

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

15/12/2016

CASE NO: 75020/2014

In the matter between:

**THE STANDARD BANK OF
SOUTH AFRICA LIMITED**

Applicant

and

NORBERTO JOSE DOS SANTOS COSTA

Respondent

**Identity number: [...] (Married out of community of property to
ANA PAULA RIBEIRO GONCALVES COSTA,
Identity Number: [...])**

AND

CASE NO: 74955/2014

In the matter between:

**THE STANDARD BANK OF
SOUTH AFRICA LIMITED**

Applicant

and

ANA PAULA RIBEIRO GONCALVES

Respondent

**COSTA Identity number: [...] (Married out of
community of property to NORBERTO JOSE**

DOS SANTOS COSTA,
Identity Number: [...])

JUDGMENT

De Kok, AJ

INTRODUCTION

1. This judgment concerns the return day of 2 provisional sequestration orders. The applicant in each application is Standard Bank Ltd ("Standard Bank"). The respondent in the application under case number 75020/2014 is Mr Costa. His wife, Mrs Costa, is the respondent in the application under case number 74955/2014. The parties are agreed that the facts and issues are identical in both applications. The applications were thus heard together and I was requested to give one judgment relating to both matters
2. The applications were further heard together with an application for rescission of a judgment under case number 63765/2012. In a separate judgment I have today granted this application.
3. Subsequent to the hearing Mr Raubenheimer, who appeared on behalf of Standard Bank, and Mr Kairinos SC, who appeared on behalf of the respondents, and at the request of the Court, provided an agreed chronology of the relevant factual events. I am indebted to them for their assistance
4. The following facts are common cause between the parties:
 - 4.1. Mr and Mrs Costa are the sole members of a close corporation, Kensington Construction CC ("Kensington").
 - 4.2. During or about 2004 Standard Bank concluded a written agreement with Kensington. The agreement is not before me, but it is

common cause that in terms thereof Standard Bank loaned to Kensington an amount of money which was repayable over an agreed term, in agreed monthly instalments. I will refer to this as "the term loan". As security for the term loan a mortgage bond was registered over certain immovable property. Pursuant to this agreement monies were advanced to Kensington under an account with number [...]94

- 4.3. During November 2008 the balance then owing in terms of the term loan was paid by Mercantile Bank to Standard Bank¹. The mortgage bond was cancelled on 21 November
- 4.4. Subsequent to the cancellation of the mortgage bond, further monies were paid by Standard Bank to Kensington². They were paid "under" account number [...]94 - i.e. the number designating the term loan.
- 4.5. During June 2009 Standard Bank instituted action against Kensington for payment of the amount of R 1 310 564.44 together with interest and costs. On 13 October 2009 judgment by default was granted against Kensington in these amounts. I will refer to this as the "Kensington judgement".
- 4.6. Kensington was finally deregistered on 24 February 2011.
- 4.7. During November 2011 Standard Bank instituted action against Mr and Mrs Costa for payment of the amount of R1 310 564.44. It relied on the judgment granted against Kensington and asserted that in terms of section 26(5) of the Close Corporations Act, 69 of 1984 they were each jointly and severally liable for this debt. In an ex parte application Standard Bank sought and obtained leave, on 8 May 2013, to serve the summons by way of substituted service.
- 4.8. Judgment was granted against Mr and Mrs Costa, by default, on 19 August 2013. I will refer to this as "the personal judgment".
- 4.9. On 10 October 2014 Standard Bank launched applications for the sequestration of Mr and Mrs Costa's estates. On 26 November 2014 provisional orders of sequestration were granted. These orders were granted on an unopposed basis.

¹ It is not entirely clear at whose behest Mercantile made this payment. Standard Bank refers to the immovable property being expropriated, but also to it being sold.

² I use the verb "paid" as opposed to "advanced" deliberately, as it is very much in issue as to what, if any, the causa

- 4.10. On 22 January 2015 Mr and Mrs Costa gave notice of their intention to oppose the sequestration applications.
- 4.11. On some date prior to 11 November 2015 Kensington was re-registered.
- 4.12. On 11 November 2015 the Kensington judgment was rescinded. This application was granted on an unopposed basis and without Standard Bank having filed any papers.
- 4.13. On 1 June 2015 Mr and Mrs Costa brought an application for the rescission of the personal judgment

5. As set out above, the personal judgment has been rescinded

THE ISSUES

6. The Kensington judgment, the personal judgment and the provisional sequestration orders were all granted in default of an appearance by the defendants/respondents. Mr and Mrs Costa contend that neither of the summonses, nor the applications for sequestration, came to knowledge of the defendant/respondents. In their answering affidavits Mr and Mrs Costa went to great lengths to attempt to demonstrate that Standard Bank could easily have obtained an address for effective service. It is not necessary for me to consider this issue as Mr Kairinos, on behalf of Mr and Mrs Costa, has accepted that the lack of personal service of the applications for provisional sequestration would not impact on the decision as to whether or not to confirm the provisional orders.
7. In the answering and supplementary answering affidavits 2 legal defences were raised, namely that Mr and Mrs Costa's liability for Kensington's debt to Standard Bank fell away when the Close Corporations Act was amended in terms of the Companies Act, 2008³ or that it fell away when Kensington was re-registered. Mr Kairinos has abandoned reliance on both of these defences.
8. In its founding affidavits Standard Bank relied on the averment that Mr and Mrs

of the flow of monies from Standard Bank to Kensington was.

³ This amendment deleted section 26(5) of the Close Corporations Act.

Costa are actually insolvent as envisaged in section 9(1) of the Insolvency Act, 24 of 1936. In the alternative, or in addition, it relied on Mr and Mrs Costa having committed an act of insolvency as envisaged in section 8(a) of the Insolvency Act in that they had departed from their dwelling or otherwise absented themselves, with the intent by doing so to evade or delay the payment of their debts. In argument before me Mr Raubenheimer abandoned any reliance on section 8(a) of the Insolvency Act.

9. What remains to be considered is whether Standard Bank has proven, on a balance of probabilities:

9.1 Its *locus standi* in terms of section 9(1) of the Insolvency Act;

9.2 That Mr and Mrs Costa are actually insolvent; and

9.3 That the sequestration of their estates will be to the benefit of their creditors.

10. As far as the issue of *locus standi* is concerned Brand J in **Payslip Investment Holdings CC v Y2K Tee Limited**⁴ summarised the test in **Kalil v Decotex (Pty) Ltd**⁵ as follows:

"With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general."

11. In **Hulse-Reutter v HEG Consulting Enterprises (Pty) Ltd**⁶ Thring J held that a respondent has a duty to adduce evidence only to the extent of alleging facts which, if proved at a trial, would constitute a good defence to the applicant's claim.

⁴ 2001 (4) SA 781 (C) at 783H-I

⁵ 1988 (1) SA 942 (A) at 980 B-D

⁶ 1998 (2) SA 208 (C) at 219E-220A

12. The aforesaid authorities were recently referred to with approval by the Supreme Court of Appeal in **Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd**⁷. The Court stressed that winding-up proceedings are not designed for the enforcement of a debt that the respondent disputes on *bona fide* and reasonable grounds. The same principle would, in my view, apply to applications for sequestration.

STANDARD BANK'S LOCUS STANDI

13. In its founding affidavit Standard Bank relied on the following allegations to prove its locus standi in terms of the Act:

- 13.1. The fact of the Kensington judgment;
- 13.2. The fact of the deregistration of Kensington; and
- 13.3. The fact of the personal judgment.

14. Standard Bank did not rely on the underlying indebtedness which gave rise to its cause of action against Kensington. It was content to rely on the Kensington judgment. This, of course, it was entitled to do as this judgment, at the time, constituted an independent debt.

15. On rescission of the Kensington judgment this independent debt ceased to exist. Mr Raubenheimer however argued that the rescission did not disturb the underlying cause of action and that Standard Bank retained *locus standi* in terms of the underlying cause of action against Kensington, as read with the provisions of section 26(5) of the Close Corporations Act.

16. It must thus be considered whether Standard has proven, on a balance of probabilities, that Kensington is indebted to it in any amount exceeding R100 or whether Mr and Mrs Costa dispute this debt on *bona fide* and reasonable grounds.

17. The difficulty faced by Standard Bank is that the references to the underlying

⁷ [2016] ZASCA 168 (24 November 2016)

cause of action in its affidavits are, at best, oblique and contradictory.

18. In the founding affidavit the only reference to the underlying cause of action is to be found in the particulars of claim in the action against Mr and Mrs Costa. These particulars of claim are not specifically referred to in the founding affidavit, but are annexed to an application for substituted service which is in turn annexed to the founding affidavit.
19. The high-water mark of the description of the underlying cause of action is to be found in paragraph 9 of the particulars of claim in which it is alleged that "*Without the consent of the Plaintiff and with full knowledge that the monies paid by Mercantile Bank Limited into the Bond account were to be utilized to settle the outstanding balance and cancel the mortgage bond B92566/04, Kensington Construction CC or its authorized agent proceeded to withdraw the funds paid by Mercantile from the Joan account held under the account number [...]94*"
20. It is somewhat difficult to see how the withdrawal by Kensington of funds held by Standard Bank could have occurred without the consent of Standard Bank. Surely the withdrawal could not have occurred without the participation of Standard Bank in paying out the monies withdrawn. Be that as it may, the cause of action made out herein, if any, appears to be a claim arising from a breach of contract.
21. The particulars of claim in the action against Kensington are not annexed to the founding affidavit. They are to be found as an annexure to the respondents' supplementary answering affidavits. Therein:
 - 21.1. It is alleged that once Mercantile Bank had paid Standard Bank, "*the facilities*" that Kensington had with Standard Bank automatically terminated.
 - 21.2. It is then alleged that "*Notwithstanding the same the Defendant withdrew the sum of R1 310 564.44 on or after the 21st of November 2008 from the facility with the Plaintiff and the Plaintiff allowed such withdrawal to the Defendant in the bona fide and reasonable belief that the facility was still in operation. The amount was not owing to the Defendant and the*

Defendant was not entitled to such monies. The Defendant nevertheless appropriated the monies." This is recognisable as a claim based on unjust enrichment.

21.3. In the alternative it is alleged that *"On the 21st November 2008 the Defendant fraudulently withdrew the sum of R1 310 564.44 from its account with the Plaintiff notwithstanding the fact that the Defendant was aware that the mortgage bond registered over the Defendant's property situated at [...] Linbro Park, Sandton had been cancelled and/or that the facility was no longer in operation."*

22. Standard Bank has not attempted to adduce any evidence as to the nature of the error relied upon for its claim based on unjust enrichment, nor of the misrepresentation relied upon for its claim based on fraud.

23. In their answering affidavits Mr and Mrs Costa contend that after the cancellation of the mortgage bond Standard Bank did not withdraw the loan facility and that Kensington loaned a further amount against the facility. They further allege that Kensington continued to make monthly repayments in the agreement amounts. Mr and Mrs Costa's defence is essentially that the term loan survived the cancellation of the mortgage bond and that Kensington continued to comply with the terms of the term loan agreement.

24. In argument, Mr Raubenheimer did not press reliance on the causes of action based on unjust enrichment or fraud. Instead he argued that on cancellation of the mortgage bond the term loan agreement automatically terminated and that advances thereafter would be on the basis of an overdraft facility, which is repayable on demand. But, absent any evidence as to the terms of the term loan agreement, I cannot conclude that this agreement terminated on cancellation of the mortgage bond. It is clear from the decision in **Penderis & Gutman NNO v Liquidators, Short Term Business, AA Mutual Insurance Association Ltd**⁸ that the termination of the agreement is dependent on the specific terms of the agreement.

⁸ 1992 (4) SA 836 (A)

25. In a final effort, Mr Raubenheimer argued that on Mr and Mrs Costa's own version, Kensington was indebted to Standard Bank. This is so because section 9(2) of the Insolvency Act provides that a liquidated claim which has accrued, but which is not yet due, is to be considered as a liquidated claim for the purposes of section 9(1). However, on the most charitable construction of Standard Bank's founding and replying affidavits, this debt (being the amounts advanced to Kensington which would in future become due and payable) was never relied upon. It conflicts with Standard's Bank stance that after the cancellation of the mortgage bond there was no longer any contractual relationship between it and Kensington. It is a bridge too far to hold that Standard Bank has proven its *locus standi* on a basis which was not raised in either the founding or replying affidavits and which in fact conflicts with version put forthwith in these affidavits

26. I conclude therefore that Mr and Mrs Costa dispute Kensington's liability to Standard Bank (and thus their accessory liability in terms of the former section 26(5) of the Close Corporations Act) on reasonable and *bona fide* grounds.

27. In the circumstances it is not necessarily to deal with the remaining issues referred to in paragraphs 9.2 and 9.3 above.

ORDER

28. I make the following order:

- (1) The provisional orders of sequestration granted under case numbers 74955/2014 and 75020/2014 are discharged;
- (2) The applications under case numbers 74955/2014 and 75020/2014 are dismissed with costs.

A DE KOK
Acting Judge of the High
Court, Gauteng Division,

Pretoria

Date of hearing: 30 November 2016

Date of judgment: 14 December 2016

Appearances

For applicant: Mr R Raubenheimer instructed by Vezi de Beer Inc

For respondents: Mr G Kairinos SC instructed by E Da C Luiz Attorneys *c/o* Jansen and Jansen Inc.