IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN CASE NO. 2243/2015

In the matter between:

ABSA BANK LIMITED **Applicant**

and

MOHAMED GOOLAM HOOSEN DADA MIA **Respondent**

JUDGMENT

Bloem J.

[1] On 16 November 2017 this court issued an order in terms whereof the respondent's estate was placed under provisional sequestration. The respondent and other interested parties, inclusive of his creditors, were called upon to advance reasons, if any, on 1 February 2018 why this court should not order that the respondent's estate be placed under final sequestration. The matter served before me on 1 February 2018. During the course of that day the respondent served an application on the applicant for the postponement of the application. That application was opposed by the applicant. When the matter was called I heard submissions on the application for a postponement as well as why it should not be ordered that the respondent's estate be finally sequestrated. I shall deal with the application for postponement first.

[2] The general principles which apply to applications for postponement are trite.[1] The court has a discretion whether an application for a postponement should be granted or refused. That discretion must be exercised in a judicial manner which means that the court must properly consider the facts placed before it. An applicant for a postponement must furnish a full and satisfactory explanation of the circumstances that gave rise to the application.[2] It follows that, absent sufficient facts, the court is unlikely to come to the assistance of an applicant for a postponement.

[3] The essence of the applicant's application for a postponement is contained in paragraph 6 of his affidavit which reads as follows:

> "*We have already engaged into negotiations with a company Siya Phezulu, to sell the abovenamed property to them, to secure advantage to all creditors and especially the applicant…*".

[4] The property referred to in the above quotation is a residential property at King William's Town (the property) of which the respondent is the owner. A mortgage bond has been registered over the property in favour of the applicant as security for the respondent's indebtedness to the applicant pursuant to a loan agreement between the parties. The respondent failed to make monthly payments in terms of the loan agreement. On 30 May 2013 this court granted judgment against the respondent in favour of the applicant for payment of the amount of R1 231 138.44, interest thereon

---

[1] *Myburgh Transport v Botha t/a SA Truck bodies* 1991 (3) SA 310 (NmS) at 314F-315J and *Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459E-G.
[2] *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC) at 1112D-E.

and costs. In addition this court declared the property specially executable.

[5] What is apparent from paragraph 6 of the respondent's affidavit is that he and others (who were not identified in his affidavit) were negotiating the sale of the property. After the issue of the provisional sequestration order the respondent had no power to sell any asset in his estate. In terms of section 20 (1) (a) of the Insolvency Act[3] the effect of the sequestration[4] of the estate of an insolvent[5] is that the insolvent is divested of his estate which vests in the Master until a trustee has been appointed, and, upon the appointment of a trustee, the estate vests in such trustee. In this case the respondent did not dispute the applicant's allegation that the Master had appointed joint trustees in his estate. The respondent's estate accordingly vests in the joint trustees.

[6] The respondent did not allege that he had the consent of the joint trustees to negotiate the sale of the property. To the contrary, the evidence suggests that he is negotiating the sale of the property without the consent of the joint trustees.

[7] But assuming that he had such consent, the sale of the property will not alleviate the respondent's financial problems because, on his version, the prospective seller is willing to purchase the property for the amount of R2 000 000.00. The applicant's main deponent averred that as at 14

[3] Insolvency Act, 1936 (Act No. 24 of 1936).
[4] In section 1 of the Insolvency Act "sequestration order" is defined as any order of court whereby an estate is sequestrated and includes a provisional order, when it has not been set aside.
[5] In section 1 of the Insolvency Act "insolvent" means a debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context and "insolvent estate" means an estate under sequestration.

November 2017 the respondent was indebted to the applicant in "*an amount of R2 841 992.87 representing capital and interest*". The respondent did not deny that averment. I shall deal with this aspect further when I deal with the main application for final sequestration. It therefore means that even if the property is sold to the prospective purchaser for R2 000 000.00, the respondent will, after the sale, still be indebted to the applicant in an amount in excess of R800 000.00.

[8] The respondent faces more problems with his application for a postponement. He failed to explain why the application for a postponement was made only on the day when the applicant sought an order for the final sequestration of his estate. He furthermore failed to explain when he commenced negotiations for the sale of the property. The last minute application for a postponement obviously prejudiced the applicant which did not anticipate being faced with an application for a postponement at the hearing. Regard being had to all the circumstances placed before the court by the parties, I am of the view that the application for a postponement is a delaying tactic. It has no merit and is not *bona fide*. In the circumstances, the application for a postponement should be dismissed with costs. The submissions made by Ms Stretch, counsel for the respondent, to the contrary cannot be sustained.

[9] In respect of the application for final sequestration of the respondent's estate, Ms Eksteen, counsel for the applicant, relied on the fact that the respondent absented himself from the property with the intention to evade

or delay the payment of his indebtedness to the applicant.[6] In his opposing affidavit the respondent alleged that he resides at 507 Quayside Road, Point, South Beach, Durban, Kwazulu Natal (the Durban address). The sheriff could not serve any documents on him at the Durban address. It is pointed out that, because of his absence from the property and the Durban address the applicant was obliged to approach this court for an order that it be authorised to launch the application for the sequestration of the respondent's estate by way of substituted service. Such order was granted on 30 June 2015. The applicant was authorised in terms of that order to serve the papers on the respondent at *inter alia* the Durban address. On 17 January 2018 the sheriff sought to serve the provisional sequestration order on the respondent at the Durban address. His return of service reflected that "*it was impossible for me to locate the given address*". In other words, that address is non-existent. In the applicant's affidavit which was filed in terms of section 9 (4A) (b) of the Insolvency Act, the applicant's attorney stated that on 17 January 2018 the sheriff "*in Durban attended to 507 Quayside Road, Point, South Beach, Durban but the premises could not be located as the sheriff could not locate number 507*." The respondent has neither denied nor dealt in any way whatsoever with that allegation. The respondent had an opportunity to do so in his affidavit in support of the application for a postponement. Despite the allegations made by the applicant's attorney, the respondent simply stated in his founding affidavit in the application for a postponement that he was residing at the Durban address.

[6] Section 8 (a) of the Insolvency Act.

[10] The respondent has not offered a satisfactory explanation for his absence from either the property or the Durban address. In my view the applicant has placed sufficient evidence before the court to come to the conclusion that it is the respondent's intention to evade the applicant and to delay payment of his indebtedness to the applicant. I am of the view that the applicant has established an act of insolvency as contemplated in section 8 (a) of the Insolvency Act.

[11] Even if I am wrong in finding that the applicant has established an act of insolvency as contemplated in section 8 (a), the second ground upon which the applicant relies for the order sought is that the respondent is actually insolvent in that his liabilities exceed his assets. In its founding affidavit the applicant's deponent alleged that the respondent elected to abandon the property in King Williams Town as well as the Durban address and that, to "*the applicant's knowledge, the respondent's assets comprise of the immovable property and should the respondent reply to this affidavit, he is hereby invited to supply the above honourable court with a list of his assets and liabilities as the applicant is not in possession of such list and cannot assist in that regard*". The respondent has elected not to accept the applicant's invitation. I am satisfied that the applicant has established on a balance of probabilities that the respondent's liabilities exceed his assets. The content of his affidavit in support of the application for a postponement puts that finding beyond any doubt. In the circumstances, I am satisfied that the applicant has established the actual insolvency of the respondent's estate.

[12] Once the respondent's estate has been finally sequestrated, the joint trustees would be entitled to sell the property by private treaty which will render a higher return than a forced sale in execution. In all probability the property will realise a market related price which may extinguish the respondent's indebtedness. There is accordingly reason to believe that sequestration of the respondent's estate will be to the advantage of creditors as there is a reasonable prospect of payment of a dividend to them. In the circumstances, I am satisfied that the applicant has placed sufficient evidence before the court for an order that the respondent's estate be placed under final sequestration.

[13] In the result, it is ordered that:

13.1. The respondent's application for a postponement be and is hereby dismissed.

13.2. The respondent's estate be and is hereby placed under final sequestration.

13.3. The costs of the application for the postponement of the application on 1 February 2018 and the costs of the sequestration be costs in the sequestration of the respondent's estate.

_____

G H BLOEM
Judge of the High Court

For the applicant:	Adv E Eksteen, instructed by Mathobi Inc, Houghton and Nolte Smit Attorneys, Grahamstown.
For the respondent:	Adv S Stretch, instructed by Messrs de Villiers Attorneys, Tongaat and Nettletons Attorneys, Grahamstown.
Date heard:	1 February 2018.
Date of delivery of the judgment:	20 February 2018.