REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNEBURG

CASE NO: 17/32539

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[10 June 2022] **……..**
SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED **APPLICANT**

And

EGIDIO FILIPE GONCALVES DA SILVA **RESPONDENT**

J U D G M E N T

MUDAU, J:

[1] The applicant, Firstrand Bank Limited ("Firstrand") seeks an order for the provisional sequestration of the respondent, Mr Egidio Filipe Goncalves Da Silva, arising from his indebtedness to Firstrand in the amount of R5,561,929.71 together with interest calculated at a rate of 9.45% per annum, calculated daily and compounded monthly in arrears from 8 August 2017 to date of payment, arising from a written agreement of suretyship. The respondent opposed this application and also launched a counter application.

The respondent has since passed away. The executor of his estate does not oppose the sequestration application and will abide by the court's decision. On 6 May 2022, I made an order placing the respondent under provisional sequestration and dismissed his counter application with costs in the terms set out in a draft marked "X" and undertook to provide my reasons later. What follows are the reasons for the judgment.

Points in limine

[2] The respondent raised two points in *limine*, the first being whether the deponent to the applicant's founding affidavit, Ms Jessica Brijnath ("Brijnath"), the applicant's commercial recoveries manager, had authority to depose to such affidavit on behalf of the applicant; secondly, whether Brijnath possessed the requisite knowledge to depose to the founding affidavit. In addition, the respondent also disputed that the applicant met the formal requirements for service of the application upon the employees of the respondent, as is required by section 9(4A) (a)(ii) of the Insolvency Act.[1]

[3] In *Ganes and Another v Telecom Namibia Ltd*[2] Streicher JA, held that: "The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised."[3] In reply, Brijnath produced a resolution of FNB which authorised her to launch proceedings of the present kind on behalf of the Bank. As Brand JA stated in *Unlawful Occupiers, School Site V City of Johannesburg*[4] the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court. As Brand JA further noted, there is rarely any motivation for deliberately launching an unauthorised application.[5] I find it inconceivable that an application of this degree could have been launched on behalf of Firstrand without its knowledge.

[4] The allegations that Brijnath lacked the required knowledge is without any foundation. Brijnath was the signatory who certified the indebtedness of both

[1] 24 of 1936.
[2] 2004 (3) SA 615 (SCA).
[3] At para [19].
[4] 2005 (4) SA 199 (SCA) at para [16].
[5] Ibid.

Silfin Commercial Property Holdings CC, duly represented by the respondent, and the respondent prior to the institution of sequestration proceedings, as appears from two certificates of balance to the founding affidavit.[6] In the replying affidavit, Brijnath pointed out that she had been "involved with the restrained debt of the respondent since 8 March 2017" and has "personal knowledge of the current status of the facilities because [she has] access to the account and is involved in the present management of the account and the collection process".

Service on employees

[5] As is evidenced from the return of service, the Sheriff reported that there were no employees found at the given address. The Sheriff reported to the applicant's attorneys that he had been informed by the respondent's spouse, who had accepted service, that there were no employees. Out of abundance of caution, the applicant's attorneys contacted the respondent's attorneys, telephonically and per email, to ascertain whether there were any employees. No response was forthcoming.

[6] In *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd*[7] the SCA had occasion to consider whether there had been compliance with the requirements of section 346(4A) (a)(ii) of the Companies Act[8], and specially whether the service requirement in respect of employees had been satisfied in a winding-up application. In interpreting the section Wallis JA found that: "[t]he requirement that the application papers be 'furnished' to the identified persons is that they must be made available in a manner reasonably likely to make them accessible to the employees. It is not a requirement that the court must be satisfied that the application papers have as a matter of fact come to the attention of those persons".[9] It follows that the points in *limine* cannot succeed. They are all without any basis, bad in law and fall to be dismissed.

Background facts

[6] See Annexure FA16 at pg 01-180 and Annexure FA17 at pg 01-181.
[7] 2015 (2) SA 526 (SCA).
[8] 61 of 1973.
[9] *EB Steam* at para [14].

[7] On 28 May 2010, the applicant and Silfin Commercial Property Holdings CC ("Silfin") (duly represented by the respondent) entered into a facility agreement in terms of which the applicant agreed to lend and advance the amount of R4,800,000.00 to Silfin ("2010 Facility"). As security for the 2010 Facility, the applicant required the registration of a mortgage bond over Erf 1671 Bedfordview Extension 323 (the "Bedfordview Property") in the amount of R6 million, as well as suretyships to be executed by the respondent and Profitable Investments CC. The respondent signed the 2010 Facility on behalf of Silfin, which incorporated the requirements for the mortgage bond and the suretyships. On 8 July 2010, the first covering mortgage bond was registered over the Bedfordview Property in the amount of R6,000,000.00.

[8] On 7 July 2015, Silfin, represented by the respondent concluded a further facility agreement in terms of which it was agreed to increase the amount of the 2010 Facility from R4,800,000.00 to R6,290,000.00 (the "2015 Facility"). As security for the 2015 Facility, security was required in favour of the applicant which included the registration of a second mortgage bond over the Bedfordview Property in the amount of R1,500,00.00; confirmation of the first covering mortgage bond of R6,000,000.00 over the Bedfordview Property; a suretyship by the respondent in his personal capacity in the amount of R8,500,000.00 (clause 24); and a suretyship by Profitable Investments CC.

[9] The respondent, acting on behalf of Silfin, signed the terms and conditions of the 2015 Facility. Clause 14.5 thereof specifically provided that the facility agreement constitutes the whole Facility. Clause 15.3.2 provided that in the event of default of the 2015 Facility, the applicant may withdraw the Facility and claim the immediate repayment of the full outstanding balance. Clause 15.3.1 listed the acts that would place Silfin in default. These acts, inter alia, include Silfin failing to pay any amount owing to the applicant when it is due; any breach by Silfin of the 2015 Facility or any Facility with the applicant, or by a surety and if a judgment is given against Silfin or any surety and it is not satisfied within 10 days of having become aware thereof.

[10] During September 2015, Silfin's account went into arrears. On 18 October 2016, the applicant sent notices to Silfin and the respondent affording them 7 days in which to make the necessary payments. Subsequently, the applicant's representatives met with the respondent on 26 October 2016, wherein the

latter undertook to settle the arrears on or before 5 November 2016; to transfer R90,000.00 to the applicant by 25 November 2016; and to transfer R3,000,000.00 to the applicant by 30 November 2016. Despite the respondent's_undertakings at the meeting of 26 October 2016, the required payments were not made. Consequent to the failure to remedy the default, the applicant in correspondences addressed to Silfin, the respondent and Profitable Investments CC on 8 November 2016 and 6 February 2017 respectively, withdrew the 2015 Facility and demanded immediate repayment of the full outstanding balance. In spite of the aforementioned demand, the balance, according to the applicant remains outstanding. According to the applicant not only has the respondent defaulted in payment of his debt to the applicant, but his municipal account was in arrears at the launch of this application.

[11] The respondent last made payment during May 2017 in the amount of R16,530.85, which was considerably less than the required monthly instalments of R61,475.42. To compound matters, judgment was obtained against him in favour of Wrenn Power Products CC on 7 October 2016 before this court (per Masipa J). Judgment was granted against the respondent in favour of Nedbank Limited on 15 April 2016 for an amount of R4,270,180.60 as well as declaring the Bedfordview Property specially executable (the "Nedbank Judgment") by this court seating in Pretoria (per Van der Westhuisen AJ, as he then was).

[12] To make matters worse final liquidation proceedings have been launched against Silfin by Standard Bank on 28 February 2017, in which Silfin is alleged to be indebted in the amount of R7,062,869.00 with the respondent having signed as surety and thus triggered a breach of clause 15.3.1.12 of the Second Facility agreement that provides that in the event that Silfin or any surety generally does or allows anything to be done that may prejudice the applicant's rights or interests in this matter.

[13] On 11 July 2017, the applicant's attorney of record addressed a letter of demand to the respondent. In terms of said letter, the respondent was advised that Silfin failed to remedy the breach and as a result thereof, the full outstanding balance due in terms of the Second Facility agreement had become due, owing and payable and that the respondent, by virtue of the

suretyship, is indebted to the applicant. It is the applicant's case that the respondent is factually insolvent, from a scrutiny of his assets and liabilities he is not able to make payment to his creditors as and when payments are due. A Windeed Spider Report shows that the respondent has an interest in a number of entities. The trustees of the respondent's insolvent estate, it is alleged, can investigate and liquidate the members' interest, alternatively take steps in respect of the entities in order for their assets to be liquidated and to derive value for the estate. The applicant contends that the sequestration of the estate of the respondent will be to the advantage of creditors.

[14] On the applicant's version, and in sum, the respondent's liability amounts to R17,640,263.75 made up as follows: the respondent is indebted to the applicant in the amount of R5,561,929.71 together with further interest thereon; the respondent is also liable to Nedbank in the amount of R4,270,180.60; to Wrenn Power he owes R254,090.00; and to Standard Bank he's liable for the amount of R7,062,869.64. The applicant's case is that the respondent's assets are valued at no more than R8,200,000.00 made up as follows: the Bedfordview Property valued at R6,350,000.00.88. The respondent has some movable assets and the like, but the estimated value of all his assets is R8,200,000.00. On the applicant's version, the respondent's liabilities exceed his assets in the amount of R9,440,263.70. This they base on indirect or inferential evidence such as the Windeed report referred to above.[10]

[15] In opposing this application, the respondent disputes in the answering affidavit that he is indebted to the applicant. He contends that the 2015 Facility was never entered into. He contends that the applicant mistakenly "bundled" together a home loan obtained from the applicant in 2004 for the purchase of the Bedfordview Property in the amount of R1,500,000.00 and a Credit Facility in the amount of R2,000,000.00. Significantly, he does not dispute that he signed the 2010 Facility or the 2015 Facility. The respondent however denies having entered into any suretyship subsequent to the one he entered into in 2010 for the R2,000,000.00 Facility. He claims to have been in "a rush" on the morning that he signed the 2015 Facility and for that reason did not have time to read it. Inexplicably, the respondent raises this aspect for the first time in the answering affidavit in 2018 as the applicant pointed out. In our law, it is

[10] See *Fedco Cape (Pty) Ltd v Meyer* 1988 (4) SA 207 (E) at 211B-D and 212D-I.

trite that by attaching one's signature to a document signifies assent to the content of the document so signed.[11]

[16] The respondent alleges that subsequent to obtaining a loan from Standard Bank in the amount of R8,200,000.00, he settled the total amount owed by Silfin to the applicant during or about May 2013. There is no supporting documentary proof to this effect. When regard is had to the bank statement of May 2013, Annexure RA3, no such bulk payment is reflected. It would seem to me that the respondent's version in this regard merely serves as nothing more than a bare denial. In his counter application in which he seeks a declaratory order, the respondent maintained that the National Credit Act[12]("NCA") was of application and that in instances where he might have reneged on his payment obligations, he effected lump sum payments shortly thereafter thus triggering section 129(3) and (4) which would have reinstated the credit agreement.

[17] The respondent also seeks an order to compel the applicant to provide him with bank statements on the home loan bank account. In his answering affidavit, the respondent alleged that the market value of his Bedfordview property is R8,600,000.00 and that Silfin's properties are estimated to be valued at R13,000,000.00. Further, he holds that the estimate of the value of his profitable investments properties is R3,500,000.00. However, the respondent failed to disclose the financial statements of Silfin or of Profitable Investments, which would show the value of his alleged interest in those entities. Notably absent is that there is no clear-cut statement of assets and liabilities to be found in the respondent's answering affidavits.

[18] Section 4 (1) of the NCA specifies the types of credit agreements that are expressly excluded from the application of the statute. These include a credit agreement in terms of which the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds R1.000.000,00[13]; or a large agreement, being more than R250,000.00, in terms of which the consumer is a juristic person whose asset

[11] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) 472A.
[12] 34 of 2005.
[13] This is the threshold value determined by the Minister in terms of s 7 (1) of the NCA.

value or annual turnover is, at the time the agreement is made, below R1,000,000.00 as intended in section 4 (1) (b) of the NCA.[14]

[19] Even if Silfin's annual turnover was less than R1,000,000.00, the NCA would not apply, given that the 2015 Facility as indicated above would be construed as being a large agreement as described in s 9 (4) of the NCA. Accordingly, if Silfin's annual turnover was above R1,000,000.00, then the NCA would also not apply. Accordingly, a large agreement which is an agreement that involves a mortgage agreement in terms of which the consumer is a juristic person irrespective of the loan value is excluded from the provisions of the NCA. I conclude that the NCA finds no application to the 2015 Facility in this matter. The respondent's contention that re-instatement was required as per section 129(3) of the NCA, is accordingly misguided.[15]

[20] As for the bank statements and the allegation by the respondent of not having received same from the applicant, he does not show any prior request addressed to the applicant to provide bank statements. The applicant attached all of the relevant bank statements to the replying affidavit. Accordingly, the counter application in this regard is also without any merit. As for the breaches, the respondent stated that he intends on launching a rescission application against the Wrenn judgment and had he known that Nedbank would take judgment against him, he would have opposed same. This is of no assistance to the respondent. It does not detract from the fact that there are two judgments in force which have not been rescinded, nor any step taken in that regard. Importantly, the launch of a liquidation application by Standard Bank against Silfin resulted in a breach of the 2015 Facility, thus enabling the applicant to call upon the respondent, as surety to Silfin, to pay its outstanding debts according to the underlying agreement.

[21] It is trite that liquidation proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds.[16] In order to avoid a sequestration order, a respondent is required to show that the debt on which the applicant relies is bona fide disputed on reasonable grounds.[17]

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[14] See *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ).
[15] See *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T) at paras [18]–[23].
[16] This is the so-called '*Badenhorst* Rule'. See in this regard *Badenhorst v Northern Construction Enterprise (Pty) Ltd* 1956 (2) SA 346 (T).
[17] *Kalil v Decotex (Pty) Ltd & Another* 1988 (1) SA 943 (A) at 980D; see also *Meyer, NO v Bree Holdings (Pty) Ltd* 1972 (3) SA 353 (T) at 354-355.

[22] Where the applicant at the provisional stage (as in this instance) shows that the debt prima facie exists, the onus is on the respondent to show that it is bona fide disputed on reasonable grounds. A positive finding that the insolvent estate is a creditor of FNB is a prerequisite to the applicant's ability to seek a winding up order, whether it be on the grounds of the respondent's inability to pay his debts or that it would be just and equitable for his estate to be liquidated. As Willis JA stated:

> "The existence of a counterclaim which, if established, would result in a discharge by set-off of an applicant's claim for a liquidation order is not, in itself, a reason for refusing to grant an order for the winding-up of the respondent but it may, however, be a factor to be taken into account in exercising the court's discretion as to whether to grant the order or not".[18]

[23] The question of whether the requirements are met on a prima facie basis is determined by assessing whether the balance of probabilities on the affidavits favour the applicant's case.[19] In my view, the balance of probabilities on the affidavits is in Firstrand's favour and the respondent has not demonstrated a bona fide dispute on reasonable grounds. Regarding the requirement of advantage to creditors, the test at the provisional stage is whether the court is 'of the opinion that prima facie' there is 'reason to believe' that it will be to the advantage of creditors if the estate is sequestrated. It remains trite that the best proof of solvency is that a man should pay his debts.[20]

[24] Having regard to the answering affidavit and the supplementary answering affidavit of the respondent and with due regard of the application of the *Plascon-Evans* rule[21], it appears to me that no real, genuine and bona fide dispute of fact is raised in respect of the respondent's indebtedness to the applicant and that the respondent has not disputed his indebtedness to the applicant bona fide and based on reasonable grounds. The respondent has not disclosed or established special or unusual circumstances[22] that warrant the exercise of this court's discretion in his favour, which in any evet is a narrow one.

[25] The grounds relied upon in the counter application do not, in the face of this liquidation application, show a nature to enable the respondent to successfully

[18] *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) at para [7].
[19] *Kalil v Decotex (Pty) Ltd & Another*, fn 17 above.
[20] As per dictum of Innes CJ in *De Waard v Andrew & Thienhaus Ltd* 1907 TS 727 at 733.
[21] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.
[22] *FirstRand Bank Limited v Evans* 2011 (4) SA 597 (KZD) at para [27].

resist an application for the respondent's provisional liquidation. I am satisfied that all the formal statutory requirements as set out in section 9(4A) (a) of the Insolvency Act have been met. Irrefutably, the applicant had established a prima facie case for the liquidation of the respondent and therefore a right to a provisional order. In addition, the counter application is dismissed with costs. It is for the above reasons that I made the order dated 6 May 2022 in this matter.

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MUDAU J

[Judge of the High Court]

APPEARANCES

For the Applicant:	Adv. JE Smit
Instructed by:	Werksmans Incorporated
For the Respondent:	No Appearance
Date of Hearing:	6 May 2022
Date of Judgment:	10 June 2022