HOA COLLECTING DEBT: CHOOSE THE METHOD WISELY

Waterkloof Boulevard Homeowners Association (Association Incorporated under Section 21) v Yusuf and Another (028945/2022) [2023] ZAGPPHC 737 (28 August 2023)

A creditor, armed with a judgment debt in its favour, is often still a long way off from having the debt settled. The creditor can in such circumstances apply to court for an order allowing it to sell the debtor's property in execution, or it can apply for the debtor's sequestration. The latter requires the creditor to prove that it is to the benefit of creditors – which is detracted from if the costs thereof is more than the costs relating to execution.

The judgment below explains why this is so and highlights considerations that a HOA management should bear in mind.

The Judgment can be viewed here.

FACTS

This matter deals with the collection of debt from an owner of a property situated within a homeowners' association development after judgment has been obtained. The history relates to the efforts of the Waterkloof Boulevard Homeowners Association ('the HOA') to collect levies it raised from owners for, amongst other things, the administration of the association, security, and upkeep in its area of business.

Mrs Yusuf is a widow. She and her erstwhile husband were married in community of property and own a property in the HOA development. Mrs Yusuf was struggling to finalise the estate of her late husband and, in the process, has run into difficulties and arrears with the payment of the levies owing to the HOA.

The HOA instituted proceedings in court to collect the amounts outstanding. It succeeded in securing a summary judgment against Mrs Yusuf and the deceased estate of her husband. However, despite this, the levies remained unpaid and the HOA instructed its attorneys to apply for the provisional sequestration of the joint estate of Mrs Yusuf and her late husband in an attempt to secure payment of the outstanding amount.

HELD

- For a creditor to succeed in a sequestration application, the Insolvency Act requires that:
  i. the creditor must establish that it has a valid claim against the debtor;
  ii. the debtor is insolvent or committed an act of insolvency;
  iii. there is reason to believe that the sequestration will be to the advantage of creditors if the debtor's estate is sequestrated.
- These facts despite, a court is not bound to grant a final sequestration order even if the court is satisfied that the proper case has been made out. A court retains a discretion to grant or refuse a sequestration order.
- In the present matter it was common cause that judgment has been obtained against the joint estate of Mrs Yusuf and her deceased husband and that the judgment remains unsatisfied. The first requirement has therefore been met. The second requirement is not addressed due to the finding in respect of the third requirement – the requirement to show that sequestration will be to the benefit of creditors.

- With regards to the last requirement, the HOA did not indicate why it chose to institute sequestration proceedings rather than attaching and selling the immovable property registered in the names of Mrs Yusuf and her deceased husband in an execution sale. It appears that an attachment and execution sale of the property could have been more advantageous in the present matter – at least because it has the advantage to the HOA of avoiding the additional costs pertaining sequestration proceedings.
- There was no reason in principle why a debtor who has only one creditor should not face sequestration for the outstanding judgment debt. However, the potential advantages for the creditor (the HOA) in sequestration proceedings are inherently fewer and the case in its favour correspondingly weaker. In this scenario, choosing sequestration rather than execution against immovable property as a way to collect debt, is "really no more than an elaborate means of execution, and because of its costs, an expensive one too. That the applicant himself is convinced of its benefits to him is not decisive, even when he is the only creditor. It is for the court to decide the question…. What is more, he must demonstrate some reasonable expectation that it will exceed the likely proceeds of ordinary execution. Unless he does that, the laborious and substantially more expensive remedy of sequestration can hardly be thought advantageous."
- In fact, our courts have explained that whilst a judgment creditor has an automatic right to seek to collect the debt owing to it by executing against the property of the debtor, the same automatic right does not apply with regards to instituting insolvency proceedings. (This is partly because, in sequestration applications, the creditor must show that such a step will be to the benefit of creditors, amongst other things.) "Sequestration can serve as a legitimate form of execution to achieve settlement of a judgment debt. However the judgment creditor does not automatically has the same automatic right to it which ordinarily governs execution of the routine kind."
- No case has otherwise been made out that there were impeachable transactions, concealment of assets or other irregularities that would best be remedied by using the machinery of the Insolvency Act.

CONCLUSION

Accordingly, the HOA failed to make out a case that sequestration proceedings would benefit itself more than a sale in execution. The application is therefore dismissed. (The HOA is accordingly liable for the cost and will have to bring a new application for execution against the immovable property registered in the name of Mrs Yusuf and her late husband.)