

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



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: **8626/2022P**

In the matter between:

BUSINESS PARTNERS LIMITED

APPLICANT

and

**WILSON SENELE GABELA
RESPONDENT**

FIRST

(ID NO.[...])

(DATE OF BIRTH: [...] DECEMBER [...])

**(MARRIED IN COMMUNITY OF PROPERTY
TO 2ND RESPONDENT)**

**NTOMBIZAMASWAZI FORTUNATE GABELA
RESPONDENT**

SECOND

(ID NO. [...])

(DATE OF BIRTH: [...] NOVEMBER [...])

**(MARRIED IN COMMUNITY OF PROPERTY
TO 1ST RESPONDENT)**

Coram: Mossop J

Heard: 2 March 2023

Delivered: 2 March 2023

ORDER

The following order is granted:

1. A rule nisi is issued calling upon the first and second respondents and any other interested parties to show cause, if any, before this court on the 13th day of April 2023, at 09h30, or so soon thereafter as the matter may be heard, why an order should not be granted in the following terms:
 - 1.1 That the joint estate of the first and second respondents, married to each other in community of property, is finally sequestrated and why the costs of the application, including the costs relating to the grant of the provisional order of sequestration, are not to be costs in the sequestration of the respondents' estate;
2. Paragraph 1.1 shall operate as an order provisionally sequestrating the joint estate of the respondents with immediate effect.
3. This order is to be served on the first and second respondents, the employees of the respondents (if any), and on the South African Revenue Service.

JUDGMENT

MOSSOP J:

[1] This is an opposed sequestration application brought by the applicant against the respondents, who are married to each other in community of property. The first and second respondents stood surety for the indebtedness of a company called Gabela Properties (Pty) Ltd (the company), which had negotiated two loans from the applicant. The company defaulted on its repayment obligations to the applicant arising out of those loans and was ultimately finally wound up in 2017. The respondents were called upon to make payment to the applicant consequent upon

their respective deeds of suretyship, but failed to do so. Summons was therefore issued by the applicant against them and judgment was granted against them, jointly and severally, for payment in the aggregate amount of R6 551 515.20 on 24 February 2017.

[2] Since the entering of that judgment, some payments have been made to the applicant by both the liquidators of the company and by the respondents and the indebtedness of the company, and therefore the indebtedness of the respondents, has consequently been reduced. The present state of the indebtedness of the company to the applicant is the amount of R4 528 855. There are no further payments that can be made from the liquidators, as the principle asset of the company, an immovable property that had been rented out by the liquidators during the winding up, has been sold.

[3] The applicant issued a writ against the first and second respondents arising out of the judgment that it obtained against them, but when he served it, the sheriff of this court only found movable property to the value of approximately R16 800. This application is the result of the sheriff's return certifying this to be the case.

[4] Section 10 of the Insolvency Act 24 of 1936 (the Act) reads as follows:
'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.'

[5] Section 12(1) of the Act reads as follows:
'(1) If at the hearing pursuant to the aforesaid rule *nisi* the court is satisfied that-
(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 sequester the estate of the debtor.’

[6] Section 9(1) provides that:

‘A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.’

[7] A sequestration application is not in its essential nature an ordinary judgment that is limited in its scope. As was stated in *Naidoo v ABSA Bank Limited*,¹

‘... a sequestration order as a species of execution, affecting not only the rights of the two litigants, but also of third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent - it is not an ordinary judgment entitling a creditor to execute against a debtor.’

[8] If the court forms an opinion that *prima facie* the three requisites set out in s 10 of the Act have been met, a provisional sequestration order may be issued. The threshold of the test at that stage is much lower than at the stage when a final order is sought in terms of s 12 of the Act.

[9] The applicant has submitted that the respondents have committed acts of insolvency in terms of section 8(e) and 8(g) of the Act. Section 8(e) and (g) read as follows:

‘A debtor commits an act of insolvency-

(e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;

. . .

(g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts;’.

¹ *Naidoo v ABSA Bank Limited* [2010] ZASCA 72; 2010 (4) SA 597 (SCA) para 4.

[10] The reliance upon these grounds by the applicant arises from two letters drawn by the first respondent and sent to the applicant's attorneys. It is important at this stage to mention that the first respondent is an attorney of this court and the letters are accordingly not the writings of a person unskilled in the law or those of a person who may not have appreciated what the consequences of such writings may be. The first letter, dated 29 April 2021 (the first letter), records, inter alia, a statement by the first respondent that he and the second respondent are:

'not intent at [sic] defending our indebtedness to your client in this matter',

and that the respondents would be in a position to make payment of R250 000 to the applicant by the end of June 2021. The second letter, dated 7 July 2021 (the second letter), is marked as being 'without prejudice' and contains the following offer by the respondents:

'We do make an offer on [sic] without prejudice basis to settle the arrears due to your client in the sum of R850 000.00 (Eight Hundred and Fifty Thousand Rand) which shall be due and payable to your client on or before 31 August 2021 in full and final settlement of the arrears due.'

[11] The applicant holds the view that the first letter constitutes an acknowledgement by the respondents that they are unable to immediately pay their entire indebtedness to the applicant. The indebtedness of the respondents exceeds R4 million. The first letter advises only of a potential payment of R250 000 at a later date. In my view, the meaning contended for by the applicant is correct as the first letter does not propose a payment of the full amount due to the applicant, but only a future payment of a portion of the admitted debt.

[12] The second letter, as previously mentioned, is marked 'without prejudice'. Ordinarily, that would mask it from the court's view and prohibit it from inclusion in the papers. However, in *Absa Bank Ltd v Chopdat*,² van Schalkwyk J, stated that:

'... as a matter of public policy, an act of insolvency should not always be afforded the same protection which the common law privilege accords to settlement negotiations. A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound

² *Absa Bank Ltd v Chopdat* 2000 (2) SA 1088 (W) at 1092H-1093A.

consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. I would therefore be inclined to draw an analogy between the individual who seeks to protect from disclosure a criminal threat upon the basis of privilege and the debtor who objects to the disclosure of an act of insolvency on the same basis.'

The learned judge concluded that:

'In this case the respondent has admitted his insolvency. Public policy would require that such admission should not be precluded from these proceedings, even if made on a privileged occasion.'³

[13] In *Absa Bank Ltd v Hammerle Group*,⁴ the Supreme Court of Appeal confirmed this approach and stated that:

'It is true that, as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest. A concursus creditorum is created and the trading public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged.'

[14] I am therefore satisfied that the second letter contains admissible evidence and that such evidence is properly before the court.

[15] The applicant contends that the second letter constitutes an attempt by the respondents to have them released from the balance of their indebtedness to the applicant upon payment of the lesser amount of R850 000 and is, thus, an attempt to

³ Ibid at 1094F-G.

⁴ *Absa Bank Ltd v Hammerle Group* [2015] ZASCA 43; 2015 (5) SA 215 (SCA) para 13.

have the applicant release them partially from their debts and is accordingly an act of insolvency. Given that the respondents have not disputed the quantum of their indebtedness, it is inescapable that the respondents in sending the second letter attempted to secure their release from the full extent of their admitted indebtedness. In my view that constitutes an act of insolvency.

[16] Even if I am incorrect in this view, the papers clearly make out a case in terms of section 8(b) of the Act, which provides as follows:

‘A debtor commits an act of insolvency-

(b) 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;’.

Judgment in a substantial amount has been obtained against the respondents and the sheriff has not found sufficient assets with which to satisfy that judgment.

[17] The applicant has caused an immovable property held in the name of the first respondent to be valued. In 2020, the appraiser appointed by the applicant assessed the value of the immovable property, situated at 17 Trafford Avenue, Dawncliffe, Westville, as having a market value at R1,85 million and a forced sale value of R1,25 million. The current municipal valuation of the property is R2 140 000. This exercise was embarked upon to establish that there will be an advantage to creditors if the respondents are sequestrated. It has not been denied by the respondents that there is substantial equity in the immovable property, it only being encumbered in the amount of R350 000.

[18] In their defence, the respondents raise several points. The first is raised in limine and is to the effect that this court lacks jurisdiction to hear this application. The respondents contend that ‘the whole cause of action arose in Durban’, the inference therefrom being that this matter should be heard in Durban and not in Pietermaritzburg, where it is being heard. This point need not detain us significantly: in terms of section 50(1)(g) of the Superior Courts Act 10 of 2013, the KwaZulu-Natal High Court,

Pietermaritzburg is the main seat of the KwaZulu-Natal Division of the High Court, and has jurisdiction over the province of KwaZulu-Natal. Durban clearly is situated within this province and this court consequently has jurisdiction. The point raised by the respondents is a point that may be taken with some profit in magistrates' court litigation but not in litigation before this court. The point in limine must thus fail.

[19] Various other issues are raised in the respondents' answering affidavit. Almost all of them relate to the winding up of the company and are not relevant to the facts of this application. As regards the offer of settlement in the amount of R850 000 mentioned in the second letter, the first respondent reveals that the amount proposed was not an amount that he actually possessed, or which was under his control, but was apparently an amount due to him at some point in the future as fees from a Land Claims Court matter that he was involved in. The offer was thus speculative in its nature as those fees had not yet been received by the first respondent. This, however, does not detract from the fact that an attempt was made to secure the respondents' release from their indebtedness to the applicant. The respondents further claim that they have never given notice to the applicant, or any other person, that they are unable to pay their debts. Yet, it is indisputable that the amount due to the applicant by the respondents, which the respondents professed in the first letter not to dispute, has not been paid since judgment was taken against them in February 2017. The inference is irresistible that it has not been paid because the respondents lack the means to pay it.

[20] Mr Quinlan pointed out in his heads of argument that the respondents have not taken the opportunity in their answering affidavits to disclose the true state of their financial situation to the court. If they contend, as they appear to do, that they are not insolvent, then this was a golden opportunity that could have been used by them to establish their solvency. The first respondent responded by saying that in drafting his answering affidavit he merely responded to the allegations in the founding

affidavit. That is a rather narrow view to take regard being had to the fact this is a sequestration application and to the fact that the respondents themselves have the best knowledge of the state of their financial affairs and should have disclosed such information if they are to avoid the result prayed for by the applicant.

[21] Having heard argument this morning from Mr Quinlan and from the first respondent, who appeared in person, I stood the court down to consider judgment.

[22] In the circumstances, I am satisfied that the applicant has established that it is a creditor of the respondents, that the respondents have committed acts of insolvency and that there is reason to believe that it will be to the advantage of creditors of the respondents if the respective estates of the first and second respondents are sequestrated.


[23] I accordingly grant the following order:

1. A rule nisi is issued calling upon the first and second respondents, and any other interested parties, to show cause, if any, before this court on the 13th day of April 2023, at 09h30, or so soon thereafter as the matter may be heard, why an order should not be granted in the following terms:

1.1 That the joint estate of the first and second respondents, married to each other in community of property, is finally sequestrated and why the costs of the application, including the costs relating to the grant of the provisional order of sequestration, are not to be costs in the sequestration of the respondents' estate;

2. Paragraph 1.1 shall operate as an order provisionally sequestrating the joint estate of the respondents with immediate effect.

3. This order is to be served on the first and second respondents, the employees of the respondents (if any), and on the South African Revenue Service.



MOSSOP J

APPEARANCES

Counsel for the appellant : Mr P. D. Quinlan
Instructed by: : Thorpe and Hands

Locally represented by:
Stowell and Company
295 Pietermaritz Street
Pietermaritzburg

Counsel for the respondent : In person
Instructed by : Not applicable

Date of Hearing : 2 March 2023

Date of Judgment : 2 March 2023