IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – GRAHAMSTOWN

CASE NO: CA338/2017
DATE HEARD: 30/07/2018
DATE DELIVERED: 28/08/18
REPORTABLE

In the matter between:

ABSA BANK LTD **APPELLANT**

and

GARY DAVID MURRAY **1ST RESPONDENT**
CLAUDIA STEPHANIA MURRAY **2ND RESPONDENT**

JUDGMENT

PLASKET J

[1] This is an appeal against an order of Bloem J in which he discharged a provisional order of sequestration. He refused leave to appeal but, on petition to the Supreme Court of Appeal, leave to appeal to the full court was granted on a limited basis.

Background

[2] It is common cause that the first respondent, Mr Gary Murray, (Murray) was indebted to the appellant, Absa Bank Ltd, (Absa) in the amount of R13 532 636.48.

The debt was secured by four mortgage bonds over immovable property owned by Murray in East London.[1]

[3] During 2009, Murray applied for debt review in terms of s 86 of the National Credit Act 34 of 2005 (the NCA). As a result, his debts, including the debt owed to Absa, were re-arranged. The order in question directed Murray to pay Absa R47 303.73 per month (as opposed to R174 047.19 per month) and to pay through the National Payment Distribution Agency (the NPDA). That order was in force at all material times and is still in force.

[4] On 4 September 2013, Absa issued summons against Murray, claiming R13 521 636.48 plus interest, this being the amount alleged to be outstanding and due to Absa at the time. Murray filed a special plea to the effect that because of the magistrate's debt re-arrangement order and Murray's compliance with that order, Absa was barred from instituting the action against him.

[5] No further steps have been taken by Absa in that matter subsequent to Murray filing the special plea.

[6] On 26 August 2015, Absa launched an application for Murray's sequestration. It was based on allegations that he was factually insolvent and had committed certain acts of insolvency. Murray opposed the application but a provisional order was granted by Cossie AJ. On the return day, Bloem J discharged the provisional order and dismissed Absa's application with costs.

[7] As a result of Absa's petition to the Supreme Court of Appeal, Petse JA and Rogers AJA granted leave to appeal in respect of one issue only. It was:

'Whether it is open to the applicant to rely on the fact that the first respondent had affected payment to the Buffalo City Municipality as constituting an act of insolvency contemplated in s 8(*c*) of the Insolvency Act 24 of 1936 when this was not the case made out in the founding papers'.

---

[1] In the application for Murray's sequestration, his wife, Ms Claudia Murray was cited as the second respondent. No relief was claimed against her and she has played no part in the proceedings.

The issues

[8] The Supreme Court of Appeal's order requires explanation. In its founding papers, the case made out by Absa, in respect of the allegation that Murray had committed certain acts of insolvency, was the following:

'43. I am aware that section 8A of the Insolvency Act provides that "*A debtor who has applied for a debt review must not be regarded as having committed an Act of insolvency*."

44. I respectfully submit that the application that the first respondent brought for debt review constituted a gross abuse of the procedure and protection afforded by the National Credit Act in which he has failed to make a frank and open disclosure with regard to his income, expenditure, assets and liabilities. In short, the first respondent mislead the court with his failure to make a proper disclosure of relevant information.

45. I submit that the provisions of section 8A relates to the protection afforded to someone that approach a court in a bona fide manner to obtain a debt review order for a legitimate purpose and that it affords no protection to the first respondent in the circumstances described.

46. In the present matter the situation is furthermore exacerbated by the persistence of the first respondent to rely on the order to protect him against creditors and in particular the applicant whilst he has failed to make the required payments and whilst apparently collecting vast amounts paid to him in rentals.

47. I accordingly submit that under present circumstances, the first respondent's debt review application was not *bona fide* and indeed amounts to an act of insolvency under section 8(c), 8(d) and 8(g) of the Insolvency Act.'

[9] In answer to these allegations, Murray stated that Absa's allegations were baseless. He denied each separate allegation. He also denied that 'an act of insolvency is constituted by an alleged (and disputed) failure to make proper disclosure to the Court which granted the Debt Review Order', stating the interpretation contended for by Absa was contrary to the NCA and the Insolvency Act.

[10] In the course of attempting to establish Murray's factual insolvency, however, Absa had alleged that he owed the Buffalo City Municipality (BCM) approximately R1.3 million. In his answering affidavit Murray stated:

'It is averred that I owe the Buffalo City Municipality an amount of approximately R1 300 000.00 as at 23 June 2015. However, Applicant is not aware that this amount has been settled. I annex marked "GDM18", "GDM 19" and "GDM20" in support thereof. Buffalo City Municipality and I were previously in dispute in respect of assessments but following the resolution of this dispute, I made full payment of outstanding amounts.'

From the annexures referred to, it is evident that the amount agreed upon and paid to BCM was R397 442.21.

[11] Not a word was said of the BCM debt in Absa's replying affidavit. Despite that, it was argued before Cossie AJ that the payment to BCM constituted an act of insolvency in terms of s 8(*c*) of the Insolvency Act. This section provides that a debtor commits an act of insolvency 'if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another.'

[12] Cossie AJ, in granting the provisional order, held in respect of the BCM debt that Murray had 'preferred BCM above the applicant and the other body of creditors, thus committing and act of insolvency as envisage in section 8(*c*) of the Act'.[2]

[13] On the return day, Bloem J, having referred to the principle that in motion proceedings an applicant is required to set out its case fully in its founding affidavit, together with the necessary facts so that a respondent knows the case he or she must meet,[3] held that Absa could not 'submit in its heads of argument that the respondent committed an act of insolvency as envisaged in section 8(*c*) when no such case was made out in its founding affidavit'.[4]

[14] It is against this finding only that leave to appeal was granted. In the result, the factual findings made by Bloem J are unchallenged and must be accepted. Two factual findings are of particular importance. First, Bloem J found that the debt review order was in place in 2015 when the application was brought;[5] and secondly, he found that Murray's assets 'of approximately R26 million far exceed his liabilities of

[2]Reasons for Judgment para 16.
[3]*National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) paras 29-30.
[4]Judgment para 23.
[5]Judgment para 17.

approximately R15.2 million', with the result that Absa had 'failed to prove that the respondent is factually insolvent'.[6]

[15] It also must be accepted on the basis of the *Plascon-Evans* rule[7] that Murray made payments as required by the debt re-arrangement order and that he was not in default. For a period, however, the money he paid to the NPDA was, due to a technical problem and through no fault of his, not paid to Absa. That problem was solved fairly quickly.

Determination of the issue

[16] Mr Coetzee, who appeared for Absa, argued that Absa was entitled to rely on the payment of the amount to BCM to establish an act of insolvency on Murray's part. The principle, he said, was that as long as the necessary facts were on record, a party could argue any legal point that arose from those facts.

[17] In *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others*[8] Wallis JA dealt with whether a party could raise a new point on appeal for the first time. He held:[9]

'Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage. But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no

[6] Judgment para 28.
[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635D.
[8] *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* 2016 (3) SA 317 (SCA).
[9] Para 24.

prejudice will be occasioned to the other parties by permitting the point to be raised and argued.'

[18] The same principles apply in respect of issues that have not been pleaded in a trial[10] and in an application.[11]

[19] The riders to the principle mentioned by Wallis JA must be stressed. They are, first, that the point must be apparent on the papers, secondly, that the facts have been fully canvassed and thirdly that no prejudice will be occasioned for the other party. I am not convinced that any of these qualifications is present in this matter.

[20] In the first place, the point does not emerge from the papers. The fact of the payment to BCM arose in the context of whether Murray was factually insolvent. No mention was made of any other of the elements of s 8(*c*) of the Insolvency Act. The matter was left there and not even mentioned in reply. It was later used – in the heads of argument for the first time – to found an argument that Murray had committed an act of insolvency different to those expressly alleged in the founding affidavit.

[21] Secondly, because of the context in which the admission of payment to BCM was made, it cannot be said that the facts were properly canvassed. Murray was called upon to answer to an allegation that his liabilities exceeded his assets and that one of his liabilities was a debt owed to BCM of approximately R1.3 million. He did so by saying that while the debt he had owed to BCM was much smaller than that alleged, it had been paid, with the result that neither amount – the larger or the smaller – could be taken into account for purposes of determining his factual insolvency.

[22] If he had known that his admission would be used to argue that he had committed an act of insolvency in terms of s 8(*c*), he would no doubt have answered differently and more fully. His mind would have been directed to dealing with whether the payment to BCM had prejudiced his creditors or had preferred BCM over other

---

[10] *Middleton v Carr* 1949 (2) SA 374 (A) at 385-386.
[11] *Maphango & others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 109.

creditors – and he would, no doubt, have dealt with these issues then. Facts directed at these core elements of s 8(*c*) would then have been before the court. Instead, he was found, on the basis of inference, to have committed an act of insolvency in terms of s 8(*c*) without ever having been heard on the issue. Because of the way in which the point was taken, the full facts were not before the court.

[23] Thirdly, it is fundamentally unfair for a party to direct a party's attention in one direction, and strike in another. In *Kali v Incorporated General Insurances Ltd*,[12] Milne J said of an application to amend pleadings during argument that '[t]he purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another'. In *Minister of Safety and Security v Slabbert*[13] Harms DP explained that '[c]ases by ambush are not countenanced'.

[24] It is clear, particularly in the light of Absa's silence in reply, that Murray had no knowledge that the point would be raised until he saw Absa's heads of argument. As no case was made in the founding affidavit, or in reply, for that matter, for his payment to BCM constituting an act of insolvency, he was entitled to take the position he did. Mr Coetzee argued that Murray ought to have applied to file a supplementary affidavit when he saw the point being taken in Absa's heads of argument. I cannot see how a duty can be cast on Murray to rectify Absa's deficiency in raising the issue. Indeed, it highlights that the issue was not properly raised on the papers and the unfairness that Murray was subjected to, as a result.

[25] I conclude therefore that Bloem J concluded correctly, in relation to the payment of the BCM debt, that Absa could not, in its heads of argument, contend 'that the respondent committed an act of insolvency, as envisaged in section 8(*c*) when no such case was made out in its founding affidavit'.[14]

The order

---

[12] *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A.
[13] *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 22. See too Mhlantla JA's judgment at para11.
[14] Judgment para 23.

[26] The appeal is dismissed with costs, including the costs of two counsel.

_____

C Plasket

Judge of the High Court

I agree.

_____

J Smith

Judge of the High Court

I agree.

_____

T Malusi

Judge of the High Court

APPEARANCES

For the appellant:	P Coetzee SC Instructed by Huxtable Attorneys, Grahamstown
For the first respondent:	G Dugmore SC and K Watt Instructed by Netteltons, Grahamstown