EFFECT OF A NOTICE TO SURRENDER ON AN INSOLVENT'S ESTATE SUBSEQUENT TO A SALE IN EXECUTION

Fourie v Edkins (740/12) [2013] ZASCA 117 (19 September 2013)

1 Introduction

A debtor who is unable to meet his or her contractual obligations may resort to the debt-relief measures provided by the Insolvency Act 24 of 1936 (hereinafter "Insolvency Act") and National Credit Act 34 of 2005 (hereinafter "NCA"). The Insolvency Act provides sequestration as one of the debt-relief measures because following the sequestration order the debtor may be rehabilitated. In one hand, a debtor may apply for sequestration process by way of voluntary surrender while on the other it is also possible for a creditor to sequestrate a debtor's estate by way of compulsory sequestration. The NCA also provides debt-relief measures because it contains provisions that are aimed at the protection of consumers who are over-indebted, and further contains measures that are aimed at preventing reckless credit granting. In *Ex Parte* (2009 (3) SA 376 (WCC)) the applicants applied for voluntary surrender, whereas the major portion of each of the applicants' debts arose out of "credit agreements" as intended in the NCA. The court enquired as to why the over-indebtedness of the applicants should not be more appropriately addressed instead of the voluntary surrender under the Insolvency Act. The court refused the application for voluntary surrender and held that an applicant has to make a full disclosure of his or her other assets and liabilities in terms of section 4 of the Insolvency Act, and the court must be fully informed of the applicant's proprietary situation (*Ex Parte Ford supra* 384). The decision in *Ex Parte Ford* indicates that an applicant, who brings an application for voluntary surrender instead of using remedies under the NCA such as over-indebtedness, will have to explain to the court as to why he has not resorted to the debt-relief measures provided by the NCA.

According to the Insolvency Act the main aim of the sequestration process is to provide for a collective debt-collecting process that will ensure an orderly and fair distribution of the debtor's assets in the circumstances where these assets are insufficient to satisfy all the creditors' claims (Bertelsmann, Evans, Harris, Kelly-Louw, Loubser, Roestoff, Smith, Stander and Steyn *Mars The Law of Insolvency* (2008) 2). Therefore the rights of creditors as a group will be preferred over the rights of a single creditor (*concursus creditorum*). The former comes into operation after a sequestration order has been granted by a court. The effect of sequestration is that the insolvent will be divested of his estate and vest in the Master at least until a trustee has been appointed (s 20(1)(a); *Brown v Oosthuizen* 1980 (2) SA 155 (O); see

Bertelsmann *et al The Law of Insolvency* 181; and Smith *The Law of Insolvency* (1988) 81). More pertinently, section 20(1)(c) of the Insolvency Act provides that one of the effects of sequestration of the estate of an insolvent is that, as soon as any sheriff or messenger, whose duty is to execute judgment given against the insolvent, becomes aware of the sequestration should stay that execution, unless the court directs otherwise.

In the matter between *Fourie v Edkins* the Supreme Court of Appeal had to consider circumstances in which a court could exercise its discretion in terms of section 20(1)(c) of the Insolvency Act, to stay the execution in the instance where a sheriff had sold immovable property in the execution of judgment, pursuant to a sale agreement concluded before the insolvent applied for sequestration of his or her estate and also prior to the registration of the transfer of the property in the name of the execution purchaser. The aim of this note is to analyse the decision in *Fourie v Edkins* in light of section 20(1)(c) of the Insolvency Act which deals with the effects of sequestration. Brief reference will also be made to other cases relating to section 20(1).

2 Facts

On 18 February 2010 Absa Bank (the registered bond holder) obtained judgment against Mr Talent Mthethwa (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) which was declared specially executable.

On the 3 August 2010 the above property was sold in execution by the sheriff to the respondent (Edkins) for the sum of R530 000. The registered mortgage bond over the property was R1 100 000. After signing the conditions of sale, Edkins complied with all his obligations in terms of the conditions of sale and guaranteed the full purchase price. Edkins also instructed his attorneys on the same day to proceed with registration of the transfer of the property into his name.

Notice of the surrender of his estate in terms of section 4(1) of the Act was published in the *Government Gazette* and local newspaper by his attorneys on 6 August 2010. The above notice indicated that the insolvent intend to apply to the North Gauteng High Court on 3 September 2010 for the acceptance of voluntary surrender and place his estate under sequestration. Accordingly, on 3 September 2010 the court accepted surrender and placed his estate under sequestration. The appellants in this matter (the trustees) were appointed as provisional trustees in the insolvent estate on 2 August 2011. During this period Edkins and the sheriff were completely unaware of the notice of surrender and the acceptance thereof. It is a common cause that publication of the notice in terms section 4(1) of the Insolvency Act took place after the sale was concluded with the sheriff.

Edkins's attorneys approached the Registrar of Deeds with the mandate to proceed with the registration of the transfer. They were informed, that according to the Registrar's Resolution 54/2009 if a debtor is sequestrated after the sale in execution, the sheriff is prevented from transferring the property in the name of the purchaser. Edkins launched an application

against the Registrar of Deeds (Johannesburg), the Master of High Court (Johannesburg), the two appellants, Absa Bank and the sheriff (Johannesburg), first seeking for a declaratory order validating the sale agreement concluded on 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.

The South Gauteng High Court, per Moshidi J, granted the relief prayed for and also found that the sale agreement was concluded before publication of notice which suggests that it was a lawful sale and did not conflict with the provision of section 5(1) of the Insolvency Act. Section 5(1) provides that after the publication of the notice of surrender in the Gazette, it is unlawful to sell any property of the estate in question which has been attached under writ of execution or other processes, unless the person responsible for such execution or other process is not aware of the publication, provided in the opinion of the Master, the value of such property is not more than R5 000 or in the case where it exceeds R5 000 the court may order the sale of the property attached and direct how the proceeds of the sale shall be applied. According to the Court the insolvent knew that Absa had foreclosed on the loan and that there was the pending sale in execution; thus the appellant deliberately waited until after the sale to publish a notice in terms of section 4(1). The Court also held that the insolvent had no authority over the property and that the appellant had no right to prevent the transfer of the property into the name of the respondent.

3 Judgment by the Supreme Court of Appeal

This case came before the Supreme Court of Appeal on appeal from the South Gauteng High Court. Shongwe JA, acknowledged that the application in the Court *a quo* was premised on the provisions of section 5(1) (par [11]). Shongwe JA indicated that section 5(1) is irrelevant for the facts of this case as the sale took place before the publication of notice of surrender (par [12]). He confirmed that section 5(1) envisaged a situation where a sheriff or an 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. He also confirmed that the purpose of section 5(1) is to protect creditors against anyone, including the insolvent from dissipating the assets of the estate.

The Court noted in the circumstances, that one can deduce from the founding affidavit that Edkins was advised that the execution of sale had been finalized before publication of the notice of surrender despite the fact that transfer of the property had not taken place (par 12). The Court also clearly indicated that the signing of the deed of sale, *per se* and also the compliance with the conditions of sale are insufficient to complete the execution of the sale (par 12).

According to the Court, the crux of this appeal is that upon sequestration of a debtor's estate, including all his or her property, property under attachment or the proceeds which are in the hands of the sheriff, will first vest in the hands of the Master and thereafter in the trustees upon their appointment. The Court said this also includes immovable property sold in

execution but not yet transferred at the date of sequestration (*Simpson v Klein NO* 1987 (1) SA 405 (W) 408E–H; *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 558–559; *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central; Schoerie v Syfrets Bank Ltd* 1997 (1) SA 764 (D) 772C–I; and *Shalala v Bowman* 1989 (4) SA 900 (W) 905E–G).

The Court focused on section 20(1)(c) and 20(2)(a) (par 14). In particular the effect of section 20(1)(c) is to confer power or control of the property on the Master and subsequently trustee and to dispossess control of the property from the sheriff unless the Court otherwise directs (par 15). Section 20(2)(a) provides that for the purpose of section 20(1) the estate of the insolvent includes all property of the insolvent at the time of sequestration or the proceeds which are in the hands of a sheriff or a messenger under writ of attachment.

Shongwe JA, indicated that Edkins relied on section 5(1) when he approached the Court *a quo* and section 5(1) is irrelevant. According to Shongwe JA Edkins should have approached the Court in terms of section 20(1)(c) and seek an order from the Court to proceed with the transfer of the property into his name despite the supervening voluntary surrender of the insolvent estate (par 16). Edkins's counsel submitted that section 20(1)(c) does not assist the appellant, but conceded that Edkins should have requested the Court for an order to direct that the execution, culminating in the property being transferred into his name, be proceeded with. The Court referred to the decision in *Master of the Supreme Court v Nevsky* 1907 TS 268, wherein Innes CJ (as he then was) held 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."

The Court noted that one must prove that it will be in the interests of the body of creditors as a group *concursus creditorum* to direct, otherwise than staying the execution of sale and in this matter Absa Bank has a bond over the property of R1 100 000, and Edkins bought the property for only R530 000 which is almost half of R1 100 000.

The Court held that Edkins failed to provide the Court *a quo* with any valuation of the property and the fact that there were other creditors of the insolvent estate, and such failure to place all these facts was detrimental to his case, bearing in mind the onus rested on him. The Court held that it will have authority to order the sheriff to proceed with the sale and registration of the property in the name of execution purchaser only in exceptional circumstances, and if the interests of other creditors of the estate will not be adversely affected (*Unie Spoorweg Onderlinge Begrafnisgenootskap v Druker* 1961 (1) SA 266 (W) 268C–D).

Shongwe JA, referred to the case of *Simpson v Klein* (1987 (1) SA 405 (W)) and emphasized that ownership of the attached immovable property does not pass during sale in execution but upon the formal registration of transfer to a purchaser. Shongwe JA, noted that the Court *a quo* mentioned section 20(1)(c) but did not deal with the effects of supervening sequestration. According to the Court this might have been caused by the

fact that the application in Court *a quo* was premised on section 5(1) and that created erroneous impression to the Court that the application is solely based on the provision of section 5(1).

The appellant submitted that the Court *a quo* misdirected itself as it did not deal with the substitution of a *pignus judiciale* by a *concursus creditorum* and ultimately the effects of section 20(1)(c) thereof. The appellant further submitted that the Court *a quo* relied heavily on the unreported judgment of *De Jager NO v Balju van die Hooggeregshof, Bloemfontein* – FB ((unreported) 2010-06-04 Case no 407/2010) and this judgment does not deal with supervening sequestration, and according to him it is distinguishable and therefore irrelevant to the facts of this case. Shongwe JA, agreed with these submissions (par 19).

Finally the Court concluded that upon publication of a notice of surrender in terms of section 4(1), the provisions of section 20(1)(c) and 20(2)(a) immediately come into operation. The Master takes control of the insolvent estate until a trustee is appointed.

4 Analysis and discussion

The decision in *Fourie v Edkins* is an important one in our law, because it illustrates the importance of placing sufficient information before a court by a litigant seeking an order of execution despite an application for voluntary surrender. The Court will be equipped with sufficient information and order that the sheriff proceed with the sale and transfer of the property, notwithstanding an application for voluntary surrender. The decision in *Fourie v Edkins* also alerts consumers who are having financial difficulties, that it will be prudent to apply for voluntary surrender earlier instead of facing dire consequences of an execution order. This will be the case provided that the debts of the consumer do not fall with the ambit of the NCA, in which case the consumer would have a remedy such as declaration of over-indebtedness or one or more of the consumers' credit be declared reckless. The application in the South Gauteng High Court was premised on the provisions of section 5(1) and this section, at least according to the Court, is irrelevant. This created the erroneous impression to the Court *a quo* that the application is solely based on the provision of section 5(1). Section 5(1) envisages a situation where a sheriff or an insolvent debtor is prohibited from selling any property of the estate after publication of the property, provided that the aforesaid person did not have the knowledge of publication. Section 20(1)(c) deals with the effects of sequestration on the insolvent's property. Any sheriff mandated to execute a judgment againt an insolvent's estate, is required by the provisions of section 20(1)(c) to stay that execution as soon as he becomes aware of the sequestration of the insolvent's estate, unless the Court orders otherwise. In terms of Rule 46(13) of the Uniform Rules of High Court a sheriff is given power to transfer the property to the purchaser and upon performance of any conditions of sale, to do anything necessary to effect registration or transfer, and whatever he has done will be deemed to valid and effectual as if he or she were the owner of the property. Therefore a sheriff remains with a duty to transfer the property to the purchaser.

It is therefore submitted that a sheriff has to enquire from the Registrar of Deeds if a consumer is being sequestrated. The Registrar of Deeds' Conference Resolution 54/2009 prevents a sheriff from transferring the property to the purchaser if a property of the debtor was sold in execution and the debtor is sequestrated after such sale.

Shongwe JA, clearly indicated that in light of the facts of this matter Edkins should have proceeded in terms of section 20(1)(c), seeking an order from the Court to proceed with the transfer of the property into his name despite the supervening voluntary surrender of the insolvent estate. One may argue that having noted the fact that Absa Bank has a bond over the property of R1 100 000, and Edkins bought the property for only R530 000 which is almost half of R1 100 000, that fact on its own will not accord with the principle of *concursus creditorum.* The *locus classicus* with regard to the concept *concursus creditorum* is *Walker v Syfrets* (1911 AD 141 166), where Innes J (as he then was) stated that:

> "The object of the [Insolvency Act] is to ensure a due distribution of assets among creditors in the order of their preference ... The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."

Edkins had to prove before the Court that it would be in the interest of the body of creditors as a group, and not on him alone as a single creditor. Edkins did not indicate to the Court *a quo* any valuation of the property and the fact that there were other creditors, and according to the Court failure to submit all these facts before the Court was detrimental to their case bearing in mind the onus rested on him. It is noted that the Court will only order the sheriff to proceed with the sale and registration of the property in the name of the execution purchaser only in exceptional circumstances and if the interests of other creditors of the estate will not be adversely affected (*Unie Spoorweg Onderlinge Begrafnisgenootskap v Druker* 1961 (1) SA 266 (W) 268C–D). For instance in the matter between *Unie Spoorweg Onderlinge Begrafnisgenootskap v Druker* (*supra* 269) the exceptional circumstances were that the applicant was a secured creditor of the insolvent for nearly £20,000, purchased the mortgaged property at the amount of £10,000 from the sheriff who also allowed the applicant to take occupation of the property, signed a power of attorney to transfer, the sale of the property was confirmed by the Court, and since the applicant took the occupation of the property had spent approximately £30,000 in effecting improvements to turn the nursing home into a modern one equipped for use in modern times. In the matter between *Simpson v Klein* (*supra* 412) there were exceptional circumstances. However, the Court decided that on the condition that the applicant pay balance of the purchase price he should be allowed to transfer the property into his name. The amount to be paid by the applicant was the balance owing under the deed of sale which was R40 412,50. Therefore, if perhaps Edkins proved to the Court that there were exceptional circumstances the Court would have ordered that the sale and transfer of the property proceed, despite voluntary surrender.

Accordingly the Court *a quo* was misdirected for relying on the unreported judgment of *De Jager NO v Balju van die Hooggeregshof, Bloemfontein* – was ((407/2010) [2010] ZAFSHC 90 (4 June 2010)), which does not deal with the supervening sequestration. According to Shongwe JA, the aforesaid judgment is distinguishable and also irrelevant to the facts of this matter.

Lastly, and perhaps most importantly, the Court held that once a publication of notice of surrender in terms of section 4(1) is made, the provisions of sections 20(1)(c) and 20(2)(a) immediately comes into operation. It follows that the normal process will continue in which a Master will take control of the insolvent estate until a trustee is appointed. The ownership, however, remains with the insolvent (*Simpson v Klein supra*; *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co supra*; *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central supra; Schoerie v Syfrets Bank Ltd supra*; and *Shalala v Bowman supra*). Once a *concursus creditorum* has been established nothing may be done by any creditor to alter the rights of the other creditors (*Walker v Syfrets supra*).

5 Concluding remarks

It is safe to say that indeed the Court *a quo* erred in its decision which was in favour of Edkins that the transfer of the property should be proceeded with. According to Shongwe JA, this might be the fact that the application in the court *a quo* was premised on section 5(1) which is irrelevant because the sale took place before publication of the notice of surrender (par 12). The Supreme Court of Appeal made it clear that Edkins should have approached the Court in terms of section 20(1)(c) and sought an order from the Court to proceed with transfer of the property into his name despite the supervening voluntary surrender of the insolvent estate (par 16). It is noted that the Court *a quo* was not provided with any valuation of the property and any indication as to whether there were other creditors. It is therefore submitted that this information is important to the Court. The Court may direct that the transfer be proceeded with and this is confirmed in the decision of *Ex Parte Eastern Province Building Society* (1939 WLD 102 105), in which Greeberg JP held that section 20(1)(c) gives the Court the power to order that the execution be proceeded with. The Court has to be provided with sufficient information in order to direct otherwise and there must be exceptional circumstances as to why the transfer of property should be proceeded with. As indicated above, in *Fourie v Edkins* Absa Bank has a bond over the property of R1 100 000 and Edkins bought the property for only R530 000 which is almost half of R1 100 000. That fact on its own will not accord with the principle of *concursus creditorum*. It is interesting to note that in this matter of *Fourie v Edkins* the Court indicated that, upon publication of a notice of surrender in terms of section 4(1), the provisions of section 20(1)(c) and 20(2)(a) immediately come into operation. Therefore a usual process would have had to be followed in which the Master takes control of the insolvent estate until a trustee is appointed.

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