REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 86763/2019

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

....
DATE SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED
t/a RMB PRIVATE BANK Applicant

and

ARTHUR PETER PEDLAR
(ID No. [….])
(married out of community
of property) Respondent

and

CASE NO: 86763/2019

In the matter between:

FIRSTRAND BANK LIMITED
t/a RMB PRIVATE BANK Applicant

and

SANDRA JOANNA PEDLAR Respondent
(ID No. [….])
(married out of community of property)

J U D G M E N T

The judgment and order are accordingly published and distributed electronically. The date and time of hand down is deemed to be 10:00 on 22 November 2021.

TEFFO, J:

Introduction

[1] The applicant launched two separate applications for the provisional sequestration of the estates of the respondents. The first application issued under case number 86763/2019 is against the estate of Mr Arthur Pedlar and the second application under case number 86763A/2019 is against the estate of Mrs Sandra Joanna Pedlar. Mr and Mrs Pedlar are married out of community of property.

[2] I was requested to hear both applications simultaneously.

[3] The respondents oppose the applications.

[4] Mrs Pedlar has not filed any opposing papers.

[5] The applicant also filed an application for condonation for non-compliance with Uniform Rule 4(1)(a)(i). The application was not opposed. It was accordingly granted.

The parties

[6] The applicant is Firstrand Bank Limited t/a RMB Private Bank. The respondent under case number 86763/2019 is Mr Arthur Peter Pedlar and the respondent under case number 86763A/2019 is Mrs Sandra Joanna Pedlar. It will be convenient to refer to the parties by name. The applicant as Firstrand Bank, the respondent under case number 86763/2019 as Mr Pedlar and the respondent under case number 86763A/2019 as Mrs Pedlar. Where appropriate the respondents will be referred to jointly as Mr and Mrs Pedlar.

The salient factual background

[7] On or about 10 January 2006, Firstrand Bank and Mr Pedlar entered into a written single term credit facility agreement (*"the agreement"*) in terms of which Firstrand Bank agreed to advance the initial sum of R1 800 000,00 to Mr Pedlar. Mrs Pedlar bound herself as surety and co-principal debtor in solidum with Mr Pedlar for the due and punctual payment by Mr Pedlar to Firstrand Bank of all and any sums of money which may now be or which may thereafter become owing by Mr Pedlar to Firstrand Bank in terms of the agreement entered into between Mr Pedlar and Firstrand Bank.

[8] In terms of the loan agreement, Mr Pedlar had to pay the principal debt in 240 monthly instalments in the amount of R16 021,83. The agreement was later varied on 30 October 2006 to the sum of R2 240 000,00.

[9] As security for the repayment of the loan, a mortgage bond was registered under bond number B24727/2006 ("*the mortgage bond*") in favour of Firstrand Bank for the amount of R2 500 000,00 and an additional sum of R500 000,00 over the immovable property known and described as the remaining extent of holding 53 Raslouw Agricultural Holdings, Registration Division J.R., the province of Gauteng; measuring 8566 (Eight Thousand Five Hundred and Sixty-Six) square metres, held by deed of transfer no. T95775/2001 ("*the property*").

[10] On or about 5 August 2010, Mr Pedlar exceeded the facility sum with an amount of R108 353,05 after defaulting to pay the monthly instalments due and payable in terms of the agreement. The outstanding balance in terms of the agreement amounted to the sum of R2 369 336,94 with interest at the rate of 11,25% to be calculated from 2 August 2010.

[11] Following the breach of the agreement by Mr Pedlar, Firstrand Bank instituted an action under case number 53126/10 against Mr and Mrs Pedlar for payment of the amount of R2 369 336,94 excluding interest and costs jointly and severally, and also sought an order declaring the immovable property to be specifically executable together with costs on a scale as between attorney and own client.

[12] Mr and Mrs Pedlar entered appearance to defend the action and Firstrand Bank applied for summary judgment. The application for summary judgment was set down for hearing on 21 June 2011.

[13] On 20 June 2011 the parties entered into a settlement agreement in terms of which Mr Pedlar agreed to pay monthly instalments of R30 000,00

with effect from 30 June 2011. However, the parties agreed that should the normal instalment in terms of the agreement exceed the amount of R30 000,00, Mr Pedlar would pay the normal instalment. The parties further agreed that should Mr and Mrs Pedlar fail to comply with the settlement agreement, Firstrand Bank would be entitled to summary judgment. Mr Pedlar then signed a special power of attorney authorising Firstrand Bank to sell the immovable property.

[14] On 21 June 2011 the settlement agreement was made an order of court and the summary judgment application was postponed *sine die*.

[15] Mr and Mrs Pedlar defaulted with their obligations in terms of the settlement agreement. They failed to make any payments of the monthly instalments agreed upon between the parties.

[16] As a result, Firstrand Bank acted in terms of the power of attorney and marketed the immovable property. It could not get any acceptable offers.

[17] Subsequently Firstrand Bank instructed Bidco Auctioneers to auction the property. The auction was scheduled to take place on 25 February 2015. On 25 February 2015 the property was sold for the amount of R1 900 000,00.

[18] Following the auction, Mr and Mrs Pedlar launched an application to set aside the order that was granted on 21 June 2011. They also sought an order declaring void and setting aside the power of attorney dated 20 June 2011, as well as setting aside any sales pursuant to the power of attorney dated 20 June 2011.

[19] Firstrand Bank and the new purchasers of the property opposed the application. The application was ultimately granted in favour of Mr and Mrs Pedlar. However, Mr and Mrs Pedlar were ordered to pay the costs of the application.

[20] Subsequent thereto, Mr and Mrs Pedlar persisted in their breach and failed to honour their payment obligations towards Firstrand Bank. Firstrand Bank re-enrolled the summary judgment application in the unopposed motion court on 28 June 2017. The amount outstanding as at 1 June 2017 was R3 112 059,18.

[21] Mr and Mrs Pedlar opposed the summary judgment application and on 30 June 2017 the application was granted in favour of Firstrand Bank for payment of the sum of R3 112 059,18 against Mr and Mrs Pedlar jointly and severally, the one paying the other to be absolved, and interest on the said amount calculated from 1 June 2007 until date of payment, calculated daily and compounded monthly, both days inclusive, costs of suit on a scale as between attorney and own client, and an order declaring the immovable property to be specifically executable.

[22] Subsequently Mr and Mrs Pedlar launched an application for leave to appeal and leave to present further evidence. The application was dismissed with costs.

[23] Firstrand Bank proceeded to arrange a sale in execution of the immovable property after obtaining the summary judgment and the sale was scheduled to take place on 3 December 2018.

[24] On 3 December 2018 the sale could not proceed in that Mr and Mrs Pedlar published notices for the surrender of their respective estates and the appointment of a *curator bonis*. The notices indicated that the applications for the voluntary surrender of their estates would be made on 21 December 2018. The statement of the debtor's affairs could not be located at the Master's Office and on 21 December 2018 the applications were not set down for hearing. Mr and Mrs Pedlar indicated they were no longer proceeding with the applications for the surrender of their estates.

[25] The second sale of the immovable property was scheduled to take place on 18 March 2019. Mr and Mrs Pedlar again published notices to surrender their estates and the appointment of a *curator bonis*. The notices stated that the applications for the voluntary surrender of their estates were set down for hearing on 11 April 2019. On 11 April 2019 the applications were not enrolled and Mr and Mrs Pedlar indicated that they were no longer proceeding with the applications.

[26] Despite the above, the immovable property was sold at a sale in execution on 18 March 2019 for an amount of R1 759 000,00. However, the sale was cancelled because the purchaser was a sheriff. Mr and Mrs Pedlar also launched an application to set aside the sale in execution of 18 March 2019 because of Firstrand Bank's alleged contravention of sections 4 and 5 of the Insolvency Act 24 of 1936 ("*the Act*") by proceeding with the sale in execution while the notices for voluntary surrender of their respective estates had been published.

[27] The judgment debt in the amount of R3 112 059,18 (excluding interest and costs) is still not yet paid.

[28] The abovementioned facts gave birth to the current applications before court.

Firstrand Bank's case

[29] Firstrand Bank contends that it is a creditor of Mr and Mrs Pedlar in the amount of R3 112 059,18 (excluding interest and costs) by virtue of the summary judgment it has obtained against them. They have not been able to pay the judgment debt.

[30] Mr and Mrs Pedlar have attempted on two occasions to voluntarily surrender their estates. However, for reasons known to them no order was made in that regard. Both applications were never enrolled for hearing after Mr and Mrs Pedlar gave notices of their intention to apply for the voluntary surrender of their estates.

[31] They can therefore not dispute its claim against them, and that they are factually insolvent.

[32] As at the date of the application, the total amount owing to it by Mr and Mrs Pedlar jointly and severally, amounts to R4 257 780,15 together with interest and costs.

[33] The market value of the immovable property at the time of the application was R2 300 000,00 and municipal valuation was R1 700 000,00.

The local authority indicated that Mr and Mrs Pedlar were in arrears in the amount of R8 799,49.

[34] The consumer credit profile of Mr Pedlar indicated that on or about 17 October 2012, he applied for debt review, which application was voluntarily withdrawn. This is an indication that Mr Pedlar had financial difficulties as early as 2012.

[35] Mr and Mrs Pedlar have other creditors which are being paid, but it is not paid.

[36] Mr and Mrs Pedlar have committed one, more or all of the following acts of insolvency: sections 8(b), 8(c), 8(e), 8(f) and/or 8(g) of the Act.

[37] Firstrand Bank asserts that Mr and Mrs Pedlar are factually insolvent. Their liabilities factually exceed their assets. They stand to be sequestrated as envisaged in section 2 of the Act.

[38] It further contends that but for the bond under bond number B24727/2006 and the suretyship in respect of Mrs Pedlar, it holds no other security for its claim.

[39] It claims that the sequestration will be to the advantage of creditors.

Mr and Mrs Pedlar's cases

[40] They deny that Firstrand Bank is entitled to the relief sought and have raised three points *in limine*, namely: failure by Firstrand Bank to consolidate their applications; they allege that there are pending negotiations between the parties; and that there is an alternative remedy available.

[41] They claim that they have not committed any act of insolvency, the sheriff's returns of service are not conclusive, they are stale and Mr Pedlar is not factually insolvent. He stands to suffer prejudice, and the court's discretion should be exercised in his favour.

[42] Mr and Mrs Pedlar do not dispute that Firstrand Bank has a claim against them in terms of section 9(1) of the Act.

Points *in limine*

Failure to consolidate the applications

[43] Mr and Mrs Pedlar contend that Firstrand Bank elected to institute sequestration proceedings against them under two different case numbers where each one of them has been cited separately. The applications are premised on a debt allegedly owed by Mr Pedlar for which Mrs Pedlar signed as surety. The underlying cause of action is the same and previous orders were granted against them when cited in one action. In both applications for sequestration the alleged act of insolvency is directed against a *nulla bona* return of service. The events giving rise to both applications are the same, alternatively, closely linked. Firstrand Bank ought not to have instituted separate applications.

[44] In pursuing the applications separately, Firstrand Bank's actions will cause inevitably fruitless incurring of extensive legal costs as they will have to file answering papers in both applications.

[45] They are prejudiced by the applicant's approach in filing the two applications.

[46] In its replying affidavit, Firstrand Bank submitted that Mr and Mrs Pedlar are married out of community of property. It is an established principle of law that a creditor cannot sequestrate more than one estate in a single application. There must be a separate application for each estate to be sequestrated.

[47] In support of their argument, Mr and Mrs Pedlar rely on the case of *Nel v Silicone Smelters (Edms) Bpk en Ander*[1] where it was held that matters in which substantially the same facts or points of law have to be pronounced upon, are cited at a single hearing in order to avoid duplication, save costs and expedite proceedings. I find this case distinguishable in that it does not deal with sequestration proceedings.

[48] Firstrand Bank placed reliance on the case of *BP Southern Africa (Pty) Ltd v Viljoen en Ander.*[2] This case is also distinguishable in that it concerned the spouses who were married in community of property.

[49] It is trite that where the parties are married out of community of property, each spouse's assets belong to that spouse alone and the sequestration or insolvency of the other spouse does not affect the spouse who is not insolvent. Where both the spouses are insolvent in a marriage out of community of property, both can (and should) be sequestrated. Since each spouse owns his/her own separate estate, two separate sequestration applications will be brought, although they can be brought simultaneously. From a cost and practical perspective, it will be better if the two applications are lodged simultaneously.

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[1] 1981 (4) SA 792 (A) 801
[2] 2002 (5) SA 630 (O) read with section 20 of the Act

[50] Firstrand Bank correctly launched two separate applications for the sequestration of Mr and Mrs Pedlar simultaneously. The point *in limine* is therefore meritless and falls to be dismissed.

Pending negotiations

[51] This point *in limine* was abandoned during argument.

Alternative remedy

[52] Mr Pedlar claims that he has an immovable property which can be realized. He disputes the valuation of his property by Firstrand Bank. He contends that the property is valued at approximately R4 000 000,00 and Firstrand Bank's claim is between R3 000 000,00 and R4 000 000,00. Declaring the property executable will extinguish the debt. His security is therefore more than sufficient to cover Firstrand Bank's alleged debt and costs. It is unreasonable to proceed by way of sequestration.

[53] Firstrand Bank submits that Mr and Mrs Pedlar admit that they are factually insolvent and do not have assets that will be easily sold to cover and pay the full judgment debt. Mr Pedlar has not attached his own valuation of the immovable property. It denies the allegations made.

[54] Having regard to the common cause facts in this matter, I am of the view that there is no alternative remedy to the sequestration of Mr and Mrs Pedlar. The immovable property was put up for sale on more than one occasion and the sales were halted by the actions of Mr and Mrs Pedlar of publishing the notices for the surrender of their separate estates and the applications thereof were never brought to court. Furthermore, taking into

account the history of the matter regarding how the sheriff attempted to execute the costs order against Mr and Mrs Pedlar by issuing the *nulla bona* returns, I do not see how the judgment can be easily executed as alluded to by Mr Pedlar. Mr Pedlar has not attached any valuation of the immovable property although he contends that the property is valued at R 4000 000,00 and denies the valuations that have been attached to the papers by Firstrand. Firstrand Bank has exhausted all its efforts to execute the judgment that was granted in its favour which remains unpaid to date.

[55] This point *in limine* has no merit. It is therefore dismissed.

The requirements for sequestration

[56] The court may grant an application for the sequestration of a debtor's estate if it is satisfied that (a) the applicant has established a claim which entitles him in terms of section 9(1) of the Act to apply for the sequestration of the debtor's estate; (b) the debtor has committed an act of insolvency or is insolvent; (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated (section 12(1)).

[57] The *onus* of satisfying the court on these requirements rests throughout on the sequestration creditor. There is no *onus* on the debtor to disprove any element.[3]

Locus standi

[3] *Braithwaite v Gilbert (Volkskas Bank intervening)* 1984 (4) SA 717 (W) 718

[58] Section 9(1) of the Act provides that a creditor who has a liquidated claim for not less than R100,00 may apply for the sequestration of the estate of the debtor.

[59] It is of no assistance to a respondent to even raise a dispute in respect of the exact amount of his or her indebtedness.[4]

[60] It is common cause between the parties that Firstrand Bank has a judgment debt against Mr and Mrs Pedlar in the amount of R3 112 059,18 (excluding interest and costs). Firstrand Bank therefore has a liquidated claim against Mr and Mrs Pedlar for an amount not less than R100,00 as envisaged in section 9(1) of the Act. It follows that Firstrand Bank has the necessary *locus standi* as a creditor to institute this application and seek the sequestration of Mr and Mrs Pedlar.

Whether Mr and Mrs Pedlar have committed acts of insolvency

[61] Firstrand Bank contends that Mr and Mrs Pedlar committed various acts of insolvency in terms of the provisions of section 8(b), (c), (e), (f) and/or (g) of the Act.

[62] Section 8 of the Act reads as follows:

> "*A debtor commits an act of insolvency –*
>
> *(b) if a court has given 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 to*

[4] *Laeveldse Koöperasie Bpk v Joubert* 1980 (3) SA 1117 (T)

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.

and/or

(c) *he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another.*

and/or

(e) *if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partly from his debts.*

and/or

(f) *insolvency where, after publishing a notice of surrender of his estate which has, which has neither lapsed nor being withdrawn, he fails to lodge the requisite statement of his affairs or he lodges such a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender on the relevant date stipulated in such notice.*

and/or

(g) *if he gives notice in writing to anyone of his creditors that he is unable to pay any of his debts.*"

<u>*Nulla bona* returns</u>

[63] Subsequent to obtaining a cost order in its favour against Mr and Mrs Pedlar in their successful application for the setting aside of the order made on 21 June 2011, Firstrand Bank taxed the costs in the amount of R76 485,32 and caused a writ of attachment of the movable property to be issued against Mr and Mrs Pedlar.

[64] On or about 6 July 2017 the sheriff attempted to execute the writ in respect of the cost order. The return of service stated that the writ was served at the *domicilium address* by affixing it to the principal door. The sheriff was not able to contact the execution debtor personally to demand payment of the judgment debt or to demand that movable and disposable property be pointed out to him to satisfy the writ. He certified that after diligent search and enquiry, there was no movable or disposable property that could be found to satisfy the warrant or any part thereof. He could not ascertain whether the defendant owns any immovable property. His return was therefore one of *nulla bona*.

[65] Another return which was worded the same way as the previous one stated that on 10 October 2019 a warrant of execution of judgment was served.

[66] Mr and Mrs Pedlar challenge the returns of service on the basis that they do not prove an act of insolvency. They indicate that Mr and Mrs Pedlar were absent at the *domicilium* address. They could not be contacted and no demand was made on them. It cannot be said that they did not have sufficient disposable assets from which the debt could be satisfied. The returns are similar in nature. They do not indicate what steps the sheriff took or what enquiries he made to establish that there was no sufficient property to satisfy

the judgment. It was also submitted that the return dated 6 July 2017 was stale in that at the time of launching the application, the return was more than 3 years old.

[67] In the replying affidavit, Firstrand Bank contends that section 8(b) of the Act makes provision for two separate and individual acts of insolvency. It is clear from the returns of service that the sheriff was unable to establish any form of contact with Mr Pedlar. There is also an application for substituted service which shows how Mr Pedlar attempted to avoid the sheriff.

[68] Firstrand Bank disputes that the return dated 6 July 2017 is stale. It contends that there is no time period contained in section 8(b) of the Act, and the judgment is executable for a period of 30 years. It further contends that the return of service states the facts as found by the sheriff.

[69] Section 8(b) of the Act creates two separate acts of insolvency: one, where the debtor, upon demand by the sheriff, fails to satisfy the judgment or to indicate disposable property sufficient to satisfy; and the other, where the sheriff, without presenting the writ to the debtor, fails to find sufficient disposable property to satisfy the judgment and states this in his return. The two acts, although separate, are not independent of each other: the second act applies only if the first cannot be established; i.e., only if the writ of execution cannot be served personally on the debtor (my emphasis).

[70] To prove that the requirements of the subsection have been satisfied, the sequestrating creditor may rely solely on the sheriff's return of service, which is regarded as *prima facie* proof of the truth of its contents. The debtor may dispute the correctness of the statements of the return, but if the return

on the face of it, establishes an act of insolvency, the *onus* is on the debtor to show by the clearest and most satisfactory evidence that the facts set out in the return are incorrect.[5]

[71] In *Corner Shop (Proprietary) Ltd v Moodley*[6] the following was said with regard to the requirements of section 8(b) of the Act:

> "*A writ is served upon a defendant by showing him the original and handing him a copy, and its nature and exigency would be sufficiently explained by a statement that the document was a writ which required the messenger to seize sufficient movable property of the defendant to cover the amount of the judgment debt and the costs of execution. When, therefore, the messenger certifies, as he does in the printed portion of the three returns, that he has duly served the writ and informed the defendant of its nature and exigency, this does not necessarily mean more than that he has exhibited the original writ to the defendant, handed him a copy, and told him that he, the messenger, was required to attach sufficient movable property to satisfy the writ. In order to satisfy the requirements of section 8(b) of the Insolvency Act it would be necessary, in my opinion, for the messenger to go further and to call upon the debtor either to pay the debt or to point out sufficient disposable property to satisfy the amount. I do not find it possible to infer from the terms of the printed portion of the return that such a demand was made … The documents are not, therefore, in my view, sufficient to show that the respondent has*

[5] *Van Vuuren v Jansen* 1977 (3) SA 1062 (T)
[6] 1950 (4) SA 55 (T)

committed an act of insolvency of the first kind dealt with in the sub-section. With regard to the second category, all that appears from the returns is that the messenger attempted to attach the particular items of the property mentioned by the applicant, that his attempts had failed in the case of the movables, but that he succeeded in attaching the building on Stand 5. It does not appear from the returns, therefore, that the messenger did not find sufficient disposable property, and an act of insolvency of the second kind has clearly not been committed. The applicant has, therefore, in my view, failed to prove an act of insolvency in terms of section 8(b) of the Act."

[72] In *Natalse Landboukoöperasie Beperk v Moolman*[7] Henning J had this to say:

"*The failure of the debtor to satisfy the writ upon demand of the execution officer is by itself not sufficient to constitute an act of insolvency. A further necessary element is the failure of the debtor, upon demand, to point out to that officer sufficient disposable property to satisfy the writ. The debtor does, of course, commit an act of insolvency if it appears from the return made by the execution officer that he has not found sufficient disposable property to satisfy the writ. I respectfully associate myself with the views expressed in Kader v Haliman, 1958 (4) SA 31 (N), and Saber Motors (Pty) Ltd v Morophane, 1961 (1) SA 759 (W) that officers charged with the execution of writs should ensure that their returns fully and intelligibly reflect what transpired when the writs were executed. I shall now consider whether*

[7] 1961 (3) SA 10 (N) at p 11

the deputy sheriff's return in the present case prima facie establishes that the respondent has committed an act of insolvency.

There is no statement in the return that the deputy sheriff failed to find sufficient disposable property to satisfy the writ. It is therefore only necessary to investigate whether the return discloses the other type of act of insolvency described in section 8(b) of the Insolvency Act. It is true that the respondent said he could not pay, and that he failed to satisfy the writ, but the return contains no statement to the effect that he failed, upon demand by the deputy sheriff, to indicate to him sufficient disposable property."

[73] Mr and Mrs Pedlar further contends that the return does not clearly indicate what transpired when the sheriff attempted to execute. The return must be unambiguous and clearly show that the respondent did not have sufficient disposable assets from which the debt could be satisfied.

[74] A warrant of execution is often the prelude to sequestration proceedings in which event the court may have to decide whether the facts fall within the wording of section 8(b) of the Act. In terms of the returns attached herewith, reliance is placed on the second requirement of section 8(b) of the Act to prove the act of insolvency. On both returns of 6 July 2017 and 10 October 2019 the sheriff could not serve the writ on the execution debtor, Mr Pedlar personally. He could not demand payment of the judgment debt from him nor could he demand that he points out movable and disposable property to him to satisfy the writ. Mars on *Insolvency*, 5th ed p 64 says the following:

> "*In view of the important consequences that may flow from a debtor's failure to satisfy a writ, it behoves all execution officers to pay special regard to the provisions of the Insolvency Statute when making out their returns to writs.*"

[75] Even though the sheriff certified that after diligent search and enquiry, he could not find any movable or disposable property to satisfy the warrant or any part thereof, I am not satisfied that the second requirement of section 8(b) of the Act has been established. In my view having regard to the fact that the warrant could not be served on Mr Pedlar personally for the demand of the payment of the debt to be made and for him to point out the movable or disposable property to the sheriff to satisfy the writ, the sheriff should have disclosed more facts relating to the search and the enquiry that he made which led to the conclusion that he could not find any movable or disposable property to satisfy the writ. Firstrand Bank has therefore in my view failed to establish that Mr Pedlar committed an act of insolvency on this ground.

[76] Having concluded as such, I do not find it necessary to consider whether or not the return of 6 July 2017 is stale.

Applications for the voluntary surrender of their estates

[77] Firstrand Bank asserts that on two occasions Mr and Mrs Pedlar published notices to surrender their estates. On the days indicated that they will apply for the surrender of their estates, no such applications were enrolled. The applications coincided with the scheduled sales in execution. It was clearly a ploy. It further claims that despite numerous enquiries at the

Master's office, it could not locate the statement of the debtor's affairs as envisaged in section 4(3) and (6) of the Act.

[78] The allegations that Mr and Mrs Pedlar applied for the surrender of their estates have been admitted. However, Mr Pedlar claims that his application was withdrawn when he began earning an income. He has not committed an act of insolvency. He contends that the acts relied upon by Firstrand Bank occurred during 2017 and 2018. Even if Firstrand Bank established on a balance of probabilities that he is unable to pay his debts, the court still has a discretion whether or not to grant a sequestration order. In this case, the proceedings are resorted primarily to enforce a debt the existence of which is bona fide disputed on reasonable grounds. The application is an abuse of the process of court.

[79] In its replying affidavit, Firstrand Bank denies that the application for the surrender of the estate of Mr Pedlar was withdrawn and that he did not commit any act of insolvency. It contends that the allegations made by Mr Pedlar are not primary facts. They are merely his own conclusions. Mr and Mrs Pedlar have not paid or satisfied the judgment debt. It has done everything possible to execute the judgment debt but Mr and Mrs Pedlar have and are frustrating it by publishing notices to surrender their estates as envisaged in section 8(f) of the Act.

[80] Mr Pedlar says nothing about the notices for the surrender of the estate of Mrs Pedlar. The allegations about their failure to lodge the statement of the debtor's affairs with the Master have also not been contested. There is no evidence to support Mr Pedlar's claims that the published notice for the

surrender of his estate was withdrawn. The notices were not withdrawn and neither did they lapse. Mr and Mrs Pedlar failed to lodge the requisite statement of their affairs with the Master. They also failed to apply for the acceptance of the surrender of their estates on the dates provided for in their notices. Mr and Mrs Pedlar have failed to pay the judgment debt. Whether or not the acts relied upon by Firstrand bank occurred in 2017 or 2018 is immaterial. Mr and Mrs Pedlar do not dispute the existence of the debt. The conduct of Mr and Mrs Pedlar falls under section 8(f) of the Act. It follows that they have committed an act of insolvency as envisaged in section 8(f) of the Act.

Preferring one creditor above another

[81] Firstrand Bank has attached consumer profiles of Mr and Mrs Pedlar (annexures F24 and F25) dated 7 August 2019 which indicate that Mr Pedlar applied for debt review in October 2012 and the application was voluntarily withdrawn after Form 17.2 notice was sent. Mr Pedlar has three accounts with African Bank opened on 11 February 2016, 8 August 2016 and 14 February 2017 respectively with credit limits and current account balances of R150 000,00, R60 000,00 and R73 330,00, and R32 742,00, R55 000,00 and R41 758,00 respectively where he paid monthly instalments of R5 088,00 R2 112,00 and R1 909,00. All these accounts have arrears amounts of R0,00. He also has a credit card account with Nedbank Limited which was opened on 1 December 2008. The account had a credit limit of R35 008,00, a balance of R7 007,00 and he paid a monthly instalment of R350,00 on the account. He had a credit account with BMW Financial Services South Africa

(Pty) Ltd – BMW Finance which was opened on 4 January 2006 for an amount of R980 724,00. The account had a current balance of R449 654,00.

[82] Mrs Pedlar has a credit card account with Firstrand Bank which had a credit limit of R13 000,00 and a current balance of R9 106,00. Her monthly instalment on the account was R543,00. She also has another credit account with Firstrand Bank Ltd, Westbank Division – Westbank Motor Loans which was opened on 12 January 2019. The account had a credit limit of R213 223,00 and a balance of R167 906,00. Her monthly instalment was R3 557,00 and the account has R0,00 arrears.

[83] Firstrand Bank contends that Mr and Mrs Pedlar have creditors who are being paid, while it is not paid. They prefer one creditor above another. They are clearly in financial difficulties.

[84] All the above allegations have not been contested in Mr Pedlar's answering affidavit.

[85] I am satisfied that Firstrand Bank has established on a balance of probabilities that Mr and Mrs Pedlar prefer one creditor above another as envisaged in section 8(c) of the Act.

[86] In *Standard Bank of SA Ltd v Sewpersadh & Another*[8], it was held that in section 8 of the Insolvency Act the legislature has designed certain conduct by a debtor as constituting acts of insolvency. The intention is that proof of any such act, as distinct from proof of actual insolvency, is to be sufficient ground for the purposes of obtaining a sequestration order.

[8] 2005 (4) SA 147 (C)

[87] I do not therefore find it necessary to deal with the issue of factual insolvency.

Advantage to creditors

[88] The Constitutional Court in *Stratford & Others v Investec Bank Ltd & Others*[9] cited with approval the *dicta* in *Meskin & Co v Friedman* 1948 (2) SA 555 (W):

> "*In my opinion, the facts before the court must satisfy it that there is a reasonable prospect not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that a result of enquiry under the Act, some may be revealed or recovered for the benefit of creditors, that is sufficient.*"

[89] The *onus* of establishing advantage to creditors remains on the sequestrating creditor throughout, even where it is clear that the debtor has committed an act of insolvency.[10] In certain earlier cases (e.g. *Wilkins v Pieterse*[11]), the view was taken that once an act of insolvency (i.e. any act) is proved, the court will require convincing reasons to persuade it that sequestration will not be to the advantage of creditors. However, more recently, the courts have held that the commission of an act of insolvency is not necessarily material to the question of advantage to creditors. Certain acts of insolvency, by their nature, tend to indicate advantage to creditors – for

[9] 2015 (3) SA 1 (CC) at paras [44] to [45]
[10] *Wilkins v Pieterse* 1937 CPD 165
[11] *Supra*

instance, a disposition of property which prejudices creditors or prefers one creditor above another – but other acts, e.g., a *nulla bona* return, do not (see, e.g. *Lotz v Raubenheimer*[12]).

[90] Firstrand Bank asserts that Mr and Mrs Pedlar's estates are not entirely depleted in that there is an immovable property which can be sold by a trustee for the benefit of creditors. A trustee is in a better position to market the immovable property. A far better price can be obtained by a trustee when marketing the property than the one that would be obtained at a sale in execution by a sheriff.

[91] A trustee can also use the insolvency mechanisms in the Act to interrogate Mr and Mrs Pedlar and see if he/she can impeach the transactions and obtain further disposable assets. All payments made by Mr and Mrs Pedlar since the issuing and service of the application for the sequestration of their estates may be investigated by the trustee for the benefit of the *concursus creditorium*.

[92] Mr Pedlar denies that the sequestration will be to the advantage of creditors. He contends that Firstrand Bank as a judgment creditor has to demonstrate a reasonable expectation that the anticipated payment to it will exceed the likely proceeds of such execution. I do not agree having regard to the history of this matter. I am persuaded that there is a reasonable prospect which is not too remote that some pecuniary benefit will result to creditors. It follows that there is reason to believe that it will be to the advantage of creditors if Mr and Mrs Pedlar's estates are sequestrated.

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[12] 1959 (1) SA 90 (O)

Prejudice

[93] Mr Pedlar contends that he is employed as a Chief Executive Officer of PACOFS. He cannot afford to be sequestrated as the sequestration would jeorpardize his employment. His credibility and reputation will be destroyed in his chosen profession. He will no longer be able to do any business and he has a family to support. The prejudice that he stands to suffer far outweighs the prejudice to be suffered by Firstrand Bank should the applications not be granted.

[94] Mr and Mrs Pedlar should have satisfied the judgment debt against them. Firstrand Bank has proven on a balance of probabilities that they have committed more than one act of insolvency as envisaged in Section 8 of the Act. Mr Pedlar's argument regarding prejudice has no merit.

Compliance with statutory requirements

[95] The application complies with the statutory requirements set out in section 9(4) A (a) of the Insolvency Act.

[96] I am persuaded that the two applications meet the requirements for the provisional order of sequestration. Consequently, Firstrand Bank is entitled to the orders for the provisional sequestration of the estates of Mr and Mrs Pedlar.

[97] Accordingly, the following order is made:

1. The draft orders marked "X1" and "X3" are made orders of court.

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M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the applicant	J Eastes
Instructed by	Delport van den Berg Inc
For the respondents	M Rakgoale
Instructed by	Mfusi & Co Attorneys c/o Malebye Motaung & Mthembu Attorneys
Date of judgment	22 November 2021