation. He testified that the company had lent money to the trust of which he was one of the trustees. In a subsequent application to sequestrate the trust the liquidators of the company sought to rely on his admission regarding the loan to establish that the company was a creditor. The court held that when he testified he did so as a witness, in his personal capacity, and was not speaking for the trust. His admission was therefore not one by the trust, and he was not authorised to speak for the other trustees. The facts in the present case are different. The writ was served on the third respondent in his capacity as a trustee. He also accepted service of the writ on behalf of the other two trustees. He was

[8] O'Shea NO v Van Zyl NO 2012 (1) SA 90 (SCA)

required, in his capacity as trustee, to satisfy the writ or point out sufficient disposable property that could be attached for that purpose, and he responded on behalf of the trustees. His authority to do so was not denied on the papers by any of the trustees.

[7] The bald denial by the third respondent that he said what was recorded in the return is not enough. Clear and satisfactory evidence is required to impeach a return of service[9]. In any event, the return does not state that the third respondent said there was no property. It states that he said there were no assets or property sufficient to satisfy the writ. Whether or not the sheriff knew that the trust owned farms, and whether or not he knew that they were all subject to mortgage bonds, is irrelevant in the light of the third respondent's response when the writ was served on him. I conclude therefore that the trust committed an act of insolvency as evidenced by the *nulla bona* return.

[8] The second and third alleged acts of insolvency relate to sub-sections 8(c) and (d). The applicant contends that the trust made a disposition of some of its property which had the effect of prejudicing its creditors or of preferring one creditor above another, and that it removed some of its property with intent to prejudice its creditors or to prefer one creditor above another. The complaint relates to the maize on farms owned by the trust, which the applicant says was harvested and delivered by the trust with the intention to apply the proceeds towards its indebtedness to APK, and to livestock which was disposed of.

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[9] **Sussman & Co (Pty) Ltd v Schwarzer** 1960 (3) SA 94 (OPD) at 96D-H

[9] The trustees say they had nothing to do with the harvesting or the delivery of the maize and that this was done at the instance of APK, who claimed that it was entitled to do so by virtue of a notarial bond and threatened to launch urgent proceedings in the High Court if the trustees did not allow them to harvest the maize. I am not persuaded that the harvesting of the maize by APK constituted a disposition by the trust of its property. It was more a case of self-help by APK. The applicant also contends that since January 2012 the trust has made a disposition of livestock and other movable assets to a value of some R8m.[10] As part of an application by the trust for credit in January 2012 the third respondent, as trustee, stated that the trust owned movable assets in the form of trucks, bakkies, trailers, tractors and equipment to the value of R2 616 000 and livestock to the value of R8 372 3000. According to the inventory prepared by the sheriff the livestock currently owned by the trust is valued at R302 080. The applicant says this shows that the trust has disposed of livestock to the value of approximately R8m. In the trust's answering affidavit the third respondent says APK attached and sold all the bakkies and trailers. He says it also attached several sheep and 104 head of Nguni cattle. The inventory relating to the attachment by APK reflects that it attached goods, including some livestock, to the value of R1 625 490. The third respondent also says the trust lost many sheep to disease, a flood and a drought. Some livestock was sold, but the trust has provided no information as to the number of animals, the proceeds of the sale, or what happened to the proceeds. This is plainly not a satisfactory explanation as to what happened to the movable assets disclosed in the application

[10] P 45

for credit, which were said to have a value of nearly R11m in 2012. The applicant's averment that none of the proceeds of these assets, save those attached by APK, was paid towards the debts owing to the applicant and APK is undisputed on the papers. I agree with counsel for the applicant and APK that the most probable inference in the circumstances is that the trust disposed of the assets which are unaccounted for, to the prejudice of its creditors. This constitutes an act of insolvency as contemplated in s 8(c).

[10] In the light of the acts of insolvency committed by the trust it is not necessary to make a finding with regard to its alleged insolvency. Suffice it to say that there is a substantial dispute of fact in this regard on the papers. The applicant said in the founding papers that the trust had liabilities amounting to R14 630 624. After the provisional sequestration order was granted, however, creditors with total claims of R18 089 710 lodged nominations with the Master for the appointment of a provisional trustee. These include the claims by the applicant and APK. The trust disputes many of these claims and contends that its liabilities do not exceed R9, 4 m. There is also a substantial dispute on the papers with regard to the value of the farms owned by the trust, which are the only assets of significance. Both the applicant and the trust put up several valuations by professional valuers, and the deponent to the trust's affidavit also offered his own opinion as a property broker who specialises in the sale of farms. The valuations vary from some R10 m to R24 m. Counsel for the applicant submitted that a more reliable indication of the value of the farms is to be found in a contract for the sale of the farms, as one farming unit, which was

concluded by the trust in February 2014. In terms of this contract the trust sold the farms to the Truter Boerdery Trust for a purchase price of R9, 5m. The sale included irrigation equipment, tractors, a planter and trailers. This is not in dispute. The only response by the trust was to say that the transaction did not proceed as the trust did not regard the price as reasonable. No explanation is provided as to how the trustees managed to persuade the purchaser that this was a basis for not proceeding with the transaction. It seems plain that there must have been a different reason.

[11] It is not possible in the light of the disputes of fact to make a definite finding as to the liabilities of the trust and the value of its assets. I have a discretion whether or not to grant a sequestration order where an act of insolvency was committed but there is no clear proof that the respondent is insolvent. The background is important in this regard. The trust has several judgments and costs orders against it which remain unsatisfied. It has breached several settlement agreements by failing to make the payments which it undertook to make. Assets with a very substantial value have disappeared over the last three years. The trust is on its own admission not in a position to pay its debts, and there is no reason to believe that its position is likely to improve. Compare in this regard the approach of Potgieter J in **Sussman**.[11] In those circumstances it seems to me that the consequence of the acts of insolvency should be the sequestration of the trust.

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[11] Sussman & Co (Pty) Ltd v Schwarzer 1960 (3) SA 94 (OPD) at 97C-D.

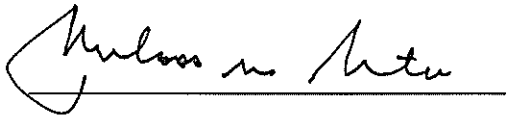
[12] There was some debate before me as to whether a sequestration would be to the advantage of the creditors of the trust. The fact that there will be a significant dividend is not in issue. Nor was it in issue that there are several judgments against the trust. It seems likely that a better price will be obtained for the farms if they are marketed properly than on a forced sale in execution. It was also submitted by counsel for the applicant and APK that there is a need for an investigation as to what happened to the assets which are unaccounted for, or their proceeds. These assets are said to have had a value of several million rand. I must also have regard to the fact that the two biggest creditors of the trust both want a final sequestration order. I am satisfied in those circumstances that there is reason to believe that a sequestration will be to the advantage of creditors.

[13] I make the following order:

(i) A final order of sequestration is granted in respect of the Erfpacht Boerdery Trust.

(ii) The applicant's costs, including those occasioned by the employment of two counsel, are to be paid out of the estate.

(iii) The costs of the intervening creditor relating to the hearing before me on 4 February 2016, including those occasioned by the employment of two counsel, are to be paid out of the estate.



J.A. PLOOS VAN AMSTEL, J

On behalf of Applicant:	Adv P Zietsman SC Instructed by: Phatshoane Henney BLOEMFONTEIN
On behalf of Respondents:	Adv HJ Benade Instructed by: Steenkamp De Villiers Coetzee Attorneys BLOEMFONTEIN
On behalf of Intervening Creditor:	Adv FH Terblanche SC With Adv AJ Wessels Instructed by: EG Cooper Majiedt Inc BLOEMFONTEIN