IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISE D ·

Case Number: 19121/2017

16/4/2019

In the matter between:

FIRSTRAND BANK LIMITED **Applicant**

and

ANNE ELIZABETH MARY PRATT **Respondent**

(an unmarried female born on 11 March 1960

With identity number [….])

JUDGMENT

RANCHOD J

Introduction

[1] In this matter the applicant (the bank), seeks the provisional sequestration of the estate of the respondent (Ms Pratt). The bank alleges that Ms Pratt is indebted to it in an amount not less than R43 811 507.99 in respect of a judgment

debt which Ms Pratt has failed or refused to pay. The amount includes interest and costs. Ms Pratt also has costs orders against her in other proceedings by the bank totalling nearly R1 000 000.00. The bank alleges that it would be to the advantage of her creditors should Ms Pratt's estate be sequestrated.

Background facts

[2] In what follows is a brief background leading up to the present application.

[3] Ms Pratt conducted an employment recruitment business through a South African company called Anne Pratt & Associates (Pty) Ltd ('APA)'. Prior to December 2001 the shareholding in APA was as follows:

3.1 70% of the shares were held by the Fast Track Trust ("FT Trust') which was established in the Isle of Man with the trustees also established there.

3.2 30% of the shares were held by Ms Pratt.

[4] During 2001 Ms Pratt informed the bank that she wished to acquire the 70% of the shares held in APA by the FT Trust, and she applied for a loan to do so. The bank agreed to lend her R25 000 000.00 to acquire the 70% interest.

[5] To give effect to the agreement the bank and Ms Pratt concluded an oral agreement as well as a written 'Origin Capital Contributor Agreement' and a written 'Origin Capital Contributor Schedule' on 6 December 2001. Both of the written contracts were subsequently amended by mutual agreement. The Origin Capital Contributor Agreement, Origin Capital Contributor Schedule, and all subsequent written amendments thereto as well as the oral loan agreement are collectively referred to as 'the Agreements'.

[6] The bank advanced the loan amount of R25 000 000.00 to Ms Pratt. The capital amount was repayable in one instalment after five years. It appears that interest on the loan was payable at regular intervals. Ms Pratt paid a number of instalments but then stopped, disputing her liability to the bank under the agreements.

[7] In October 2003 Ms Pratt instituted action against the bank and MCubed to declare the agreements null and void on the ground that no exchange control permission had been obtained for the agreements as required by the exchange control regulations. (The FT Trust had an offshore investment in MCubed.)

[8] The bank defended the action and counterclaimed for the payment of the loan amount. The bank joined Waterman's Chartered Accountants *(>NGA)* to the proceedings as a third party on the basis that WCA had, at Ms Pratt's behest, valued the 70% of the shares in APA at R25 million and if it were to be held that the agreements were void for lack of fair value, WCA would be liable to the bank on the grounds of its misrepresentation.

[9] The matter went on trial in January 2007 on separated issues that the parties agreed would be dispositive of the merits of both the claim and the counterclaim. Acting Justice Mokgoatlheng (as he then was), found in favour of the bank. He held that there was indeed exchange control permission for the transaction and that the agreements were valid. Ms Pratt appealed against the decision of Mokgoatlheng AJ, but it was dismissed by the Supreme Court of Appeal (SCA) in 2008.

[10] The substratum of Ms Pratt's defence to the counterclaim was identical to that of her claim in the action against the bank. Her claim having failed, it ought to have been clear that her defence to the counterclaim would similarly fail. Nevertheless, she sought to amend her plea to the counterclaim to include new defences based on allegations of fraud on the part of the bank. Her amendment was allowed by Goodey AJ. The bank replicated to her amended plea that the new matters were *res judicata.* The case proceeded to trial on the *res judicata* issue in 2013 and Fabricius J of this court found that the new defences raised by Ms Pratt were indeed *res judicata.* Ms Pratt appealed to the SCA which again ruled in favour of the bank in 2014. As a result, all that remained outstanding for determination was the quantum of the bank's claim.

[11] The quantification of the counterclaim was enrolled for trial in November 2015 before Fabricius J. The bank called a witness, Mr. Giger, who testified about the computation of the bank's claim, taking into account the proceeds of

the offshore investment that had been ceded to the bank as security in terms of the agreements, totalling R20 437 758.37 and that had been credited to Ms Pratt. Ms Pratt did not testify. One 4 November 2015 Fabricius J granted judgment in favour of the bank for R19 634 279.49 together with interest from 19 June 2007 to date of payment (the judgment debt). Taking interest and the *in duplum* rule into account the aggregate of the judgment debt, including interest, was R39 268 558.98 at the date of the judgment. In terms of the *in duplum* rule and the agreed interest rate, interest will continue to accrue on this amount at the prime rate calculated daily and compounded monthly from date of judgment (4 November 2015). The bank says Ms Pratt has failed or refused pay any portion of the judgment debt which stood at R43 811 507.99 as at 14 December 2016.

[12] Ms Pratt was also ordered to pay the costs of her unsuccessful second appeal to the SCA which amounted to R44 881.96. Although the bank issued a letter of demand she has failed or refused to pay any portion of the taxed costs. She was also ordered to pay certain other taxed costs of the bank totalling R900 757.48. The bank says those costs have also not been paid by Ms Pratt.

[13] In April 2016 Ms Pratt brought an urgent application for a stay of execution of the order of Fabricius J (the stay application) pending the outcome of an action she intended to launch to set aside the judgments and orders of Mokgoatlheng AJ and Fabricius J. On 30 June 2016 Tuchten J dismissed the stay application with costs. Undaunted, Ms Pratt applied for leave to appeal but the application was refused, again with costs. She did not apply for leave to appeal to the SCA. Still in 2016, Ms Pratt launched action proceedings (the fraud action) from this court against both the bank and the South African Reserve Bank (the SARB) in which she seeks to set aside the judgments and orders of Fabricius J and Mokgoatlheng AJ as intimated in the stay application. That action is still pending.

[14] On 14 July 2016, the bank's attorneys sent a letter to Ms Pratt's attorneys demanding payment of the judgment debt by Ms Pratt. Despite granting her an extention of time to do so, Ms Pratt failed to pay the judgment debt or any part thereof.

[15] Thereafter, for more than a year the bank unsuccessfully attempted to

execute against Ms Pratt's movable assets. Ultimately the bank launched the present application for the provisional sequestration of Ms Pratt's estate.

[16] The bank states that it made numerous attempts to serve a warrant of execution on Ms Pratt personally but was unable to do so. The deponent to the founding affidavit mentions at least nine steps the bank took to try and serve the warrant of execution personally on Ms Pratt but was unable to do so as she either obstructed the Sheriff or evaded service entirely. It concluded that having regard to Ms Pratt's continued relocations and that she has failed or neglected to pay or secure the bank's claim the conclusion is inescapable that she cannot pay her debts and that she is deliberately evading service of the writ thereby frustrating the bank's attempts at completing the attachment of her movable property. It therefore launched the present application for her provisional sequestration on the basis that she is factually insolvent and it would be to the advantage of her creditors if the application was granted.

[17] In a sworn statement made on 17 May 2013 Ms Pratt had provided the bank with details of her assets and liabilities and stated that her assets, at a realistic value, were worth only RS 896 911.00 and her liabilities were a loan of R18 869 375.00 from the Fast Track Trust. (In the founding affidavit the bank states that the liability is a loan 'to' the Fast Track Trust which appears to be incorrect as then it would constitute an asset in her estate.) It is apparent that as at that date Ms Pratt's liabilities far exceeded her assets. Ms Pratt counters in her opposing affidavit that these figures are outdated and are not relevant as far as the present application for sequestration is concerned. I will revert to this aspect later on.

[18] Ms Pratt had also stated that her monthly remuneration from several sources in 2013 was R70 267.69 per month. The bank avers that Ms Pratt's lavish lifestyle indicates otherwise. It has set out in detail in the founding affidavit a number of businesses in which Ms Pratt has interests and from which she derives income. She is a director of several companies; a member of certain close corporations; beneficiary of a number of trusts including off-shore trusts. Hence, says the bank, a provisional sequestration order will be in the best

interests of Ms Pratt's creditors as it would enable the trustee of her estate to investigate her financial and business affairs and fully and properly interrogate her. The bank relies on sub-sections 8(a) and (b) as well as section 10 of the Insolvency Act 24 Of 1936 (the Act).

[19] Ms Pratt opposes the application on some technical grounds and also on the basis that she is not factually insolvent and that the application is premature as her fraud action against the bank and the SARB should first be concluded.

[20] Insofar as the technical defences are concerned Ms Pratt argued, *inter alia,* that the application was not served on her personally. It was also raised for the first time - in any detail - in Ms Pratt's heads of argument that her marital status, date of birth and her identity number were not stated in the application. However, at the commencement of the hearing, her counsel, Mr Hoffman, informed me that those defences were no longer being pursued. The remaining grounds upon which Ms Pratt opposes the application may be summarised as follows:

20.1 The application is premature as the bank has not fully excussed her assets;

20.2 The bank has failed to show that she is factually insolvent; and

20.3 The judgment debt of R19 634 279.49 together with interest and costs granted in favour of the bank by Fabricius J on 4 November 2015 was procured by the bank using fraudulent means.

<u>The relevant legal provisions relating to provisional sequestration orders</u>

[21] In terms of section 10[1] of the Act the court may grant a provisional

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[1] **'10 Provisional sequestration**
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 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,

sequestration order if it is satisfied that *prima facie:*

21.1 The applicant has established a claim which entitles it, in terms of section 9(1) of the Act to apply for the sequestration of the debtor's estate[2]; and

21.2 The debtor has committed an act of insolvency or is factually insolvent; and

21.3 There is reason to believe that it would be to the advantage of creditors of the debtor if his/her estate is sequestrated (section 12 (1) of the Act).

[22] The onus of satisfying the court of the three requirements rests on the sequestrating creditor.

[23] Where a debtor raises a factual dispute the requirements for sequestration are established on a balance of probabilities.

[24] In the matter of *ABSA Bank v Van Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 443C-D the court stated the following:

'Even, however, where a debtor has not committed an act of insolvency and it is incumbent on his unpaid creditor seeking to sequestrate the termer's estate to establish actual insolvency on the requisite balance of probabilities, it is not essential that in order to discharge the onus resting on the creditor if he is to achieve this purpose that he set out chapter and verse (and indeed figures) listing the assets (and their value) and the liabilities (and their value) for he may establish the debtor's insolvency inferentially. There is no exhaustive list of facts from which an inference of insolvency may be drawn, as for example an oral admission of a debt and failure to discharge it may, in appropriate circumstances which are sufficiently set out, be enough to establish insolvency for the purpose of the *prima facie* case which the creditor is required to initiallymake out. It is then

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it may make an order sequestrating the estate of the debtor provisionally. '

[2] Section 9(1) provides that where a creditor has a claim of not less than R100 i.e. a liquidated claim against the debtor who has committed an act of insolvency, or is insolvent, the creditor may petition the court for the sequestration of the estate of the debtor.

for the debtor to rebut this *prima facie* case and show that his assets have a value exceeding the sum total of his liabilities. See *Mars: The Law of Insolvency in South Africa,* 8th ed at 108; *Mackay v Cahi* 1962 (4) SA 193 (0) at 194F-H, 195C-E, 204F-H.'

Mr Louw SC, stated that the bank relies on the judgment in *Webster v Mitchell*[3] with regard to the requirements in an application for a temporary interdict in that, as a provisional sequestration order was sought the bank has established a *prima facie* case. The bank of has several taxed bills of costs totalling about R900 000.00 which Ms Pratt has failed to pay.

[25] The test where a provisional order is being sought, as is the case here, is not whether the sequestrating creditor has established the requirements on a balance of probabilities (i.e. the standard of proof to obtain a final order). In this regard, the provisional sequestration stage is designed to afford the creditor a simple and speedy remedy for preserving the debtor's estate and enforcing its claim. *(Provincial Building Society of South Africa v Dubois* 1966 (3) SA 76 0N) at 80.)

[26] Section 8[4] of the Act defines acts of insolvency. Section 8(a) provides that

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[3] 1948 (1) SA 1186 (WLD). The Headnote provides: 'In an application for a temporary interdict , applicant' s right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.

In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted, subject, if possible, to conditions which will protect the respondent.'

[4] **'8 Acts of insolvency**

A debtor commits an act of insolvency-

(a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself , with intent by so doing to evade or delay the payment of his debts;

(b) if a court has given a judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;

a debtor commits an act of insolvency if he/she leaves the Republic or being out of the Republic remains absent therefrom, or departs from his/her dwelling or otherwise absents himself/herself with the intent by so doing to evade or delay the payment of his/her debts.

[27] Section 8(b) of the Act creates two separate acts of insolvency, namely, firstly, where the debtor, upon demand of the Sheriff, fails to satisfy the judgment debt or to indicate disposable property sufficient to satisfy it and, secondly, where the Sheriff, without presenting the writ to the debtor, fails to find sufficient disposable property to satisfy the judgment debt and states this fact in his return.

[28] In addition to an act of insolvency, the creditor may also rely on the fact that the debtor's estate is insolvent (i.e. that his/her liabilities exceed his/her assets). If the creditor relies on an act of insolvency and is unable to establish that it was committed, but it is quite clear that the debtor is in fact insolvent, the court may grant the sequestration order on the latter ground. *(Comer Shop (Pty) Ltd v Moodley* 1950 (4) SA 55 (T)) In this regard, proof of insolvency need not be direct. It is sufficient if the creditor establishes facts from which the inference of insolvency is fairly and properly deducible. See *ABSA Bank v Rhebokskloof (supra).*

[29] In terms of the provisions of section 12(1)(c) of the Act, before the court will grant the sequestration order, it must be satisfied that there is reason to believe that it would be to the advantage of creditors if the debtor's estate is sequestrated. 'Creditors' means all or at least the general body of creditors. *(Lotzof v Raubenheimer* 1959 (1) SA 90 (0) at 94.)

[30] The question is whether a 'substantial portion' of the creditors, determined according to the value of the claims, will derive advantage from sequestration. *(Fesi v* ABSA *Bank Ltd* 2000 (1) SA 499 (C).)

[31] For a sequestration to be to the advantage of creditors it must 'yield at the least, a not negligible dividend'. *(Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) at 111.)

[32] It is not necessary to prove that the debtor has any assets, provided it is

shown either that the debtor is in receipt of an income of which portions are likely to become available to creditors in terms of section 23(5) of the Act, (*Ressel v Levin* 1964 (1) SA 128 (C) or that there is a reasonable prospect that the trustee, by invoking the machinery of the Act, will reveal or recover assets which will yield a pecuniary benefit for creditors. (BP *Southern Africa (Pty) Ltd v Furstenberg* 1966 (1) SA 717 (0) at 720; and *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) at 583.)

Is the application premature?

[33] Ms Pratt contends that the bank has not fully excussed her assets. Hence the application for her provisional sequestration is premature.

[34] The bank lists a number of steps it says it has taken to excuss Ms Pratt's movable assets and attempts made to serve the writ personally on her. On 17 November 2015 it caused a warrant of execution to be issued to attach and execute upon the movable assets of Ms Pratt at Unit 4, Carrington Pointe in Sandown, Sandton, which the bank believed to be Ms. Pratt's primary residence. The Sheriff attempted to serve the warrant on her and attach the movable assets at Carrington Pointe but was unable to do so as she refused the Sheriff entry into the dwelling. The Sheriff recorded an inventory of the movable property situated outdoors at Carrington Pointe. However, only a partial inventory was possible because Ms Pratt prevented the Sheriff from completing the inventory inside the house.

[35] Thereafter, for more than a year the bank attempted to secure personal service and execute on the judgment granted by Fabricius J in its favour. These attempts have been deliberately frustrated because Ms Pratt has either obstructed the Sheriff or evaded service. It made numerous attempts i.e. on 24 August 2016; 14, 29 and 30 September 2016; 14, 18, 19, 22 and 23 November 2016; and 8 December 2016 to serve the writ on her personally at various places (including at Court) but it was unsuccessful. The bank says Ms. Pratt has also continuously relocated. Therefore, the inference is inescapable that she cannot

pay her debts and that she is deliberately evading service of the writ, thereby frustrating the bank's attempts at completing the attachment of her movable property.

[36] Carrington Executive Lodge CC (the CC) (an entity different from Carrington Pointe) of which Ms Pratt is the sole member, is the registered owner of the Carrington Pointe property. Ms Pratt filed an interpleader affidavit on behalf of the CC in which she stated under oath that all the movable property attached by the Sheriff and that inside the house belong to the CC and not to her personally. The bank says based on this, it would appear that Ms Pratt has no movable assets.

[37] In light of these facts Ms Pratt's contention that the application is premature because the bank should first have excussed her assets is without merit. There is an apparent inconsistency in this argument. The facts alleged in the founding affidavit by the bank have simply been ignored by Ms Pratt or she has failed to pertinently respond to them. In fact, she was invited by the bank to state her current financial position in her answering affidavit which she has failed to do. She had every opportunity to take the court into her confidence to give any flesh to her bald denial of factual insolvency but failed to do so. One cannot but draw an adverse inference in this regard. Indeed, the inference is inescapable that she is factually insolvent.

[38] Ms Pratt's counsel submitted that the facts in *Zadi v Body Corporate of Outiniqua* 2001 JDR 1096 (GNP) are apposite to this application. In my view, the submission cannot be sustained. The facts differ and counsel conceded as much. There the first respondent had applied for leave to sue Zadi by way of substituted service, by publication in certain newspapers. A rule nisi was issued calling upon interested parties to show cause why Zadi should not be sequestrated. The rule nisi was later confirmed. At a later stage Zadi discovered that his estate had been sequestrated. When applying for rescission, Zadi submitted that if the judgment creditor had simply attached and sold his assets in execution, its debt would have been paid. Instead, argued Zadi, it abused the court process by applying for his sequestration. The court criticized the judgment creditor in that there was nothing

in the papers to suggest that it had attempted to ascertain Zadi's whereabouts and in fact misled the court in this regard in the application for substituted service. The court also criticized the fact that the judgment creditor had not made mention of its failure to first attach and sell Zadi's assets in execution prior to apply for his sequestration. The court therefore in that case concluded that the respondent 'never intended to serve the papers on the applicant. No attempts appears *[sic]* to have been made to ensure that the method of service for which leave was sought was effective.' I have already set out the facts regarding the attempts made by the bank to ascertain Ms Pratt's whereabouts on certain occasions and the number of attempts made to execute the warrant of execution. She can hardly now complain as she does that the bank has not excussed all of her assets when she is primarily the cause of its inability to do so.

[39] Ms Pratt contends that the sequestration application has been launched with an ulterior motive, i.e. to avoid the consequences, and to scupper the proper ventilation of the fraud action against both the SARB and the bank, and both the criminal and Public Protector Investigations. The submission is misconceived. As matters stand Ms Pratt owes taxed costs that were ordered by this court and her fraud action will not (in the event that it is successful) affect those orders and concomitant debts. She may, if she is successful, get some compensation from the SARB or even the bank, but that will have no bearing on the costs orders and the main judgment against her.

[40] Ms Pratt complains that the bank approbates and reprobates in that on the one hand it alleges that she is a woman of substantial means and on the other that she has no assets. I do not think the complaint is warranted. As I understand it, the bank says that while she claimed - in 2013 - to have an income of about R70 000.00 her lifestyle and expenditure is clearly not consistent with that alleged income. According to a statement which she admits having provided to the bank in 2013 her liabilities far exceeded her assets. Despite stating that the bank cannot rely on a statement that is more than four years old in an attempt to evidence her insolvency, she provides no information on what her current position is. The information is peculiarly within her knowledge and by refusing to

disclose it she is acting mala *fide.* The bank has excussed against as much as it could of her assets. She gives the indication of being a successful and wealthy business woman. But that does not mean that she is also able to satisfy her debt in the region of R45 million. I have mentioned earlier the number of trusts and other business entities that Ms Pratt is involved in in various capacities. What it shows is that she is a businesswoman who does not earn most of her income in her own name thus justifying an order to investigate her financial affairs in greater detail. (See *Meskin & Co v Friedman* 1948 (2) SA 555 0/v) at 559 and the authorities cited in para [32] above.) It would accordingly be to the advantage of creditors if a provisional sequestration order is granted.

[41] In conclusion, I can do no better than to echo the words of my learned brother Tuchten J in paragraph 64 of his judgment dated 30 June 2016 in the Stay of Execution Application where he said:

> '[F]or the last thirteen years [now almost sixteen years], Ms Pratt has had what I might call a Rolls Royce ride through the highways of the South African legal system. After a multitude of hearings, FirstRand has won an order for payment which is no longer subject to any appeal'.

And yet she fails to pay what she owes and instead launched the Fraud application which seems to be nothing other than a red herring designed to further frustrate the bank in recovering what is-legitimately due to it. In my view the bank has made out a proper case for the provisional sequestration of Ms Pratt.

[42] I make the following order:

1. The estate of Anne Elizabeth Mary Pratt, an unmarried female born on 11 March 1960, with identity number [….] is placed under provisional sequestration in the hands of the Master of the High Court;
2. A *rule nisi* is issued calling upon Anne Elizabeth Mary Pratt, and any other interested parties, to show cause, if any, to this Court at 10h00

on Tuesday 25 June 2019 as to why:

2.1 the estate of Anne Elizabeth Mary Pratt should not be finally sequestrated; and

2.2 the costs of this application, including the costs of two counsel where so employed, should not be costs in the administration of the estate of the said Anne Elizabeth Mary Pratt.

RANCHOD J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

For the Applicant:

Adv. PF Louw SC

Adv. MA Chohan

Adv. LG Kilmartin

Instructed by: Hogan Lovells (SA) Inc;

Johannesburg.

For the respondent:

Adv. LM Hodes SC

Adv. JM Hoffman

Instructed by:

Ian Levitt Attorneys Johannesburg.