JOHANNES NICOLAAS BEKKER -vs- JOHANNES PHILLIP KOTZE & 6 OTHER.

1994/12/08

Strydom, J.P.

INSOLVENCY.

Recognition of foreign provisional trustee by Court - doubtful whether this is possible before trustee's appointment final. Vesting of movable property - such takes places also in other jurisdictions if insolvent was domiciled within jurisdiction of Court declaring him insolvent at time of such order.

CASE NO. 270/94

IN THE HIGH COURT OF NAMIBIA

In the matter between

JOHANNES NICOLAAS BEKKER **APPLICANT**

versus

JOHANNES PHILLIP KOTZE & 6 OTHERS **RESPONDENTS**

CORAM: STRYDOM, JUDGE PRESIDENT

Heard on: 1994/12/06,08

Delivered on: 1994/12/08

JUDGMENT

STRYDOM, J.P.: This was an urgent application for the relief set out in the Notice of Motion.

This application followed upon a provisional sequestration of the common estate of the first and second Respondents in the Republic of South Africa.

The application before me was argued by Ms Viviers-Turck, Mr Grobler appeared on behalf of the first and the second Respondents. No answering affidavits were filed by the Respondents, neither was the Court asked for a postponement to afford Respondents an opportunity to file any documents. However, both parties freely made use of

affidavits and documents previously filed in this Court and in the Court in South Africa. From the allegations in these documents it was alleged that the First Respondent had defrauded the Government of the Republic of South Africa to the tune of some R23 914 752,11 by falsely recovering value added tax on bogus purchases of mining machinery. When this was discovered, application was made for a writ suspectus de fuga. However, by then the First Respondent had already moved to Namibia. In moving to Namibia the First Respondent brought with him various movable assets as well as money.

Thereafter and on the 11th October 1994 the common estate of First and Second Respondents were provisionally sequestrated in the Republic of South Africa and the Applicant was appointed as a provisional trustee. This sequestration was at the behest of the Receiver of Revenue.

Following upon this sequestration, the Applicant as provisional trustee in the estate, asked and obtained orders in this Court whereby he was recognised as provisional trustee in the estate and whereby all assets of First and Second Respondents in Namibia vested in him as provisional trustee. The Applicant by way of Rules Nisi also asked for the attachment of various movables and interdicted the other Respondents from dealing with any money which the First Respondent had allegedly paid into their banking accounts.

An attempt was made by the First Respondent to set aside the order by Teek, J, and more particularly the order whereby **the Applicant was recognised in Namibia as a provisional**

trustee in the estate. If successful this would have brought about the collapse of the Applicant's case. The application was however refused. The Rule Nisi was confirmed and an appeal was lodged to the Full Bench of this Court. This is due to be heard on the 8th December 1994.

However, on the 28th November 1994 the provisional sequestration order obtained by the Receiver of Revenue in the TPD was discharged on a ground of lack of locus standi. This had the effect of taking away the sub-stratum on which the orders made by my brother Teek were founded. An application was then launched by First Respondent to set aside the orders made by my brother Teek, this application will also be heard on the 8th December. However, both counsel were agreed that there is no way in which the orders given by my brother Teek can survive the discharge of the sequestration order in South Africa. These orders had then also been set aside by me this morning.

On the 1st December 1994 the common estate of the First and Second Respondents was again provisionally sequestrated, this time at the behest of the Government of South Africa. Following upon this the Applicant was again appointed as provisional trustee in the estate and the application now brought by him in this Court is substantially the same as previously brought before my brother Teek although the prayers set out in the Notice of Motion are now more carefully framed as part of a Rule Nisi, and not as a final order except for prayer 2 which again ask for an out and out

declaration that all the movable assets in Namibia vest in the applicant. Various points were argued by counsel. I myself have serious doubts whether this Court can at this stage, bearing in mind that the Applicant was appointed as a provisional trustee on a provisional sequestration order, recognise such appointment. It seems to me that the previous recognition which was based on a provisional sequestration order clearly demonstrated why a Court would only recognise final orders by a foreign court.

It therefore seems to me that this application turns on a question whether the Respondents, when the provisional sequestration was given in the TPD, were domiciled within the jurisdiction of that Court or not. Where the sequestration order was given by the Court of the debtors domicile movables, wherever situated, vest in the trustee and in my opinion also in the provisional trustee. See Section 18(3) and 54(5) of Act 24 of 1936; and see further Mars, The Law of Insolvency, 8th ed. p. 133 paragraph 7.5.

As far as the vesting of movables are concerned, Mars, in my view correctly sums up the law as follows:

> "At common law, therefore, a sequestration order has no effect per se on immovable property situated in a foreign country. Such property remain vested in the insolvent. But in regard to movables, the situation is different. A sequestration order granted by the Court of the debtors domicile ipso facto divest the insolvent of all his movable property, wherever situated, but a sequestration order granted by any other

> Court has per se no operation on the debtors assets, whether movable or immovable, situated out of such Court's jurisdiction."

See in this regard, Mars, opus citandi p. 177 and see further Viljoen v Venter N.O. 1981(2) SA 152, (W.L.D) at 155B.

As regards the issue of First Respondent's domicile this must be determined on all the evidence, as was stated by Jansen, J (as he then was), in Massey v Massey 1962(2) SA 199 at 200:

> "the ipse dixit of an interested party in these circumstances should be carefully scrutinized."

For purposes of this question I will accept the various affidavits which were by consent placed before me. In paragraph 4 of his answering affidavit in the first application, First Respondent stated that he is a Namibian citizen by birth and that he was residing in Namibia with the intent to make it his permanent home. He further went on to state that it is his intention to buy a farm in Namibia and that the vehicles brought by him were brought with the purpose of using them on this farm. He furthermore stated that he did not flee South Africa but moved here in the normal way to settle.

To this the Applicant replied that there was still no fixed address in Namibia where he could contact the First Respondent and the documents still had to be served on his

attorney. To this was added that the First Respondent spent the greater part of his adult life in the RSA. All documentation

that the applicant could find indicate that First Respondent was a South African citizen. It was further also pointed out that First Respondent is also not employed in Namibia.

It is furthermore also clear from documents filed by the First Respondent himself that the bulk of his estate is in the Republic of South Africa. The Court was further informed by Mr Grobler that the wife of the First Respondent, the Second Respondent herein, is also still in the RSA.

Taking into consideration the circumstances under which the First Respondent came to Namibia, the fact of his physical presence in Namibia cannot be seen as a voluntary move to Namibia with the view of settling here. Notwithstanding the First Respondent's assurances that this was just a normal move to Namibia, evidence in my opinion is overwhelming that he left South Africa because he knew of the risks involved if he should remain there. This is further confirmed by the fact that, as shown out by the Applicant, no prior arrangements were made to obtain property etcetera or was given in evidence by the Respondent. There is also the issue of the various amounts which were concealed by paying them into the accounts of third parties and which were left unexplained by the First Respondent.

His ipse dixit that he intends to buy a farm in Namibia and **to stay here permanently was countered by the fact that he tried to sell the very vehicles which he said were earmarked for such a farm. It seems furthermore from his affidavit handed in by Mr Grobler that he is adamant that he is not insolvent and that he is confident that the problems which he is presently facing can be taken care of in South Africa.**

On all the evidence I am therefore satisfied that the Applicant has at least prima facie established that the First and Second Respondent were at the time of sequestration of their common estate still domiciled in the Republic of South Africa.

From this it follows as already previously set out, that the movable assets of the common estate, also those in Namibia, vest in the Applicant, and that as a result thereof he has the necessary locus standi to bring this application. In the circumstances it is also not necessary for this Court to recognise him as a provisional trustee. As far as recognition is concerned, it is stated by Mars, op. cit. at p. 178 as follows:

> **"The necessity for recognition will always exist if the insolvent has immoveables in a foreign jurisdiction, but in the case of his having movables there, only if the order of sequestration has been granted by some Court other than that of his domicile."**

The vesting of such movables follows by operation of law, and it is therefore also not necessary for me to make such an order. If the provisional sequestration is confirmed and this applicant is appointed as trustee in the estate he must then ask for recognition to deal with such assets. For purposes of this application this is however not necessary.

See Ex Parte Palmer NO: IN RE Hahn 1993(3) SA 3 59 CPD.

I have not dealt with counsel's arguments re the recognition of the provisional trustee and the arguments around the definition that Republic also includes the mandated territory of South West

Africa because of the conclusion to which I have come on the other point. As regards Mr Grobler's argument that this application is premature, the submission is in my opinion without any substance. Counsel were agreed that nothing could extend the order which will be set aside on the 8th. As it is, this judgment will only be given on the 8th and the Applicant is duty bound to safeguard the interest of creditors.

I am also further satisfied that a prima facie case was made out by the Applicant against all the Respondents for the relief set out hereunder, namely:

1. The non-compliance with the rules of this Court is condoned.

2 . A Rule Nisi is hereby issued calling upon all the Respondents to show cause on the 20th January 1995 at 10:00 a.m. or as soon thereafter as counsel can be heard why -

2.1 Leave and authority should not be granted to the Applicant in terms of Section 18(3) of Act 24 of 1936 to take all such legal steps to receive and/or freeze movable assets which belong to the estate of the First and Second Respondents (now under provisional sequestration)•

2.2 The movables already attached in terms of the Rule Nisi granted on 21st October 1994 should not remain under the attachment for the purposes of this application;

2.3 All the money or funds of the First and Second Respondents, held in various bank accounts of the First and the Second Respondents, and already attached in terms of the Court orders dated 21st October 1994 and 1st November 1994, should not remain under the attachment for the purposes of this application;

2.4 The Third and/or Fourth Respondent should not be interdicted and restrained from withdrawing the amount of N$99 530 from his/her bank account held with the Sixth Respondent's branch in Swakopmund or transfer or deal in any manner with the amount of N$99 530 (or interest thereon).

2 .5 The Sixth Respondent should not be interdicted from transferring and/or dealing in the amount of N$99 53 0 (and interest) in it's Swakopmund branch in the name of Third and Fourth Respondents;

2.6 The Fifth Respondent should not be interdicted and restrained from transferring, dealing or drawing the amount of N$l 180 000, (and further interest thereon) held in his bank account with Seventh Respondent;

2.5 The Seventh Respondent should not be interdicted from transferring or dealing in any manner with the amount of N$l 180 000 (and further interest thereon) at present held in the account of the Fifth Respondent.

2.6 The amounts of N$99 530 and N$l 180 000 (together with further interest thereon) in the bank accounts of Third, Fourth and Fifth Respondents with the Sixth and Seventh Respondent's branches in Swakopmund should not be attached.

2.7 The order set out in prayers 2.1 to 2.8 shall serve as an interim interdict pending the finalization of this application and the appointing and recognition of the trustee to administer the joint estate of the First and Second Respondents.

2.8 Leave is hereby granted to the Applicant herein, and in the event that he is appointed as trustee in the aforesaid insolvent estate in terms of the provisions of Act 24 of 1936, to approach this Court, upon notice thereto to First and Second Respondents on the same papers, amplified if necessary for the relief set out in paragraphs A, B, C and D of the Notice of Motion.

After the orders were given Mr Grobler informed the Court that the Second Respondent herein is presently residing in

a' 1 a^d that ther„^ this f ar(- ,
have

Ct Unre^rvedl y .

STRYD0^, **JUDGE**

PRESIDED