REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/19791

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

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SIGNATURE **DATE:** 13 August 2021

In the matter between:

MERCANTILE BANK
A DIVISION OF CAPITEC BANK LIMITED Applicant

and

MICHAEL MAURICE ROSS Respondent

JUDGMENT

WEINER J

Introduction

[1] The applicant applied for the sequestration of the respondent's estate. The applicant initially relied on the fact that the respondent failed to pay the sum of R32 807 774.41 owed to it. The applicant delivered a letter of demand. In response, the respondent denied his indebtedness. The applicant contended that such failure to pay amounted to an act of insolvency in terms of s 8(g) of the Insolvency Act 24 of 1936 (the 'Act').[1] It abandoned reliance on this section and relied on the fact that the respondent had committed an act of insolvency in terms of s 8(c) of the Act,[2] in that he disposed of his immovable property (the Gallo Manor property) to the prejudice of his creditors, at a time when he was insolvent. The applicant also alleged that the respondent was factually insolvent.

[2] Section 9 of the Act details the requirements for a sequestration order. It is not disputed by the respondent that all of the formal requirements set out in s 9 have been complied with by the applicant. In addition, the respondent admitted that he has no employees, and therefore there was no need to comply with s 9(4A)(a)(i)-(ii) of the Act, which relates to service on trade unions and employees.

[3] The application for sequestration is based on the respondent being indebted to the applicant in the sum of not less than R100, as contemplated in s 9(1) of the Act, and that the respondent committed an act of insolvency, and/or is factually insolvent as contemplated in s 9(3)(a)(v) of the Act.[3]

Background

[4] It is not disputed that the applicant lent and advanced monies to a company styled QD Cellular (Pty) Ltd ('QD Cellular') throughout the period of 2007 to 2017. Repayment of the debts of QD Cellular was secured by a cession of its book debts, various notarial bonds and suretyship undertakings by three parties, one of whom is the respondent. The respondent bound himself as surety and co-principal debtor unto

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[1] In terms of s 8, 'A debtor commits an act of insolvency— (g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts'.
[2] In terms of s 8, 'A debtor commits an act of insolvency— (c) if he makes or attempts to make any disposition of any or his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another'
[3] Section 9(3)(*a*)(v) of the Act provides: 'Such a petition shall, subject to the provisions of paragraph (c), contain the following information, namely— (v) the debtor's act of insolvency upon which the petition is based or otherwise allege that the debtor is in fact insolvent.'

and in favour of the applicant in terms of various suretyship agreements concluded over time.

[5] In July 2019 the applicant was advised that, due to severe financial strain, the business of QD Cellular was no longer sustainable and that it could no longer service its loan accounts with the applicant. There is no dispute between the parties that the business of QD Cellular failed and that an amount of R32 807 774.41 was owed to the applicant. The applicant submitted that:

(a) In terms of an Authority and Appointment agreement (the 'Agreement') concluded in August 2019, the parties agreed that the notarial bonds registered and held in favour of the applicant would be perfected, and that the respondent would be appointed to recover the book debts of QD Cellular and dispose of its cellular stock.

(b) The Agreement provided that the respondent would be released from his liability as surety, if a sum of R12 million was recovered from the sale of the stock and recovery of the book debts.

(c) The R12 million recovery mark was not reached and the respondent remains liable to the applicant for the balance of the debts of QD Cellular.

[6] As a result, demand was made to the respondent to make payment of the amount in terms of his suretyship obligations. The respondent denied liability and referred to the Agreement. He contended that in terms of the Agreement, he was appointed by the applicant to act as their agent in order to dispose of the movable assets and collect the Trade Debtors of the company. He stated that:

'Clause 10 of this agreement states that should the Bank realize a net R12 million from the disposal of the stock and collection of the debtors, it would release me from my obligation under a suretyship for the indebtedness of the Company to the Bank. I have not been made aware by the Bank as to how much has been realized and collected to date against the R12 million target and what the balance outstanding on Trade Debtors is that still has to be collected by the Bank to be applied against the target'.

Respondent's defences

[7] The respondent raises four disputes:

(a) Firstly, he denies that he is liable to the applicant at all, because he should have been released from his liability as surety in terms of clause 10 of the Agreement. Had it not been for the applicant's repudiation, or breach of that Agreement, the indebtedness would not have arisen. He accordingly contended that the order for sequestration could not be granted because the applicant does not have a claim as contemplated in s 12(1)(a) of the Act.

(b) The respondent further denies that he is insolvent as contemplated in s 12(1)(b) of the Act. This denial is dependent on whether the respondent is in fact liable to the applicant in terms of the suretyship.

(c) Further, he denies that he committed an act of insolvency, as contemplated by s 12(1)(b) of the Act, when he disposed of his immovable property to the prejudice of his creditors (including the applicant).

(d) Lastly, he denies that it will be to the advantage of creditors for the respondent's estate to be sequestrated as contemplated in s 12(1)(c) of the Act.

(e) In a subsequent application brought by the respondent, he applied for certain witnesses to be called to provide oral evidence,[4] as he submitted that there were irresoluble disputes of fact in the application, which could not be resolved on the papers.

Repudiation/breach of the Agreement

[8] The respondent contended that the applicant acted in breach of the Agreement by interfering with his duties, thereby preventing him from executing same. This breach resulted in the respondent having been unable to realise R12 million for the stock and book debts of QD Cellular in order for him be released from any further liability towards the applicant.

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[4] Application in terms of Rule 6(5)(g) launched on 12 July 2021.

[9] The respondent stated that he commenced with his duties, in conjunction with the staff members of QD Cellular. He began by the processing of outstanding credits due to debtors, preparing letters of demand to outstanding debtors, telephoning outstanding debtors and commencing with negotiations with major role players in the industry to purchase the remaining stock of QD Cellular.

[10] According to the respondent, the applicant, in breach of the Agreement, immediately commenced obstructing him by insisting on authoring the letters of demand. This caused a crucial delay in having the letters issued. The applicant also stated that, for this reason, he could reconcile and account to the applicant on a daily basis as per the provisions of the Agreement. The applicant also received returns of equipment from debtors, thereby also short-circuiting the process agreed upon between himself and the applicant. Whilst he was still negotiating with retailers and major role players in the industry for the purchase of the stock of QD Cellular, representatives of the applicant decided during mid-October 2019 (some two months after the Agreement was concluded) that the process would be halted and that a public auction was the quickest and most effective way to dispose of the stock.

[11] This conduct, the respondent submitted, constituted an obstruction to him completing his duties as duly appointed agent, and constituted a repudiation of the Agreement. The respondent thus contended that this conduct was prejudicial to him, as surety, which flowed from the breach of a contractual obligation and which constituted a defence in law to the indebtedness.

[12] The applicant denied these allegations. Instead, it contended that Ms Reddy, the applicant's head of collections, assisted the respondent in recovering the debt from the outstanding debtor's book and the sale of stock. On the respondent's own version, the book debts and cellular stock had a value of R7.7 million. According to the respondent, by October 2019, the book debts of QD Cellular totalled around R4.2 million.

[13] In November 2019, the hypothecated stock of QD Cellular was set to be auctioned. This was done in agreement with the respondent, because he realised that the stock would not realise the value that he had previously attached to it.

[14] According to the applicant, much effort went into this auction, both from the applicant's side and also from the QD Cellular team. The auctioneers itemised all QD Cellular stock and, in cooperation with the respondent, carefully prepared auction lots comprising of a number of mixed stock lots, a lot of all stock, a lot of non-stock items (movables such as furniture and equipment) and a lot of shelving. The respondent participated in this auction process. The auctioneers sent an excel spreadsheet to the respondent for the respondent's consideration and approval. The respondent gave his approval.

[15] The auction was conducted electronically from 30 November 2019 to 9 December 2019, with 20 lots of made-up stock. The aggregate of the highest bids received for all stock, non-stock, movables and shelving amounted to R510 500. As a result of the poor interest in the stock, which was fast becoming obsolete, the applicant revisited engagements with a business associate of the respondent at KNR Flatrock, with whom there had been previous negotiations to procure all stock of QD Cellular (including movables, shelving and equipment). Upon viewing the warehouse of QD Cellular, KNR Flatrock submitted an offer of R2.1 million (exclusive of VAT) for all stock and non-stock items.

[16] As a result of the low auction offers, the lack of interest of other parties that had been approached, and the fact that most of the stock was slow-moving and becoming obsolete, the applicant accepted the offer. The respondent was at all relevant times aware of the negotiations with KNR Flatrock. He did not procure a better offer. The stock was subsequently sold to KNR Flatrock, with the respondent's knowledge and approval. The applicant submitted that the total value recovered by the applicant is not that dissimilar from the estimate of the value of the stock and book debts conveyed by the respondent in early August 2019.

[17] The applicant contended that this alleged interference and breach of the Agreement was described in vague and unsubstantiated terms in the answering affidavit, without any detail to support the allegations. The applicant thus submitted that these allegations were simply an attempt by the respondent to create a material dispute of fact where none, in fact, existed.

[18] The applicant contended that no act of repudiation was committed by the applicant. Repudiation is the conclusion by one party to the contract, that performance in terms of the contract by the other party will not be forthcoming.[5] That did not occur in this case.

[19] In *Dominick v Nedbank Limited*,[6] the SCA dealt with the issue of prejudice relating to a surety. The case concerned the bank extending the date of expiry of overdraft facilities which resulted in certain payments being met. The appellant argued that he was prejudiced by the bank extending the overdraft facilities and that such payments should not have been paid out of his account. Mpati JA held that—

'The principle relating to the release of a surety as a result of prejudice caused to him or her by the actions of the creditor was set out as follows by this court (per Olivier JA) in *Absa Bank Ltd v Davidson* [1999] ZASCA 94; 2000 (1) SA 1117 (SCA) para 19:

"As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If . . . the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer . . ." '

[20] The court found in *Dominick* that, '[s]ince the extensions of the overdraft facilities were authorised by the suretyships, no breach of any legal duty owed to the appellants, or obligation towards them under the two agreements, was committed by Nedbank when it effected the transfers in question.'[7]

[21] Similarly in the present case, the applicant legitimately exercised its right in terms of clause 7 of the Agreement to revoke and cancel the respondent's authority to further act as its agent.[8] The steps that were taken by it to recover the book debts of QD Cellular and sell the stock were rightfully exercised. The respondent was appointed to act on behalf of, and exercise the applicant's rights to recover the book debts and sell the stock – but this was not to the exclusion of the applicants. The

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[5] See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2000] ZASCA 81; 2001 (2) SA 284 (SCA) para 16.
[6] *Dominick v Nedbank Limited* [2015] ZASCA 160 para 15.
[7] Ibid para 20.
[8] Clause 7 provides: 'The Bank may revoke this authority at any time by written notice to the agent.'

contract does not express such agreement between the parties. The appointment of the respondent as the applicant's agent did not, in law, deprive the applicant (as principal) of its rights to recover the book debts and sell the stock. Clause 6 of the Agreement is clear that the applicant did not waive any of its rights and that it was entitled to act as it did.[9]

[22] In regard to the respondent's disposal of the Gallo Manor property, the chronology of events relating to the disposal of this property is of significance:

(a) An action for divorce between the respondent and his wife was instituted on 11 November 2019 – at about the time the respondent realised that R12 million would not be obtained for the assets of QD Cellular;

(b) After the divorce proceedings were instituted, Ms Reddy (not knowing of the divorce proceedings) advised the respondent that he should dispose of the Gallo Manor property in order to pay a portion of his debt to the applicant. At the time, the respondent made no mention of the pending divorce proceedings and/or the settlement agreement. (In the divorce agreement, the respondent gave the property to his ex-wife, apparently in lieu of his maintenance and accrual obligations).

(c) As appeared from documentation from TransUnion on the respondent's credit profile, as at 22 January 2020, the property was still registered in the name of the respondent.[10]

(d) On 28 February 2020, a Deeds Office search report in respect of the property recorded that the property was still registered in the respondent's name and was bonded to Nedbank Ltd in 1999, 2003 and 2008 for repayment of a total sum of R1 000 000.

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[9] Clause 6 provides: 'This authority will take effect on date of signing by the Bank and shall not be construed in any way whatsoever that the Bank is obliged to appoint an agent or that the Bank waives any of its rights in any way whatsoever.'

[10] TransUnion is a company that supplies credit status reports.

(e) As at 2 March 2020, a further report showed that the respondent was still the registered owner of the property. It also appeared from the information contained in the report that the Nedbank bond had been repaid in full.

(f) The applicant's legal team was therefore satisfied that the sequestration of the respondent's estate would result in an advantage to creditors.

(g) The respondent transferred the property to his ex-wife on 19 March 2020. The applicant contended that the divorce between the respondent and his wife was one of convenience, with the main purpose of disposing of an unencumbered immovable property to prevent creditors from laying claim to it.

[23] The respondent disputed these allegations, and contended that he and his wife were divorced and that the transfer of the property was done pursuant to a divorce agreement – with no intention to prejudice his creditors.

[24] However, as the applicant pointed out:

(a) The respondent continues to reside at the property, despite the fact that he and his wife are divorced.

(b) At the time when the parties were negotiating a strategy for the QD Cellular debt, the applicant's representatives proposed *inter alia* that a bond be registered over the Gallo Manor property. The respondent rejected the offer, as he did not want to expose the property to the QD Cellular debt.

[25] The applicant submitted that it was highly suspicious that the respondent hid this information, and that the reason was to prevent the applicant from obstructing the disposal and transfer of the property to his ex-wife.

[26] In *de Villiers NO v Maursen Properties (Pty) Ltd*,[11] it was held that the intention of a respondent in making a payment is irrelevant. The only question is whether the transfer of the property to the respondent's ex-wife actually preferred his ex-wife to other creditors, or whether other creditors actually prejudiced. The court held:

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[11] *De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T) at 675G.

'That the intention of the debtor is irrelevant in s 8 (c) can be deduced from the wording of the section.

In s 8 (c) "effect" is related to "disposition" which indicates an objective test to be applied to the effect of the disposition.'

[27] The disposition of the property obviously caused prejudice to the respondent's creditors, because it resulted in the respondent's financial position deteriorating, and rendering him insolvent. This directly affects the creditors and the applicant's prospects of recovering the debt due to it appear minimal.

The application in terms of Rule 6(5)(g)

[28] On 12 July 2021, the respondent launched the application for the matter to be referred for oral evidence and for certain witnesses to testify, or for the matter to be referred to trial. Although the respondent, in his founding affidavit, dealt with the matters he contended amounted to disputed issues, he did not, in the Notice of Motion, define the issues which he wanted to refer to oral evidence.

[29] In the application, the respondent contended that there was a dispute of fact that required a referral to oral evidence on the disposal of QD Cellular's assets, in that a former director of QD Cellular, Mr de Villiers, confirmed that the value of the stock and equipment of QD Cellular was R28 million and it was sold for the nominal value of R2.7 million to KNR Flatrock.

[30] The respondent stated that the offer accepted by the applicant of R2.7 million represented 7.5% of the reasonable market value. The respondent also raised queries about the proceeds obtained for various other assets. He submitted that the applicant has not explained why it hastened to have the assets sold under circumstances where the market values could not be achieved. He also wished to examine various witnesses who he stated could give evidence on the alleged repudiation and provide a valuation of the goods in issue. He also wished to callas a witness the attorney for his ex-wife, who represented her during divorce proceedings. The latter, he contended, could give evidence disputing the applicant's case that the divorce proceedings were specifically instituted and the settlement agreement concluded to dispose of the Gallo Manor property to the prejudice of his creditors.

[31] The applicant sought to counter this application on various grounds. Firstly, it relies on *Law Society, Northern Provinces v Mogami*,[12] where the SCA held that '[a]n application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal.' The applicant submits that the timing of the respondent's application is not explained. He has been aware of the issues he now claims as disputes of fact from the inception of this matter. There is no explanation as to why this application was launched some nine months after the sequestration application was launched, and why it did not form part of the respondents answering affidavit. It was only launched a few days prior to the hearing of the matter. This alone demonstrates a lack of bona fides.

[32] In regard to whether a genuine dispute of fact exists, reference was made by the applicant to *Wightman t/a JW Construction v Headfour (Pty) Ltd*,[13] where the SCA held as follows:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed ....

...factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision... There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[33] In addition, this was dealt with in *Fakie NO v CCII Systems (Pty) Ltd*,[14] wherein the SCA stated—

'That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit

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[12] *Law Society, Northern Provinces v Mogami and Others* [2009] ZASCA 107; 2010 (1) SA 186 (SCA) at 195B-C.
[13] *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) paras 12-13 (footnotes omitted).
[14] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 55.

unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise "fictitious" disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be "a bona fide dispute of fact on a material matter". This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.'

[34] It is common cause that the sum of R12 million was not realised, as required in terms of clause 10 of the Agreement. The proceeds received from the sale of the movable property of QD Cellular were credited to the total sum owed by QD Cellular to the applicant, and QD Cellular remains indebted to the applicant, as at 1 February 2020, in the total sum of R32 807 774.41. As set out above, the applicant legitimately exercised its rights to revoke the respondent's authority and was entitled to dispose of the goods as it did.

[35] The allegations relating to the repudiation of the Agreement are vague and legally untenable. The issues relating to the value of the assets are raised at a late stage in the proceedings with no factual or clear evidentiary proof of such allegations. There was no explanation for the delay in launching the application in terms of Rule 6(5)(g).

[36] The applicant accordingly submitted that it had demonstrated that the respondent was indebted to it for a sum not less that R100, in compliance with s 12(1)(a) of the Act. It constitutes a liquidated amount as evidenced by the certificate of balance attached to the papers.

[37] The indebtedness was not disputed on bona fide and reasonable grounds. The application in terms of Rule 6(5)(g) must accordingly fail. If the respondent has further submissions and evidence that he wishes to introduce, in this regard, he can do so on the return day. There is thus no prejudice to him.

Advantage to creditors

[38] The respondent apparently has only three concurrent creditors. The applicant accordingly contended that it will be to the advantage of the respondent's three known creditors to establish a *concursus creditorum* and participate in a fair distribution of the assets of the respondent.

[39] In regard to the Gallo Manor property, the applicant submitted that if the respondent's estate is sequestrated, the appointed trustee has the power to investigate the transfer of the property and recover and realise it in order to distribute the proceeds amongst the respondent's creditors. The trustee can also investigate the repayment of the bond to Nedbank.

[40] The appellant also relied on the fact that the respondent was factually insolvent. Having found that the indebtedness to the applicant has been proven, the respondent has not demonstrated that he is factually solvent. He did not deal with his financial position to demonstrate that his assets exceed his liabilities. Thus the position of factual insolvency has also been established.

[41] The applicant seeks a final order of sequestration. This is not permitted in terms of the Act. The applicant is required to approach the court twice: once to obtain a provisional order of sequestration in terms of s 10 of the Act;[15] and again to have the provisional order confirmed and made final in terms of s 12 of the Act.[16] Although the applicant must establish the same requirements, the standard of proof differs. At the provisional stage, the court must be of the opinion that, *prima facie,* the requirements for a sequestration order have been satisfied; at the final stage, the court must be

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[15] Section 10 of the Act, titled 'Provisional sequestration' provides:
'If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie—
(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 make an order sequestrating the estate of the debtor provisionally.'

[16] See footnote 12 above. Further, s 12(2) provides that, 'If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*.'

satisfied that those requirements are proved on a balance of probabilities.[17] A final order cannot be granted without a provisional one first being made.[18] At this stage, the applicant has provided *prima facie* evidence of the indebtedness, the act of insolvency and the advantage to creditors.

Accordingly, the following order is made:

1. A provisional order of sequestration of the respondent's estate is granted.

2. The respondent is to show cause on the return date being 4 October 2021, why a final order should not be granted.

3. Costs of the application to be costs in the sequestration.

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 13 August 2021.

Date of hearing:	19 July 2021
Date of judgment:	13 August 2021

[17] *Sacks Morris (Pty) Ltd v Smith* 1951 (3) SA 167 (O) 170; *Lindhaven Meat Market* CC *v Reyneke* 2001 (1) SA 454 (W) 460.
[18] R Sharrock et al *Hockley's Insolvency Law* 9 ed (2012) at 53.

Appearances:

Counsel for the applicant:	I Oschman
Attorney for the applicant:	Bezuidenhout van Zyl & Associates Inc
Counsel for the respondent:	D Schoeman
Attorney for the respondent:	Schoeman Borman Inc