REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 208/2013

In the matter between:

1.1.1.1. **BANK WINDHOEK LIMITED**

APPLICANT

and

LOUW ANDREW JACOBS **RESPONDENT**

Bank Windhoek Limited v Jacobs (A 208/2013) [2013] NAHCMD 328 (13 November 2013)

Coram: Smuts, J
Heard: 7 November 2013
Delivered: 13 November 2013

Flynote: Application for the respondent's sequestration. The court found that the applicant had prima facie established its claims, an act of insolvency as contemplated by s8(b) of the Insolvency Act, 1936 and that it would be to the benefit of the creditors for the respondent to be sequestrated. Provisional

sequestration order granted.

ORDER

(a) The respondent is placed under a provisional order of sequestration in the hands of the Master of the High Court.

(b) A rule *nisi* hereby issues calling upon the respondent and all other interested parties to show cause, if any, to this court on 22 January 2014 at 15h30 why the respondent should not be placed under a final order of sequestration.

(c) Service of this order is to be effected

(i) by the deputy sheriff on the respondent personally;

(ii) by way of publication in one edition of each Die Republikein and the Government Gazette.

(d) The costs of this application to date are to be costs in the sequestration. Such costs include the cost of one instructed and one instructing counsel. Any further costs of opposition may be determined upon the return date.

JUDGMENT

Smuts, J

(b) This is an application for the provisional sequestration of the respondent. The applicant is a commercial bank. It relies upon three acts of insolvency in this application, namely s8(b), (c) and (d) respectively of the Insolvency Act, 1936.

(c) The applicant relies upon a *nulla bona* return of service and further contends that the respondent makes or attempts to make a disposition of his property which would have the effect of prejudicing his creditors or preferring one creditor over another. The applicant further contends that the respondent removes or attempts to remove his property with the intent to prejudice his creditors.

(d) The applicant relies upon to two claims which it has against the respondent.

(e) In the first instance, the applicant obtained judgment by default against the respondent in the amount of N$111 230, 40 together with interest at the rate of 12.75% from 15 June 2011 and costs. The underlying indebtedness arose from a written loan agreement.

(f)

(g) Claim 2 arises from a credit agreement entered into between the parties in terms of which the applicant financed a motor vehicle (a 2007 VW Golf 5 GTI) for the respondent. In respect of the second claim, it is common cause that the parties entered into a settlement agreement on 27 September 2012 which was made an order of this court on 28 September 2012. In terms of the settlement agreement, the parties agreed that the applicant would appoint a nominated valuator to determine the market value of the vehicle. Both parties undertook to

bind themselves to that valuation. The respondent was authorised by the applicant to sell the vehicle in question by way of private treaty by not later than 15 November 2012 for an amount not less than the value which had been determined by the valuator. In the event of the respondent being unable to sell the vehicle by that date, the respondent was compelled to restore it to the applicant's possession by not later than 16 November 2012. The valuator proceeded to determine a value. The outstanding balance on the credit agreement amounted to N$189 276, 73 together with interest at 12.75% per annum. The applicant further states that the respondent was unable to sell the vehicle by the date in question and had thereafter refused or failed to deliver it to the applicant.

(h) The applicant further states that on 18 July 2012 it caused a writ to be issued in pursuance of the judgment obtained in respect of claim 1. The writ was served personally upon the respondent on 16 April 2013, as is confirmed in the return by the deputy sheriff. The return further states:

> 'Further it is hereby certified that at the above address the amount of N$91,584.97 in satisfaction of this warrant has been demanded from Louw Andrew Jacobs. I was informed that the addressee has no money or negotiable property *inter alia* to satisfy the said warrant. No disposable property was pointed out, or could be found by me after a diligent search at the given address. Therefore my return is one of *nulla bona*.'

(i) The applicant accordingly relies upon s 8(b) for an act of insolvency) on the basis of this *nulla bona* retrun.

(j)

(k) The applicant also relies upon s 8(c) and (d). The applicant refers to a financial enquiry held in respect of the respondent on 12 April 2012 where the respondent provided a statement of his expenses to the applicant's legal representative at the time. In that statement, it is contended that the respondent was indebted to Southern Engineering in the amount of N$72 767, 40 in respect of repairs effected to the vehicle and that Southern Engineering was exercising a lien over the vehicle. A VAT invoice was also attached in the name of

Southern Engineering. The respondent had also represented to the applicant's legal practitioner that his brother, JWC Jacobs, had a lien over the vehicle. This resulted in the settlement agreement being entered into which was conditional upon Mr JWC Jacobs relinquishing his lien over the vehicle. He however failed to sign that waiver. After the respondent had failed to sell the vehicle by the deadline of 15 November 2012, the applicant's legal practitioner proceeded on a writ against the respondent for the delivery of that vehicle. The return by the deputy sheriff stated that the respondent refused to hand over the vehicle, claiming that there was an outstanding amount due for retention.

(l) The applicant points out that in the meantime and on 16 April 2013 it launched an application for the sequestration of the applicant's father, Mr Andrew Joseph Jacobs. In the answering affidavit to that application, the applicant's father stated that he traded as Southern Engineering and that there was a separate legal entity being Southern Engineering CC in which he, (the applicant's father), "may hold certain members' interests".

(m) The applicant further points out that after the respondent's father had filed his answering affidavit in the sequestration application facing him, the respondent addressed a letter to the applicant's legal practitioner attaching two invoices from Southern Engineering CC for the repairs and storage of the vehicle respectively. The applicant accordingly points to this discrepancy in respect of the assertion in support of the repairs lien. The applicant disputes those invoices.

(n) The applicant further contends that the sequestration of the respondent would be to the advantage of creditors. In support of this, the applicant refers to safekeeping the assets of the respondent for the distribution between creditors as a whole and to the need for a thorough investigation of all the affairs of the respondent in order to trace and retrieve monies. The applicant also refers to the need for a trustee to properly investigate and evaluate the claim of creditors including particularly the alleged claim by Southern Engineering CC and generally the legal position of the close corporation and that business. The applicant also states that sequestration would also avoid the possibility of the

respondent disposing of assets to the prejudice of creditors.

(o)

(p) The respondent filed an answering affidavit. Much of it is devoted to defending the claimed repairer's lien of his brother. Certain preliminary points are also taken. The first of these is one of non-joinder of his brother, Mr JWC Jacobs who he alleges is a lien holder over the vehicle. He states that his brother is the sole member of Southern Engineering CC.

(q) The point of non-joinder would also not avail the respondent. Firstly, on the respondent's version, it would be the close corporation which should have been joined and not his brother. It is after all a separate legal entity to his brother. But more importantly, the alleged lien holder is not a necessary party to this application for sequestration.

(r)

(s) The respondent also objects to evidence concerning the financial enquiry as hearsay evidence. What the applicant however relies upon in that regard is the respondent's own schedule of income and expenses in which there is a reference to the repairer's claim and to a lien. Clearly this evidence, being the respondent's own document, does not constitute hearsay evidence in proceedings against him.

(t)

(u) On the merits of the matter, the respondent contends that he would be entitled to rescission of the judgment in respect of claim 2 – the settlement agreement made an order of court - and further says that claim 1 was "covered" by the proceeds of the sale of Erf 3675, Unit 2B, Klein Windhoek which was the property of Park Mignon Two CC and that he "verily believes" that claim 1 had been paid in the process.

(v) It is however pointed out in reply that the sale of the immovable property belonging to that CC was pursuant to a meeting held between the applicant's representatives and the respondent's father in respect of is father's indebtedness but did not involve the respondent's liabilities at all. The applicant refers to the affidavits exchanged in the respondent's father's sequestration application in support of this. It was stated in that application that the proceeds

of the sale of that immovable property was allocated to two accounts for which the respondent's father was responsible. There was no reference by either party in that application to the payment addressing the respondent's liabilities in any way. This claim is thus unsupported.

(w) Despite the respondent's statement in his answering affidavit that he is not insolvent and is able to pay his debts and liabilities, the applicant in reply points out that, quite apart from his indebtedness to it which remains unpaid, the respondent's indebtedness in respect of the repairs and storage invoices likewise remained unpaid. The applicant contended that the respondent was in fact insolvent.

(x) When the matter was called, Mr L Karsten appeared for the respondent. He stated that he had had received instructions only to approach the applicant's legal practitioners of record in a bid to settle the application as the respondent did not want to incur the costs of preparation of argument and for the matter to be argued. Mr Karsten stated that two settlement offers had been made which were rejected. He confirmed that no heads of argument had been filed and that he had no instructions to advance any submissions in court.

(y) Mr Schickerling appeared for the applicant. He argued that the applicant had discharged the onus upon it to establish *prima facie* its entitlement to an order of provisional sequestration of the respondent. Mr Schickerling further referred to the written heads of argument which had been filed and submitted that the applicant had *prima facie* established its claims against the respondent, the acts of insolvency contended for and that it would be to the advantage of creditors if the respondent were to be sequestrated.

(z) The respondent was present in court. He requested to be heard. He confirmed that he had engaged his instructing attorney to make settlement offers to the applicant and did not want to incur further legal costs. He said that the difference in the invoices for the repairs and storage for the motor vehicle should be ascribed to human error. He said that he wanted to settle his accounts with the applicant and accepted that the vehicle should be sold. He

said that he would also request his mother to assist him to reach a settlement but accepted that he had not been able to do so to date.

(aa) It is well established that an applicant in sequestration proceedings needs to show at the preliminary stage when seeking a provisional order that there is *prima facie* proof of the three facts which are to be present in sequestration, namely the applicant having established a claim in excess of N$100, the respondent having committed an act of insolvency or is insolvent, and thirdly that there is reason to believe that the sequestration would be to the advantage of the respondent's creditors.

(bb)

(cc) Weighing up the affidavits filed in this application, it is clear to me that the applicant has *prima facie* established both of its claims against the respondent. The respondent's less than unequivocal claim that his indebtedness in claim 1 had been "covered" by a settlement made by his father of the latter's indebtedness to the applicant indeed finds no support at all in the affidavits exchanged in his father's sequestration application. I also take into account that this defence would attract on onus. Furthermore, the applicant's assertion that he would be entitled to rescission of the judgment in respect of the second claim does not avail him in the absence of taking any steps in that regard or in establishing a proper basis in his answering affidavit in support of that contention. As far as the lien is concerned, there would in any event remain a sum in excess of N$100 000 a indebtedness even after there had been provision for that lien.

(dd) Having regard to the terms of the return of service of the deputy sheriff, it would further appear that the applicant has in my view *prima facie* established an act of insolvency contemplated by s 8(b) of the Insolvency Act. It is accordingly not necessary for me to consider whether an act of insolvency under s8 (c) or 8 (d) was established.

(ee) Finally, the applicant has *prima facie* also established that the respondent's sequestration would be for the benefit of creditors. An important factor in this regard, and one of the factors which tilted the scales in favour of

establishing this requisite on a *prima facie* basis, is the need for a trustee to investigate the lien claimed. In this regard, there were the two fundamentally conflicting VAT invoices provided from by two separate entities in respect of the claimed repairs. There was also the failure on the part of the respondent to file any specified breakdown of an account for the repairs to the vehicle, despite being invited to do so.

(ff) Upon weighing up of all the facts of the matter and the affidavits filed, I am satisfied that the applicant has prima facie established a case for the respondent's sequestration. It follows from the above that I accordingly grant the following order:

(a) The respondent is placed under a provisional order of sequestration in the hands of the Master of the High Court.

(b) A rule *nisi* hereby issues calling upon the respondent and all other interested parties to show cause, if any, to this court on 22 January 2014 at 15h30 why the respondent should not be placed under a final order of sequestration.

(c) Service of this order is to be effected

(i) by the deputy sheriff on the respondent personally;

(ii) by way of publication in one edition of each Die Republikein and the Government Gazette.

(d) The costs of this application to date are to be costs in the sequestration. Such costs include the cost of one instructed and one instructing counsel. Any further costs of opposition may be determined upon the return date.

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D SMUTS

Judge

APPEARANCES

APPLICANT:	J Schickerling Instructed by Behrens & Pfeiffer
RESPONDENT:	L Karsten Instructed by MB De Klerk & Associates