REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 912/2013

In the matter between:

1.1.1.1.

1.1.1.2. **BANK WINDHOEK LIMITED**

APPLICANT

and

MR ANDREW JOSEPH JACOBS **RESPONDENT**

Bank Windhoek Limited v Jacobs (A 91/2013) [2013] NAHCMD 329 (13 November 2013)

Coram: SMUTS, J
Heard: 5 November
Delivered: 13 November 2013

Flynote: application for sequestration. Applicant relying upon nulla bona retion (s8 (b) of the Insolvency Act, 1936) and also contending that the respondent is insolvent. The applicant's claims were both judgment debtor. The respondent opposed the application and contended that the claims had been covered by the proceeds of a sale of immovable property, secured in favour of the applicant. The respondent filed a supplementary affidavit shortly before the

hearing, stating that he abided the court decision. It appeared from the supplementary affidavit that the respondent was insolvent. Weighing up the evidence and taking into account the evidence of the onus (to establish the requisites for sequestration and in respect of the defences raised), the court was of the view that the applicant had prima facie established those requisite and granted a provisional order of sequestration.

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, a commercial bank, relies upon two acts of insolvency in this application and also contends that the respondent is insolvent.

(c)

(d) The applicant relies upon s8(b) of the Insolvency Act, 1936 which provides:

> 'A debtor commits an act of insolvency if the 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 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.'

Background facts

(e) The applicant obtained two judgments against the respondent and the Deputy-Sheriff subsequently provided a *nulla bona* return in respect of a writ issued for both judgments.

(f)

(g) On 10 October 2012 the applicant obtained judgment against the respondent for payment of the amount of N$90 112, 82 together with interest of 20% per annum from 1 November 2011 to date of payment.

(h) The second judgment obtained by the applicant against the respondent was on 22 November 2012 in respect of an amount of N$61 997, 17 together with interest of 12,75% per annum from 22 October 2012 to date of final payment.

(i) The applicant points out that these two judgments were pursuant to two settlement agreements which were made an order of court. During the negotiations and conclusion of the agreement, the respondent stated that he reached those agreements 'via my sons' and that he had 'acted through my sons'.

(j) It is common cause that the respondent did not comply with the fixed terms of payment which were set out in the settlement agreement thus made an order of court. This resulted in the full outstanding balance becoming due and payable and resulted in the applicant proceeding upon a writ against the respondent.

(k) The writ in respect of the first case was presented to the respondent's son, Mr C. Jacobs, who had represented the respondent throughout the litigation and settlement negotiations as was acknowledged by the respondent. On 9 February 2013, he informed the deputy-sheriff that the respondent 'has insufficient property to satisfy the writ'. The Deputy-Sheriff then recorded in his return:

> 'I was unable to find the defendant . . . his son, Mr C. Jacobs (was) in charge of the premises. . . Mr C. Jacobs informed me that the judgment debtor has insufficient property to satisfy the warrant of execution. I confirm that after due and diligent search I was unable to find sufficient disposable property to satisfy the warrant. . .'

(l) The applicant submits that the writ was thus duly served on the respondent's agent, his son, who had represented him throughout and that an act of insolvency as contemplated by s8(b) was duly established.

(m) The applicant further and in any event submits that an act of insolvency under s8(b) was established – in the absence of personal service of the writ – because the deputy-sheriff failed to find disposable property sufficient to satisfy the judgment. The applicant accordingly contends that a second act of insolvency was thus in any event established by virtue of this fact.

(n) The applicant also contends that the respondent's liabilities far exceed his assets and that he is accordingly unable to pay his debts is thus insolvent.

(o)

(p) In the founding affidavit, the applicant refers to a number of different accounts held by the respondent with the applicant and says that the indebtedness in respect of these other accounts amounted to the sum of N$5 058, 000. In support of this assertion, a statement of balances is attached. But the applicant's deponent acknowledges in reply that she had misread the column reflecting the balances in the account and that the total outstanding indebtedness of the respondent to the applicant was in fact in the sum of N$14 228 487, 84, excluding legal expenses which will still need to be taxed. From this total would need to be deducted an amount which was an agreed settlement figure in respect of the respondent's indebtedness in one account secured by a mortgage bond and certain other amounts which resulted in the outstanding balance of his liability to the applicant at the time in the sum of at least N$7 793, 000 which was considerably more than the N$5 million figure referred to in the founding affidavit.

(q)

(r) The applicant further referred to a judgment which had been obtained against the respondent by the City of Windhoek in a sum in excess of N$11, 5 million. The applicant pointed out that the respondent did not own any immovable property and that there was a massive shortfall in his estate, given the fact that the applicant did not consider that the respondent possessed many assets. The applicant also contended that the sequestration of the respondent would be the advantage of creditors.

(s)

(t) **Respondent's position**

(u) The respondent opposed this application and filed an answering affidavit.

(v)

(w) In his opposition, the respondent took a preliminary point that the applicant had not set security as is required. This point however became moot as the applicant did comply with the requirement to provide security shortly after the application was served upon the respondent and well in advance of the

hearing.

(x)

(y) The respondent further stated that the two claims in respect of which judgment against him had been obtained were the subject of a further compromise or settlement and that the amounts outstanding in respect of these judgment debts would be settled from the proceeds of the sale of Erf 3675, Unit 2B, Klein Windhoek, being the property of Park Mignon Two CC which was secured by way of a mortgage bond in favour of the applicant. The respondent further stated that an amount of N$149 000 was paid in respect of a separate account on 22 October 2012 and that an amount of N$347 000 was paid from the proceeds of the sale of Erf 3675. The respondent further contended that the applicant held security for the claims and had full knowledge of his assets.

(z) The respondent thus admitted the two judgment debts but contended that they had been compromised and that an estimated sum of N$500 000 from the process of the sale of Erf 3675 would be applied and utilised to settle the amounts of the two judgments debts. He accordingly contends that the judgment debts were thus paid in this manner. He also denied liability of the judgment debt to the City of Windhoek on the basis that the judgment was appealed against.

(aa) The respondent denied that his sequestration would be to the advantage of creditors but did not substantiate this.

(bb)

(cc) In reply, the applicant acknowledged that an amount of N$149 000 had been paid. This did not affect the respondent indebtedness in respect of the two claims.

(dd) In reply, the applicant pointed out with reference to a letter from a registrar of the Supreme Court that the respondent's appeal against the judgment in favour of the City of Windhoek had since lapsed.

(ee) After this matter was referred to case management, the respondent was also invited to address aspects in the replying affidavit of the applicant, which

had rectified what was stated in the founding affidavit (in respect of the respondent's indebtedness to the applicant).

(ff)

(gg) Shortly before the postponed date of hearing, the respondent filed a supplementary affidavit. In it, he correctly accepted that the judgment in favour of the City of Windhoek had become final against him by reason of the lapsing of the appeal. He accepted his indebtedness to the City of Windhoek in an amount in excess of N$13, 5 million. He stated that he could not afford to pay that amount and decided that 'it would serve no purpose to attempt to come to an arrangement with my other creditors to attempt to avoid the consequences of not being able to pay all of them.'

(hh)

(ii) The respondent also referred to other judgment debts, not referred in the founding affidavit, which had been taken against him. The names of seven creditors are referred to and judgment debts exceeding a total of N$2 million are then referred to. In addition to these judgment creditors, he also referred to an approximate sum of N$4,4 million as his indebtedness in respect of other creditors – but where judgments had not yet been taken against him.

(jj)

(kk) The respondent further stated that, apart from his personal effects, he had no assets and it would be likely that his creditors would be required to make a contribution to the costs sequestration if they pursue their claims against his insolvent estate. He thus denied that sequestration would be to the benefit of his creditors. He concluded by stating:

> 'With my precarious financial position as set out above I simply cannot afford lawyers to further represent me and I leave the matter in the hands of this Honourable Court and would abide its decision.'

(ll) When the matter was called, his instructing legal practitioner, Mr Karsten, was present and confirmed that the respondent would abide the decision of this court and that he had no submissions to make. No heads of argument had in any event been filed.

The test to be applied at this stage

(mm) The Insolvency Act, 1936 contemplates two distinct stages in a sequestration application. Insolvency proceedings are designed to afford an expeditious remedy to preserve a debtor's estate and enforcing a claim.[1] A provisional order is granted in the preliminary stage. The respondent and other interested persons are then called upon to show why a final sequestration order should not be granted. At the preliminary stage where a provisional order is sought, there need only be prima facie proof of the three facts which are to be present whereas at a final order stage a more positive degree of persuasion is required.[2]

(nn) At this stage of the enquiry, this court would need to be of the opinion that prima facie:

(a) the applicant has established claims against the respondent in excess of N$100; and

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

(c) there is reason to believe that it will be to the advantage of respondent's if this estate is sequestrated.

(oo) Mr Schickerling submitted that the respondent's denials of these factors were either bald or not genuine. He made detailed submissions on the application of the test in determining factual disputes in motion proceedings as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[3] As I put to him in argument, it would not appear to me that this rule together with its exceptions would find application at this stage of the enquiry. What is required is for prima facie proof of these three facts being adduced, with the onus to establish these facts resting upon the applicant.[4]

(pp) I turn to consider whether the applicant has *prima facie* established these

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[1] *Provisional Building Society of South Africa v Du Bois* 1966 (3) SA 76 (W) at p80.

[2] Joubert at al (eds) The Law of South Africa vol II (2nd ed) at 228.

[3] 1984 (3) SA 623 (A) at 634-635.

[4] Joubert et al (eds) The Law of South Africa vol. II, supra at 229.

three facts.

The applicant's claims

(qq) The applicant relies upon the two judgments referred to. The respondent does not despite his indebtedness under those claims but says that they would be paid by a surplus in the course of the applicant finalising the sale of immovable property to realise the applicant's security of a mortgage bond held over that immovable property (to secure the respondent's indebtedness in respect of an account secured by that immovable property).

(rr) The applicant explains in reply how the settlement figure in respect of the realisation of its security was to be applied. It is made clear that the settlement figure in respect of that account had nothing to do with the judgment debts and the accounts represented by them.

(ss) Whilst the onus is upon the applicant to establish its claims, once they are admitted and a defence of settling the claims is raised, it would be for the respondent to establish payment or the compromise of those claims. The respondent's claim that the outstanding amounts of the judgments would be paid by the sale of the property is largely unsupported.

(tt) Taking into account all the evidence advanced on affidavit concerning the two judgment debts, as well as the range of the respondent's accounts held with the applicant or for which he was responsible and the steps taken by the applicant, it would seem to me that the applicant has *prima facie* established that its claims against the respondent are due and payable.

Act of insolvency or being insolvent

(uu) The return by the deputy-sheriff is not essentially placed in issue. It would follow that the applicant has prima facie established both of the two acts of insolvency contemplated by s8(b) of the Act. Firstly, the applicant has *prima facie* established that the respondent's son Mr C Jacobs was the respondent's

authorised agent. But the applicant has also *prima facie* established the second act of insolvency contemplated by s8(b).

(vv) Quite apart from these acts of insolvency, it is clear from the respondent's supplementary affidavit that he is in fact insolvent.

(ww) It follows that the applicant has established the second requisite.

(xx)

Advantage of creditors

(yy) In his supplementary affidavit the respondent contends that his sequestration would not be to the advantage of creditors. He refers to his parlous financial position with judgment debts and other debts for exceeding his assets, and only having his personal effects as assets. He says that a sequestration order would result in creditors who prove their claims having to make a contribution to the costs of sequestration. That would certainly follow upon the exposition of assets and liabilities given by him in his supplementary affidavit. But this exposition must be weighed up with other extracts from his answering affidavit and even a prior portion of his supplementary affidavit which appear to be inconsistent with that exposition.

(zz)

(aaa) In his answering affidavit, he however stated that the applicant's estimate of N$50 000 as to his assets in 'a gross understatement.' Despite this, he failed to set out a list of his assets with values in that affidavit or provide any details of assets.

(bbb) Furthermore, there is the respondent's statement earlier in his supplementary affidavit after accepting that the judgment of the City of Windhoek was final against him:

> 'As I simply cannot afford to pay that amount, I decided that it would serve no purpose to attempt to come to an arrangement with my other creditors to attempt to avoid the consequences of not being able to pay all of them.'

This would imply an ability to come to some arrangement with creditors if his

total indebtedness were to have been so extensive.

(ccc) As against these aspects, the applicant's lists the usually encountered factors raised in support of the respondent's sequestration being to the advantage of his creditors, including a trustee taking control of assets for distribution, investigating the affairs of the respondent in order to trace and retrieve assets and staying legal proceedings.

(ddd) Taking the aforegoing into account, it would seem to me that the applicant has prima facie established that he respondent's sequestration would be to the advantage of his creditors.

(eee)

Conclusion

(fff) It follows from the above that upon a conspectus of all the affidavits filed that the applicant has made out a case for the respondent's provisional sequestration. The following order is accordingly granted:

(a) The respondent is placed under provisional order of sequestration in the hands of the Master of 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:	Y Campbell
Instructed by:	Behrens & Pfeiffer
RESPONDENTS:	T. Mbaeva
Instructed by:	Mbaeva & Associates