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

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

....
DATE SIGNATURE

Case No: 447/2021

In the matter between:

JAMES ANTHONY HARRISON Applicant

(Identity No: […])

and

PHEMELO AMBROSE GONKGANG

(Date of birth: […] January […])

(Identity No: […])

(Marital Status: Married in community of property) First Respondent

NOKULUNGTA HAZEL PERSEVERANCE GONKGANG

(Date of birth: […] February […])

(Identity No: […])

(Marital Status: Married in community of property) Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 14 June 2023.

JUDGMENT

LG KILMARTIN, AJ:

INTRODUCTION

[1] This is an opposed application for the provisional sequestration of the First and Second Respondents (hereinafter collectively referred to as "the Respondents"), who are married in community of property.

[2] The Respondents brought a counter-application for the rectification of a Deed of Suretyship executed by, *inter alia*, the Respondents in favour of the Applicant on 30 July 2018 ("the Deed of Suretyship"). However, during the hearing, counsel for the Respondents advised that the Court need not decide the counter-application as it was "*more along the lines of a defence to the main application*". The difficulty with the counter-application for rectification is that in such matters, the claimant for rectification of a written agreement must prove a common intention which the parties had intended to express in the written contract but which, through a mistake, they failed to express.[1] There is a real dispute of fact on the papers in this regard which, in my view, cannot be decided without a referral to oral evidence and the benefit of cross-examination. Be that

---

[1] *Humphrys v Laser Transport Holdings Ltd and Another* 1994 (4) SA 388 (C) at 395H – H/I.

as it may, it was confirmed that the relief in the counter-application need not be decided. The only remaining issue is the costs of the counter-application which will be dealt with at the end of the judgment.

THE REPLYING AFFIDAVIT BY VAN COLLER

[3] The Respondents also requested that the entire replying affidavit in the main application be struck out on the basis that it was deposed to by Sean Van Coller ("Mr Van Coller") who is a Chartered Accountant and not the Applicant in these proceedings. In this regard the following was stated in paragraphs 5 to 7 of the replying affidavit:

> "*5. The applicant is at present unable to depose to this affidavit as he is resident in Khon-Kaen, Thailand (which is approximately 400 kilometers North East of Bangkok). Khon-Kaen is not located anywhere near a South African consulate or other venue where the applicant would be in a position to authenticate this affidavit as contemplated in Uniform Rule 63 of the Rules of Court.*
>
> *6. Given the practical difficulty of the applicant in deposing to this affidavit (as well as my knowledge of his financial and business affairs), the applicant has requested that I depose to this affidavit on his behalf.*
>
> *7. I am advised that together with this affidavit, the legal representatives of the applicant will cause to be filed a power of attorney from the applicant confirming my authority to depose to*

> *this affidavit as well as appropriate documentation from the Applicant confirming the correctness of the allegations in this affidavit.*"

[4] A statement was filed by the Applicant in which he confirmed Mr Van Coller's authority to depose to the affidavit and the practical difficulties experienced by him in having an affidavit authenticated as contemplated in Uniform Rule 63 of the Rules of Court. In paragraph 4 of the statement the following was stated:

> "*4. I have at all material times been involved in the preparation of the affidavit and have considered the final affidavit signed by Vann Coller on 7 June 2021, which I confirm is correct insofar as it relates to me.*"

[5] In addition, a power of attorney was filed on record in which the Applicant confirmed the authority of Mr Van Coller.

[6] Having regard to the content of the replying affidavit and the further documents that were filed in support thereof, I am of the view that there is no reason to strike out the affidavit, particularly as Mr Van Coller confirms in paragraph 3 of the replying affidavit that he has extensive knowledge of the financial and business affairs of the Applicant in South Africa and has served as his financial and business advisor since 2015. Mr Van Coller further lists the dealings where he has represented the Applicant (and entities in which he was involved) which include: (i) representing the Applicant in dealings with the First Respondent in negotiating and concluding the Loan Agreement dated 14 July 2018 ("the Loan Agreement") and the Deed of Suretyship (annexed to the

founding affidavit as annexures “JAH4” and “JAH5”) which are at the heart of the dispute; and (ii) assisting the Applicant in calculating the value of his loan account in JHDA (Pty) Ltd (“JHDA”), as set out in annexure “JAH8” to the founding affidavit.

[7] Before dealing with the relevant legal provisions and authorities as well as the merits of the application, I set out a summary of the relevant background facts as this provides context which is relevant to the manner in which the Loan Agreement and the Deed of Suretyship are to be interpreted.

RELEVANT BACKGROUND FACTS

[8] The Applicant and OOO Investments (Pty) Ltd (“OOO”) are shareholders in JHDA (in liquidation), with their shareholdings being 74% and 26%, respectively.

[9] The First Respondent is the sole shareholder and director of OOO.

[10] In 2017, JHDA approached Guardrisk Insurance Company Limited (“Guardrisk”) and entered into an agreement in terms of which Guardrisk undertook to provide guarantees and indemnities for the performance of JHDA in terms of certain construction contracts, subject to collateral securities being provided to Guardrisk in the event that a demand was made on such guarantees or indemnities (“the Guardrisk Agreement”).

[11] On 20 July 2017, pursuant to the conclusion of the Guardrisk Agreement, JHDA executed an indemnity in favour of Guardrisk for amounts to be paid pursuant to any guarantees or indemnities issued at the behest of JHDA ("the Guardrisk Indemnity").

[12] On 6 March 2018, as additional security for any debts owed by JHDA to Guardrisk, OOO, the First Respondent (with the consent of the Second Respondent) and the Applicant executed a Deed of Suretyship and Indemnity in favour of Guardrisk for the payment of any amounts due by JHDA to Guardrisk ("the Guardrisk Suretyship").

[13] OOO, the First Respondent (with the consent of the Second Respondent) and the Applicant thereby signed themselves as sureties and co-principal debtors, jointly and severally, *in solidum*, to Guardrisk for any due payment by Guardrisk to the insurance company.

[14] In 2018, JHDA entered into a contract with Anglo Operations (Pty) Ltd ("Anglo") for the design, supply, delivery, construction, installation, testing, commissioning and remedying of any defects for the bulk materials handling work for the Navigation Pit Project at Kwezela Colliery ("the Anglo Project").

[15] It was a requirement of the contract that a performance guarantee be issued by a third party for the performance by JHDA of the Anglo Project.

[16] To enable JHDA to obtain a performance guarantee from Guardrisk, it was necessary to procure funds to pay for the performance guarantee and the Applicant was approached to loan the amount of R2 000 000.00 to JHDA.

[17] In terms of the JHDA Loan Agreement which was signed on 31 July 2018, the loan amount was to be advanced on or before 10 August 2018 and subject to the following conditions:

[17.1] OOO and the Respondents would provide surety for the loan; and

[17.2] the loan was to become due and payable immediately should JHDA go into business rescue or liquidation.

[18] On 30 July 2018 (the same day as the Loan Agreement was signed), OOO and the Respondents signed the Deed of Suretyship in favour of the Applicant whereby they bound themselves as sureties and co-principal debtors, jointly and severally, with JHDA, *in solidum* for the due payment by JHDA to the Applicant of "*all and any amounts which* [JHDA] *may be liable to pay to* [the Applicant]". The question which needs to be answered is whether the Deed of Suretyship only related to the R2 000 000.00 loan or whether it covered more than that.

[19] OOO and the Respondents agreed that their obligations and liability in terms of the Deed of Suretyship would continue to be of full force and effect until such time as JHDA has been entirely and finally released and discharged from

its obligations to the Applicant. Again, the question is whether those obligations were limited to the R2 000 000.00 loan.

[20] To service additional funding requirements of JHDA (other than the JHDA Loan Agreement referred to above), the Applicant from time to time loaned it funds which were credited against a loan account in the Applicant's favour in the books of JHDA ("the JHDA Loan Facility").

[21] The JHDA Loan Facility was repayable on demand, *alternatively*, when JHDA was placed into liquidation. The Applicant contends that the Deed of Suretyship also covers amounts loaned by him to JHDA to service additional funding requirements. The Respondents deny this.

[22] According to the Applicant, as of July 2020, the Applicant's JHDA loan account amounted to a total R14 237 156.03.

[23] In mid-2020, JHDA experienced significant financial difficulties and, on 6 July 2020, Anglo made a demand on the Guardrisk Indemnity. This immediately resulted in a payment of R17 574 775.82 to Anglo from Guardrisk and an indebtedness in the same amount by JHDA to Guardrisk.

[24] On 24 July 2020, JHDA was placed into business rescue by way of a special resolution.

[25] Subsequent to the business rescue practitioner finding that there was no prospects of the business rescue of JHDA being successful, the proceedings

were converted into winding-up proceedings and JHDA was finally wound up on 23 September 2020.

[26] As stated above, according to the Applicant, JHDA is indebted to the Applicant in the amount of at least R15 917 497.57, which amount he claims is calculated as follows and is due and payable:

[26.1] R13 917 497.57 in respect of the Applicant's JHDA loan account (which is made up of the loan account at the end of July 2020 which totalled R14 237 156.03 less the payment received from the business rescue practitioner of R319 658.57, pursuant to a cession agreement signed by the First Respondent in favour of the Applicant); and

[26.2] R2 000 000.00 in respect of the JHDA loan, which has not been repaid.

[27] The Applicant claims that the Respondents stood as surety and co-principal debtors, together with OOO, for all and any amounts which JHDA may be liable to pay to the Applicant. It is on this basis that the Applicant claims that the Respondents are indebted to him in the amount of R15 917 497.57.

[28] However, as stated above, In terms of the Guardrisk Suretyship, OOO, the First Respondent and the Applicant are jointly and severally liable, *in solidum*, as co-principal debtors, to Guardrisk for any due payment by Guardrisk to the insurance company.

[29] The Applicant claims that he made payment of R7 000 000.00 to Guardrisk in respect of the Guardrisk Suretyship and that the outstanding amount on the Guardrisk Indemnity is R8 879 476.29.

[30] According to the Respondents, the Deed of Suretyship was executed simultaneously with the Loan Agreement between the Applicant and JHDA on 30 July 2018 and the very purpose of the Loan Agreement, and the Deed of Suretyship, was to raise the procurement costs of the performance guarantee for the Anglo Project in the sum of R1 695 299.53. The Respondents further allege that:

[30.1] given the importance of the Anglo Project to JHDA, the Respondents and the Applicant agreed that they would each be liable for the procurement costs of the performance guarantee in proportion to their respective shareholding, i.e. the Applicant would be liable for 74% and OOO for 26% of such costs;

[30.2] in terms of the Shareholders Agreement: (i) all funding required by JHDA from time to time by outside sources, after having regard to the funding as was made available to JHDA, would be provided on loan account by the shareholders of JHDA in proportion to their respective shareholding; and (ii) the intention of the parties in concluding the Shareholders Agreement was *inter alia* to fund JHDA in the ordinary course of its business in proportion to the respective shareholding of the parties, namely the Applicant would fund 74% and OOO would fund 26%;

[30.3] despite the fact that OOO, and not the Respondents, was the shareholder in JHDA, they executed the Deed of Suretyship because the First Respondent was the sole shareholder in, and a director of, OOO, which company was incorporated as a special purpose vehicle for the sole purpose of acquiring and holding the shares in JHDA; and

[30.4] when JHDA was required to procure the aforementioned performance guarantee, the Applicant agreed to fund such requirements by loaning to JHDA the sum of R2 000 000.00 in terms of the Loan Agreement.

[31] The Respondents pointed out in the answering affidavit that an entity, Bonhill Properties (Pty) Ltd ("Bonhill") had actually made payment of the R2 000 000.00 to Guardrisk and this had not been disclosed in the founding affidavit. The Applicant explained in reply that Bonhill was a company of which the Applicant is the sole director and shareholder and made the payments as the Applicant's agent.

[32] The Applicant contends that the Respondents are indebted to the Applicant in the amount of R15 917 497.57 and that the Respondents' liabilities amount to R13 605 764.83. The Applicant further contends that the Respondents have insufficient assets and/or income in order to make payment of the full amount that they are indebted to Applicant for.

[33] The Respondents, on the other hand, contend that they have assets totalling an amount of R16 640 000.00 and liabilities totalling R3 337 704.30, resulting in a surplus of R13 302 295.70.

[34] The Respondents also contend that they are only liable for a *pro-rata* liability under the Deed of Suretyship and are therefore only liable for an amount of 26% of the R2 000 000.00 loan amount made to JHDA, being R520 000.00. In this regard, an amount of R319 658.57 was transferred by the Respondents to the Applicant, leaving (on the Respondents' version) a balance of R200 341.43 owing to the Applicant. The Respondents pointed out in the answering papers that the Applicant did not disclose receipt of the sum of R319 658.57 in the founding affidavit. Apparently the aforesaid amount was deducted from the First Respondent's remuneration package in reduction of OOO's *pro rata* liability under the Deed of Suretyship as read with the Shareholders Agreement in respect of JHDA.

[35] The Applicant submits that, on the Respondents' own version, they are indebted to the Applicant in an amount of R200 341.43 and therefore the Applicant has a claim against the Respondents for at least that amount. The Respondents have deposited the aforesaid sum into their attorney's trust account and have tendered to pay it to the Applicant.

INTERPRETATION OF THE RELEVANT PROVISIONS OF THE LOAN AGREEMENT AND THE DEED OF SURETYSHIP

[36] According to the Respondents, it is relevant that the Loan Agreement and Deed of Suretyship Agreement were concluded on the same day and this is indicative of the fact that the Deed of Suretyship is accessory to the Loan Agreement and not to JHDA's alleged liability to Guardrisk or in respect of the Applicant's loan account in JHDA.

[37] It is necessary to have regard to the relevant provisions of the Loan Agreement and the Deed of Suretyship to ascertain whether they are linked and whether this limits the ambit of the Deed of Suretyship.

[38] The Loan Agreement was entered into by the Applicant (as "*LENDER*") and JHDA (as "*PRINCIPAL*") (represented by the First Respondent in his capacity as director and authorised in terms of a resolution of the company).

[39] The preamble to the Loan Agreement provides as follows:

> "*The LENDER hereby agrees to loan to the PRINCIPAL an amount of R2 000 000.00 (TWO MILLION RAND), to be advanced on/before 10 August 2018* ***subject to the terms and conditions set out in this agreement****.*" (Emphasis added).

[40] Clauses 1 to 3 of the Loan Agreement provide as follows::

> "*1.* ***APPLICATION OF LOAN***
>
> *Proceeds from the loan shall exclusively be used to finance the collateral requirements for the furtherance of the performance bond for the contract between the PRINCIPAL and Anglo Coal a division*

of Anglo Operations (Proprietary) Limited, detailed in inquiry no 36000826, for the design (if any), supply, construction, installation, testing, commissioning and remedying of any defects for the bulk materials handling work for the navigation pit project of the Khwezela Colliery hereinafter referred to as the Khwezela project.

2. ***LOAN SECURITY AND CONVENANTS***

The loan will be secured by the underlying collateral investment provided for purposes of the Khwesela project, which is encumbered in terms of this agreement.

Should there be an amount outstanding on the loan and/or the return on loan upon release of the collateral investment to the PRINCIPAL, the proceeds from the collateral investment, limited to the amount outstanding on the loan, shall be paid to the LENDER within 7 days of receipt thereof by the PRINCIPAL.

The loan shall not be utilised for any other purposes.

2. ***LOAN SECURITY AND CONVENANTS (continued):***

Convenants for the PRINCIPAL whilst there is an amount outstanding on the loan and/or the return on loan:

- *No dividends may be declared or paid by the PRINCIPAL.*

- *No loans may be advanced by the PRINCIPAL. This includes, but is not limited to, advances to directors, staff, shareholders, and associated companies.*

- *The PRINCIPAL may not procure any further finance without prior written consent of the LENDER.*

Personal surety is to be provided to the LENDER for the amount outstanding on the loan and/or the return on loan from the following parties on a joint and several basis:

- ***OOO Investments Proprietary Limited***
- ***Phemelo Ambrose Gonkgang***
- ***Nokulunga Hazel Perseverance Gonkgang***

The above convenants and security has been agreed for the benefit of the LENDER, the LENDER may consent to the removal of any / all securities or convenants by providing such consent in writing. Should the security and convenance need to be removed in furtherance of settlement of this loan this may be done with the prior written consent of the LENDER." (Emphasis and underlining added).

[41] It is also necessary to have regard to the content of the Deed of Suretyship which was (significantly) signed on the same day as the Loan Agreement.

[42] The Deed of Suretyship was entered into between the Applicant (as "*LENDER*"), OOO and the Respondents (as "*SURETY/SURETIES*").

[43] The Deed of Suretyship provides, *inter alia*, that:

"*I/We the SURETY/SURETIES hereby interpose and bind myself/ourselves as SURETY/SURETIES for and co-principal debtor/s*

jointly and severally with JHDA (Proprietary) Limited, registration number 1987/001725/07, hereinafter referred to as the PRINCIPAL, in solidum for the due payment by the PRINCIPAL to LENDER of all and any amounts which the PRINCIPAL may be liable to pay to the LENDER. I/We renounce the legal exceptions or benefits of excussion, division, cession of action, and no value received, with the meaning and effect whereof I/We declare myself/ourselves to be acquainted.

My/Our obligations and liability hereunder shall continue and remain in full force and effect as a continuing covering surety until such time as the PRINCIPAL has been entirely and finally released and discharged from all its/their obligations, contingent or otherwise, to the LENDER and I/we shall not be entitled to withdraw here from until the PRINCIPAL has been so finally released and discharged.

Should the Deed of Suretyship for any reason be unenforceable against me/us or any of us, or not be signed by all the persons hereinafter named, it shall nevertheless be and remain of full force and effect against the other or other of us, being signatories hereto.

Each paragraph in this Deed of Suretyship is servable, the one from the other, and if any clause is found to be defective or unenforceable for any reason by a competent Court, the remaining clauses shall be and remain in full force and effect.

The SURETY/SURETIES, by executing the Deed of Suretyship warrant that:-

- *I/We, warrant that the execution of this Deed of Suretyship is to my/our benefit and I/We have a material interest in securing the liability covered by this Deed of Suretyship.*

- *I/We are legally competent to sign this Deed of Suretyship.*

- *I/We are duly authorised and empowered to sign this Deed of Suretyship.*"

[44] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] ("*Endumeni*") the Supreme Court of Appeal ("the SCA") summarised the current state of our law in regard to the interpretation of documents (including contracts) as follows:

> "*Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.* ***The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard***

[2] 2012 (4) SA 593 (SCA), at para [18].

> ***against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used.*** *To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made.* ***The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document***." (Emphasis added).

[45] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*,[3] ("*Bothma-Batho*") the SCA referred with approval to the *Endumeni* case and indicated that, in interpreting a document, whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise.[4]

[46] The SCA (per Wallis JA – who wrote the judgment in the *Endumeni* case) gave further clarification on the approach to interpretation in *CSARS v United Manganese of Kalahari (Pty) Ltd* ("*United Manganese* case")[5] and stated the following (footnotes omitted):

---

[3] (802/2012) [2013] ZASCA 176.
[4] *Batho-Bothma*, at para [12].
[5] 2020 (4) SA 428 (SCA), para [16].

"*[16] A consideration of the context of the Royalty Act and its provisions in regard to payment of royalties points decisively away from the construction advanced by Sars. A brief word about context in regard to statutory interpretation may not be out of place in the light of a recent suggestion in a minority judgment that: 'Context is fact-specific and can be applied in the interpretation of contracts and the like documents, but not of statutes.'*

The judgment said that Endumeni had suggested, in reliance on a passage from KPMB v Securefin, that there is 'no distinction in the interpretation of contracts, statutes and other documents'. That misconstrues what was said in Endumeni*. It summarised the general approach to the interpretation of documents. The footnote reference to Securefin was to the proposition that the rules of admissibility of evidence in the interpretation of documents do not change depending on the nature of the document, whether statute, contract or patent. That was cited because, if common evidential rules apply to the interpretation of all documents, it logically follows that the basic approach to interpretation will not vary depending on whether they are contracts, statutes or other documents. The latter proposition was not novel. In formulating his 'golden rule' of interpretation in Gray v Pearson, a case about the construction of a will, Lord Wensleydale said the rule applied in 'construing wills, and indeed statutes and all written instruments'.* ***Context is fundamental in approaching the interpretation of all written instruments, but there are differences in context with different documents, including the nature of the document itself. Legislation is different in character from contracts, and a contract formulated carefully by lawyers after lengthy negotiations will differ from one scribbled by laypeople on a page torn from a notebook****."* (Emphasis added).

[47] Accordingly, in interpreting the Loan Agreement and the Deed of Suretyship, one must carry out a unitary exercise, by examining the literal meaning of the clauses, having regard to the whole of the documents and all admissible context, including the circumstances in which it came into being.

[48] In my view, it is clear that the Deed of Suretyship was signed in order to meet the condition set out in paragraph 2 of the Loan Agreement which required "*[p]ersonal surety … to be provided to the LENDER for the amount outstanding* ***on the loan*** *and/or the return on loan…".* The loan being referred to is the R2 000 000.00 loan and nothing more.

[49] I will now deal with the requirements to succeed with a provisional sequestration order and, thereafter, discuss the merits of the application.

REQUIREMENTS TO SUCCEED WITH A PROVISIONAL SEQUESTRATION ORDER

[50] Section of the Insolvency Act, 24 of 1936 ("the Act") reads as follows:

> "***10 Provisional sequestration***
>
> *If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie-*
>
> *(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and*

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally."

[51] In *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd*[6] ("*Rhebokskloof*")the court set out the nature of the onus on the Applicant as follows:

"*A case for the sequestration of a debtor's estate may be made out from the commission of one or more specified acts of insolvency or on the grounds of actual insolvency, ie that his total liabilities (fairly valued) exceed his total assets (fairly valued). The Legislature appreciated the difficulty which faces a creditor, whose dealings with his debtor might fall within a restricted ambit of business activity, in ascertaining the assets versus liabilities position of the latter. In alleviating this difficulty, statutory provision was made for recognising certain conduct on the part of a debtor as warranting an application to sequestrate his estate, this by way of introducing the concept of an act of insolvency.*

Even, however, where a debtor has not committed an act of insolvency and it is incumbent on his unpaid creditor seeking to sequestrate the former's estate to establish actual insolvency on the requisite balance of probabilities, it is not essential that in order to discharge the onus resting on the creditor if he is to achieve this purpose that he set out chapter and verse (and indeed figures) listing the assets (and their value) and the liabilities (and their value) for he may establish the debtor's insolvency inferentially. There is no exhaustive list of facts from which an inference of insolvency may be drawn, as for example an oral admission

[6] 1993 (4) SA 436 (C) at 443 B-G.

of a debt and failure to discharge it may, in appropriate circumstances which are sufficiently set out, be enough to establish insolvency for the purpose of the prima facie case which the creditor is required to initially make out. It is then for the debtor to rebut this prima facie case and show that his assets have a value exceeding the sum total of his liabilities. See Mars The Law of Insolvency in South Africa 8th ed at 108; Mackay v Cahi 1962 (4) SA 193 (O) at 194F-H, 195C-E, 204F-H."

[52] In *London Estates (Pty) Ltd v Nair*[7] Jansen J stated the following about the standard of proof when seeking a provisional versus a final sequestration order:

"The standard of proof differs in respect of a provisional and final order (cf. Sacks Morris (Pty.) Ltd v Smith, 1951 (3) SA 167 at p. 170 (O)). This must relate to the proof of the facts giving rise to the belief - not to the degree of conviction the belief engenders. In both cases the facts must show that there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors. But in the case of a provisional order there need only be prima facie proof of those facts; in the case of a final order the Court must be satisfied that those facts exist, presumably on a balance of probabilities. This must be the case whether the applications are opposed or not. The onus is on the applicant and in general he must allege and prove his facts. A bald allegation in the petition that sequestration will be to the benefit of creditors is not sufficient (Meikles (Gwelo) (Pty.) Ltd v Potgieter, 1957 (2) SA 20 (SR))."

[53] "*Creditors"* means all or at least the general body of creditors.[8]

---

7 1957 (3) SA 591 (D) at 593 B - D.

8 *Lotzof v Raubenheimer* 1959 (1) SA 90 (I) at 94 (top of the page before the letter A).

[54] The question is whether a "*substantial portion"* of the creditors, determined according to the value of the claims, will derive advantage from the sequestration.[9]

[55] For a sequestration to be to the advantage of creditors it must "*yield at the least, a not negligible dividend"*.[10]

[56] It is not necessary to prove that the debtor has any assets, provided it is shown either that the debtor is in receipt of an income of which substantial portions are likely to become available to creditors in terms of Section 23(5) of the Insolvency Act,[11] or that there is a reasonable prospect that the trustee, by invoking the machinery of the Insolvency Act, will reveal or recover assets which will yield a pecuniary benefit for creditors.[12]

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

(a) First requirement (Section 10(a) of the Act): Claim in terms of Section 9(1) of the Act

[57] The Respondents have admitted to owing at least R200 341.43 to the Applicant and, therefore, I am satisfied that the Applicant has a claim for an amount of not less than R100.00. The fact that this amount has been tendered does not result in this requirement not being met.

---

9 *Fesi v ABSA Bank Ltd* 2000 (1) SA 499 (C) at 505 C/D.

10 *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) at 113 F.

11 *Ressel v Levin* 1964 (1) SA 128 (C) at 129 D/E.

12 *BP Southern Africa (Pty) Ltd v Furstenburg* 1966 (1) SA 717 (O) at 720 F; and *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) at p 583 B/C – G/H.

(b) <u>Second requirement (Section 10(b) of the Act): Act of insolvency / Actual insolvency</u>

[58] In paragraph 55 of the founding affidavit the following is stated:

"*<u>The acknowledgement of indebtedness by the first respondent</u>*

55. I have been in contact with the first respondent on a number of occasions during mid-2020 to discuss how he intends to make payment of the various debts he and the second respondent owe. On each occasion the first respondent, while not disputing that he and the second respondent are indebted to me in significant amounts, simply stated that he is unable to make payment to me as he does not have sufficient assets or income to do so."

[59] The Applicant claims that the Respondents' answer to the allegation of having acknowledged indebtedness merely amounts to a bare denial but this is not so. In paragraph 8.3 of the answering affidavit, the following is stated:

"*8.3 I have not acknowledged myself to be indebted to the applicant in 'significant amounts' or at all, and I have certainly not acknowledged that I am unable to make payment of undisputed amounts to the applicant. In this regard, it is noteworthy that the applicant puts up no evidence in substantiation of the allegation that I have made any such acknowledgements. Apart from what is set out below, I submit that this is because no such evidence exists.*"

[60] Furthermore, in paragraphs 47 and 48 of the answering affidavit the following is stated:

"***MY ALLEGED ACKNOWLEDGEMENT OF INDEBTEDNESS***

47. The applicant devotes no more than one paragraph to my alleged acknowledgement of indebtedness of the fact that same is due and payable.

48. Apart from the Deed of Cession, which, based on Bunn's advice, was in relation to OOO's pro-rata liability under the Loan Agreement only, I pertinently deny that I acknowledge myself to be indebted to the applicant in 'significant amounts' or at all. I can simply not even deal in any meaningful manner with the contents of the founding affidavit in this regard inasmuch as the applicant does not even say, at a minimum, when, where and in what manner I allegedly made these acknowledgments."

[61] Having regard to the above, I do not accept that the First Respondent admitted to owing the Applicant significant amounts or that he said he was unable to make payment as he does not have sufficient assets or income to do.

[62] Insofar as the issue of actual insolvency is concerned, according to the First Respondent he was unemployed at the time of deposing to the answering affidavit but was in the process of attempting to re-enter the construction and engineering industry. The First Respondent confirmed that, from time to time, he provides consulting engineering services through Tshwelopele Engineering Solutions (Pty) Ltd ("Tshwelopele"). It is unclear to me whether the First Respondent is currently earning anything. At the time that the answering papers were signed, the Second Respondent was a lecturer at UNISA and a financial manager.

[63] The Applicant points out that, prior to the liquidation of JHDA, the First Respondent was a director and well remunerated for this senior position.

[64] The Applicant is a director of OOO and Kutu Engineering (Pty) Ltd ("Kutu"), which do not possess immovable property or other assets. Kutu is used to bid for work from Exxaro and other mining companies.

[65] The Respondents point out that being provisionally sequestrated would have a major and detrimental effect on them and their family as, *inter alia*, they would not be able to hold positions as directors in any companies. The Court was urged to take these factors into account if a *prima facie* case if found to have been made out. The Respondents submit that the Applicant should be directed to take ordinary recovery proceedings against them in which "*the myriad disputes of fact can be properly ventilated*".

[66] According to the Applicant, the Respondents' assets amount to, at most, R12 640 000.00, which is made up as follows:

[66.1]	Waterfall property:	R8 500 000.00
[66.2]	Panorama property:	R640 000.00
[66.3]	Vehicles:	R700 000.00
[66.4]	Furniture:	R500 000.00

[66.5] Tshwelopele: R2 300 000.00

[67] According to the Respondents, they have assets totalling an amount of R16 640 000.00, made up as follows:

[67.1] Waterfall property: R12 500 000.00

[67.2] Panorama property: R640 000.00

[67.3] Vehicles: R700 000.00

[67.4] Furniture: R500 000.00

[67.5] Tshwelopele: R2 300 000.00

[68] The Applicant complains that the "*valuation*" of the Waterfall property does not constitute "*acceptable and admissible evidence*".

[69] In *Ex parte Harms*,[13] the court stated the following:

> "*The valuations amount to no more than various letters, admittedly written by the estate agents or valuers, which clearly do not amount to admissible evidence. It follows that there is no real evidence before us to persuade us that the values placed on his properties by the insolvent were wrong.*"

[70] In respect of the Waterfall property, the Respondents produced a valuation certificate signed by one RG Sekhu (EAAB No.: 0046720) of KWCLOCKWORK, Keller Williams Realty. In respect of the Panorama property,

---

[13] *Ex Parte Harms* 2005 (1) SA 323 (N) at 327.

a Lightstone Property report dated 24 March 2021 was produced by the Respondents.

[71] In the replying affidavit it was pointed out that "*the valuation*" had not been performed by a qualified expert valuer and was not supported by a confirmatory affidavit (despite there being an indication in the answering affidavit that such an affidavit "*would be filed*"). Furthermore, it was pointed out that the valuation was extensively qualified in that it provided for a "*cushion*" below the estimated value of 30% which was calculated as being R3 750 000.00 in the present instance. Despite the criticism of the Respondents' evidence, in reply, the Applicant merely put up a Search Works report obtained pursuant to a search conducted by Mr Bunn which provided that the expected value of the Waterfall property was R8 500 000.00.

[72] The vast difference between the value placed on the Waterfall property is problematic and I do not believe that the Search Works report can trump the evidence of the Respondents. The valuations also date back to March 2021 and May 2021 respectively. I also note that the estimated high on the Search Works report is R11 270 000.00. It would therefore appear that the value placed on the Waterfall property by the Applicant is too low.

[73] In calculating the liabilities of the Respondents, the Applicant claims that the Respondents' liabilities total at least R13 605 564.83, made up as follows:

[73.1] Waterfall property: R2 987 337.12

[73.2] Panorama property: R350 367.18

[73.3] Guardrisk: R8 879 476.29

[73.4] OOO: R1 188 243.00

[73.5] amount owing to the Applicant: R200 341.24

[74] On this basis, the Applicant claims that the liabilities of the Respondents exceed their assets by R965 764.83. I note that the whole balance of the amount owing to Guardrisk is included, notwithstanding that the Respondents would only be jointly and severally liable with OOO and the Applicant for that amount if it was being claimed.

[75] In the answering affidavit, the Respondents set out their liabilities as totalling R3 337 704.30, made up as follows:

[75.1] the Waterfall property: R2 987 337.12

[75.2] Panaroma View property: R350 367.18

[76] In corroboration of the above, copies of the statements of account in respect of the mortgage loan accounts were attached to the answering affidavit. It was also stated that the other remaining assets were unencumbered.

[77] In criticism of this in reply, the Applicant stated that the Respondents had not included in their liabilities the loan from OOO Investments in the amount of R1 188 243.00 and the R200 341.24 which is the amount the Respondents claim to owe the Applicant.

[78] With reference to the Rheebokskloof matter, I am not satisfied that the Applicant has demonstrated that the Respondents' liabilities, "*fairly valued*" exceed their assets "*fairly valued*". In my view the evidence produced does not justify this Court drawing an inference of insolvency, even on a *prima facie* basis.

[79] In light of the above, I find that the requirement in section 10(b) has not been met. It is therefore not necessary to consider whether section 10(c) is satisfied.

[80] As far as costs are concerned, costs in the sequestration application should follow the result. In relation to the counter-application, I am of the view that the parties should bear their own costs.

ORDER

In the circumstances I make the following order:

1. The application for sequestration is dismissed;

2. The Applicant is directed to pay the First and Second Respondents' costs in the sequestration application; and

3. In respect of the counter-application, the parties are liable for their own costs.

_____

LG KILMARTIN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Date of hearing:	16 March 2023
Date of judgment:	14 June 2023
For the Applicant:	S Bunn
Instructed by:	Hewlett Bunn Incorporated
For the Respondents:	Adv M De Oliveira
Instructed by:	Motsoeneng Bill Attorneys