Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

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

…….....
N. REDMAN **2023**

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 16052/2020

In the matter between:

FIRSTRAND BANK LIMITED Applicant
[acting through its RMB Private Bank Division]

and

FRANS LODEWYK BASSON N.O. First Respondent

LINDA BASSON N.O. Second Respondent
[in their capacities as trustees of the Karmighael Trust
Master's reference number IT4038/995]

KARLA BASSON
(ID No: […]) First Intervening Party

MICHAEL BASSON Second Intervening Party
(ID No: [..])

JANA BASSON Third Intervening Party
(ID No: […])

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be 10h00 _____ 2023.

JUDGMENT

REDMAN AJ:

[1] This is the return day of a provisional sequestration order in terms of which the Karmighael Trust ("**the Trust**") was placed under provisional sequestration on 3 March 2022.

[2] The respondents are the joint trustees of the Trust. It is common cause that the applicant is a creditor of the Trust, having obtained two judgments against it namely -

2.1. a judgment in the amount of R4,5 million together with interest at the prime rate from 13 June 2014 to date of final payment under case number 2014/35431 ["the Autohaus debt"];

2.2. a judgment in the amount of R17 432 841,63 together with interest at the rate of 9,45% per annum calculated daily and compounded monthly in arrears from 1 May 2019 to date of final payment under case number 13813/2018 ["the Basson debt"].

[3] A court may only grant a final sequestration order if it is satisfied that –

3.1. the petitioning creditor has established a claim against the debtor entitling it to apply for the sequestration of the estate;

3.2. the debtor has committed an act of insolvency or is insolvent; and

3.3. there is reason to believe that it will be to the advantage of creditors of the debtor if its estate is sequestrated.

(Section 12 of the Insolvency Act, 24 of 1936)

[4] The applicant bears of onus of establishing the requirements for a final sequestration order on a balance of probabilities. (See *Braithwaite v Gilbert (Volkskas Bpk intervening)* 194 (4) SA 717 (W) at 718B-C and *Esterhuizen v Swanepoel and Sixteen Other cases* 2004 (4) SA 89 (W)).

[5] The primary assets belonging to the Trust are two immovable properties, one located in Northcliff ["**the Northcliff property**"] and the other located in Parys ["**the Mullers-Rust property**"]

Affidavits

[6] The application for sequestration was issued in July 2020. The application was opposed by the Trust and answering affidavits were delivered on 11 September 2020. A replying affidavit was delivered on behalf of the applicant on 5 October 2020.

[7] On 19 January 2021, a supplementary affidavit was delivered by the Trust. Annexed to this affidavit were two affidavits providing valuations in respect of the two immovable properties.

[8] By agreement between the parties, on 15 March 2021, the Trust was granted condonation for the late filing of the affidavits of the valuers and the Trust was ordered to grant the applicant's valuers access to both the Northcliff and Mullers-Rust properties. The applicant was also granted leave to deliver a further affidavit dealing with the valuation of the two properties. On 24 August 2021 the applicant delivered its further affidavit. A response to that affidavit was delivered by the Trust on 25 November 2021.

[9] On 3 March 2022 a provisional order for sequestration of the Trust was granted. Shortly prior to the return day, the intervening parties brought an application to intervene in the sequestration application.

[10] The return day was extended to the opposed motion roll for 28 November 2022. A further answering affidavit was delivered by the respondents on 5 August 2022. In this affidavit the Trust alleged that it owned a database which it claimed was worth some R64 million. On 5 August 2022, the intervening parties delivered an answering affidavit wherein they contended that it was not necessary for them to add any further evidentiary matter. On 26 August 2022, a further replying affidavit was delivered by the applicant in response to the affidavits delivered on 5 August 2022.

[11] Shortly before to the extended return day, on 25 November 2022, the respondents delivered another affidavit described as a "Supplementary Further Affidavit". The Supplementary Further Affidavit included additional valuations in respect of the immovable properties as well as a purported valuation of the database. The applicant objected to the admission of this affidavit.

[12] At the commencement of the hearing on 28 November 2022, the parties agreed that the respondents would not be entitled to rely on the contents of the Supplementary Further Affidavit save for paragraph 34.5 thereof. In paragraph 34.5 the respondents alleged that the liability of the Trust was less than that which was stated by the applicant because, so it was averred, the Trust did not owe the City of Johannesburg R1 961 359,99 as contended by the provisional liquidators but only owed an amount of R286 507,98. An

Acknowledgement of Debt signed on behalf of the Trust agreeing to pay this in instalments was attached to the Supplementary Further Affidavit.

[13] Save for this allegation contained in paragraph 34.5 of the Supplementary Further Affidavit, the respondents conceded that they were not entitled to rely on the balance of the allegations contained therein.

FACTUAL INSOLVENCY

[14] In sequestration proceedings it is notoriously difficult to establish that a respondent is in fact insolvent. For a final sequestration to be granted it is necessary to establish clear proof of insolvency i.e. as a fact the Trust's liabilities exceed its assets. (See *Corner Shop (Pty) Ltd v Moodley* 1950 (4) SA 55 (T) at 59H.

[15] In its founding affidavit the applicant provided details of the assets and liabilities of the Trust and concluded that the total liabilities of the Trust were in the region of R22 150 000 and that the value of its assets amounted to approximately R19 708 000.00. It thus contended that the Trust's liabilities exceeded its assets, rendering it factually insolvent. According to the applicant the Trust's liabilities included the two judgment debts owed by the Trust to the applicant plus amounts due in respect of municipal charges owed to the City of Johannesburg and the Metsimahalo Municipality. The applicant's computation of the Trust's liabilities did not take account of the interest accruing on the judgment debts.

[16] The computation of the value of the Trust's assets provided by the applicant was as follows:

16.1. Value of Northcliff property – R 11 000 000,00

16.2.	Value of Mullers-Rust property –	R 8 500 000,00
16.3.	Value of movable assets –	R 208 000,00
	Total	R 19 708 000,00

[17] In its answering affidavit the Trust disputed the amounts due to the Municipal authorities as well as the applicant's values of the immovable properties. The Trust contended that the market value of the Mullers-Rust property was R25 million and the Northcliff property was R17 million. In support of these valuations the Trust attached affidavits deposed to by Stefan Rudman, an associated professional valuer and Henriette Brian ("**Brian**"), a professional property valuer. According to Brian the value of the Northcliff property was somewhere between 12 and R17 million.

[18] On the respondents' version the total value of the two immovable properties was between R37 million and R42 million. In the applicant's further affidavit delivered on 24 August 2021, it took issue with the valuations provided by the Trust and provided further valuations in respect of the two properties.

[19] The applicant provided three updated valuations as set out below:

19.1.	Northcliff property:	J J du Toit	R11 725 000
		Y van Dyk R13 000 000	
		T Padayachee	R11 000 000
19.2.	Mullers-Rust property:	J J du Toit	R16 250 000
		Y van Dyk R16 000 000	
		JPJ v d Westhuizen	R10 000 000

[20] Having regard to the value placed on the movable assets by the applicant in the amount of R208 000,00, on the applicant's version as at 24 August 2021 the value of the Trust's assets was somewhere between R21 208 000 and R29 458 000. The applicant valued all the assets of the Trust at R26 108 000,00.

[21] In its further affidavit, the applicant provided updated certificates of balance in respect of the two judgment debts as at 29 June 2021. The certificates of balance reflected the Trust's indebtedness in the amounts of R9 million and R20 878 804,76 respectively. In addition, the applicant contended that the amount due to the City of Johannesburg as at March 2021 was the amount of R1 741 324,43; that there was an amount of R13 972,16 due to the Homeowners Association and that an amount of R160 970 was due to the Metsimahalo Municipality as at March 2021. The Trust's total liabilities on the applicant's updated version was thus R31 795 070,35.

[22] In the further answering affidavit delivered by the Trust on 5 August 2022, it contended that the Trust was the owner of a database having a value of R64 518 345,00. No proper valuation of the database was provided and despite the bald allegation that the Trust was the owner of the database, the documentation attached to the further answering affidavit provided no corroboration therefor. No reference was made to the alleged ownership of the database in any of the previous affidavits signed on behalf of the Trust nor was it disclosed to the Trust's provisional trustees. The database was not reflected in the financial statements of the Trust as at 28 February 2013.

[23] The allegations relating to the ownership of the database and the value thereof are so vague, laconic and unconvincing that they can be rejected out of hand.

[24] Without taking account of the database, there remains a substantial and material dispute as to the solvency of the Trust.

[25] The assessment of the solvency of the Trust is contingent on the value of the two immovable properties. Although the disparity between the values placed

on the Northcliff property by the various valuers is not significant, the same cannot be said in respect of the Mullers-Rust property. The applicant values the Mullers-Rust property at between R10 million and R16,25 million, whereas the Trust values it at R25 million.

[26] The determination of the value of the Mullers-Rust property is thus critical to the determination of factual insolvency.

[27] In argument, counsel for the applicant pointed out what the alleged inconsistencies in Rudman's valuation of the Mullers-Rust property. The applicant argued that the respondents' valuation of R25 million was more illusory than real, more particularly in the light of the valuers' conclusion that it would be unlikely to offload the property in the open market. It was contended that the comparative sales utilised by Rudman did not support his conclusion.

[28] For the purposes of determining whether a final order should be granted, it is necessary to apply the Plascon-Evans rule (see *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 A.

[29] Motion proceedings are generally not appropriate for the resolution of disputes of fact on material issues. In *Fakie v CCII Systems (Pty) Limited* [2006] SCA 54 (RSA), the South African Courts described the position as follows: -

> "[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of

> the matter or to deny the applicant its order. There had to be 'a *bona fide* dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[30] On a conspectus of the affidavits in the current matter, it cannot be contended that the respondents' version relating to the value of the Mullers-Rust property is so far-fetched or clearly untenable that it can be rejected out of hand. There appears to be a genuine dispute of fact which in the normal course would require resolution by means of the oral testimony.

[31] I am not satisfied that the applicant has established that the Trust is factually insolvent.

ACTS OF INSOLVENCY

[32] The applicant contends that the Trust has committed acts of insolvency in terms of section 8(b) and 8(g) of the Insolvency Act, 24 of 1936 ("the Act"). These will be considered below.

Acts of insolvency under section 8(b) of the Act

[33] A debtor commits an act of insolvency under section 8(b) of the Act -

> "*if a Court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment*;"

[34] In support of its contention that the Trust has committed an act of insolvency under section 8(b) of the Act, the applicant relies on two returns of service issued by the Sheriffs of the Court, Sasolburg ("**the first Return**") and

Johannesburg North ("**the second Return**") respectively. The returns of service were issued in the following circumstances –

The first Return

34.1. On 7 August 2014 the Court granted judgment against the Trust in favour of the applicant in respect of the Autohaus debt.

34.2. On 29 November 2018, the Sheriff of the Court, Sasolburg, acting on a writ of execution attended at the Mullers-Rust property and demanded payment of the Autohaus debt from the person found present thereat. On demanding payment, the person in attendance at the property pointed out certain disposable assets to the Sheriff who made an inventory thereof. The value placed on the assets by the Sheriff was approximately R188 000,00.

34.3. According to the applicant, the disposable assets pointed out were insufficient to satisfy the Autohaus debt.

34.4. The Sheriff of Sasolburg rendered a return of service recording, *inter alia*, the attachment of the movable assets found at the premises.

The second Return

34.5. On 29 May 2019, judgment was granted against in favour of the applicant in respect of the Basson debt.

34.6. On 26 September 2019, the Sheriff of the Court, Sasolburg, acting in accordance with a writ of execution issued in respect of the Basson debt attended at the Northcliff property and demanded payment of the judgment debt.

34.7. The first respondent pointed out movable assets which were

attached and inventorised by the Sheriff, Johannesburg North, and recorded to have a value of approximately R20 000,00.

34.8. The Sheriff, Johannesburg North, rendered a return of service which recorded, *inter alia*, the attachment of movable assets to the value of approximately R20 000,00 and that the attached assets were insufficient to satisfy the judgment debt.

[35] It is common cause that the applicant is the holder of first mortgage bonds over both the Northcliff and Mullers-Rust properties. For the purposes of section 8(b) of the Act, disposable property includes immovable property, irrespective of whether a writ of execution is directed only against movables. See *Nedbank Ltd v Norton* 1987 (3) SA 619 (N) at 622E and *Absa Bank v Collier* 205 (4) SA 364 (WCC) at para 27.

[36] Section 8(b) of the Act contemplates two acts of insolvency, namely –

36.1. if a court has given judgment against the debtor and he fails, upon the demand of the officer whose duty it is to execute the judgment, to satisfy it or to indicate to that officer disposable property to satisfy it, or

36.2. if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment.

[37] To constitute a *nulla bona* return, the following should be stated therein –

37.1. that the Sheriff explained the nature and exigency of the warrant, and the person to whom he explained it;

37.2. that he demanded payment;

37.3. that the defendants failed to satisfy the judgment;

37.4. that the defendants failed, upon being asked to do so, to indicate

disposable property sufficient to satisfy it;

37.5. that the Sheriff had not found sufficient disposable property to satisfy the judgment, despite diligent search and enquiry. – See *Kader v Haliman* 1958 (4) SA 31 at 32G-H.

[38] The first return of service records the process followed by the Sheriff as follows:

"ATTACHMENT: RETURN OF SERVICE : ANOTHER PERSON
On 29th day of November 2018 at 09:14, I, DEPUTY SHERIFF J M BARNARD, handled this WRIT OF EXECUTION as follows:
By service of a copy of abovementioned process upon Colin Mpila, employee of Mr FLM Basson, representative of the 4TH EXECUTION DEBTOR during his absence, a person apparently not less than 16 years of age and apparently in authority or in charge. As the representative of second 4TH EXECUTION DEBTOR named above was unable to pay the judgement debt plus costs in full or any part thereof, an attachment has been made of the following movable assets:
(SEE ATTACHED INVENTORY)
...
Attempted execution on 23/11/2018 at 12h28. No one responded to any calls made by myself, gate is locked, security guard to the Mullers-Rust development confirmed that the Basson family is still residing at the given address and that the property is not used often. ..."

[39] It is immediately apparent from the first return that it was not served on any of the trustees of the Trust. There is also no evidence *ex facie* the document that there was any demand that sufficient disposable assets be indicated to the Sheriff to satisfy the judgment debt. The first return makes no reference to the immovable property owned by the Trust (more particularly the Mullers-Rust property at which execution was being effected).

[40] The second return, served at the Northcliff property by the Sheriff, Johannesburg North, similarly omits any reference to the Sheriff having made a demand to the Trust to indicate sufficient disposable property to satisfy the writ. It is notable that the execution at the Northcliff property took

place after the Northcliff property had been declared specially executable.

[41] There is no reference to the immovable properties recorded in the second return and they were not taken into account by the Sheriff.

[42] The facts of this matter are analogous with those in *Absa Bank v Collier.* The immovable properties constituted disposable property at the instance of the applicant for the purposes of section 8(b), notwithstanding the fact that at the time of executing the first writ the properties had not been declared specially executable in terms of Rule 46(1). See *Absa Bank v Collier supra* at para 34.

[43] On any version, the value of the two immovable properties would have been sufficient to satisfy either of the two judgment debts. Accordingly the applicant has not shown that the Trust committed an act of insolvency within the meaning of section 8(b) of the Act.

Acts of insolvency under section 8(g) of the Act

[44] A debtor commits an act of insolvency under section 8(g) -

"*if he gives notice in writing to anyone of his creditors that he is unable to pay any of his debts;* …"

[45] The applicant contended that, in affidavits submitted on behalf of the Trust in earlier proceedings, the Trust had stated that once the Mullers-Rust property was sold it would be in a position to pay its debts. The applicant averred that these statements constituted admissions on the part of the Trust that it was unable to pay its debts. It was thus argued that the Trust it had accordingly committed an act insolvency in terms of section 8(g) of the Act.

[46] The paragraphs in the affidavits relied upon by the applicant do not constitute acknowledgements on the part of the Trust that it was unable to pay its

debts. On the contrary, the statements read in context, do not demonstrate an inability to pay but merely indicate the manner in which the Trust intended to settle its debts, i.e. from the proceeds received from the sale of the Mullers-Rust property. (See *Barlows (Eastern Province) Ltd v Bouwer* 1905 (4) SA 485 (E) at 390G.)

[47] The statements relied upon by the applicant do not constitute acts of insolvency as contemplated in terms of section 8(g) of the Act.

BENEFIT TO CREDITORS

[48] The Act provides that a final sequestration order may be made if there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated. The onus of establishing that there is a reason to believe that it will be to the advantage of creditors rests on the applicant. See *Trust Wholesalers and Wollens (Pty) Limited v Mackan* 1954 (2) SA 109 (N) at 112C-D.

[49] The following facts emerge from the affidavits:

49.1. The immovable properties constitute the primary assets owned by the Trust.

49.2. The applicant holds a first mortgage bond over both the immovable properties.

49.3. Both immovable properties have been declared specially executable at the instance of the applicant.

49.4. The immovable properties of the Trust located at the immovable properties have been attached pursuant to writs of execution issued at the instance of the applicant.

49.5. The applicant is the major creditor of the Trust; the only other identifiable creditors being the Municipal Authorities and Homeowners Association who are owed amounts in respect of municipal charges, levies and imposts in respect of the two immovable properties.

[50] The applicant has obtained judgment and commenced with execution against the Trust's property, In these circumstances, it is difficult to conceive how the sequestration of the Trust would benefit its creditors. In *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (N) at 1068H-1069A the following was stated:

"A feature ... which one notices immediately is that, as far as can be gathered, the applicant is the first respondent's sole creditor. There is certainly no hint of any other. These proceedings thus lack resemblance to the typical sort, in which the debtor has a variety of creditors but insufficient assets to meet all their competing claims, and sequestration seems likely to benefit them as a group by ending the danger that some may be preferred to others and ensuring instead that the proceeds are shared fairly. There is, no reason in principle why a debtor with only one creditor should not have his estate sequestrated. But the potential advantages of sequestration in that situation are inherently fewer, and the case for it is correspondently weaker. Then it is really no more than an elaborate means of execution and, because of its cost, an expensive one too."

[51] The suggestion in the founding affidavit that the immovable properties will be sold for more if sold by a trustee as opposed to a sale by the Sheriff in a sale in execution is both speculative and unsupported.

[52] I am accordingly not satisfied that there is no reason to believe that the sequestration of the Trust will be to the advantage of creditors. (See *Investec Bank v Lampbrechts* 2019 (5) SA 179 at paras 55-57; *Lundy v Beck* 2019 (5) SA (GJ) at para [37]).

[53] In the circumstances I make the following order:

1. The application is dismissed with costs.

_____

N. REDMAN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 28 November 2022
Judgment: __ February 2023

Appearances:

For Applicant:	Adv. N Horn
Instructed by:	Werksmans Attorneys
For Respondent:	Adv. B Stoop SC
Instructed by:	Mabuza Attorneys
For Intervening parties:	Adv H Scholtz
	Kruger Attorneys