THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 240/2016

In the matter between:

THE BODY CORPORATE OF EMPIRE GARDENS **APPELLANT**

And

NOBUHLE GLORIA SITHOLE **FIRST RESPONDENT**

NEDBANK LIMITED **SECOND RESPONDENT**

Neutral citation: *Body Corporate v Sithole & another* (240/2016) [2017] ZASCA 28 (27 March 2017)

Coram: Tshiqi, Wallis, Petse and Mbha JJA and Nicholls AJA

Heard: **6 March 2017**

Delivered: **27 March 2017**

Summary: Application for compulsory sequestration : advantage to creditors as contemplated in s 10*(c)* of the Insolvency Act, 24 of 1936 not proven : no basis to find that a body corporate of a sectional title development need not prove pecuniary benefit to the general body of creditors.

ORDER

On appeal from: The High Court Gauteng Division, Pretoria (De Klerk AJ sitting as court of first instance):

a) The appeal is dismissed.

JUDGMENT

Tshiqi JA (Wallis, Petse and Mbha JJA and Nicholls AJA concurring):

[1] The issue in this appeal is whether in an application for compulsory sequestration, a body corporate of a sectional title development is required to prove that the order of sequestration sought will be to the advantage of the whole body of creditors as contemplated in s 10*(c)* of the Insolvency Act 24 of 1936 (Insolvency Act).[1]

[2] The appellant, the body corporate of Empire Gardens (the E G Body Corporate) was established in accordance with s 36 of the Sectional Titles Act, 95 of 1986 (the Sectional Titles Act). The first respondent, Ms Nobuhle Sithole, is the joint registered owner of unit 12 of the sectional title scheme of the E G Body Corporate and is accordingly, in terms of s 36(1) of the Sectional Titles Act, one of the members of the E G Body Corporate. The other registered owner of the unit is the first respondent's sister, Ms Cynthia Sithole, but she was not cited as a party in these

[1] [1] Section 10*(c)* of the Insolvency Act 24 of 1936 provides:
'If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie*
(a) . . .
(b) . . .
(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.'

proceedings. Any reference to Ms Sithole in this judgment will thus be a reference to Ms Nobuhle Sithole.

[3] Section 37(1)*(a)* of the Sectional Titles Act, provides that a body corporate is obliged to:

'. . . establish for administrative expenses a fund sufficient in the opinion of the body corporate for the repair, upkeep, control, management and administration of the common property (including reasonable provision for future maintenance and repairs), for the payment of rates and taxes and other local authority charges for the supply of electric current, gas, water, fuel and sanitary and other services to the building or buildings and land, and any premiums of insurance, and for the discharge of any duty or fulfilment of any other obligation of the body corporate;'

In terms of s 37(1)*(b)* it must require the owners of the units, who, in terms of s 36(1), are also members of the body corporate, to make contributions, where necessary, to the fund established in terms of s 37(1)*(a)*, for the purposes of satisfying any claims against the body corporate. It must determine from time to time amounts to be raised from each member and must raise the amounts by levying contributions on the owners in proportion to the quotas of their respective sections (s 37(1)*(c)* and *(d))*.

[4] The Sithole sisters, as joint owners of the unit were obliged to pay their proportionate share of the levies, but they defaulted and two default judgments in the amounts of R13, 385.70 and R99, 298.80 were granted against them respectively. In order to satisfy the judgments, their movable assets were attached and sold at an auction, but it only realised an amount of R3, 237. The Sheriff first appropriated the money towards the payment of his fees and costs and declared a shortfall of R147.23 in respect of his fees and costs. The consequence was that the E G Body Corporate received nothing from the proceeds.

[5] In a further attempt to satisfy the judgments, the E G Body Corporate obtained a warrant of execution against their immovable property and the unit was attached and sold at an auction, but the sale had to be abandoned because the second respondent, (Nedbank) which had a mortgage bond registered in its favour in respect of the unit, did not accept the selling price of R170 000. The E G Body Corporate

then launched an application for Ms Sithole's sequestration. It alleged that Ms Sithole appeared to be factually insolvent in view of the fact that she had not paid for her levies, and because her movable assets had only realised a meagre amount of R3,237. It also referred to a judgment in the amount of R31 008 in favour of an entity known as Amazing Properties CC, which it alleged had been granted against her but remained unsatisfied.

[6] Regarding the advantage to creditors the E G Body Corporate stated in the founding affidavit that:

'. . . a Body Corporate need not show a pecuniary benefit when it applies for the sequestration of its members. In this regard, it is important to point out that the Applicant is not a normal concurrent creditor in insolvent estates. Because of the nature of a sectional title development, the Applicant enjoys a certain preference over other creditors. Section 89 of the Insolvency Act, 24 of 1936 (as amended) read with Section 15B of the Sectional Titles Act, 95 of 1986 states that the Applicant is a preferential creditor for any unpaid levies or contributions. The position has been confirmed by the Supreme Court of Appeal in the decision of *Barnard NO vs Regspersoon van Aminie en 'n ander* 2001 (3) SA 973 (SCA).

As stated in 8.3 above, the concept of advantage to creditors where a sectional title scheme is the Applicant has been the topic of many debates. The current position is that where a Body Corporate applies to have a member sequestrated the guiding principle should be the removal of the defaulting member from the scheme in order to bring the negative effect of her actions to an end.'

[7] Ms Sithole, who opposed the application as an unrepresented party in the court a quo, did not meaningfully deal with the provisions of the Insolvency Act and it is thus not helpful to unduly burden this judgment with the contents of her affidavit. In this appeal Ms Sithole was also unrepresented, but Ms Nhlapho, counsel at the Free State Society of Advocates made herself available, as an amicus, at short notice. We are indebted to her and the Free State Society of Advocates for their assistance.

[8] Nedbank, which has a mortgage bond over the unit, obtained leave of the court a quo to intervene in the sequestration proceedings. It opposed the application mainly on the basis that it was not proved that the sequestration would be to the advantage of any creditor other than the E G Body Corporate. It said that its bond instalments were up to date. It further criticised the fact that the application was

against only one of the co-owners of the unit and highlighted the fact that if an order of sequestration were granted in respect of only one co-owner, the trustee would face practical difficulties in dealing with half of the value of the unit. The court a quo accepted the submission by Nedbank that a sequestration order would only benefit the E G Body Corporate and it consequently dismissed the application and subsequently granted leave to this court.

[9] The purpose and effect of the sequestration process is 'to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that the creditors are treated equally'.[2] (See *Investec Bank Ltd & another v Mutemeri & another* 2009 ZAGPJHC 64; 2010 (1) SA 265 (GSJ) at 274-275.) It cannot fittingly be described as a mechanism to be utilized by a creditor to claim a debt due by the debtor to one single creditor. (See *Collett v Priest* 1931 AD 290 at 299.) Once a sequestration order is made, a *concursus creditorum* comes into being. This means that the rights of the creditors as a group are preferred to the rights of the individual creditor.

[10] The phrase 'advantage to creditors' is not defined in the Insolvency Act, but if the principle of *concursus creditorum* is taken into account, it means that there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole. (See *Lynn and Main Inc. v Naidoo & another* 2006 (1) SA 59 (N) paras 33-35; *Ex Parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP) para 13). This requirement is fulfilled where it is established that there is reason to believe that there will be advantage to a 'substantial proportion' or the majority of the creditors reckoned by value.[3] (See *Fesi & another v Absa Bank Ltd* 2000 (1) SA 499 (C) 505-506; *Trust Wholesalers and Woolens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N); *Samsudin v De Villiers Berrange NO* [2006] SCA 79 (RSA)). Although advantage to creditors is not a rigid concept (*Stratford v Investec Bank* 2015 (3) SA 1 (CC) para 44) it requires proof of a tangible benefit to the general body of creditors.

[2] P M Meskin *Insolvency Law and its Operation in Winding Up* Service Issue 47 (December 2016) at 2 – 1, para 2.1.
[3] Ibid at 2 – 20 – 2 – 24 para 2.1.4.

[11] In this appeal counsel for the E G Body Corporate urged this Court to deviate from the trite principle of *concursus creditorum* and conclude that it is not necessary for bodies corporate to prove actual or prospective pecuniary benefit to the general body of creditors. He submitted that a body corporate only needs to establish that it has exhausted all reasonable execution remedies in respect of the movable assets and immovable properties of one of its members. According to him this distinction is necessary, because bodies corporate are not merely acting to protect their own financial interests, but have a statutory obligation to protect the interests of all the members who are prejudiced when a single member fails to pay their arrear levies. Counsel confirmed that he was not asking this Court to develop the common law and agreed that no such case was made out in the papers. He was also constrained to concede that the Insolvency and the Sectional Titles Acts, do not provide for the distinction sought.

[12] The fundamental problem with the proposition is that the difficulty experienced by bodies corporate in collecting arrear levies is not a novel one. It is part of a 'socio-economic problem'. (See *Body Corporate of Geovy Villa v Sheriff Pretoria Central Magistrate's Court, & another* 2003 (1) SA 69 (T) at 73 paras 6-7; *Barnard NO v Regspersoon van Aminie* 2001 (3) SA 973 (SCA) at 981 D-F; South African Law Journal.[4]) Since 1986 the legislature has effected several amendments to the Sectional Titles Act,[5] but has not deemed it fit to accord bodies corporate any other preferential treatment beyond that provided through the provisions of s 15B (3)*(a)*(i)*(aa)* of the Sectional Titles Act and s 89(1) of the Insolvency Act. Section 15B(3)*(a)*(i)*(aa)* provides that a sectional title unit cannot be transferred to the name of a new owner unless a clearance certificate is obtained from the body corporate and, provision is made for the payment of all arrear contributions. In terms of s 89(1) of the Insolvency Act, outstanding levies due to the body corporate are treated as being part of the cost of realisation. (See *Nel NO v Body Corporate of the Seaways Building & another* 1996 (1) SA 131 at 140 A-D; *First Rand Bank Limited v Body Corporate of Geovy Villa* 2004 (3) SA 362 (SCA) at para 27).

[4] N Segal 'Any cure for the body corporate blues?' (2004) 121 *SALJ* at 552 – 555.
[5] 1991;1992;1993;1997;1999;2002;2003;2005;2006;2010;2011 and 2013.

[13] This Court cannot usurp the functions of the legislature and grant the immunity from the Insolvency Act now being sought. There is thus no basis to make the distinction between bodies corporate and other creditors.

[14] The other fundamental problem that the E G Body Corporate is facing, is the fact that the debt allegedly owed to Amazing Properties CC has not been proved and Nedbank, which is both a major and preferential creditor has objected to the application on the basis that its monthly instalments are paid regularly. It is not clear on the papers how Ms Sithole is able to pay for the mortgage bond, but there is no basis to conclude that a sequestration order would be to Nedbank's advantage, and hence to the general body of creditors. Simply put the E G Body Corporate is seeking to obtain a preference that neither the Sectional Titles Act, nor the Insolvency Act confers upon it. That would require an amendment of these statutes, which is a matter for Parliament, not this Court.

[15] I therefore make the following order:

(a) The appeal is dismissed.

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

For the Appellant:	J Vorster and W J Botha
Instructed by:	Christo Sutherland Attorneys, Pretoria
	Francois Van der Berg Van Vuuren Attorneys
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For the First Respondent:	In person
Amicus Curiae:	K Nhlapo