



**REPORTABLE**

CASE NO: SA 38/2018

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**STEPHEN GLENN BAARD  
BRIGGITA BAARD**

**First Appellant  
Second Appellant**

and

**SERENGETTI TOURISM (PTY) LTD T/A  
ETOSHA MOUNTAIN LODGE**

**Respondent**

**Coram:** DAMASEB DCJ, FRANK AJA and MOKGORO AJA

**Heard:** 16 March 2020

**Delivered:** 04 December 2020

**Summary:** This is an appeal against a sequestration order granted by the High Court on 7 June 2018.

The respondent on 26 October 2012 obtained a default judgment against the appellants jointly and severally of final payment of the judgment debt, in the amount of N\$269 062.71 and N\$4000 with 20% interest per annum payable from 20 November 2009 to date. Writs of execution in respect of each of the appellants were served on the first appellant in person by the Assistant Acting Deputy Sheriff of Swakopmund on 20 November 2013. The first appellant claimed that they both were

unable to pay their debts due or a portion thereof. As a result the Sheriff issued a *nulla bona* return and advised the respondent of the appellants' inability to satisfy the writs. It was on that basis that on 14 October 2014 the respondent brought an application for an order to have the estates of the appellants sequestrated as the appellants had unsatisfied debts exceeding N\$5000, had committed acts of insolvency in terms of the Insolvency Act 24 of 1936 (the Act), and failed to satisfy an order of insolvency benefitting their creditors in that an appointed trustee could trace further assets in the appellants' estates once their affairs were investigated and could have equitably distributed their assets, thus avoiding the disposition of any assets by the appellants.

Opposing the sequestration application, the appellants raised three points in *limine*: first, that the *nulla bona* return was premature and defective in that it did not contain a ground of insolvency; second, the fact that their marriage was out of community of property, arguing that the writ was not personally served on the second appellant and therefore not served at all; and third, that the contract between the respondent and the appellants, which was the basis of the claims against the appellants, do not support a ruling that would make the appellants' jointly and severally liable for the debt.

The High Court rejected the appellants' points in *limine* and noted that the default judgment of 26 October 2012 was obtained jointly and severally and had not been appealed and/or set aside and therefore still stands. On that basis, the court proceeded with the sequestration application.

On the merits, the High Court noted that the appellants' were not completely honest with the court and that they concealed certain available assets, including their current earnings. The High Court concluded that the appellants had committed an act of insolvency in terms of s 8(c) and (d) of the Act and are indebted to the respondent in excess of N\$600 000, including simple interest at 20% per annum.

Aggrieved, the appellants appealed to this court on the basis that the court *a quo* erred in issuing a final sequestration order based only on the evidence on affidavit; that the appellants committed acts of insolvency and were actually insolvent; that there was reason to believe that the sequestration of the appellants' estates would be to the advantage of their creditors; that the respondent had impermissibly joined the appellants as respondents in one sequestration application. In addition, the appellants sought to raise a new point on appeal, being that the High Court lacked jurisdiction to hear the sequestration application as the application was not accompanied by a security of costs certificate issued by the Master as required in s 9(3) of the Act.

*Ad the application to amend the grounds of appeal*

*Held that* when a party raises a new point on appeal, the court has a discretion to allow the point so belatedly raised if the new point is covered by the pleadings; whether it would cause unfairness to the opposing party(ies); whether the relevant facts to support such ground have been established without a reasonable possibility that facts that would counter the new ground could be raised had the point been taken earlier.

*Held that* where the new point relates to an illegality, an appeal court is entitled to raise the point *mero moto* as the court cannot, in essence, sanction illegal conduct.

*Held that* the purpose of filing the certificate in terms of s 9(3) of the Act is to cover the costs necessarily incurred by the officials to start the sequestration process once an application is launched for a provisional sequestration order and such order is granted but becomes wasted if the order is not confirmed.

*Held that* the irregularity does not amount to a vitiating irregularity and the mischief which s 9(3) of the Act aims to avoid has been cured, although the certificate has been belatedly filed.

*Ad the points in limine raised by the appellants*

*Held that* the joinder of more than one respondent in a single sequestration application is permissible provided the requirements of the permissible joinder test is complied with, namely that, there is complete identity between the respondents who are the debtors in the sequestration application relating to the acts of insolvency committed, their assets and the interests of their creditors.

*Held that* sequestration comes with grave personal and proprietary consequences for an insolvent and accordingly consent to be joined in sequestration proceedings cannot be impliedly given.

*Held that* the joinder of the second appellant in the sequestration application was defective for lack of consent and therefore impermissible, making the sequestration order against the second appellant a nullity.

*Held that* the sequestration order in respect of the second appellant is therefore set aside.

*Ad the merits*

*Held that* the test for insolvency is whether a debtor's liabilities fairly estimated exceed the fair value of their assets.

*Held that* the court when granting a sequestration order must be satisfied that the applicant creditor has a liquidated claim against the debtor of an amount not less than N\$5000; the debtor must have committed an act of insolvency and is in fact

insolvent and based on the facts and circumstances of the particular case the court must find reason to believe that sequestration of the debtor's estate would be to the advantage of their creditors.

*Held that* in the case of the first appellant, all requirements of sequestration have been met and the order of sequestration against the first appellant must stand.

The appeal against the sequestration order relating to the second appellant is upheld.

The appeal against the sequestration order in relation to the first appellant is dismissed.

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## APPEAL JUDGMENT

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MOKGORO AJA (DAMASEB DCJ and FRANK AJA concurring):

### Introduction

[1] This is an appeal against the whole judgment and the orders, including the cost order, granted by the High Court on 7 June 2018. The appellants are husband and wife, Stephen Glenn Baard and Briggita Baard, married out of community of property and working together as business partners. The respondent is Serengetti Tourism (Pty) Ltd trading as Etosha Mountain Lodge, formally the employer of the appellants.

### Background

[2] The respondent on 26 October 2012 obtained a default judgment against the appellants. The appellants were found by the High Court to be jointly and severally liable to the respondent, to the extent of N\$269 062.71 and N\$4000 with 20% interest

per annum payable from 20 November 2009 to date of final payment of the judgment debt.

[3] To have the default judgments satisfied, writs of execution in respect of each of the appellants were served on the first appellant in person by the Assistant Acting Deputy Sheriff of Swakopmund (the Sheriff) on 20 November 2013. The first appellant claimed that they were both unable to pay their debts due or a portion thereof. As a result the Sheriff issued a *nulla bona* return and advised the respondent of the appellants' inability to satisfy the writs thereby committing an act of insolvency in terms of s 8(b) of the Insolvency Act 24 of 1936 (the Act). It was on that basis that on 14 October 2014 the respondent brought an application for an order to have the estates of the appellants sequestrated.

[4] The grounds on which the sequestration application were sought included that, the appellants had unsatisfied debts exceeding N\$5000, had committed acts of insolvency in terms of the Act, and failed to satisfy an order of insolvency benefitting their creditors in that an appointed trustee could trace further assets in the appellants' estates once their affairs were investigated and could have equitably distributed their assets, thus avoiding the disposition of any assets by the appellants.

[5] Opposing the sequestration application, the appellants raised three points in *limine*:

- a) first, the *nulla bona* return was premature and defective in that it did not contain a ground of insolvency;
- b) second, the fact that their marriage was out of community of property, arguing that the writ was not personally served on the second appellant and resultantly was not served at all; and
- c) third, that the contract between the respondent and the appellants, which is the basis of the claims against the appellants, does not support a ruling that would make the appellants jointly and severally liable for the debt.

[6] Rejecting the appellants' points in *limine*, the High Court found that the default judgment of 26 October 2012 was obtained against the appellants jointly and severally and has not been appealed and/or set aside and therefore still stands. On that basis, the court proceeded with the sequestration application.

[7] On the merits, the appellants contended that the application was premature and fatally defective and for that reason, must be set aside with costs. They argued that contrary to the Sheriff's *nulla bona* return, they do have sufficient assets to satisfy the writs. Property owned by first appellant in Henties Bay had been sold and with the entire proceeds a substantial Standard Bank mortgage bond, together with an overdraft and credit card facilities have already been settled, thus reducing the extent of the due debt. The first appellant also refuted claims of undue disposition of assets, contending that the alleged sale of a restaurant he had owned had been

finalized long before the underlying summons was issued and thus has no relevance to the current sequestration proceedings.

[8] The appellants contended that the sequestration of their estates would not benefit their creditors considering that the first appellant has only one substantial creditor and the second appellant none at all. Both of them contended further that they have only regular monthly payments to make to their service providers.

[9] The appellants also argued that both of them are estate agents and earn substantial salaries with which they can settle their debts. For that reason, sequestration will only serve to jeopardize not only their employment, but also their earning capacity and ability to pay their daily expenses.

[10] The respondent contended that as to the first appellant he was personally served with the writs and thus a *nulla bona* return was issued. With regards to the second appellant it was contended that she cannot claim that she was not aware of the resultant return issued. Further went the argument, the appellants had failed to provide the court with an outline of their assets and liabilities to refute a declaration of insolvency. Besides, the respondent contended, the default judgment stands for as long as it has not been set aside.

[11] On 21 April 2016, the High Court found that the appellants were married out of community of property and for that reason opposed the finding that they were jointly and severally liable. The court however concluded that the grounds for granting a



provisional sequestration order in terms of the Act have been met. That is so because, the court held, the appellants had unsatisfied debts in excess of N\$5000; committed an act of insolvency in terms of s 8(b) of the Act; had failed to outline to the court sufficient assets to show solvency giving the court reason to believe that a sequestration order is not premature as they had contended, but would be to the advantage of their creditors.

[12] Furthermore, noting the appellants' non-disclosure and concealment of available assets, the court also found that the assets in their estates, including their current earnings should be made available to their creditors. The High Court thus concluded that the appellants had committed an act of insolvency in terms of s 8(c) and (d) of the Act and are indebted to the respondent in excess of N\$600 000, including simple interest at 20% per annum.

[13] Addressing the question of service on the second appellant the court found that because the first appellant had deposed to the answering affidavit on behalf of the second appellant, he could accept service on her behalf notwithstanding that they were married out of community of property. Further, relating to both appellants, the *nulla bona* return had stated clearly that no property could be found to satisfy the default judgment and they were unable to pay their debts. The High Court confirmed that the appellants, having failed to satisfy the writ, had therefore committed an act of insolvency in terms of s 8(b) of the Act, confirmed the provisional sequestration order and granted the final sequestration order sought.

### The Appeal

[14] The appellants filed their notice of appeal on 6 July 2018 against the whole judgment and orders of the High Court, including the costs order. The appeal was on the grounds that, the court *a quo* erred in issuing a final sequestration order based only on the evidence on affidavit; the appellants had committed acts of insolvency and were actually insolvent; there was reason to believe that the sequestration of the appellants' estates would be to the advantage of their creditors and that the respondent had impermissibly joined the appellants as respondents in one sequestration application. In addition, a new ground is sought to be raised, namely that the High Court lacked jurisdiction to hear the sequestration application as the application was not accompanied by a security of costs certificate issued by the Master as required by s 9(3) of the Act. This new ground is sought to be raised by way of an application to amend the original grounds of appeal.

[15] At the hearing of the appeal, counsel for appellants cited *Cole v Government of the Union of South Africa*,<sup>1</sup> and contended that a new point can be raised on appeal if it is covered by the pleadings and its consideration would not result in unfairness to the opposing party. Emphasizing the importance of the case at hand in determining the solvency status of the appellants, that the prospects of success in the matter were good and that there was no wilfulness on the part of the appellants in the late introduction of the additional ground of appeal, counsel strongly argued that the appellants should be granted the leave sought.

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<sup>1</sup> 1910 AD 263 at 272.

[16] Having also filed its notice to oppose the appellants' late enlargement of their grounds of appeal, the respondent contended that should the application be granted, first, it may dispose of the application; second, the reason tendered for having taken four years for the additional ground of appeal to be raised was insufficient; third, there was insufficient time for the respondent to file a proper response to the application<sup>2</sup> and fourth, the security already provided in the Master's certificate filed on 23 April 2018 was sufficient and substantially compliant with the Act, the contention being that there was no need to provide any further security. Before traversing the merits in this appeal, it is necessary first to address the preliminary question whether the appellants may belatedly supplement their grounds of appeal raising a new ground at the appeal stage.

#### Application to amend the grounds of appeal

[17] The appellants applied for leave to amend their notice of appeal to supplement the record and raise a further ground of appeal. The further ground of appeal seeks to introduce a legal point which was not raised *a quo* and is to the effect that s 9(3) of the Act was not complied with 'on or before the application for the provisional sequestration order was heard on 9 March 2016'. This according to the intended new ground means that the 'court *a quo* lacked the competence to grant the provisional sequestration order and also the final order of sequestration'.

[18] In terms of rule 7(2)(c) of the Supreme Court Rules a notice of appeal must spell out 'concisely and distinctly' the grounds of appeal. These grounds must be set

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<sup>2</sup> Considering that the legal representative had to uplift documents, prepare and brief counsel.

out in separate numbered paragraphs and must specify the findings of fact and the conclusions of law that the appellant intends to raise on appeal.

[19] The notice of appeal thus informs the respondent(s) and the court what the issues on appeal will be so as to allow the respondent(s) and the court to prepare for the hearing of the appeal. The appellant thus by necessary implication limits his appeal to the grounds articulated in the notice of appeal and the appellant will, as a general rule, not be permitted to raise issues not covered by the notice of appeal *Donnelly v Barclays National Bank Ltd*.<sup>3</sup>

[20] Where an application is made to supplement the notice of appeal a distinction must be made between points not raised in the court below, legal points and points relating to factual conclusions.<sup>4</sup> Thus for the purpose of this appeal it is only necessary to deal with the matter on the basis that it is a legal point and was not raised *a quo* but is now sought to be raised on appeal as it was 'overlooked' by the appellants' then legal practitioners *a quo* but was picked up by the legal practitioner tasked with the appeal 'on or about 10 February 2020', namely about five weeks prior to the hearing of the appeal.

[21] The application seeks to introduce certain documentation to supplement the record to establish that the security was not in place when the provisional sequestration order was granted. From the application it is evident that the certificate

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<sup>3</sup>1990 (1) SA 375 (W) at 380H-381B.

<sup>4</sup> *Argus Printing and Publishing Co Ltd v Die Perskorporasie van Suid-Afrika Bpk; Argus Printing and Publishing Co Ltd v Rapport Uitgewers (Edms) Bpk* 1975 (4) SA 814 (A), *Donnelly supra* and *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC).

required pursuant to s 9(3) was only signed by the Master about a month prior to the return day of the provisional sequestration order and only filed with the Registrar of the High Court on 13 February 2020. How this came about is not explained.

[22] In deciding whether to allow a new ground to be raised the considerations generally are to see whether the point is covered by the pleadings, whether it would cause unfairness to the opposing party(ies), whether the relevant facts to support such ground have been established without a reasonable possibility that facts that would counter the new ground could be raised had the point been taken earlier.<sup>5</sup> Further where the new point relates to an illegality, an appeal court is entitled to raise the point *mero moto* as the court cannot, in essence, sanction illegal conduct.<sup>6</sup>

[23] To raise a point at this late stage is from a timing perspective most prejudicial to the respondent. It had already participated in two opposed applications with substantial costs implications which could have been avoided had the point been raised timeously. This aspect however can be addressed with an appropriate costs order if necessary. It must also be borne in mind that it was respondent's duty to ensure that the certificate was at hand when the provisional sequestration order was sought.

[24] The point obviously arose on the pleadings as the respondent (as applicant) had to allege compliance with s 9(3) which it did. However, for unknown reasons the

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<sup>5</sup> See *Donnelly* case above, *Cole v Government of the Union of South Africa* 1910 AD 263 at 272 and *Prosecutor-General v Namoloh* (SA 4/2019) [2020] NASC (19 May 2020), para 37.

<sup>6</sup> *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167, *Zalzman v Toubkin* (2) 1928 OPD 202 and *Naidoo v Karodian Supply Stores* 1936 NPD 323.

matter proceeded without the certificate being handed in to the court *a quo*. Both side's legal practitioners and the judge *a quo* did not pick this up. Respondent seeks to create an issue around the late amendment to the grounds of appeal sought and suggests it was not given enough opportunity to establish whether indeed a certificate was handed in or not. I am not impressed by this effort as there is no such certificate on the court file *a quo* and why a copy, if a timeously issued certificate existed, could not be obtained from the Master is not stated.

[25] In the circumstances I am of the view that the application to amend the appellants grounds of appeal should succeed.

#### Effect of non-compliance with s 9(3) of the Act

[26] In terms of s 9(3) of the Act, a certificate by the Master that security has been given 'for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate' up to either the appointment of the trustee or the discharge of the estate from sequestration must accompany an application for sequestration (including provisional sequestration). In the context of the certificate the reference to sequestration applications in this judgment for practical purposes is a reference to provisional sequestration as this is how sequestration applications normally commence.

[27] The requirement of the certificate has generally been accepted as peremptory or imperative and the rule *nisi* have been set aside despite the fact that a certificate had been belatedly filed. Whereas I agree that a sequestration application should not

be heard without the certificate of the Master relating to security being at hand as this is what s 9(3) of the Act clearly requires, the question that arises is what is the consequences of an order granted contrary to s 9(3). The traditional answer is that such order is a nullity and should be set aside as the requirement relating to security prior to the bringing of a sequestration order is imperative.<sup>7</sup>

[28] The first consideration to note is that s 9(3) is not for the benefit of the respondent in sequestration proceedings. As pointed out by Leon J, 'there is nothing in the subsection which provides that the security must in any way relate to the costs of the respondent: the costs of the opposition are not the costs referred to in the subsection'.<sup>8</sup> It is to cover the costs necessarily incurred by the officials to start the sequestration process once an application is launched for a provisional sequestration order and such order is granted but becomes wasted if the order is not confirmed. A creditor who commences sequestration proceedings does so at his or her own costs until a trustee is appointed<sup>9</sup> and the security required in terms of s 9(3) ensures the mentioned officials' costs are secured if the sequestration application is unsuccessful.

[29] As the objective of s 9(3) of the Act is to ensure that the public purse is reimbursed for its expenses should the sequestration application not proceed, why should the failure to comply with s 9(3) timeously necessarily lead to a nullity of the proceedings where such proceedings have proceeded to the granting of the

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<sup>7</sup> *RSA Factors Ltd v Hansen* 1983 (4) SA 873 (D).

<sup>8</sup> See *RSA Factors* above at 874H.

<sup>9</sup> Section 14(1) of the Act.

provisional order or further and where a certificate in terms of s 9(3) had in the meantime been furnished and the mischief against which s 9(3) is aimed at has been addressed?

[30] It is clear from the wording of s 9(3) that it should be complied with and that a sequestration order should not be granted without the Master's certificate provided for in this section. A failure to produce the certificate at this stage should either lead to a postponement or the refusal of the application for provisional sequestration. This would, of course, allow an applicant to obtain the certificate and launch the application afresh without much prejudice or costs. There is thus simply no reason for not insisting on compliance with s 9(3) at this stage.

[31] The question that arises is what is the situation where the provisional sequestration order has been erroneously granted without such certificate and a certificate is only issued thereafter? With the issuing of the certificate the mischief that is sought to be addressed by s 9(3) is dealt with. Does it mean that the intention of the Act still is that all steps taken in the sequestration process is a nullity? The current case law suggest that the court should not confirm a rule *nisi* where a certificate was issued after the rule *nisi* was granted.<sup>10</sup> This approach is understandable as the rule is premised on it being confirmed unless cause to the contrary can be shown and without a s 9(3) certificate it should not have been issued. However, for the reasons set out below, the approach that the rule *nisi* should necessarily be discharged even if a s 9(3) certificate has in the meantime been

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<sup>10</sup> *RSA Factors* above.



supplied because the granting of the rule *nisi* was a nullity rather than as a matter of legal policy so as not to encourage applicants to attempt to obtain provisional sequestration orders without the requisite security is in my view not the correct approach.

[32] In the present matter the point is only sought to be raised subsequent to the issuing of a rule *nisi* which was opposed and a final order which was likewise opposed and where this issue was never raised *a quo*. As already mentioned, the mischief at which s 9(3) is aimed has in the meantime been addressed. I am not satisfied that the Act intends that all the steps taken to finalise the sequestration application must in such circumstances be considered nullities. This is so because the non-compliance with s 9(3) is not illegal, there is no direct statement in the Act that such non-compliance will void all subsequent actions taken, the security is now indeed in place and to allow a respondent to raise the issue may in such circumstances lead to injustice. Considering the scope and object of the provision this also militates against an automatic nullity in all cases.<sup>11</sup>

[33] The appellants were not prejudiced at all by the non-compliance with s 9(3). As pointed out above the subsection is not for their benefit. They further fully partook in the proceedings so their version was fully placed before the court *a quo* and their case on the merits of the application was fully argued.

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<sup>11</sup> *Torbitt & others v International University of Management* 2017 (2) NR 323 (SC), paras 36-40.

[34] In the result, I am of the view that whereas the granting of the provisional order and possibly also the final order of sequestration were irregular this irregularity did not per se amount to a vitiating irregularity. It is not clear from the Act that a failure to timeously provide the certificate must necessarily lead to a sequestration order being regarded as a nullity where the point is taken for the first time on appeal and after the security has been put in place.<sup>12</sup>

[35] In the result the appellant's attempt to rely on the new point raised in respect of the non-compliance with s 9(3) of the Act cannot assist them in this matter.

#### The issue of Misjoinder

[36] The next point in *limine* to address is the issue of the misjoinder of the second appellant. Relying heavily on the *dicta* in *Ferela (Pty) Ltd v Craigie & others*,<sup>13</sup> the appellants submitted that on the basis that the appellants are married out of community of property, joining them in one single sequestration application is impermissible in law. The respondent however submits that the *Ferela* court did not establish a rule against joining more than one respondent in one single sequestration application. What that court held, submits the respondent, was only to advise against such joinder. For the respondents to construe the advice as a rule, contends the respondent, is to misrepresent the *dicta* of the court and to deviate therefrom.

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<sup>12</sup> *Kanguatjivi & others v Shivor Business and Estate Consultancy & others* 2013 (1) NR 271 (HC), paras 22-25 and 28-29.

<sup>13</sup> 1980 (3) SA 167 (W).

[37] In my view, the *Ferela* court was correct urging against the joinder of more than one respondent in a single sequestration application. That court, relying on the common-law<sup>14</sup> and rule 10 of its Rules<sup>15</sup> which is similar to rule 40 of the High Court Rules<sup>16</sup>, held that a respondent is permitted to join other respondents in a single application if they all rely on substantially the same law or fact where, had they been separately sued, the particular law or fact would apply in the case of each of the applications. In a sequestration application, however, held the court further, the joinder will be permissible if it meets the requirements of the permissible joinder test, namely that, there is complete identity between the respondents who are the debtors in the sequestration application relating to the acts of insolvency committed, their assets and the interests of their creditors.

[38] The *Ferela dicta* has been followed in sequestration proceedings where debtors married out of community of property had been joined. Considering that sequestration is about the coming together of creditors, determining the extent to which their interests may be met by a sequestrated debtor's available assets, the *Ferela* court held at 171 D-F:

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<sup>14</sup> See *Knoesen & another v Huijink-Maritz & others* (5001/2018) [2019] ZAFSHC 92 (31 May 2019), at paras 7-9. Also *Rabinowitz & another NNO v Ned-Equity Insurance Co Ltd & another* 1980 (3) SA 415 (W), at p419.

<sup>15</sup> Rules regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, GN R315, GG 19834, 12 March 1999 provided as follows with effect from 5 May 1999. Rule 10 refers to joinder of parties and causes of action. In particular rule 10(3) states 'Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.'

<sup>16</sup>Rule 40(3): 'A plaintiff may sue several defendants in one action either jointly, jointly and severally, separately or in the alternative whenever the dispute arising between them or any of them on the one hand and the plaintiff or any of the plaintiffs depends on the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.'

'But even more important is the fact that, as far as the third requirement is concerned, one has to do with two sets of creditors, two different sets of assets, two different sets of circumstances which will each have to be investigated in order to decide whether in that particular case there is the likelihood of an advantage to creditors in respect of that particular debtor. It could therefore quite easily be that two completely different cases, both as far as the act of insolvency or actual insolvency and the advantage to creditors are concerned, may have to be heard and determined by the Court.'

[39] *The Ferela* joinder approach has become good law and has been followed in cases where debtors, married out of community of property had been joined. However, as the *Ferela* court noted, courts insist that when it comes to determining whether an act of insolvency had been committed and in particular, determining the advantage to creditors, considering the centrality of the latter factor in sequestration proceedings, the importance of the particular circumstances of each case as context for that determination would require that the estates of the debtors be separated.<sup>17</sup>

[40] Thus and correctly so, in the final analysis, even where individual debtors are joined in one single application, a shared creditor's interests must still be determined in relation to each debtor's available assets based on the applicable facts and circumstances of each debtor so joined. It is therefore in that context that the correctness of *Ferela* must be understood, urging against the joinder of separate estates of individual debtors, unless the conditions, including consent to be joined have been met.<sup>18</sup>

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<sup>17</sup> *Body Corporate of John Rock v Nedzamba (Nedbank Limited Intervening Party)* 2013 JDR 2023 (GNP).

<sup>18</sup> See the much earlier case of *Solomon v Lotter & another* 1924 (WLD).

[41] Generally, parties married in terms of an antenuptial contract (ANC) take comfort in the notion that creditors may not attach the property of the one for the debts of the other. But in this matter the court *a quo* accepted that the one provisional sequestration order had been issued against both jointly and severally thus making them both liable for the debt owed to the respondent. That order had not been appealed and therefore still stands. The High Court treated the separate estates of the appellants together and was satisfied that they had together met all the requirements of sequestration.

[42] Without at any stage of the proceedings separating the estates of the appellants to determine the interests or advantage of creditors resulting from the sequestration, the court *a quo* issued one sequestration order against both appellants.

[43] Two writs of execution had been handed to the first appellant. One writ was served on the first appellant in person and in relation to his own estate. The second writ was also handed to the first appellant but purportedly as service on the second appellant and in relation to her own separate estate. However, the Sheriff did not separate the assets and liabilities of the appellants, nor were the claims against each of the appellants determined.

[44] Further, the Sheriff did not separately determine whether each of the appellant's assets satisfied the writs served. Instead, the writs were treated as if they

related to one estate. So too were the estates treated when the determination was made that there were no sufficient assets to satisfy the writs. That the first appellant was purportedly speaking on behalf of the second appellant was simply accepted. One act of insolvency in terms of s 8(b) was as a result declared to have been committed by both appellants as if there was only one single estate, with the Sheriff issuing a *nulla bona* return as if there was one single estate. The respondent followed suit, joining the appellants in one single application for the sequestration of both of their estates, treating them as if they were one.

[45] It was the contention of the respondent that notwithstanding, the second appellant at no stage objected to the first appellant acting on her behalf. By implication, was the contention, she had given her consent, making the joinder legally permissible. Such a contention should however not be taken lightly. Sequestration comes with grave personal and proprietary consequences for an insolvent, precluding them from participating in a number of public, economic and professional activities.<sup>19</sup> The impact on their proprietary rights are equally grave. Among other things, an insolvent's estate is handed to the Master of the High Court who in turn vests it in an appointed trustee. The insolvent is thus divested of his/her property which must be distributed by the trustee among the insolvent's creditors. An insolvent debtor is therefore divested of control over their own estate, precluding them from dealing in their own property.

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<sup>19</sup> See s20 of the Act for the effects of sequestration on the insolvent's property.

[46] The personal and proprietary consequences of sequestration are therefore too far reaching for the required consent to be joined in sequestration proceedings to be impliedly given. In the context of the above facts and circumstances and for the above reasons I am satisfied that the second appellant did not consent to be joined in the sequestration proceedings. For that reason, the joinder of the second appellant is defective for lack of consent and therefore legally impermissible. As a result, the sequestration order against the second appellant is a nullity and must be set aside.

[47] Citing *Main Industries (Pty) Ltd v Serfontein & another*,<sup>20</sup> the appellants contended that when a court finds that there was impermissible joinder, the entire sequestration application must be nullified and set aside. I disagree. The result in *Main Industries* followed from the finding of misjoinder without any reasoning. Whereas this may be the usual result where a finding of misjoinder it is not necessarily the only finding in all circumstances. In the present matter the facts are as such that the full picture relating to first appellant was put before the court *a quo*. First appellant was the person who guided the opposition to the application, who made detailed answering affidavits and who acted as spokesperson for both the appellants. He is the one who alluded to the fact that his wife's (second appellant) position was different to his and that he did not have the authority to accept service of the writ of execution on her behalf. It also turned out that she possessed property (sold in the meantime) which was not disclosed during the course of the proceedings and when her writ of execution was served on first appellant. In short, it is clear that

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<sup>20</sup> *Main Industries (Pty) Ltd v Serfontein & another* 1991 (2) SA 604 (N).

the first appellant did not suffer any prejudice because the court *a quo* dealt with this position.

[48] Furthermore, in terms of s 16 of the Act the second appellant will have to prepare a statement of her assets for the trustee if first appellant is sequestrated. The trustee will then consider her title to these assets and if disputes arise in this regard these must be resolved as provided for in the Act. This procedure may, of course, assist her creditors including the respondent to decide whether to seek the second appellant's sequestration. The point is this procedure will assist in determining the true assets of the first appellant. This also emphasises the fact that the party prejudiced by the joinder was not the first appellant but the second appellant.

[49] In the circumstances of this case it is desirable that the application against the first appellant be finalised.

#### Insolvency of the First Appellant

[50] Having decided to separate the estates of the first and second appellants, I will confine the rest of the discussion to the separate estate of the first appellant. In that regard and hereafter, all reference to 'the appellants' is in respect of the first appellant unless otherwise stated.

[51] Section 12(1)(c) of the Act outlines the requirements of sequestration. *Venter v Volkskas Ltd*<sup>21</sup> set the test for insolvency to be whether fairly estimated, a debtor's liabilities exceed the fair value of his/her assets. A debtor may therefore satisfy the

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<sup>21</sup> 1973 (3) SA 175 (T), at 179.



insolvency test but for legal purposes may not suffer the legal consequences of insolvency until a final order of sequestration has been issued by a court of law, serving as a formal declaration of insolvency. A court will thus grant a compulsory sequestration order at the instance of a creditor as in this case.<sup>22</sup>

[52] The requirements of sequestration which must be met for a valid sequestration order, repeated here for convenience, are that the applicant creditor must have a liquidated claim against the debtor of an amount not less than N\$5000; the debtor must have committed an act of insolvency in terms of the Act and is in fact insolvent and the court, using its discretion based on the facts and circumstances of the particular case must be satisfied that sequestration would be to the advantage of the creditors. The court in *Braithwaite v Gilbert (Volkskas BPK Intervening)*<sup>23</sup> confirmed that the onus rests entirely on the applicant creditor and not on the debtor to show that the above requirements have been met.

[53] It will be recalled that the first appellant was personally served with the writ of sequestration. When the matter came before the High Court, the sequestration application under case number I 1905/2011, the respondent's first combined claim against the appellants was in the amount of N\$269 062.71 and the second claim for N\$4000 with 20% interest per annum where the appellants were held to be jointly and severally liable. As already indicated, although two writs of execution were issued, the first and second appellants were joined in one sequestration application. The Sheriff

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<sup>22</sup> In the case of voluntary sequestration, the court order is at the instance of the debtor. See s 3 of the Act.

<sup>23</sup>1984 (4) SA 717 (W).

having found no assets to satisfy the writ and the first appellant having failed to point out any, issued a *nulla bona* return, having concluded that an act of insolvency had been committed by the appellants.

[54] In a desperate attempt to reduce his indebtedness to avoid sequestration, when the Sheriff failed to find insufficient property to satisfy the writ, the first appellant found it necessary to mention that he had sold his Henties Bay property to pay off the related Standard Bank mortgage bond and with the remaining balance paid his overdraft and settled the credit card facilities of both himself and that of the second appellant.

[55] According to the first appellant, the sale of his restaurant occurred long before the sequestration proceedings were instituted. He further pleaded that considering that the second appellant did not have substantial creditors except for the regular monthly service providers and without giving a clear indication, he argued that the second appellant had only one other substantial creditor. He also submitted that he, like the second appellant was an estate agent earning a regular and substantial salary and would be able to pay his debts forthwith. Thus, sequestrating his estate, he contended, would not only jeopardize his employment, but will also affect his earning power and capacity to meet his day to day living expenses. For the above reasons, the argument went, a sequestration order will not be to the advantage of their creditors.

[56] First, with a default judgment in the above amount where the second appellant does not owe a substantial amount points to the first appellant as the major, if not the

only, debtor of the N\$600 000, bringing him into the N\$5000 debt bracket required according to s 9(1) of the Act, for an act of insolvency to have been committed. On that basis, the first appellant has satisfied the first requirement of insolvency.

[57] Second, despite the effort he had made to avoid the sequestration of his estate by reducing his debt, selling his Henties Bay property to pay off his Standard Bank mortgage bond, paying their credit cards and joining the second appellant in one application, their combined debt was still too large to satisfy the writ on demand. Thus, the argument that the appellants were seasoned estate agents who earn substantial salaries which would later enable them to pay off their debts, arguing against the grant of the sequestration order, had no merit. The Sheriff found no assets to satisfy the writ, nor could the first appellant, who was served in person point to any. Besides, the first appellant expressly pointed out to the Sheriff that they were unable to pay their debts thus satisfying the second requirement for a sequestration order that an act of insolvency has been committed in terms of s 8 (b) of the Act.

[58] Having decided that the second appellant's estate shall be separated from that of the first appellant and its sequestration be separately determined, the question now is whether the sequestration of the first appellant's estate would be to the advantage of the respondent who he claimed to be his only creditor. The first appellant contended that sequestrating his estate at this point in time would be premature in that he will be able to pay his debts with his regular income and what he claimed were substantial estate agent earnings between R2 million and R3 million per annum.

[59] An important purpose of sequestration is to prevent a debtor from unduly disposing of any of their available assets and thereby disadvantaging creditors. It is therefore important that consideration be given to the interests of the respondent, ensuring that whatever assets still remain in the estate of the first appellant are preserved to avoid any further disadvantage suffered by the respondent creditor.

[60] The first appellant had sold his Henties Bay property, being a substantial part of his estate. With the proceeds he paid off a related mortgage bond he had with Standard Bank and settled credit card debts he and the second appellant had at the time. He thus clearly showed a propensity to prefer some of his creditors above the respondent. Granting a sequestration order against the first appellant would salvage the remaining assets in his estate, protecting them against any dissipation that would further disadvantage the respondent.

[61] Concerning the question of the application of the burden of proof by the High Court, the court had issued a provisional order of sequestration<sup>24</sup> against the appellants' estates, holding that on the return date<sup>25</sup> it will consider and determine whether appellants have placed sufficient evidence before it to satisfy itself that the provisional order shall be made final. The appellants made much of the notion that the court had incorrectly placed the *onus to show cause* why a final sequestration order must not be granted on the appellants, rather than on the respondent creditor who made the claim. The High Court did however find that the appellants had failed to meet the judgment debt, thereby committing an act of insolvency. The court also

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<sup>24</sup> 21 April 2016.

<sup>25</sup> 22 May 2018.

found that the appellants had failed to show that they had made any alternative arrangements to settle their indebtedness to the respondent exceeding N\$5000. The court thus concluded, on a balance of probabilities, that the sequestration of the appellants would be to the respondent's advantage and must be granted and so ordered.

[62] In this court, the appellants strongly contended that the court *a quo* had erred by incorrectly applying the principle of the burden of proof. The *onus*, they contended, as they did in the High Court, that the burden was not on the appellants to discharge, but rested on the respondent. It was submitted that the respondent's failure to discharge the *onus* in terms of the *Plascon-Evans* rule<sup>26</sup> must lead to the court finding in favour of the appellants.

[63] In the South African case of *Braithwaite v Gilbert (Volkskas BPK Intervening)*, the court held:<sup>27</sup>

'It is clear that in order to obtain a final order of sequestration of a debtor's estate the applicant must satisfy the Court that it has a claim for a liquidated amount of not less than R100, that the respondent has either committed an act of insolvency or is insolvent and that there is reason to believe that it will be to the advantage of creditors if his estate is sequestrated. . . .The *onus* of satisfying the Court on these three points is on the creditor and there is no *onus* on the debtor to disprove any of them.'

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<sup>26</sup> *Kauesa v Minister of Home Affairs & others* 1994 NR 102 (HC).

<sup>27</sup> Fn 23 at p718A-B.

[64] Although the court *a quo* might indeed have misapplied the *onus* in relation to the sequestration proceedings, what is however clear is that the first appellant's indebtedness to the respondent is not in dispute. He had considered the respondent as his only creditor. Further, the objective facts in this matter, detailed above, show that all three requirements of sequestration have been met. The facts thus speak for themselves and this court may not disregard the objective facts, preferring form over substance.

[65] The first appellant has committed an act of insolvency and is actually insolvent. He has failed to meet on demand the writ of execution and in his own words stated to the Sheriff that they are unable to pay their debts, thus pointing to the unavailability of assets to satisfy the writ. Further, I am satisfied that sequestrating the first appellant's estate would be advantageous to the respondent. For the above reasons therefore, it was just and equitable that an order of sequestration against the first appellant be granted.

#### Costs in this matter

[66] It was the submission of the appellants and the respondent that, following the basic principle in matters of costs, costs must follow the result. Absent particular facts and circumstances which show otherwise, I am inclined not to deviate from that basic principle in this appeal. Notwithstanding that the appeal against the order of sequestration relating to the estate of the second appellant has been granted, the respondent, being the sole creditor of the first respondent, has succeeded in

confirming the sequestration order against the first appellant, entitling it to the benefit of a cost order.

### Order

[67] Resultantly, the following order is made,

1. The application by appellants to amend their grounds of appeal is granted. As the applicants sought an indulgence from the court in this regard and the respondent's opposition was not unreasonable, applicants are to pay the costs of this application including the costs of one instructing and one instructed legal practitioner.
2. The appeal of first appellant is dismissed with costs, including the costs of one instructing and one instructed legal practitioner.
3. The appeal of second appellant succeeds with costs including the costs of one instructing and one instructed legal practitioner.
4. The order of the High Court is set aside and replaced with the following order:
  - (i) The provisional sequestration order against first applicant is confirmed with costs, including the costs of one instructing and one instructed legal practitioner.
  - (ii) The provisional sequestration order against second applicant is discharged with costs, including the costs of one instructing and one instructed legal practitioner.

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**MOKGORO AJA**

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**DAMASEB DCJ**

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**FRANK AJA**

APPEARANCES

APPELLANTS:

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