REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: **2015/17903**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

30/11/2017 _____

DATE SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

And

ROBERT ANDREW McCRAE Respondent
(Identity Number: […])

JUDGMENT

FISHER J:

BACKGROUND

[1] This is an application for the provisional sequestration of the respondent. It has had a relatively lengthy journey through this court. It seems that the delays in obtaining finality have been caused, for the most part, by the respondent.

[2] At a previous hearing of the matter which took place approximately a year ago, i.e. during November 2016, the respondent sought a postponement and leave to supplement his answering affidavit for the purposes of putting forward an expert evaluation of his assets which assets allegedly include cash amounts of approximately R3 500 000, motor vehicles and shareholdings in private and public companies in Australia. His contention was, and remains, that his assets exceed his liabilities by more that R30 million. The postponement was granted for that purpose.

[3] The respondent now states that he did not go ahead with obtaining the intended expert valuation, as settlement negotiations were entered into between the parties and he thus abandoned this exercise on the assumption that there would be a settlement of the matter and such exercise would then be wasted.

[4] It is common cause that a settlement agreement in relation to the indebtedness in issue was indeed reached some months later. Pursuant to this, and on 25 May 2017, Van Oosten J made an order by consent in this court to the effect, *inter alia,* that the respondent would pay the applicant the amount of R 3 500 000 by 31 July 2017.

[5] The respondent did not pay this agreed debt by 31 July 2017 or at all. The applicant thus set down the sequestration application again, and it now comes before

me.

[6] During the week before the hearing the respondent filed an interlocutory application in terms of which he sought leave to file a supplementary affidavit that he apparently had deposed to in May 2017 and to place before the court further matter which was contained in the affidavit founding this interlocutory application.

[7] Notwithstanding the fact that the interlocutory application came late in these proceedings and that there was thus no time for it to be answered, the applicant agreed that the supplementary affidavit together with the other matter could be admitted for the purposes of this stage of the proceedings, subject to its right to answer at a later stage should this be deemed necessary. Such an approach seems sensible and such an order is thus granted.

LEGAL PRINCIPLES

[8] The applicant relies on section 8 of the Insolvency Act which reads as follows:

> *"A debtor commits an act of insolvency-*
> *(e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;"*

[9] In an application for the provisional sequestration the applicant must establish *prima facie* that:

(a) It has established a claim for R200 or more against the debtor;
(b) The debtor has committed an act of insolvency or is insolvent; and
(c) There is reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated.

[10] An advantage to creditors need not necessarily sound in money or a guaranteed dividend to each creditor. In certain circumstances (often when the financial situation of a debtor is unknown to his creditor) an advantage to creditors may be established on other grounds; for example, the avoidance of an unfair distribution of a debtor's assets or an investigation of the debtor's affairs with a reasonable prospect that assets may be revealed as a result of the investigation.

[11] Trengove AJ, in *Investec Bank Ltd and Another v Mutemeri and Another* 2010 (1) SA 265 (GSJ) at 274–275 pointed out that while the creditor's underlying motive may be to obtain payment of his debt, an application for sequestration in fact does not constitute proceedings for the recovery of a debt, but rather *"[i]ts purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally*." (See also *Naidoo v ABSA Bank Ltd*, *Naidoo v ABSA Bank Ltd* 2010 (4) SA 597 (SCA) at para 7).

[12] The making of an offer by the debtor which entails release from his debts is an act of insolvency provided it involves, expressly or impliedly, an acknowledgment by the debtor that he is unable to pay such debts in full.(see: *Laeveldse Koöperasie Bpk v Joubert* 1980 (3) SA 1117 (T) at 1125–1126 and cases there cited).

[13] The Legislature cannot have intended there to be a commission of an act of insolvency under section 8(e) where negotiations for the settlement of a dispute take place in a normal commercial context to "*get a better or more satisfactory deal*" on a transaction and there is no indication thereby that the party so entering into such negotiations is doing so because he is unable to pay his debts. The essence of each of the acts of insolvency is that, by the particular conduct, the debtor has intended to evade or delay the payment of his debts. (*see: Abell vStrauss* 1973 (2) SA 611 (W); *Berrange NO v Hassan and Another* 2009 (2) SA 339 (N)) -unaffected by this case on appeal in *Hassan and Another v De Villiers Berrange* (SCA), 2012 6 SA 329 (SCA)).

[14] The test in relation to the debtor's intention is a subjective one, however such intention is established "*by a process of inferential reasoning and is not dependant on the mere ipse dixit of the debtor*". In determining whether the requisite intention existed the Court must "*weigh up all the relevant facts and circumstances in order to determine what, on a balance of probabilities, was the 'dominant, operative or effectual intention in substance and in truth*' of the debtor."(See: *Hassan and Another v De Villiers Berrange NO supra* at para 37).

[15] An offer is one within the purview of section 8(*e*) of the Insolvency Act notwithstanding that it purports to have been made "*without prejudice*".

[16] In *ABSA Bank Limited v Hammerle Group* (*Pty*) *Ltd* 2015 (5) SA 215 (SCA) at para 13 the Supreme Court of Appeal stated;

> "*it is true that as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure . . . regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency. . . public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings is a matter which by its very nature involves the public interest. A concursus creditorum is created and the trading public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged".*

THE FACTS

[17] The applicant's claim against the principal debtor arise out of three agreements concluded between the applicant and the principal debtor; namely:

A written loan agreement concluded between the applicant and the principal debtor on 12 November 2009; a written overdraft agreement concluded between the applicant and the principal debtor on 20 November 2009; and a written fleet management facility agreement concluded between the applicant and the principal debtor on 12 December 2011.

[18] The principal debtor was liquidated by a third party on 14 March 2014. Apparently unaware of the winding up order, the principal debtor applied again for voluntary liquidation on 6 May 2014.

[19] The liquidation of the principal debtor constitutes a breach of all three agreements. The applicant alleges that, as at 19 March 2014, the principal debtor was indebted to the applicant in the following capital sums: R4 331 375.75 in respect of the loan agreement; R3 303 150.38 in respect of the overdraft agreement; and R42 524.19 in respect of the fleet agreement.

[20] The respondent is liable in his capacity as surety and co-principal debtor for these payments. The total amount that the applicant may recover from the respondent under his suretyship is unlimited and includes all unpaid interest. The respondent puts forward no compelling defence to this indebtedness – save to raise issues of miscalculation which would not, in any event, serve to reduce his indebtedness significantly .

[21] On 7 April 2014, the respondent met with Ms Georgina Brand (of the applicant) and with Ms Janine Matthews (formerly of the applicant's attorneys) for the purposes of attempting order to resolve the indebtedness. At the meeting, the respondent indicated that he would make an offer in full and final settlement of the total indebtedness.

[22] On 5 May 2014, the respondent emailed Ms Matthews and offered (and I quote):

"*SAR1M immediately and 500k every 6 months for a period of 18 months thereafter in final settlement*." ("*the offer*").

[23] The offer amounted to some R2.5 million over 18 months in respect of a total indebtedness of more than R7 6 million.

[24] As stated above, on 25 May 2017 a consent order was issued by this court in terms of which, in essence, in full and final settlement of these proceedings, the respondent would make payment to the applicant of the sum of R3.5 million by no later than 15 July 2017.

The supplementary answering affidavit and the other new matter, is aimed, in the main, at demonstrating that the respondent's assets far exceed his liabilities, so that he is not insolvent. This notwithstanding, the respondent has failed to make payment to the applicant of the settlement figure contained in the consent order or any portion thereof. This is not disputed. In the face of this glaring failure, the protestations of wealth ring somewhat hollow. It is worth repeating the oft-quoted dictum of Innes CJ in *De Waardt v Andrew & Thienhaus Ltd*: 1907 TS 727 at 733:

> "*Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him. . . . Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes*."

[25] The respondent contends furthermore that he has not committed an act of insolvency under section 8(e) because, at all material times, he was negotiating to pay the debt *on behalf of* the principal debtor (in liquidation).

[26] The respondent has no right or authority to negotiate on behalf of the principal debtor as it is in liquidation the debt is his debt as well as the debt of the principal debtor in liquidation. It is, in the circumstances, contrived to suggest an offer from him was not made in respect of his own indebtedness. Furthermore, it seems clear that the respondent was closely associated with the principle debtor. Not only was the principle debtor was in liquidation at the time of the offer, but an attempt was purportedly made to liquidate it voluntarily on 6 May 2014 – i.e. the day after the offer was made. If the principle debtor was to be voluntarily wound up it would obviously not be in any position to make good on such an offer and thus one must assume that the offer was not on its behalf. That the offer was made by the respondent personally is fortified by the fact that the further and on-going settlement negotiations admittedly ensued with the respondent and a settlement was ultimately concluded with him personally.

[27] The respondent attached to his supplementary affidavit a spreadsheet prepared by him of his assets and he attached to the affidavit in support of the interlocutory affidavit what he contends is an updated spreadsheet. These spread sheets show that, on his version, he has disposed of certain assets. There is no explanation given as to what he did with the proceeds of these disposals. Furthermore, he attaches no proof of his holding of these assets – stating merely that he has at all times intended to provide proof in the form of an expert valuation. That this expert report is still not forthcoming notwithstanding that the alleged estate seems straightforward and easily capable of valuation, is of concern. The respondent has failed even to give any proof of the alleged cash component of his assets which he puts at R 3 500 000. One would expect that, at very least, this would be a simple matter to verify by way of bank statement. It is also difficult to understand why- if there is cash available- the settlement amount could not be paid

[28] The respondent did not pay the debt notwithstanding that there does not appear to be any defence that the amount claimed is owing by him. He then made an offer which was substantially less than the amount owing. There was no indication of any attempt to engage in a negotiation process in the context of the offer. In fact, when there was eventually a negotiation process which occurred in the course of the application for sequestration which did result in settlement the amount was still not

paid. The respondent furthermore, admits that he could not pay this agreed lesser amount. This inability to pay even the compromised debt is compelling evidence that the offer was made in the first place on the basis of inability to pay.

[29] In my view it has been established at least *prima facie* at this stage that the email of 05 May 2017 constitutes an offer by the respondent to make an arrangement with the applicant to release him partially from his debt and that he has thus committed an act of insolvency; that there is a substantial sum owing to the applicant and, that it will be to the benefit of the respondents creditors that the respondent be sequestrated, at very least so that the true state of his affairs can be investigated and his estate protected by a trustee.

[30] In all the circumstances, this appears to me to be a proper case for a provisional order to be granted.

ORDER

I thus make the following order:

1. The estate of the respondent is provisionally sequestrated.
2. All persons who have a legitimate interest in the outcome of this application are called upon to put forward their reasons why this court should not order the final sequestration of the respondent on 19 March 2018 at 10h00 or so soon thereafter as the matter may be heard.
3. A copy of this order must forthwith be served on:
    3.1. The respondent personally;
    3.2. The employees of the respondent;
    3.3. The Master and
    3.4. The South African Revenue Services.

4. The costs of this application are costs in the sequestration of the respondent's estate.
5. The respondent is granted leave to supplement his answer in the proceedings with:
   5.1. The affidavit deposed to by him on the 22 May 2017 and the annexures therein; and
   5.2. Paragraph 31 to 38, and the annexures referred to therein, of the affidavit in support of the respondent's interlocutory application for leave to supplement.
   5.3. The applicant is granted leave to file a further reply to the respondent's further affidavit and evidence within ten (10) days of the grant of this order.

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FISHER J
HIGH COURT JUDGE
GAUTENG LOCAL DIVISION

Date of Hearing: 09 November 2017

Judgment Delivered: 30 November 2017

APPEARANCES:

For the Applicant: Adv A Bester Instructed by Jason Michael Smith Inc.

For the Respondent: Adv G Karinos SC with Adv M De Oliveira Instructed by Schindlers Attorneys.