IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG HIGH COURT, PRETORIA)

Case Number: 61152/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

---------- ----------
DATE SIGNATURE

DATE: 3/4/2014

In the matter between:

AFGRI BEDRYFS BEPERK
APPLICANT

And

KAREL JOHANNES GRIBNITZ **RESPONDENT**

JUDGMENT

Fabricius J,

1.

This is the extended return date of a rule *nisi* granted on 14 October 2013 by Khumalo J. The Applicant herein rely on the actual insolvency of the Respondent in the context of the provisions of ***s. 9 (1) read with 9 (3) (v)***. Applicant say that they have a liquidated claim, and that the sequestration of

the Respondent would be to the advantage of the creditors. In the founding affidavit Applicant deals with numerous creditor agreements entered into between the Respondent and the Applicant and the Applicant's predecessor in title, which resulted in an amount of more than R9 million plus interest being due to Applicant, which amount the Respondent simply has failed to pay. It also relies on a number of instalment sale agreements (also referred to as hire-purchase agreements) which resulted in the Respondent being indebted to Applicant in a sum of some R4 million as at 31 August 2012 plus interest. In addition Applicant says that Respondent is indebted to it in a further sum of some R17 000 as at 31 August 2012 together with interest thereon, advanced on a so-called "monthly account". There is no doubt that the substantial amounts are due to Applicant, that Respondent has not paid them, nor even made an offer of payment. Respondent denies that it is *de facto* insolvent, and furthermore alleges that the provisional order was wrongly granted inasmuch as no proper notice was given to its employees, as required by the provisions of ***s. 9 (4) A (a) (ii)***. The other defence is that Applicant has no *locus standi* to bring this application and that it is also guilty of reckless lending in the context of the provisions of ***s. 80 of the National Credit Act no. 34 of 2005.***

2.

The affidavits are voluminous and I intend to deal with the relevant facts only in summary form having regard to the Respondent's defences relied on. In judging the application as a whole, apart from the question of service on employees, I have regard to two important considerations:

2.1

"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 examining very narrowly, the position of a debtor who says "I'm sorry that I cannot pay my creditor, but my assets far exceed my liabilities". To my mind the best proof of insolvency is that a man should pay his debts, and therefore I always examine in a critical spirit the case of the man who does not pay what he owes." This was the realistic approach of Innes J (as he then was) in ***De Ward vs Andrew and Thienhaus Ltd 1907 TS 727 at 733***.

This approach was also followed by Naidoo J in ***Hellmut and Others in re: Agri Bedryfs Bpk and Lotter N. O. and Others case number 4172/2013***, in the Free State Division of the High Court, the judgment having been delivered on 27 February 2014.

2.2

In numerous instances Respondent, in the answering affidavit simply denied certain allegations made by Applicant. In this context I have kept in mind what was said in ***Whightman T/A JW Construction vs Head Four (Pty) Ltd 2008 (3) SA 371 SCA at 375 par 13*** where the following was said: "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. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact overt lies purely

within the knowledge of the averting party and no basis is laid for disputing the veracity or accuracy of the averment."

3.

BACKGROUND FACTS:

As I have said, the Applicant (and Grow Capital Financial Services after Applicant's rights were ceded to it) entered into various credit agreements with the Respondent. These were all annexed to the founding affidavit and indicate in some detail the relevant information provided by the Respondent himself for purposes of such applications for credit and/or extensions of repayment obligations. In each such instance, so the documents show, a full evaluation and assessment was conducted by Applicant and in the 2009 assessment of Respondent's financial position it was recorded that it had a surplus of assets over liabilities in the sum of R34.8 million. Respondent is an experienced businessman on his own version and well qualified academically as well. After the said assessment, a credit agreement was accordingly concluded between the Applicant and Respondent on 1 August 2007. In terms of this agreement, a production credit of R1.25 million was advanced to the Respondent, which was payable by no later than 31 August 2008. In September 2007, Respondent applied to convert the production credit advanced to revolving credit ("wentel krediet"). Another evaluation/assessment was conducted in this context and it was recorded that Respondent had a surplus of assets over liabilities of about R39.5 million. After that a credit agreement was concluded on 18 October 2007. This credit was to be repaid within 12 months of the date of conclusion of the agreement. In December 2007 Respondent applied to have the credit facility increased from R1.25 million to R3 million. Another assessment/evaluation was

conducted in this regard. It was recorded at that time that Respondent had a surplus of assets over liabilities of some R38.4 million. Thereafter a credit agreement was concluded on 20 December 2007. In terms of this agreement a credit facility of R3 million was made available to Respondent which had to be repaid within 12 months. In November 2008, Respondent applied for an increase of this credit facility from R3 million to R8 million. Another assessment/evaluation was conducted in this context. Security in the form of surety-ships was required from the Respondent, so it was noted. In this evaluation report it was recorded that Respondent had surplus assets over liabilities of some R45 million. As part of this evaluation process, Respondent provided Applicant with a very comprehensive business plan. This was Respondent's "cash flow projection for the grass business for a period of three years with detailed 12 months projection". Further, Respondent provided Applicant with a statement of assets and liabilities. This reflected a surplus of R1.39 million. This document did however not reflect any of Respondent's interests in other companies which were repeatedly reflected in the credit assessment/evaluations that had been done to date. This statement was clearly incomplete therefore. Pursuant to this credit assessment, another credit agreement was concluded on 2 December 2008. A facility of R9.457 million was made available to Respondent which had to be repaid by 31 January 2010. This repayment date was extended by agreement to 31 March 2010.

4.

These were the main agreements between Applicant and Respondent, and the other agreements that followed thereafter were for an extension of re-payment time only.

5.

On 18 December 2008 Applicant and GRO Capital Finansiële Dienste (Pty) Ltd entered into a written agreement in terms of which Applicant ceded all its rights to GRO Capital. In November 2010, the Respondent replied to this entity for an extension of time for the re-payment of the credit advanced to him previously, which extension was granted. In August 2011 Respondent applied for a further extension which was again granted to 20 October 2011. It was contended by Mr M. Maritz SC on behalf of Applicant that in accordance with the provisions of ***s. 14 of the Prescription Act 68 of 1969***, the running of prescription was interrupted by this agreement in terms of which Respondent expressly, or at worst tacitly, acknowledged liability towards Applicant. On 27 September 2012 GRO Capital and Applicant entered into a further written agreement in terms of which all GRO Capital's rights to certain receivables, including the claims against the Respondent aforesaid were ceded back to the Applicant. Mr Kaplan on behalf of Respondent had a number of problems with the cession and the re-cession between Applicant and GRO Capital. He pointed to a number of alleged defects in this context, which I do not intend to discuss in any great detail. Firstly, Respondent's denial of the pertinent allegations in this context can have no evidential value in the light of the quoted *dictum* from the ***Whightman-***decision *supra.* Secondly, the Respondent's contentions and criticism in this context are in any event irrelevant in that it is a well-known that any obligationary agreement (an agreement creating the respective obligations or "verbintenis-skeppende ooreenkoms") must be distinguished from the transferring agreement ("saaklike ooreenkoms"), being the cession itself.

See: ***Gaffoor N.O. vs Vangates Investments 2012 (4) SA 281 (SCA) at par. 33 read with footnote 14***.

It is clear that the invalidity of the former, does not in law affect the validity of the latter. In any event, the actual cession read with annexure A thereto leaves one with no doubt as to what was ceded and Respondent's name was also reflected thereon. Mr Kaplan did not ask me to refer this dispute that was created in the answering affidavit for the hearing of oral evidence. In my view there is in any event no merit in this defence of Respondent at all.

6.

RESPONDENT'S INDEBTEDNESS:

In the context of the credit agreements the amount due to Applicant is R8.93 million as at 31 August 2012 and together with further interest to date of payment. The conclusion of the credit agreements themselves has not been put in issue and neither the amount of the credit advanced.

In addition to the production credit granted, Respondent is also indebted to Applicant in respect of instalment sale agreements in the amount of R3.95 million as at 31 August 2012 together with interest on such amount. Respondent's denial of this allegation is unsubstantiated. Respondent's own business plan supports Applicant's allegations in this context. The financial statements that were annexed to the answering affidavit, for the year ending 28 February 2011 also fully reflect the relevant instalment sale agreements. It is also common cause that on 30 November 2011 Applicant addressed a formal notice of demand in terms of the National Credit Act to Respondent setting out Respondent's indebtedness under the various instalment sale agreements in great detail, and in which each and every contract was identified by a contract number. The comparison between the instalment sale

agreements reflected in this notice of demand were those listed and identified in Respondent's mentioned financial statements, demonstrate that the exact same instalment agreements were reflected in Respondent's own financial statements. I have referred to ***s. 14 of Prescription Act*** in this context and it is in my view clear that prescription would have to commence afresh from 30 June 2011, which is the date of Respondent's financial statements. On Respondent's own version therefore there can be no dispute about these amounts. I may add that the formal notice of demand dated 30 November 2011 did obviously not deserve a reply according to Respondent and a reference to what was said in ***McWilliams vs First Consolidated Holdings (Pty) Ltd 1982 (2) 1 (AD)*** is not out of place: Quiescence is not necessarily acquiescence, it was said, and the party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as a truthful. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor tending against him in the assessment of the probabilities and in the final determination of the dispute. ***(at 10 par. E – F)***

Respondent also sent an email dated 16 February 2011 in which he stated the following: "I hereby confirm that I have not been able to make repayment of production account and have not been able to make the outstanding payments on the instalment sale account due to the unexpected delay." This was admitted in the answering affidavit and Mr M. Maritz SC submitted that in

the light of all of the above, Respondent's denial of any indebtedness to Applicant in respect of instalment sale agreements was simply dishonest. It is my view that this submission could reasonably have been made on the basis of the documents referred to.

Applicant also alleges that Respondent is indebted to it in the sum of R17 153 in respect of the "maandrekening" (monthly account) as at 31 August 2012 together with interest thereon to date of payment. Respondent also denied this allegation. The notice of demand again clearly reflected Respondent's indebtedness under this heading. Respondent admitted that he failed to react to this demand and failed to dispute it. I agree that this justifies the inference that Respondent has no defence and that he is in fact indebted to Applicant in this amount.

7.

ALLEGED PRESCRIPTION OF DEBT:

This is raised in the Respondent's answering affidavit but was not persisted in during argument. There is no merit in that defence in any event having regard to what I have already said about Respondent's own business plan and financial statements.

ALLEGED RECKLESS CREDIT:

In this context ***s. 78 - 81 and 83 of the National Credit Act 34 of 2005,*** are relevant. I have already dealt with the various credit evaluations/assessments and the fact that all the information contained therein was provided by Respondent. The relevant allegations in the founding affidavit are not disputed in the answering affidavit in this context. The various assessments conducted in each instance show a substantial surplus of assets over liabilities. The business plan that I have mentioned must also be kept in mind. It was a well-

considered and well-prepared document in which great detail was supplied regarding the anticipated income and anticipated expenses. This plan clearly demonstrates that there would be sufficient cash flow to service the production credit applied for. The statement of assets and liabilities which was provided by Respondent and which also reflects an access of assets over liabilities of some R1.39 million, makes no mention of Respondent's interests in the Strider Holdings group of companies which in the July 2007 credit assessment was reflected to be some R34 million. On the basis of all the detailed information supplied by Respondent, the Applicant granted the credit that has now not been repaid. I have already mentioned that Respondent is an experienced businessman, farmer and senior business rescue practitioner, with qualifications [……]. In his curriculum vitae it is also stated that he was a director of numerous companies. In each of the credit agreements concluded Respondent acknowledged that he had read the agreement and understood it and also confirmed that he could afford the repayment of the facility provided to him. The financial statement ending February 2008 was not available to Applicant at the time of the earlier credit assessments and at the time of the conclusion of the credit agreement on 2 December 2008. Respondent's reliance thereon during argument (which was later withdrawn) was in my view unfortunate and certainly not called for. The fact that Applicant mentioned it in the founding affidavit was clearly an error committed by the draftsman thereof, and one would certainly not expect Counsel to rely on that at all. It only came into existence on 3 February 2009 as an objective fact.

On the basis of all the facts before me there is no justifiable basis for arguing that credit had been recklessly provided. According to the ***Gumgudoo vs Hanover Re-insurance Group Africa 2012 (6) SA 537 SCA at 543 par. 18***

decision, the Respondent is required, in good faith, to adduce facts which, if proved at trial, would constitute good defences to each of the claims against him. The facts relied upon by Applicant in the context of the assessments done prior to the credit agreements are not in dispute on the papers and it is my view that Mr M. Maritz SC was correct in submitting that this defence was completely devoid of any merit, and could not in law give rise to any valid defence. The Respondent's assertion that he was insolvent at the time of the various agreements is not borne out by the reports and is in fact completely refuted thereby. Alternatively, this defence must in any event fail having regard to the provisions of ***s. 81 (4) of the National Credit Act***. If the relevant assessments do not correctly reflect the position, then it follows that Respondent himself had completely misrepresented his financial position to the Applicant and to GRO Capital in applying for credit and in the course of their credit assessment. According to the provisions of ***s. 81 (4)*** this would establish a complete defence to Respondent's assertion. As I have said, the February 2008 financial statements reflecting the negative position of R1.772 million was only prepared and dated on 3 February 2009, some months after the assessment had been concluded and the relevant credit agreement had been concluded. Such financial statements were obviously then not in Applicant's possession at the time of conducting the assessment.

DE FACTO INSOLVENCY:

During argument Mr M. Maritz SC relied on actual insolvency and not on the email dated 16 February 2011 as an act of insolvency in terms of ***s. 8 (g) of the Insolvency Act.*** He nevertheless submitted that I had to take this email into account, as on the Respondent's own version therein, he was insolvent at the time when the various credit agreements were concluded. In the founding

affidavit it was alleged that none of the Respondent's cash projections had realised as he had envisaged and he had obviously not paid anything to Applicant or GRO Capital. Respondent also of course advised that he could make no payments in respect of the instalment sale account. Nevertheless Respondent now disputes the fact he is factually insolvent. He relies on a balance sheet as at 31 October 2013 for the period 1 March to 31 October 2013. This reflects a surplus of some R4.6 million over liabilities. This balance sheet however completely ignores Respondent's indebtedness to the Applicant under the various instalment sale agreements which amounted to R3.95 million as at 31 August 2012 and which amount bares interest from that date at 12%. A simple calculation will show that this indebtedness would wipe out the alleged surplus in any event. The balance sheet is clearly incorrect and I agree with Mr M. Maritz SC in this context that it is a self-serving document which has no proper evidential value. I have already mentioned in the introduction to this judgment that Respondent has failed to date to pay any of the outstanding and long overdue amounts to Applicant. He has raised defences which do not relate to such indebtedness or to his insolvency. If he is not insolvent why does he not pay? Why does he not even make an offer? The most probable inference to be drawn from such conduct is that he is not in a position to pay and that he is in fact insolvent.

8.

It is therefore my view having regard to the totalities of the undisputed facts that the Respondent is factually insolvent.

ADVANTAGE TO CREDITORS:

It is similarly clear from the documentation that Respondent is possessed of assets, which would most probably yield a substantial dividend to creditors.

The threshold set by ***s. 12 (1) (c) of the Insolvency Act*** in this regard is not a definite advantage but it is sufficient "that there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated".

See: ***Ex parte Matthyssen et uxor (First Rand Bank intervening) 2003 (2) SA 308 (T) at 316 B***.

ALLEGED DEFECTIVE SERVICE OF THE APPLICATION AND ALLEGED NON-COMPLIANCE WITH S. 9 (4A) OF THE INSOLVENCY ACT:

The crux of this argument is that Respondent says that the application was not served on the Respondent's employees in accordance with the provisions of ***s. 9 (4 A) (a) (ii) of the Insolvency Act.*** The relevant return of service of the Sherriff states that the notice of motion was effected on employees by serving a copy on a Mrs L. Lewis, a person in charge … The provisional order was served on 24 October 2013 on a "Mrs Lynn Curt-Lewis, employee of the Respondent." It is common cause that the said Mrs L. Lewis or Curt-Lewis is in fact Mrs Lynn Curlewis and that she was an employee of the Respondent at the time. Respondent also alleges in his answering affidavit that the Sherriff attended at his premises on 30 October 2012 and told him in the presence of his farm manager Mr Tiaan Botha that he had with him papers for his sequestration. The farm manager is the most senior employee of all the employees. On the probabilities I accept that what was served on Mrs L. Lewis (it is common cause that she is Mrs L. Curlewis) was in fact the notice of motion, and although the Respondent is coy about that, as Mr M. Maritz SC put it, on the probabilities this must have occurred. Both Mrs Curlewis and Mr Botha filed a confirmatory affidavit saying that they had read the answering affidavit. Obviously they were fully aware of the fact that the sequestration proceedings had been instituted and were pending. The object of s. 9 (4A) of

the Insolvency Act is clearly to ensure proper notification so as to enable employees to explore possible solutions with their employer to obviate a need for dismissal or to limit the number of dismissals for operational reasons.

See: ***Gumgudoo vs Hanover Re-insurance Group Africa supra at par. 36 – 37.***

The Act requires service by affixing a copy to the gate or front door of the premises or on the notice board if there is one. In this context I was referred to a recent judgment of the Supreme Court of Appeal delivered 27 November 2013 in ***E B Steam Company (Pty) Ltd vs Eskom Holdings SOC Ltd [2014] 1 All SA 294.***

This appeal dealt with the requirement contained in ***s. 346 (4A) of the Companies Act 61 of 1973*** requiring that an application for winding-up be furnished to employees. It also refers to notice to the employees in this context by affixing a copy of the application to any notice board, or to the front gate of the premises. The ***Insolvency Act*** is of course similarly worded. They were introduced into the ***Labour Relations Act*** by the ***Labour Relations Amendment Act 12 of 2002***. Their purpose was to ensure, as far as reasonably feasible, that applications for winding-up, voluntary surrender or sequestration come to the attention of the employees of the employer in question. In the ***E B Steam*** judgment the Court held at par. 14 that the proper interpretation of the requirement that application papers be furnished to the relevant employees, is that they must be made available in the manner reasonably likely to make them accessible to the employees. It is not a requirement that the Court must be satisfied that the application papers have as a matter of fact come to the attention of those persons. The methods for furnishing employees with the application papers, as set out in the relevant

statutory provisions, are no more than guides. If other more effective means are adopted and reflected in the affidavit that has to be filed in this context then, provided that the Court is satisfied that the method adopted was reasonably likely to make the application papers accessible to the employees, there has been compliance with the section. The position is therefore that the requirement that the application papers be furnished to the persons identified in the statutory provisions is peremptory. It is however not peremptory that this be done in any of the ways specified in the particular sections. If those modes of service are impossible or ineffectual, another mode of service that is reasonably likely to make them accessible to the employees will satisfy the requirements of the section.

9.

In this context Mr M. Maritz SC submitted on behalf of Applicant that I must take the following facts into account:

9.1

Service of the Notice of Motion was effected on a “Mrs Curlewis” an employee in charge of the Respondent’s farm;

9.2

In addition the Notice of Motion was served on the Respondent by the Sherriff who told him, in the presence of the farm manager, Mr T. Botha, that he had papers for the Respondent’s sequestration;

9.3

Both Mrs Curlewis and Mr Botha deposed a confirmatory affidavit asserting that each had read the Respondent’s answering affidavit. It must therefore be clear that both the farm manager, Botha, as the most senior employee, and

Curlewis, an employee in charge of the premises at the time of service, obtained full knowledge of the application;

9.4

In addition, the provisional order was again served on the said Mrs Curlewis;

9.5

The provisional order was also published in the Beeld newspaper and in the Government Gazette.

10.

It was therefore contended that it was reasonably likely that these steps would have come to the knowledge of the bodies of employees and would have resulted in the application papers becoming accessible to the body of employees. The steps that were taken under circumstances that I have mentioned, clearly satisfied the object of the section, so it was contended. Neither Botha, nor Curlewis stated in their respective confirmatory affidavits that he or she did not notify or inform other employees. In the absence of such allegation, the most reasonable inference to be drawn is that the body of employees would have been notified of the present proceedings. It is in my view highly improbable that neither Botha nor Curlewis, or the Respondent would have said anything about the present proceedings and would not have mentioned it to anyone else.

11.

In my view, the purpose of the section in the ***Insolvency Act*** relating to service has been satisfied.

12.

Accordingly Respondent has no *bona fide* defence to Applicant's application.

The following order is therefore made:

1. **The provisional sequestration order is confirmed.**
2. **The cost of the application is to be costs in the sequestration, including the cost consequent on the employment of two Counsel.**

_____

JUDGE H.J FABRICIUS
JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Counsel for the applicant:	Adv M Maritz SC Adv Z Schoeman
Instructed by:	Strydom & Bredenkamp Inc
Counsel for the respondent:	Adv J Kaplan
Instructed by:	Cowan-Harper Attorneys

Heard on: 03/03/2014 to 04/03/2014

Date of judgment: 03/04/2014