REPUBLIC OF SOUTH AFRICA

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

CASE NO: 25062/2018

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

…… ……
SIGNATURE **DATE**

In the matter between:

VBS MUTUAL BANK (IN LIQUIDATION) Applicant

and

ANDILE MALUSI ATTWELL RAMAVHUNGA First Respondent

ZANELE PERTUNIA MAZEER RAMAVHUNGA Second Respondent

JUDGMENT

MATOJANE J

Introduction

[1] This is an application for the final sequestration of the joint estate of the respondents, Mr and Mrs Ramavhunga, who are married in community of property. The joint estate of the respondents was provisionally sequestrated on 3 August 2018 by a court order granted by His Lordship Mr Justice Tsoka.[1]

[2] The application finds its genesis in the large-scale fraud perpetrated on retail depositors of the applicant, VBS Mutual Bank ('VBS' or the 'Bank') which includes, among other things: members of the Venda community; business institutions; and public institutions, including local municipalities and the Public Investment Corporation ('PIC').

[3] The fraud has caused the VBS a loss of at least R1 521 925 280.40, which led to the Bank's severe liquidity crisis. On 10 March 2018 VBS was placed under curatorship in terms of s 81 of the Mutual Banks Act 124 of 1993 read with s 69(1) of the Banks Act 94 of 1990. SizweNtsalubaGobodo Incorporated ('SNG'), a firm of auditors, was appointed as the curator of the Bank. Annosh Rooplal ('Rooplal'), a director of SNG, conducted preliminary investigations into the fraudulent scheme and deposed to the founding affidavit in support of the present application.

[4] Pursuant to Mr Rooplal's initial findings, the Deputy Governor of the South African Reserve Bank, in his capacity as the Chief Executive Officer of the Prudential Authority, established in terms of s 32 of the Financial Sector Regulation Act 9 of 2017 (the 'FSR Act') appointed Advocate Terry Motau SC as investigator to conduct an investigation into the Bank.[2] The investigation uncovered numerous serious irregularities, including wide-scale fraud, in the conduct of the banking business of VBS.

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[1] *VBS Mutual Bank (In Liquidation) v Ramavhunga and Others* (2018/25062; 2018/25057) [2018] ZAGPJHC 516 (3 August 2018).
[2] In terms of section 134 of the FSR Act.

[5] Mr Rooplal obtained an affidavit deposed to by Mr Phophi Londolani Mukhodobwane ('Mukhodobwane') in terms of s 136(1)(a) and s 140(6) of the FSR Act, dated 22 May 2018. Mukhodobwane, who was the Head of Treasury of VBS, is a co-perpetrator of the fraudulent scheme. VBS relies on his evidence in the affidavit to assert that Ramavhunga participated and benefited from the aforesaid fraudulent scheme, which involves Vele Investments (Pty) Ltd ('Vele'). VBS assert that Ramavhunga is jointly and severally liable to VBS for the loss occasioned as a result of the fraud.

Background facts

[6] The following facts are either common cause or at least not disputed. The fraudulent scheme involved Vele. According to Mr Rooplal, the scheme was devised and executed by the following executives and officials within VBS: Tshifhiwa Calvin Matodzi ('Mr Matodzi'), the Chairman of the VBS Board of Directors and the Chairman of Vele; Andile Malusi Attwell Ramavhunga (the first respondent in this matter), VBS' Chief Executive Officer; Robert Madzonga ('Mr Madzonga') who is VBS' former Chief Operations Officer and who thereafter became the Chief Executive Officer and Chief Operating Officer of Vele; Phophi Londolani Mukhodobwane, VBS' Head of Treasury; and Phillipus Nicholas Truter ('Truter') VBS' Chief Financial Officer.

[7] The estates of Mr Matodzi, Mr Mukhodobwane, Mr Truter and Mr Madzonga have been finally sequestrated. Vele was finally wound-up on 31 July 2018.

The fraudulent scheme

[8] According to Rooplal, the fraudulent scheme was effected in the following manner: Truter created fictitious deposits by manufacturing general ledger entries on the EMID system.[3] He would then set up and use 'suspense accounts' within VBS to create fictitious deposits, from where they were credited to the intended beneficiaries' VBS accounts. Truter then credited the fictitious deposits to VBS accounts held by the perpetrators or VBS accounts held by Vele or its related

[3] The EMID system is an electronic banking platform which records the accounting entries relating to banking transactions.

parties. Mr Mukhodobwane would authorise the release of the fictitious deposits out of the VBS accounts into a bank account held in another bank. The money flowing out was the real money that had been deposited therein by the depositors.

[9] The fictitiously created deposits were used by the perpetrators to clear their numerous overdraft facilities, purchase immovable properties and high-end motor vehicles and a helicopter.

[10] VBS seeks the final sequestration of the joint estate of the first and second respondent on the basis that Mr Ramavhunga knowingly participated and benefited from the fraud described above which involves Vele.

Hearsay evidence

[11] Mr Ramavhunga argues that Mr Mukhodobwane's affidavit, which is relied upon by VBS, amounts to inadmissible hearsay evidence and ought to be struck out by the Court. Mr Rooplal, in his affidavit, states that after his appointment as a curator, he conducted a preliminary investigation that confirmed fraud amounting to R1.5 billion. His investigation was confirmed by Mr Mukhodobwane in his affidavit. The corroboration cannot, therefore, be hearsay.

[12] Second, Tsoka J, in his judgment provisionally sequestrating the joint estate of the Ramavhungas, has already determined that Mr Mukhodobwane's affidavit does not constitute hearsay evidence and that even if it does, it is admissible under the Law of Evidence Amendment Act 45 of 1988. Tsoka J's decision on the admissibility of Mr Mukhodobwane's affidavit is a finding of law and can only be overruled on appeal. See *Macdonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another*.[4]

Disputes of fact

[4] *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another* 1997 (1) SA 1 (A) at 27D-E. The Appellate Division in this case found that a decision on the admissibility of evidence is one of law.

[13] It is trite that where there is a genuine and bona fide dispute as to whether the respondent in sequestration proceedings is indebted to the applicant, the court should as a general rule dismiss the application.[5] In *Kalil v Decotex (Pty) Ltd*,[6] Corbett JA held as follows:

'… In regard to *locus standi* as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding-up order. The *onus* on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds….'

[14] Ramavhunga does not dispute the allegations of fraudulent activities within VBS. His defence is that he was not, at any time, a participant in the fraudulent scheme. He explains that to the extent that massive fraud was committed, he does not bear personal knowledge of the details thereof. He states that he relied on information provided to him by his subordinates.

[15] The remarks by Corbett JA in the oft-quoted case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* is apposite:[7]

'….It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact…. [such as] where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers….'

[16] The assertion by Ramavhunga that he was unaware of what was happening at VBS, including the perpetuation of the fraudulent scheme is untenable and demonstrates a lack of bona fides on his part. Ramavhunga, as a Chartered

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[5] *Badenhost v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T) at 347-8.
[6] *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980B-C.
[7] 1984 (3) SA 623 (A) at 634H-635C.

Accountant and the Chief Executive Officer of VBS, must have known that VBS paid for and purchased a helicopter for an amount of R12 825 000. He must also have known that Mr Matodzi purchased a Ferrari for an amount of R6 500 000.

[17] Ramavhunga was involved when Vele fraudulently acquired shares valued at R80 million in VBS to become the majority shareholder in VBS. Insure (Pty) Ltd ('Insure') deposited an amount of R80 million into VBS, which purported to be payment by Vele for its shareholding in VBS. The deposit was placed with VBS for two weeks for a purpose unrelated to the VBS share acquisition transaction. On 13 March 2017, the deposit was withdrawn by Insure in the ordinary course of business.

[18] In order to create a paper trail, Mr Ramavhunga addressed a letter to the VBS Board in which he motivated for Vele's acquisition of shares in VBS, stating that Vele has deposited amounts over R250 million into VBS during periods of liquidity distress. Also, he stated that Vele, through Insure, had held deposits over R1.5 billion over a six-month cycle which was false.

[19] One of the essential disputes was the R15 million that Ramavhunga received from Vele. He was one of the five individuals that received a 'bonus' payment on the very day that R350 million was fictitiously created in Vele's VBS account. I agree with the findings of Tsoka J when he dealt with the issue in these terms:

'[19] On 01 August 2017, Dambale submitted an invoice for the said amount of R15 million, R6 million being the introductory fee while the R9 million was the success fee. He is, however, unable to explain how in August 2017, the period when he introduced one Mhlanga to Matodzi for the acquisition of Mvunonala, he or Dambale could have been entitled to R9 million success fee when nothing at that stage was concluded. He changed tact. His explanation, which is implausible, is that August 2017 is the period he travelled to Zimbabwe to negotiate the acquisition of Mvunonala. However, this does not explain the success fee of R9 million in August 2017 when the deal was in its gestation. In his evidence before the investigation instituted by the Deputy Director-General of the SARB in terms of Act No. 9 of 2017, he conceded that Mvunonala was purchased by Gazela Trust as far back as April 2017. The explanation that he went to Zimbabwe to negotiate the purchase of Mvunonala is, therefore, a lie.

[20] The uncontested evidence is that the shares in Mvunonala as at April 2017 were owned by Gasela Trust, which acquired Mvumonala for R700 million. That the R15 million is the

proceeds of fraud is more probable if not true. The attempted explanation by Ramavhunga of the origins of this amount is not only beyond reasonable doubt false but is a lie. The R15 million is the proceeds of fraud perpetrated on VBS. In the result, the court finds his explanation implausible and not bona fide. VBS has established a prima facie case against him for the provisional sequestration of his estate.'

[20] According to Mr Rooplal, there was no declaration of this arrangement in any of the board or governance meetings, nor was there any other formal declaration to the Bank in violation of his fiduciary duties and good corporate governance standards expected of a bank CEO.

[21] Mr Mukhodobwane alleges that fictitious contract finance deals were created to generate fictitious profits he states that Mr Ramavhunga signed fictitious contract finance deals totalling approximately R100 000. Witnesses have testified in the investigation conducted by Advocate Motau SC that Ramavhunga had taken the 'credit decisions' in respect of those fictitious contract finance deals. Mr Ramavhunga admitted in his testimony in the investigation that he signed the fictitious contracts.

[22] Ramavhunga was aware of the bribery and corruption involving payments of commissions to influential persons. Two senior executives of the PIC, Mr Magagula (the Head of Risk at the PIC) and Mr Nesane, (the Head of Legal at the PIC) were respectively appointed by the PIC as non-executive and alternate directors of VBS. Both Mr Magagula and Mr Nesane confessed, under oath, that payments made to them by Vele were bribes to keep them silent. Nesane testified that Ramavhunga knew that the payments were bribes.

[23] Ramavhunga, as CEO of VBS, aggressively pursued the opportunity for VBS to obtain a R1 billion deposit from the Passenger Rail Agency of South Africa ('PRASA'). Ramavhunga admits that he instructed Mukhodobwane to pay Bhekwam Holdings (Pty) Ltd ('Bhekwam Holdings') R1.5 million as a 'performance incentive' in this regard. He alleges that Bhekwam Holdings had an agreement with VBS for it to try and convince PRASA to open a bank account with VBS. According to Mr Rooplal, Ramavhunga failed to disclose that Mr Gift Manyanga, VBS' Chief Banking Officer, is the sole director of Bhekwam Holdings and that Bhekwam Holdings is Mr Manyanga's alter ego. Mr Ramavhunga and Mr Manyanga signed the agreement.

The agreement does not refer to PRASA or the facilitation of the 12-month deposit from PRASA (as Mr Ramavhunga alleged).

[24] Mr Ramavhunga does not explain why a 'performance incentive' had to be made to Manyanga's Bhekwam Holdings when Manyanga had, in his capacity as Chief Banking Officer of VBS, and without reference to Bhekwam Holdings, corresponded with Ms Page, the CFO of PRASA, regarding its potential R1 billion deposit.

[25] Despite knowing that Ms Page and Mr Botabota of PRASA were against opening an account with VBS, a payment of R1.5 million was made into Mr Manyanga's Bhekwam Holdings account.

[26] On 24 January 2018, Mr Ramavhunga wrote to the new PRASA acting Group Chief Executive Officer, Mr Molepo, to motivate the deal. He offered PRASA an increased rate of 9.25% per annum, and falsely claimed that Vele had an asset base of R50 billion. Ramavhunga further stated that VBS was 'one of the most highly capitalised banks in the country with a current capital adequacy of 32% against industry average of 15%'.

[27] Despite Ms Page and Mr Botabota's disapproval, Mr Molepo agreed to a deposit with VBS, to which Ms Page emphatically refused.

[28] I find that Ramavhunga has failed to raise a bona fide disputes of fact on the papers, as he failed to seriously and unambiguously address the facts he says he disputes. His denials are fictitious and intended merely to delay the inevitable.

Liquidated claim

[29] Ramavhunga contends that VBS has failed to establish a liquidated claim against him. He argues that the claim on which VBS has based its application is not for a liquidated amount as the amount has not yet been determined. Ramavhunga refers to Rooplal's affidavit where it is stated that the Bank has suffered a loss of over R1 521 925 280.54. Mr Ramavhunga maintains that the debt cannot be proven without extrinsic evidence as the investigation itself remains ongoing.

[30] In *Irvin & Johnson Ltd v Basson*,[8] a manager was dismissed when an investigation into the affairs of the branch that he managed revealed that he had to misappropriated funds from his employer, the sequestrating creditor. The investigations were not yet complete. The respondent argued unsuccessfully that the applicant had not proven a liquidated claim. The court held:

'For the present purposes, it is of no consequence, in my view, that the full extent of the respondent's liability may eventually prove to be in excess of the amount of R103 925,49. The evidence, as it stands, if it is accepted, establishes a liability of not less than the amount to which I have referred. ..

[31] I accordingly find that VBS' claim of R1 521 925 280.46 is a liquidated claim and it therefore satisfies the requirements of sections 9(1) and 12(1)(a) of the Insolvency Act 24 of 1936 (the 'Insolvency Act').

[32] I now turn to consider the essential issue relating to the provisions of section 12(1) read with sections 9(1) of the Insolvency Act. The section provides as follows:

'**12. Final sequestration or dismissal of a petition for sequestration**—

(1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and

(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 of the debtor if his estate is sequestrated, it may sequestrate the estate of the debtor.

[31] Section 9(1) of the Insolvency Act, in so far as is relevant to this matter, provides that a creditor who has a liquid claim for not less than R100 against a debtor who has committed an act of insolvency or is insolvent may petition the court for the sequestration of the estate of the debtor. It is not disputed that it will be to the advantage of creditors of the joint estate if the estate is sequestrated.

Factual insolvency

[8] *Irvin & Johnson Ltd v Basson* 1977 (3) SA 1067 (T) at 1072H-B.

[32] Mr Ramavhunga submits that VBS has not in its founding papers made the critical averment that he is factually insolvent and has not attended to any valuation his assets and liabilities. He argues that that VBS has failed to provide any evidence that he and his wife are factually insolvent and that their liabilities exceed their assets.

[33] The court is empowered to grant a final order of sequestration despite the fact that factual insolvency was not specifically relied upon in the application.[9] Such proof need not be direct. It is enough if facts are proved from which the inference of insolvency is fairly and properly deducible.[10] The question of whether or not the debtor is, in fact, insolvent is decided on the balance of probabilities. If the debtor's liabilities (fairly valued) exceed his assets (fairly valued) he is insolvent.

[34] In the investigation, Mr Ramavhunga testified before Advocate Terry Motau SC that he was indebted to Mr Matsepe, who had granted him a personal loan of R750 000. He testified that he had repaid R100 000 and that he is unable to repay the balance due to Mr Matsepe. The best proof of solvency is payment of debts, and consequently, Mr Ramavhunga's failure to pay is itself an indication of actual insolvency.[11]

[35] Ramavhunga admits receipt of R15 million from Dambale Holdings. Neither he nor Dambale have filed tax returns in respect of this income, and they have not been assessed for income tax. Since Dambale is Ramvhunga's alter ego, it is likely that he is personally responsible for this tax liability.

[36] Mr Ramavhunga has failed to disclose that he has a bank account with Investec Bank into which more than R2.1 million was deposited between August 2018 and April 2019, despite him being advised of his obligations in terms of s 23 of the Insolvency Act.

Advantage to creditors

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[9] *Smith and Walton (SA) (Pty) Ltd v Holt* 1961 (4) 157 at 166 E-H.
[10] *Absa Bank Ltd v Rhebokskloof (Pty) Ltd & Others* 1993 (4) SA at 443B-E.
[11] See *Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd intervening)* [1998] 2 All SA 433 (W) at 443 'Factual insolvency may also be established indirectly by adducing circumstances indicative thereof – such as the facts that respondent's debts remain unpaid…'

[37] There is a reasonable possibility that a pecuniary benefit will redound to VBS if the joint estate of the respondents is sequestrated. The is also the prospect that the trustee of the joint estate will be in a position to conduct a proper enquiry into the affairs of Mr Ramavhunga and his wife which might yield further assets falling into the insolvent estate that may have been concealed. VBS has discharged the onus of establishing that there is reason to believe that the sequestration will be to the advantage of creditors.

[38] In the circumstances, I find that a proper case has been made out for the sequestration of the respondents joined estate.

I accordingly make the following order:

1. The joint estate of Ramavhunga, Andile Malusi Attwell (Identity Number […]) and Ramavhunga, Zanele Pertunis Mazeer (Identity Number […]) is placed under final sequestration;

2. The cost of the application, including the costs of two counsel, shall be the costs in the sequestration of the estate.

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K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	21 June 2019
Date of judgment:	23 August 2019

Appearances:

Counsel for the Applicant:	Adv. M Antonie SC
	Adv. E van Vuuren SC
	Adv. Gishatha Singh
Instructing Attorneys:	Werksmans Attorneys

Counsel for the Respondents:	Adv. J H Groenewald
Instructing Attorneys:	BDK Attorneys