REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 18882/2022

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

_____ _____
DATE SIGNATURE

In the matter between:

MONYADUOE MARIA DIRERO First Applicant

and

CHARL-ANDRE VAN BRUGGEN First Respondent

VAN BRUGGEN ATTORNEYS Second Respondent

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 November 2023.

JUDGMENT

MANAMELA AJ

INTRODUCTION

[1.] This is an opposed application for the provisional sequestration of the first and second respondents, and for the placement of the estate of the respondents to be under the control of the Master of the High Court of South Africa.

[2.] The applicant also seeks a *rule nisi* calling upon all interested persons to appear and show cause, if any, why a final order for sequestration should not be granted on the return date.

[3.] The first respondent, Charl Andre van Bruggen, is an attorney and conveyancer practising as a sole proprietor under the name Van Bruggen Attorneys. The applicant, Ms Monyaduoe Marie Direro, is a former client of the second respondent [the first and second respondent shall be referred to as the "respondent" hereinafter since the first respondent is a sole proprietor].

[4.] This application is premised on a contention that the respondent failed to satisfy a judgment debt for the amount of R800 000.00, plus interest and costs. In terms of paragraph 9, of the founding affidavit the applicant relies on the provisions of section 8(g) of the Insolvency Act 24 of 1934 ("Insolvency Act") and later relied on section 8(b) under the heads of arguments.

[5.] The applicant further contends that the respondent is factually insolvent.

[6.] In addition, the applicant alleges that respondent has misled the Court, and has committed an act of perjury. Based on this allegation, the applicant additionally seeks an order for punitive costs against the respondent.

BACKGROUND

[7.] The applicant, Ms Direro, purchased a vacant immovable property at Ruimsig Country Club from the San Vito Residential Development Partnership, for an

amount of R600 000.00. The second respondent was appointed as a conveyancing firm of attorneys to give effect to the registration of the transfer of the property.

[8.] Prior to the sale, Ms Direro paid a reservation deposit of R20 000.00 into the second respondent's trust account. Furthermore, Ms Direro made payments of R100 000.00 per month into the second respondent's trust account, towards the purchase price of the vacant land, which was, according to the applicant, supposed to have been invested into an interest-bearing account, payable to the seller upon registration of the property into Ms Direro's name.

[9.] On 14 February 2016, a written sale agreement was concluded. Subsequently, the applicant concluded a building agreement with Thora Light (Pty) Ltd for the construction of the property for an amount of R2 745 000.00. The sale was cancelled, on several occasions.

[10.] The point of contention emanates from the fact that the respondent kept the amount paid by the applicant in the trust account despite the cancellation of the sale by the applicant. The reason for cancellation of the sale agreement is incompatible between the parties. The respondent's version is that the applicant had certain obligations towards the developer, the estate agents emanating from the sale and failed to meet those obligations, which led to wasted costs and the applicant's version is that she felt disrespected had to cancel the sale.

[11.] The payment of the amount R800 000.00 by the applicant is not disputed.

[12.] The applicant obtained judgment against the respondent.

[13.] Pursuant to the judgment, the Sheriff confirmed that a warrant of execution demanding payment of the amount of R800 000.00 was served on Mrs Lorraine, the receptionist, at the second respondent's address, in terms of which the movable assets pointed out were insufficient to satisfy the judgment and accordingly the *nulla bona* returns of service were issued.

ISSUES OF DETERMINATION

[14.] Whether the applicant met the requirements for provisional sequestration of the respondent.

[15.] Whether the debt has since been discharged prior to the application for provisional sequestration.

LEGAL PRINCIPLES

[16.] Section 8(b) of the Insolvency Act, which reads as follows:

> "*a debtor commits an act of insolvency - 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 judgment found sufficient disposable property to satisfy that judgement.*"

[17.] Section 8(g) of the Insolvency Act, which reads as follows:

> "*If he gives notice in writing to any one of the creditors that he is unable to pay any of his debts.*"

[18.] The requirements for provisional sequestration are set-out under section 10 of the Insolvency Act, in terms of which a court may only grant a provisional sequestration order if it satisfied that a *prima facie* case has been made that –

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

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

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

[19.] It is trite that section 8(b) contains two acts of insolvency: The first occurs when, upon the demand of the sheriff, the debtor fails to satisfy judgment debt and thereafter fails to indicate sufficient disposable property to satisfy the warrant. In *casu*, there is no dispute about the fact that the first respondent failed to satisfy the judgment debt on demand to satisfy the judgment.

[20.] A debtor commits an act of insolvency in terms of Section 8(g), if they give notice in writing to any one of their creditors that they are unable to pay their debts.

[21.] The applicant bears the onus to prove that the respondent has committed an act of insolvency and all the above requirements must be met.

APPLICANT'S VERSION

[22.] The applicant's version is that around 3 November 2016 and 18 October 2017 she demanded a refund for the outstanding amount of R800 000.00 from the respondent after the respondent had failed to the register transfer of the property in her names. The applicant instructed her eastwhile attorneys, Clark Coetzee Attorneys, to institute civil action against the second respondent under case no.80251/2018 for the recovery of all monies paid into the second respondent's trust account. The parties reached a settlement, and the settlement agreement was made an order of the court on 4 April 2019.

[23.] The applicant contends that the respondent failed to comply with the settlement agreement, and proceeded with an application for summary judgment, which was granted on 18 February 2020. Pursuant to the order, the sheriff of the court attended to attach disposable properties from the respondent's premises, however the properties pointed out to the sheriff were not sufficient to satisfy the judgment debt.

[24.] The applicant also proceeded to report the first respondent to the Legal Practice Council, where he was found guilty on three charges, which included the failure to pay an amount of R800 000 in terms of an Order of the High Court of South Africa, Gauteng Division, Pretoria dated 18 April 2018.

[25.] The applicant argues that the first respondent is deemed to be unable to pay his, since he failed to pay the R800 000.00 and the failure to pay the debt amounts to an act of insolvency as contemplated in section 8(g) of the Insolvency Act.

[26.] The applicant further submits that the sequestration of the respondent would be to the advantage of the respondents' creditors, as the trustees would locate other assets and would ensure a fair distribution of the realized value of assets between its creditors. In her founding affidavit, the applicant pointed out that the first respondent owns an immovable property at erf 225 Eldoraigne, Pretoria.

[27.] In the replying affidavit the applicants avers that the money never reached her eastwhile attorneys, apparently due to some fraudulent act by a third party.

RESPONDENT'S VERSION

[28.] The respondents' opposes this application based on submissions that the debt has become expunged. Further, the respondent denies that he is factually insolvent and has committed any act of insolvency.

[29.] The respondents' case is that the applicant's husband cancelled the sale on the basis that the applicant was disrespected.

[30.] From the respondent's evidence the apparent reasons for retaining R800 000.00 the in his trust account is that there were unresolved disputes between the applicant, the agent and the developers and that payment could not be effected until the wasted costs relating to the transaction were quantified by way of an agreement between the applicant and the developer, or unless the release of the funds was authorised by an order of court.

[31.] The respondent became aware of the order, when the sheriff of the court came to his premises, with a writ of execution, and no request for payment was made.

[32.] The respondent contacted the applicant's erstwhile attorneys, Jaco van den Berg of Gishen Gilchrist Inc, from whom the respondent received the firm's trust banking details in a letter dated 15 October 2020.

[33.] After a period of a week, and despite making payment of the R800 000.00 into the said attorney's trust account, the respondent was advised that the funds were not received and that the account number to which the payment was made was incorrect. The respondent relied on a statement by his IT consultants that the email under which the letter with the banking details was generated and originated from the said attorneys' office and therefore argued that the order has been complied with.

[34.] The matter is apparently under police investigation and was reported to the fidelity fund by the applicant's former attorneys.

[35.] The respondent argues that the applicant understated the facts in her founding affidavit, in that she failed to place on record the facts that were provided for under case no. 42269/2021, and that there was indeed a payment made. She also failed to provide the correspondences exchanged relating to the cancellation of sale.

[36.] The respondents' averments lay premise on the principle that where a person who is owed a debt is prescribed a method of payment of the debt and the payer obliges, it is the payee who bears the risk of possible losses.[1]

ANALYSIS

[37.] An application for sequestration is not a procedure for the recovery of a debt, it is aimed at bringing a convergence of the claims in an insolvent estate to ensure that it is would up in an orderly fashion. The court in *Investec Bank and another v Mutemeri and another*[2], held that:

> "*[i]ts purpose and effect are merely 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 creditors are treated equally. An applicant for sequestration must have a liquidated claim against the respondent, not because the application is one for the enforcement of the claim, but merely to ensure that applications for sequestration are only brought by creditors with a sufficient interest in the sequestration. Once the sequestration order is granted, the enforcement of the sequestrating creditor's claim is governed by the same rules that apply to the claims of all the other creditors in the estate. The order for the sequestration of the debtor's estate is thus not an order for the enforcement of the sequestrating creditor's claim.*"

[1] Stabilpave (Pty) Ltd v South African Receiver of Revenue Services 2014 (1) SA 350 (SCA)
[2] *2010 (1) SA 265 (GSJ) at 274-275.*

General requirements for sequestration

[38.] In terms of section 9(1) of the Insolvency Act, a creditor may petition the court for the sequestration of the estate of the debtor if the debtor has committed an act of insolvency, the creditor has established a liquidated claim of not less than R100. In Kurz NO and another v Van den Berg [2017] JOL 37250 (KZP), the court held that-

> "*[6] At this stage these proceedings are governed by section 12 of the Insolvency Act 24 of 1936 This section determines that I may sequestrate the estate of a debtor, if I am satisfied of the following:(a)that the petitioning creditor has established against the debtor a claim of not less than R100, or that two or more creditors have in the aggregate liquidated claims of not less than R200.(b)that the debtor has committed an act of insolvency or is insolvent; and(c)that there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated*."

[39.] The test for sequestration of an estate, is that the party against whom the relief is sought must be cash or capital insolvent, the former relates to being unable to pay debts as and when it becomes due and payable and the later relates to when liabilities exceed assets. The applicant in this case relies on the inability to pay debts [cash insolvency] as the basis of this application. Ultimately the sequestration process is aimed to benefit the general body of creditors.

[40.] The court has a discretionary power to grant a winding up order, irrespective of the ground upon which the order is sought and the discretion must be exercised on judicial grounds.

[41.] The Court will not order sequestration on the general ground of insolvency unless that state is very clearly proved; there should be a definite allegation of insolvency, and this should be supported at least by some prima facie evidence of insolvency. Furthermore, there is no allegation of general insolvency. By

general insolvency is meant that the debtors liabilities exceed his assets and B this fact must be clearly proved. In any event, it has not been shown that sequestration would be to the advantage of creditors. An investigation by itself is not sufficient. There must be a reasonable prospect that some asset may be recovered or revealed[3]. In other words it would not be sufficient to simply state that the respondent is insolvent without stating the reason thereof.

Statutory Compliance requirements

[42.] As far as statutory compliance is concerned, the applicant has filed a bond of security, in accordance with section 9(3) of the Insolvency Act and the Master has issued a Certificate of tendered security accordingly. There is evidence of statutory compliance relating to service of the application on the South African Receiver of Revenue as well as the Master of the Hight Court, in terms of section 4A(a) of the Insolvency Act.

[43.] The central issue is whether the respondent be placed under provisional sequestration. In considering this issue, the applicant has to provide *prima facie* evidence to prove all three requirements under section 10 of the Insolvency Act.

Existence of a claim

[44.] The existence of a debt is disputed by the respondent. It is not disputed that the first respondent failed to satisfy the judgement at the time when he was approached by the sheriff, and that there were insufficient disposable assets to satisfy the writ of execution.

[45.] The respondent submits that he paid the amount claimed into the applicant's attorneys nominated trust account. It is apparent that between the transmission of the letter directing the respondent to pay into the applicant's attorneys' trust

[3] *(Corner Shop (Pty) Ltd v Moodley 1950 (4) SA 55 (T)*

account, there was an interception which led to payment being made into an incorrect bank account.

[46.] The applicant argues that the respondent failed to verify the correctness of the bank account details before making the payment. I cannot find that there was a further need to verify the bank account details after a telephone discussion ensued between the respondent and the applicant's attorney. I find it unjustifiable that the applicant persists that the debt still exists when there is clear proof of payment into the nominated bank account. The respondent produced proof of payment into the applicant's attorney's bank account.

[47.] When the creditor stipulates (or requests) a particular mode of payment and the debtor complies with it, any risk inherent in the stipulated method is for the creditor's account. That is said to be "the legal position"[4], "the principle", or "the law"[5].

[48.] The point of contention is whether the respondent failed to exercise a duty of care by failing to verify the bank account details before making payment. I have taken note that the banking details were provided by the applicant's attorneys following a telephone discussion with the respondent. I do not see the reason why it would be necessary for the respondent to make another call back to the same attorney to enquire about the banking details. I find that the applicant's legal representative was the proximate cause of the plaintiff's loss.

[49.] In *Hawarden v Edward Nathan Sonnenbergs Inc*[6]*,* the court dealt with the question of whether or not delictual liability for pure economic loss sustained by the plaintiff, who fell victim to cyber-crime through a business email, compromised as a result of the defendant's negligent omission to forewarn the plaintiff of the known risk to take the necessary safety precautions that are

[4] *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd 1978 (4) SA 901 (N) at 908B-E.*
[5] *Barclays National Bank Ltd v Wall [1983] (1) SA 149 (A)] at 156H-157C*
[6] *(4) SA 152 (GJ).*

designed to safeguard against the risk of harm occasioned by business emails compromised from eventuating. Conversely, in casu, there were no further precautionary steps that the respondent could have taken between him and the applicant's former attorneys, as both are professionally on the same level and equally aware of cyber-crime. It is found that, the first respondent acted reasonably, in that any reasonable attorney would have proceeded to make payment after receiving telephone discussion and receipt of the letter.

[50.] I find that at the time of application the debt was no longer in existence.

Failure to satisfy judgment

[51.] It is trite that section 8(b) contains two acts of insolvency: in the first personal service occurs and the debtor fails to satisfy the judgment or to indicate sufficient disposable property to satisfy it, and in the second, personal service does not occur and a search by the officer fails to produce sufficient disposable property to satisfy the judgment.

[52.] The applicant's reliance on section 8(g) is misplaced, as there was notice by the respondent that he is unable to pay the debt. At the very least the respondent provided correspondence explaining that the trust funds will be retained until the dispute between the applicant and the developer is resolved, or unless authorised by agreement between the parties or an order of court.

[53.] The applicant did not specially plead section 8(b), except in argument. Section 8(g) applied when a judgment in its favour against a debtor and the debtor cannot satisfy the judgment debt, or if the sheriff, upon his return from the debtor makes a *nulla bona* (no goods) return. This is where the debtor does not have enough property that can be seized to satisfy the judgment debt. The applicant relied on the *nulla bona* return and the court order granted against the respondent and the developer.

[54.] An act of insolvency is committed when a warrant of execution is served on a debtor, and when the debtor fails to satisfy the judgment by pointing out sufficient disposable property to satisfy it. However, the mere failure to point out does not constitute an 'act of insolvency', there must be a failure to indicate sufficient disposable property on demand the Sheriff [7].

[55.] The respondent disputes the submission that he did not comply with the order granted on 4 April 2019 which provided for provision of security in the sum of R800 000.00 to enter a defense in the summary judgment application.

Factual Insolvency or act of insolvency

[56.] For decades our law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities). See, for example, *Johnson v Hirotec* (*Pty*) *Ltd*;4 *Ex parte De Villiers and another NNO: In re Carbon Developments* (*Pty*) *Ltd* (*in liquidation*);5 *Rosenbach & Co* (*Pty*) *Ltd v Singh's Bazaars* (*Pty*) *Ltd*[8]

[57.] Primarily the court must be satisfied that the respondent is factually insolvent. The applicant relied on actual insolvency as an alternative to the acts of insolvency allegedly committed by the respondent. In terms of the act, the applicant was required to establish that the respondent was in fact insolvent, in that his liabilities factually exceeded his assets. The fact that a debtor has not paid his debts does not necessarily lead to an inference that he is insolvent. It appeared from the applicant's own version in the founding affidavit that the respondent's disposable assets would exceed his liabilities and accordingly he could not be factually insolvent.

[7] *Natalse Landboukoöperasiebeperk v Moolman [1961] 3 ALL SA 162 (N) at p 164.*
[8] *Boschpoort Ondernemings (Pty) Ltd v ABSA BANK LTD [2014] 1 ALL SA 507 (SCA) at para 16*

[58.] In her own version, the applicant indicates that she cannot prove that the respondent is factually insolvent as she had no access to the bank accounts. In *Rodel Financial Services Proprietary Limited v O' Callaghan*[9], the court held that:

> "It is trite that in the exercise of the court's discretion as to whether or not to grant a provisional sequestration order, the court may refuse to sequestrate where, in light of the evidence adduced by the debtor in opposition to the application, it is satisfied that, notwithstanding the act of insolvency, the debtor is in fact solvent."

[59.] The applicant relies on the court order directing the developer, Thora Light (Pty) Ltd and the second respondent herein to pay the sum of R800 000.00 and costs to substantiate the requirement of an existence of a debt to satisfy the requirement of an existence of a debt for sequestration order. The respondents' argument that the applicant failed to bring the court in her confidence by disclosing in the founding affidavit that the respondent disputes the debt on a reasonable and *bona fide* grounds, as illustrated in the Badenhorst rule[10].

[60.] In her own version the applicants mentioned that the respondent owns an immovable property, which I find to be of possible realizable value, besides the fact that the applicant failed to attach the respondent's bank account, I cannot find that the respondent is factually insolvent.

[61.] There is no explanation why the respondent's legal practice bank account was not attached, when considering movable assets to be attached by the sheriff.

[62.] The applicant bears the onus, to be discharged on a balance of probabilities, of showing the respondent to be factually insolvent. Strangely in the instant matter

[9] [2017] ZAGPJHC 467 at para 26.
[10] *Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347H-348C.*

the applicant does not allege in his founding affidavit that either or both of the respondents are factually insolvent. Neither has the applicant made an attempt to show that the respondent's liabilities exceed their assets (jointly or severally). It is only in the replying affidavit that the applicant seems to bring forth facts from which insolvency can possibly be inferred. The fact of the matter is that the applicant failed to rely exclusively or alternatively on the debtor's insolvency in its founding affidavit. Reliance on the contents of the replying affidavit which were not contained in the founding affidavits amounts to reliance on new matters which the respondents have had no opportunity to reply to. The applicant's failure to allege in the founding affidavits that the respondents are de facto insolvent clearly militates against the applicant's contention in submissions before the court that the respondents are de facto insolvent[11].

Advantage of Creditors

[63.] In a provisional sequestration application, the court must be satisfied that there is *prima facie* reason to believe that sequestration will be to the advantage of creditors of the debtor[12].

[64.] The applicant failed to prove the extent to which the sequestration order would be to the advatance of creditor, and in the absence of a valid claim I find it unnecessary consider this aspect any further. The respondent's version is more acceptable, particularly when one applies the Plascon-Evans rule[13]. As far as the debt is concerned, I find that there is clearly a *bona fide* which substantiates the dispute of indebtedness.

CONCLUSION

[65.] The application for provisional sequestration for the respondent's estate is unsustainable, the applicant's case was not made out in her founding affidavit, I could not find that the applicant has made out a probable necessary *prima facie*

[11] *Standard Bank of SA Ltd v Sewpersadh and Another 2014 (5) SA 148 (C) at 19*
[12] *In Meskin & Co v Friedman 1948 (2) SA 555 (W), the Court described it at 559: "In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospects – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to the creditors."*
[13] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 620.*

case for provisional sequestration. Neither does she seem to possess the necessary *locus standi* to sequestrate the respondent's estate as the existence of a debt is questionable.

[66.] I could not find that the respondent has committed any act of insolvency or is factually insolvent as alleged. I am therefore not convinced that neither the requirements under section 8(b) or section 8(g) have been met. Therefore, in my discretion the exercise of my discretion, the application for provisional sequestration is refused.

[67.] Generally, in sequestration proceedings costs are never awarded against the party against whom the sequestration order is sought, but in this case the applicant sought an unusual order of costs against the respondent. It is trite law that the costs of the sequestration application are costs in the sequestration of the respondent's estate.

[68.] I find that sequestration is an inappropriate recourse, in a case where a fraudulent loss of funds through cyber crime is confirmed.

[69.] The applicant brought the same application more than once, which she failed to mentioned at the earliest opportune moment, under the founding affidavit. I find that to be an abusive of a legal process and for that reason the applicant should bear the costs.

[70.] It is trite law that an applicant must stand or fall by the allegations made in the founding affidavit and cannot make out its case in the replying affidavit[14]. The court will not allow new matter in reply when no case was made in the original application or if the reply reveals a new cause of action.

[14] *My Vote Counts NPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC), Director of Hospital Services v Ministry 1979 (1) SA 626 (A)*

[71.] In view of the aforegoing the applicant has failed to show that the respondent has either committed an act of insolvency upon which the court can rely nor that the applicant is factually insolvent. According the following order is issued:

It is ordered that:

(a) The application is dismissed with costs.

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P N MANAMELA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 22 August 2023

Judgment delivered: 10 November 2023

APPEARANCES:

Counsel for the Applicant:	Adv. SB Radebe
Attorneys for the Applicant:	Rams Attorneys
Counsels for the Respondents:	Adv H Scholz
Attorneys for the Respondents:	JC van Eden Attorneys