REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **9137/2016**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

30/10/17

Date: **WHG VAN DER LINDE**

In the matter between:

Absa Bank Limited **Applicant**

and

Appelcryn, Casper **Respondent**

JUDGMENT

Van der Linde, J:

[1] This is an application for a provisional order of sequestration of the respondent's estate. The respondent is a farmer, and the applicant his bank. The respondent owns land, but it is all bonded to the applicant. The bank put up two certificates of balance, aggregating R10,611,977,89, as of 10 December 2015. The respondent admits this indebtedness. The respondent admits too that he is not able to pay the debt due to the applicant. He says he is not *"currently"* able to do so.

[2] He points out however that the value of his two farms is R2,300,000 and R22,000,000 respectively. These are based on valuations that the applicant has annexed to its founding affidavit, and on which it relies. The same valuations reflect the respective forced sale values as R1,495,000 and R14,300,000, an aggregate of R15,795,000. This would leave a positive residue in the respondent's estate of R5,183,022.

[3] These valuations were dated some four years ago. In the applicant's replying affidavit the debt to the applicant as of 21 February 2017 is stated to be R12,098,880. It is there contended that the respondent's assets *"cannot be valued for much more than R15,795,000.00 and his liabilities amount to at the very least an amount of R13,827,674.64."* That would leave net equity in the respondent's estate of R1,967,325.

[4] The applicant's case for the provisional sequestration of the respondent is his insolvency. That case is asserted in the founding affidavit where, as the cases have firmly said, it is required to be.[1] The assertion is, to be true, that the respondent is *"factually and commercially"* insolvent.

[5] But commercial insolvency, another way of saying that a debtor cannot pay his debts as and when they fall due for payment, is no more than an onus-shifting device, which then burdens the debtor to show that his assets exceed his liabilities.[2] I agree with Ms Cirone for the respondent that it does not serve as a standalone ground for the sequestration of a debtor's estate.[3]

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[1] Recently a full court in this division: Absa Bank Limited v Molotsi (A5022/2015, 20637/2014, 15444/2010) [2016] ZAGPJHC 36 (8 March 2016) at [11]. See too Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others, 1999 (2) SA 279 (T) at 323 F.

[2] Mars, The Law of Insolvency in South Africa, 9th Ed, #1.1, p2.

[3] Compare Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd, 1962 (4) SA 592 per Caney, J at 597 D: *"The proper approach in deciding the question whether a company should be wound up on this ground appears to me, in the light of what I have said, to be that, if it is established that a company is unable to pay its debts, in the sense of being unable to meet the current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency; that it is unable to pay its debts may be established by the means provided in para. (a) or para. (b) of sec. 112, or in any other way, by proper evidence. If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts."*

[6] This issue was put as follows by Fourie, J in the main seat of the Gauteng Division of the High Court, Pretoria:[4]

"[4] This brings me to the central issue to be decided: has it been proven, at least prima facie, that the respondents' estate is insolvent? One may seek to establish factual insolvency either directly by adducing evidence of the debtor's liabilities and of the market value of his assets at the date of the application, or indirectly by providing evidence of circumstances indicative thereof, e.g., the fact that debts remain unpaid, or that the debtor has sought a moratorium or that he has endeavoured to compromise with his creditors (Meskin, Insolvency Law, par 2.1.3). However, a Court must be cautious to infer insolvency from such circumstances. As was pointed out in Corner Shop (Pty) Ltd v Moodley 1950 (4) SA 55 (T) at p 60 the inability to pay a debt should not be taken out of its context, for it may be "consistent with a state merely of temporary financial embarrassment" or due to "commercial insolvency" in circumstances where a debtor's liabilities do not exceed the value of his assets."

[7] On the evidence in this matter the respondent has, on the applicant's own case, established that his assets exceed his liabilities. No question of discretion arises.

[8] For the applicant Mr Meyer referred to Court v Standard Bank of SA Ltd; Court v Bester NO[5] for the proposition that a person is unable to pay his debts if he is unable to pay any one or more of his debts. But there the sequestration application was brought on the basis that the debtor had committed acts of insolvency, as well as that the debtor was factually insolvent.[6]

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[4] OBC Distribution Centre (Pty) Ltd t/a OBC Cold Storage v Correia and Another (12381/14) [2014] ZAGPPHC 743 (23 September 2014).

[5] 1995 (3) SA 123 (A).

[6] See p132: *"At the first hearing Standard Bank sought the sequestration order on the grounds that the appellant had committed acts of insolvency in terms of s.8(c) and (g) of the Act and that she was in fact insolvent as contemplated by s 10(b) of the Act. Scott J held (at 294E-F and 295F-G of the first judgment) that both acts of insolvency had been established. With regard to the question of the appellant's actual insolvency, Scott J correctly pointed out (at 295I) that this depended upon the value placed on her immovable properties. At the time Standard Bank's valuer, Carroll, valued the farm at R1 300 000 and the industrial property at R1 529 220, for a total of R2 829 220, while the appellant's valuers placed a substantially higher value on the properties. Scott J said in the first judgment (at 296B) that the mere fact that Doggett was initially prepared to pay R2 245 000 for the remainder of erf 5089 indicated that Carroll's valuation may be over-conservative. The learned Judge accordingly held that it had not been established that the appellant was in fact insolvent. In the second judgment Scott J confirmed his previous finding that the appellant had committed an act of insolvency in terms of s 8(g) of the Act."*

[9] He referred too to Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others[7] for the proposition that a debtor proves his solvency by paying his debts. But there McEwan, J went further (emphasis supplied):

"It is clear that Levin has not paid the debts owed by him in terms of the deeds of suretyship. The main defences that he has raised have been rejected. One of the strongest proofs of solvency is that a man pays his debts and failure to do so gives rise to an inference that he is insolvent (see De Waard v. Andrew and Thienhaus Ltd., 1907 T.S. 727, per INNES, C.J. at p. 733; Hugo, N.O. v. Lipkie, 1961 (3) SA 66 (O), per POTGIETER, J. at p. 67H; Mars, loc. cit.). At the same time one must bear in mind the principle that the Court will not make an order for compulsory sequestration on the ground of general insolvency unless the facts are clearly proved (see, e.g., Bhyat v. Khurishi, 1929 T.P.D. 896 at pp. 900, 901; Union Government v. Milne, 1948 (3) SA 1153 (T); Corner Shop (Pty.) Ltd. v. Moodley, 1950 (4) SA 55 (T) at p. 59H)."

[10] What is more, in that case the learned judge went on to find that such a case had not been established. So too, in this case, the insolvency of the respondent has not been established, albeit that he concedes that he cannot pay his debts. The way remains open to the applicant, secured to the hilt, to obtain judgment and execute on its solid security.

[11] In the result the consequence is inevitable.

The application is dismissed with costs.

WHG van der Linde
Judge, High Court
Johannesburg

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[7] 1976 (2) SA 856 (W).

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