IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

CASE NO: 3846/2011

Date Heard: 10 January 2012

Date Delivered: 17 January 2012

REPORTABLE

In the matter between:

FIRST RAND BANK LIMITED Applicant

and

HEINRICH JANSE VAN RENSBURG Respondent

and

CASE NO: 3847/2011

Date Heard: 10 January 2012

Date Delivered: 17 January 2012

In the matter between:

FIRST RAND BANK LIMITED Applicant

and

AZELLE JANSE VAN RENSBURG Respondent

JUDGMENT

GOOSEN, J:

[1] The applicant moved for a provisional order of sequestration against each of the respondents in two separate unopposed applications before me. The respondents are married to each other out of community of property. In each application reliance was placed on section 8(g) of the Insolvency Act (Act 24 of 1936, as amended) it being alleged that the respondents had committed an act of insolvency by applying, in terms of section 86 of the National Credit Act (Act 34 of 2005, hereinafter the NCA), for debt review in terms of the NCA.

[2] Although the applications were moved separately, the legal and factual issues raised in the matters are identical. I have therefore prepared a single judgment dealing with these issues.

[3] The applicant is a registered credit provider in terms of the NCA. During or about 2002 the applicant lent and advanced funds to a close corporation, Niqua Juices CC (hereinafter the Corporation), in which each of the respondents holds a 50% membership interest. The application papers disclose that the close corporation is indebted to the applicant in the sum of R638,790.22. This is evidenced by a certificate of balance certified by the Commercial Recoveries Manager of the applicant. It is apposite to note that the papers contain no averments regarding, or documents supporting, the existence of the debt due by the Corporation other than that it is due.

[4] On 20 February 2002 each of the respondents entered into a Deed of Suretyship in respect of the indebtedness of the Corporation to the applicant. The applicant

further obtained security for the suretyship liability by way of a general covering bond over an immoveable property owned by the respondents. The covering mortgage bond provides security in an amount of R600,000.00 together with an additional amount of R120,000.00[1].

[5] In each instance the applicant's application for a provisional sequestration order is founded solely upon the alleged commission of an act of insolvency in terms of section 8(g) of the Insolvency Act. In this regard it is alleged that each of the respondents has made application for an order in terms of section 86(7)(c) of the NCA for a declaration of over-indebtedness (as envisaged by the NCA). In confirmation hereof the applicant relies upon a consumer profile report issued by a Credit Bureau, in which it is reported that the respondents have applied for debt review.

[6] The credit bureau reports reflect merely that the consumer (the relevant respondent) has applied for a debt rehabilitation or to be placed under debt review with a registered debt counsellor. No further details regarding the application for debt review are supplied, save that the application was made on the 23rd of March 2011.

[7] At the hearing of the applications I requested counsel to address me on the question as to whether an application for debt review constitutes an act of insolvency and whether the applicant has established that an act of insolvency in terms of section 8(g) of the Insolvency Act has been committed.

---

[1] The allegation was made in both applications that the immoveable property is owned by and registered in the name of the respective respondents. The document purporting to evidence this in the application brought under case no. 3847/2011 (the application against Azelle Janse Van Rensburg) reflects a Deeds Office search indicating that the immoveable property is registered in the name of her husband Heinrich Janse Van Rensburg.

[8] Mr *De Vos*, who appeared for the applicant in both matters, submitted that an application to be placed under debt review in terms of section 86 of the NCA constitutes an act of insolvency in terms of section 8(g) of the Insolvency Act. He further argued that the available evidence establishes that such an application was in fact made and accordingly that each of the respondents has thereby committed an act of insolvency entitling the applicant to move for the sequestration of their respective estates.

[9] In support of his submissions Mr *De Vos* referred to the judgment of Wallis, J (as he then was) in *First Rand Bank Limited v Evans*[2], in which consideration was given to the question whether notice of the fact that the respondent was under debt review constitutes an act of insolvency as envisaged by section 8(g) of the Insolvency Act.

[10] In the *Evans* matter the application for a provisional sequestration was opposed. The applicant in that matter relied upon a letter addressed by the respondent to the applicant in which the applicant's attention is drawn to the fact that the respondent had been placed under debt review. The learned judge, in dealing with the content of the letter addressed to the applicant states the following[3]:

> "[14] The letter states that Mr Evans is under debt review. That means that he must have applied for debt review in terms of section 86(1) of the NCA. The purpose of his application was to obtain a declaration that he was over-indebted because that is always the purpose of applying for debt review. In terms of section 79(1) of the NCA:
>
> > 'A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all

[2] 2011(4) SA 597 (KZD).
[3] At para 14 – 15.

> the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's (a) financial means, prospects and obligations; and (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.'
>
> It follows from this statement of what constitutes over-indebtedness for the purposes of the NCA that a debtor who informs his creditor that he has applied for, or is under, debt review is necessarily informing the creditor that he is over-indebted and unable to pay his debts.
>
> [15] The proper approach to adopt in determining whether a letter such as this constitutes a notice of inability to pay in terms of section 8(g) is to consider how it would be understood by a reasonable person in the person of a creditor receiving the letter. In construing it the knowledge that the creditor would have of the debtor's circumstances must be attributed to the reasonable reader."

[11] The learned judge then proceeded to deal with particular facts known to the applicant regarding the respondent's financial circumstances and his history of servicing such obligations at the time that it received the letter from the respondent. He then went on to state[4]:

> "[20] The requirements of section 8(g) are satisfied when the notice given by the debtor to the creditor conveys that the debtor is at present unable to pay his or her debts. The debtor's willingness to attempt to pay the debts in the future is not relevant. As Scott, J pointed out in *Standard Bank of SA Ltd v Court, supra*, '…..' 'a debtor who gives notice that he will only be able to pay his debt in the future gives notice in effect that he is 'unable' to pay. A request for time to pay a debt which is due and payable will, therefore, ordinarily give rise to an inference that the debtor is unable to pay a debt and such a request contained in writing will accordingly constitute an act of insolvency in terms of section 8(g). This is particularly so where the request is coupled with an undertaking to pay the amount due and payable by way of instalments …. A distinction must, however, be drawn between an inability to pay and an unwillingness to pay. If a reasonable person in the position of the creditor to whom the notice is addressed would understand the notice to mean that while the debtor was unwilling to pay his debt forthwith he could nonetheless do so if pressed, then the notice will not constitute an act of insolvency … In each case where there is a request for time, the enquiry, therefore, is whether the content of the written statement, viewed together with the circumstances to which it may be permissible to have regard, is such as to negative the inference arising from the request for time to pay and to justify the conclusion that the debtor would be able to pay at once if pressed to do so.'

[4] At para 20 - 21.

> [21] Mr Evans was asking for time to pay. He was also conveying that he wanted to pay his debts other than in accordance with his existing contractual obligations in consequence of their being rearranged by way of court order in terms of section 87 of the NCA. That he was conveying unequivocally that, at the time of the letter, he was unable to pay his debts is in my view clear."

[12] Wallis, J on this basis went on to find that the letter addressed to the applicant constituted an act of insolvency by the respondent in terms of section 8(g) of the Insolvency Act.

[13] The learned judge dealt with two further arguments put forward. The first of these concerned the question whether section 8(g) of the Insolvency Act ought to be interpreted differently in the light of the enactment of the NCA. It was contended that a debtor who applies for debt review and thereby invokes the machinery of the NCA necessarily places himself in the invidious position of thereby committing an act of insolvency. For this reason and in order to give effect to the purpose of the NCA section 8(g) should be interpreted as to exclude an application made for debt review in terms of the NCA. In dealing with this argument Wallis, J pointed out, correctly in my view, that had it been intended by Parliament to exclude an application for debt review from the ambit of section 8(g) of the Insolvency Act specific provision would have been made in the NCA for that exclusion. It was further pointed out that there is nothing in the NCA to suggest that such an interpretation of section 8(g) is warranted.

[14] The second issue concerned whether the effect of the NCA is to preclude a credit provider from bringing an application for the sequestration of the debtor's estate. As pointed out by Wallis, J this issue has been authoritatively decided by the SCA in

Naidoo v ABSA Bank[5] where, *inter alia*, that court expressly approved the reasoning in *Investec Bank Ltd v Mutemeri*[6]*.*

[15] Mr *De Vos* urged upon me the submission that the *Evans* judgment is clear authority for the proposition that the fact of an application for debt review constitutes an act of insolvency which falls within the ambit of section 8(g) of the Insolvency Act. On this basis it was contended that proof of that fact is sufficient to enable an applicant to rely on the provisions of section 8(g). My attention was however drawn to the unreported judgment in *Nedbank Ltd v Maxwell* in which a contrary view appears to have been favoured[7].

[16] The submission made by Mr *De Vos* is without merit. The *Evans* judgment is, in my view, not authority for the general proposition that the mere fact of an application for debt review in terms of the NCA constitutes compliance with the provisions of section 8(g) of the Insolvency Act. The finding that an act of insolvency had been committed by the respondent in the *Evans* matter turned upon the delivery by the respondent to the applicant (the creditor) of a written notice drawing to the attention of the applicant that the respondent had been placed under debt review, and, given the particular facts of the *Evans* matter, the reasonable interpretation of that written notice by the applicant creditor. Wallis, J did not find that notice of the mere fact of an application for debt review constitutes written notice of inability to pay a debt as required by section 8(g).

---

[5] 2010(4) SA 597 (SCA).
[6] 2010(1) SA 265 (GSJ).
[7] Reference to the unreported judgment (SGJ case number 18027/2010) is to be found in Scholtz *et al* Guide to the National Credit Act, 11 - 59. Regrettably Mr *De Vos* was unable to obtain a copy of the judgment. I too, have not been able to source a copy of the judgment.

Indeed if regard is had to Wallis, J's reliance on the dictum of Scott, J in the *Court* matter (a dictum approved on appeal in *Court v Standard Bank of South Africa Ltd*[8]) then it is apparent that Wallis J's approach to the application of section 8(g) is consistent with a long line of authorities which require that a court, in construing a written notice purporting to be a notice in terms of section 8(g), is required to consider the terms of the written notice and, where appropriate, the appropriate circumstances in which that notice is given to a creditor. (See in this regard *Barlows (Eastern Province) Ltd v Bouwer* 1950(4) SA 385 (E) at 390; *Shaban & Co. (Pty) Ltd v Plank* 1966(1) SA 59 (O); *Rodrew (Pty) Ltd v Rossouw* 1975(3) SA 137 (O); *Du Plessis en 'n Ander v Tzerefos* 1979(4) SA 819 (O); *Optima Fertilizers (Pty) Ltd v Turner* 1968(4) SA 29 (D); and *Court v Standard Bank of SA Ltd*; *Court v Bester NO & Others* 1995(3) SA 123 (A)).

[17] A careful reading of the *Evans* judgment indicates that this is the basis upon which Wallis, J considered the content of the letter. The letter had been addressed by the respondent in that matter to the creditor indicating, in the first instance, that he had been placed under debt review and secondly requesting that the debit order operative on his banking account (in terms of which he was then servicing his liability to the creditor) be cancelled. The content of this written notice given by the debtor to the creditor was interpreted by Wallis, J in the light of facts and circumstances known to the creditor at the time that it received the letter and on this basis it was found that the letter constituted an act of insolvency as envisaged by section 8(g) of the Insolvency Act.

[8] 1995(3) SA 123 (A).

[18] Wallis, J was not called upon to decide whether the mere fact that an application had been made for debt review in terms of the NCA constituted an act of insolvency and he made no such finding.

[19] Wallis, J's consideration of the effect of an application to be placed under administration in terms of section 74 of the Magistrate's Court Act, and the principle authority relevant thereto, occurred in the context of evaluating a further argument raised by the respondent in the *Evans* matter; namely that the policy considerations underlying the enactment of the NCA favour the view that an application for debt review ought not to be construed as evidencing an act of insolvency. Wallis, J's remarks are to the effect that a debt review is not in a novel position since applicants for administration orders are in precisely the same position are, in my view obiter. Wallis, J did not find that an application for debt review in terms of the NCA, *ipso facto*, constitutes an act of insolvency.

[20] Nor in my view is it to be suggested that the judgment in *Madari v Cassim*[9] is authority for such a proposition. In that matter Caney, AJ (as he then was) stated[10] that:

> "The act of insolvency committed by the respondent is the very fact of making his application for an administration order. He has applied for it as a debtor unable to liquidate his liabilities and having insufficient assets capable of attachment to satisfy such liabilities. In doing this he has necessarily given notice in writing to all his creditors that he is unable to pay any of his debts, and this is an act of insolvency within section 8(g) of the Insolvency Act, 24 of 1936. Administration orders under section 74 of the Magistrate's Court Act have been described, I think correctly, by the learned authors of Jones & Buckle on the Civil Practice of the Magistrate's Courts, as a

[9] 1950(2) SA 35 (D).
[10] At page 38.

> 'modified form of insolvency'. This is designed, it seems to me, as a means of obtaining a *concursus creditorum* easily, quickly and inexpensively, and is particularly appropriate for dealing with the affairs of debtors who have little assets and income and genuinely wish to cope with financial misfortune which has overtaken them. Creditors have certain advantages under such an order, including the appointment of an independent administrator and the opportunity of examining the debtor. They are not debarred from sequestrating the debtor if the occasion to do so arises."

[21] The decision in *Madari* however did not turn upon a determination of the question whether notice of intention to apply for administration in terms of section 74 constituted an act of insolvency. That issue, namely the fact that an act of insolvency had been committed, appears to have been common cause in *Madari*. The judgment in *Madari* turns on the question as to whether an advantage to creditors was established.

[22] The procedure by which a debtor can apply for an administration order, in terms of section 74 of the Magistrate's Court Act, involves a materially different procedure to that now provided by the NCA. In terms of section 74 (even prior to its more recent amendments) a debtor who was unable to meet his or her financial obligations or is unable to satisfy a judgment debt could move a Magistrate's Court for an order placing the estate under administration. This procedure constitutes a "modified form of insolvency" applicable to small estates in which a *concursus creditorum* is created allowing for a court sanctioned debt rearrangement[11].

[23] The application to be placed under administration required submission of a detailed statement of affairs setting out the financial affairs of the applicant; confirmation of the correctness of the information under oath; a motivation as to the

[11]The characterisation of the administration procedure as a modified form of insolvency was first made in Jones & Buckle the Civil Practice of the Magistrate's Courts in South Africa 5th Edition (1946) a designation approved in *Madari v Cassim* (*supra*) at 38 and more recently in *Weiner NO v Broekhuysen* 2003(4) SA 301 (SCA) at para 3.

basis upon which the applicant is not able to meet his or her financial obligations and importantly, delivery of a notice of the application to creditors.

[24] The application itself therefore meets the particular requirements of section 8(g) of the Insolvency Act, namely notice in writing delivered to a creditor in which the debtor states that he or she is unable to meet his financial obligations.

[25] Thus insofar as the authorities relating to applications for an administration order in terms of section 74 of the Magistrate's Court Act suggests that the mere application fulfils the criteria of section 8(g) these authorities are to be read in the context of the particular procedure by which an administration order is sought.

[26] Notwithstanding this the authorities nevertheless maintain that in construing the notice to the creditor, upon which reliance is placed in sequestration proceedings, the whole content of the application (for an administration order) should be considered in order to ensure that the requirement that the notice conveys an unequivocal statement of inability to pay is met and that the creditor receiving the notice can reasonably conclude that the debtor is unable rather than merely unwilling to pay his or her debts. (See *Barlows (Eastern Province)* (*supra*); *Shaban* (*supra*); *Rodrew* (*supra*)).

[27] The procedure by which a consumer (or debtor) applies for debt review in terms of the NCA is different to that envisaged by section 74 of the Magistrate's Court Act. Section 86 of the NCA (read with regulation 24 of the Regulations promulgated in terms of the NCA) posits an application made by the consumer to a registered debt counsellor. The consumer does so by submitting Form 16 and supplying certain

specified documents and information to the debt counsellor. Upon receipt of the application the debt counsellor is required within a stipulated period to issue to all credit providers identified in the application a notice in the form of Form 17.1 in which the credit provider is informed that an application for debt review has been received. The application submitted by the debtor (ie. the information contained in Form 16) is not provided to the credit provider. Once the debt counsellor has made a determination (which is to be made within a stipulated period) the debt counsellor is obliged to issue a further notice to creditors in accordance with Form 17.2 in which notice is given of the outcome of the application. This involves either rejection (if it is found that the debtor is not over-indebted as envisaged by section 79 of the NCA) or a declaration of over-indebtedness and a referral to a magistrate for purposes of debt restructuring.

[28] The application for debt review in terms of section 86 accordingly does not involve notice given by the debtor to the creditor in which the debtor declares an inability to pay one or more of his or her debts. A notice of inability to pay a debt envisaged by section 8(g) must be given deliberately and with the intention of giving such notice[12]. The notice must be such that upon its receipt the recipient creditor can reasonably conclude that the debtor is unable to pay his or her debts. If the words of the notification do not convey an unequivocal statement of inability to meet a debtor's obligation, the fact that the creditor may have construed the notice in that manner does not render the notice one in terms of section 8(g) of the Insolvency Act[13].

---

[12] See Mars the Law of Insolvency in South Africa 9th Edition page 97 and the authorities there cited.

[13] Mars (*supra*) at page 99; *Barlows (Eastern Province) (Pty) Ltd* (*supra*); *Optima Fertilizers Ltd v Turner* (*supra*) at 33 D.

[29] In this instance the applicant does not rely upon any written communication addressed to it by the respondents. The written notice, it is contended, is constituted by the profile report issued by the credit bureau reflecting that the respondents made application for debt review in terms of the NCA.

[30] This profile report provides no details of the terms of the application for debt review; contains no reference to statements and declarations made by the debtor and contains no information upon which a creditor may determine that the debtor is indeed unequivocally stating an inability to pay. In my view this does not constitute a written notice envisaged by section 8(g) of the Insolvency Act.

[31] The applicant in this matter is constrained to rely upon inferential reasoning. So it is argued that since the very basis upon which a debt review is sought is the existence of over-indebtedness, the fact that a debtor has sought such a declaration is indicative of the fact that the debtor is declaring an inability to pay one or more of his or her debts. In my view such inferential reasoning is not only unsound it is contrary to the express requirements of section 8(g) of the Insolvency Act which require written notice by a debtor to the creditor of inability to pay his or her debts.

[32] There is of course the further difficulty, namely that the written notice upon which the applicant relies is one communicated by a credit bureau rather than by the debtor. Credit bureaux are registered entities which engage in the business of trading information in a credit market regulated by the NCA. These bureaux provide a service to both consumers and credit providers by providing information retained for that purpose. There is no suggestion on the papers that the relevant credit bureaux were

authorized by the respondents to make any declarations on behalf of the respondents nor that they hold such general authority in regard to the affairs of the respondents such as would bind the respondents by any declarations made by the credit bureaux. In *Eli Spilkin (Pty) Ltd v Mather*[14] Kannemeyer, J held[15] that:

> "If an agent, on behalf of a debtor, writes a letter which amounts to an act of insolvency in terms of section 8(g) of the Act the court must be satisfied that the principal knew that the letter was being written in those terms and consented to it being so written."

[33] This statement of legal principle relates to the circumstance where the act of insolvency is committed "through an agent" (compare *Walsh v Kruger* 1965(2) SA 756 (E) and *Meyer en Kie v Maria* 1967(3) SA 27 (T)). An act of insolvency can however also be committed by an agent in the management of the principal's affairs (as was the case in the *Eli Spilkin* matter). However in that circumstance it is necessary to establish that the agent acted within the scope of the general authority to manage the affairs of the principal and that the particular act of declaration was made within the scope of that authority. (See also *Chenille Industries v Vorster* 1953(2) SA 691 (O) at 698 A – F; *Goldblatt's Wholesalers (Pty) Ltd v Damalis* 1953(3) SA 730 (O) at 734 A – C).

[34] There is no basis in this matter to find that the credit bureaux acted on the basis of authority specifically conferred by the respondents nor on the basis of any general authority which could bind the respondents. It can also not avail the applicant to contend that the information published by the credit bureaux is evidence of the

[14] 1970(4) SA 22 (E).
[15] At 24 (A-B).

existence of a Form 16 declaration made by the respondents and that such a declaration in the ordinary course must of necessity amount to a declaration of inability to pay. As I have already indicated that would extend the reach of section 8(g) of the Insolvency Act way beyond its purpose.

[35] It was suggested in argument that the evidence of the commission of the act of insolvency tendered by the applicants is the best available since the applicant was not served with a Form 17.1 notice and does not have access to the content of the Form 16 application made by the respondents. That may indeed be so but it is not sufficient. An applicant who seeks to invoke the provisions of the Insolvency Act must prove either that an act of insolvency as specifically provided by the Act has been committed or that the respondent is actually insolvent. If the applicant is not able to do so it cannot succeed with the sequestration order.

[36] It follows therefore that the applicant has failed to establish that the respondents committed an act of insolvency in terms of section 8(g) of the Insolvency Act. As I have previously stated the application papers do not set out any other basis upon which such an order may be granted.

[37] It accordingly follows that the applications must fail. In the light of this finding it is unnecessary for me to deal with any of the other requisites for the granting of a provisional order of sequestration.

[38] I make the following order:

The applications under case numbers 3846/2011 and 3847/2011 are dismissed.

_____

GG GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCE:

FOR THE APPLICANT:	Mr De Vos, instructed by Greyvensteins Attorneys