REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE) CAPE TOWN

CASE NO: 6112/2009

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **Plaintiff**

and

JACOBUS MICHAEL VAN ZYL **First Respondent**

SANDRA ELIZABETH VAN ZYL **Second Respondent**

JUDGMENT DELIVERED THIS 23rd DAY OF OCTOBER, 2009.

THRING, J.:

This is an application for an order placing the estate of the first respondent under provisional sequestration. It is opposed by him. He owes the applicant money. As at the 20th March, 2009, the date on which the applicant's founding affidavit was deposed to, the total amount of the first respondent's indebtedness to the applicant was said to be R2,948,733.28. The indebtedness arises out of moneys lent and advanced at various times by the applicant to the first respondent in respect of so-called "home loans".

The first respondent's indebtedness is secured by seven mortgage bonds, the earliest dated the 12th August, 1991 and the most recent dated the 8th August, 2006, all of them hypothecating certain immovable property at Firlands, Gordon's Bay, which is where the first respondent apparently resides. The applicant avers that the full amount owing to it under the bonds has become due and payable to it by reason of the first respondent having fallen into arrears with the periodical payments of capital and interest which are stipulated in the bonds.

On the 13th January, 2009 the applicant issued a simple summons out of this Court against the first respondent, in which it claimed payment of the aforesaid sum, together with interest thereon, costs, and an order that the hypothecated property be declared executable. The first respondent entered appearance to defend the action. The applicant then applied for summary judgment. In response, the first respondent delivered an affidavit jurat the 27th February, 2009 in which he denied, inter alia, that he had at any time fallen into arrears with his payments under the bonds. He relied in this regard on an alleged over-recovery from him by the applicant of certain life insurance premiums. By agreement summary judgment was refused on the 3rd March, 2009 and the first respondent was

given leave to defend the applicant's action. The action is still pending in this Court. Nevertheless, on the 25th March, 2009 the applicant launched the present application.

First to be considered, I think, is the attack which the first respondent appears to make on the applicant's locus standi. Mr. de Vries, who appears for the first respondent, has correctly pointed out that in a number of decided cases our Courts have repeatedly laid down that resort ought not to be had, for the purpose of enforcing the payment of a debt, to applying for the liquidation of companies where the existence of the debt concerned is bona fide disputed by the company concerned. He referred in this regard, inter alia, to Badenhorst v. Northern Construction Enterprises (Pty.) Ltd., 1956(2) SA 346 (T) and Hülse-Reutter and Another v. HEG Consulting Enterprises (Pty.) Ltd (Lane and Fey NN.O. intervening), 1998(2) SA 228 (C). No doubt the same principle applies to sequestration. However, the relevant portion of section 9(1) of the Insolvency Act, No. 24 of 1936, reads:

> "A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, ... against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor."

Section 9(2) goes on to provide that:

> "A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition, shall be reckoned as a liquidated claim for the purposes of subsection (1)."

That the first respondent is indebted to the applicant under the bonds in a liquidated sum of R2,948,733.28, or at least in a sum not very substantially less than this, is not disputed by the first respondent. What is in dispute is whether or not this debt is presently due and payable. The fact that, on the first respondent's version, payment thereof may not yet be due does not preclude the applicant, in my opinion, from relying on this debt to supply it with the necessary locus standi to bring this application under section 9(1) of the Insolvency Act, especially if that sub-section is read with section 9(2) which, of course, it must be.

Turning now to the merits of the application: it is based on two grounds. The first is that the first respondent has committed an act of insolvency in terms of section 8(g) of the Insolvency Act in that he is alleged to have given the applicant notice in writing that he is unable to pay any of his debts, that is to say, any one of his debts, and, in particular, that owing by him to the applicant: see Court v. Standard Bank of South Africa Ltd.;

Court v. Bester N.O. and Others, 1995(3) SA 123 (AD) at 133 I-J and Optima Fertilizers (Pty.) Ltd. v. Turner, 1968(4) SA 29 (D) at 32 F- 33 A. The second ground is that he is actually insolvent, inasmuch as his liabilities exceed the value of his assets.

I shall deal with each of these grounds in turn.

The first respondent's alleged act of insolvency

The applicant relies on two e-mails, both of which were sent by a Mr. H. Klopper on behalf of first respondent to the attorneys acting for the applicant and the first respondent, respectively, on the 19th and 25th February, 2009. Mr. Klopper acted as the first respondent's mediator. The relevant portion of the first e-mail reads:

> "Ek het teenoor me. Le Roux bevestig dat ek as bemiddelaar vir mnr van Zyl optree ten opsigte van die skuld en dat mnr van Zyl reëlings wil tref om betalings te begin maak."

(Ms. le Roux being the applicant's attorney.) In the second, Mr. Klopper said:

> "Soos vantevore meegedeel is Mnr van Zyl se voorstel dat hy onmiddellik weer sy normale paaiement begin betaal vir res van hierdie jaar en dan volgende jaar wanneer sy

> sakebedrywighede verbeter het sal hy dubbele paiemente betaal."

An act of insolvency can be committed by a debtor through an agent, provided, of course, that the agent acts with the debtor's knowledge and consent: see Walsh v. Kruger, 1965(2) SA 756 (E) at 759 H. Mr. Sievers, who appears for the applicant, contended that these communications amounted to an act of insolvency on the part of the first respondent, in that they must be interpreted as an admission by him that he is unable to pay his debt to the applicant.

I am unable to agree. In Court v. Standard Bank of South Africa Ltd., supra, Vivier, J.A. said at 134 A-C:

> "Whether a particular notice is such as to constitute an act of insolvency within the meaning of s 8(g) depends on a construction of its contents, read as a whole. The question when considering the letter is not whether the debtor is in fact unable to pay or whether he is solvent or insolvent. Inability to pay must be distinguished from unwillingness to pay. If the debtor is merely saying that he is unwilling to pay, the letter does not constitute an act of insolvency. Construing the written notice involves deciding how the reasonable person in the position of the creditor receiving the notice would understand it. To such a reasonable person must be attributed the creditor's knowledge at the time of the relevant circumstances."

The e-mails must be construed against their factual background. On the 12th September, 2007 the first respondent had ceased to pay his monthly instalments under the bonds. His attitude, rightly or wrongly, was that he was legally excused from doing so by reason of the over-recovery by the applicant of certain insurance premiums from him. The first e-mail says no more than that the first respondent is now desirous of making arrangements to resume his bond payments. There is no suggestion therein of any inability on his part to pay anything. In the second e-mail his suggestion that he immediately resume his normal payments is repeated, with a rider that they be doubled next year, "wanneer sy sakebedrywighede verbeter het". There is certainly no express admission here of an inability to pay, nor even of an obligation to pay double the normal amounts.

Mr. Sievers argues that such an admission must be inferred, but I do not think that it can. In short, to me the content of the two e-mails reveals a preparedness to pay rather than an inability to pay. The fact that what was apparently being proposed by the first respondent would constitute payment of less than what the applicant contended was owing to it at the relevant time cannot, in my view, have the effect of elevating the first

respondent's proposals into an admission of inability on his part to pay more than what was being proposed by him: it is rather an indication simply of the first respondent's unwillingness at that stage to pay more, and mere unwillingness to pay must be distinguished from inability to pay: see the Court case, supra, loc. cit.

The applicant has not persuaded me that the e-mails in question constituted an act of insolvency.

Actual insolvency

For the first respondent's estate to be provisionally sequestrated on this ground it must be established by the applicant that he is actually insolvent, i.e. that his total liabilities (fairly valued) in fact exceed his total assets (fairly valued). This must be objectively determined, but it can be proved by inference in an appropriate case: see Absa Bank Ltd. v. Rhebokskloof (Pty.) Ltd. and Others, 1993(4) SA 436(C) at 443 B-E and Venter v. Volkskas Ltd., 1973(3) SA 175 (T) at 179 A.

As to the first respondent's liabilities, he says in his opposing affidavit that he has no debts "in my persoonlike hoedanigheid" other than

his indebtedness to the applicant, and this averment is not disputed by the applicant. At best for the applicant, then, it must be accepted, for the purposes of this case, that, as at the date of the launching of this application, the first respondent's liabilities amounted to the sum of R2,948,733.28 which the applicant contends is currently due and payable to it by the first respondent under the bonds. This is leaving out of account, for the moment, the balance owing by the first respondent to the applicant in respect of a mortgage on his plot, to which I shall advert presently.

The applicant has set out to establish that the first respondent's assets are worth less than this. For this purpose the applicant has obtained and placed before the Court valuations of two pieces of immovable property, viz. the first respondent's property at Firlands, Gordon's Bay which is hypothecated by the seven mortgage bonds, to which I shall refer herein as "the first respondent's main property", and a piece of unimproved land, also at Gordon's Bay, to which I shall refer herein as "the first respondent's plot", which also belongs to him and is also mortgaged to the applicant. The first respondent says that he is also the owner of a 25% member's interest in a close corporation called Pham Ondernemings BK, which owns some 14

hectares of land, also at Firlands, Gordon's Bay, adjacent to the first respondent's main property, and this is not in dispute.

The applicant has valued the first respondent's main property on two alternative bases: first, it has obtained a "market valuation"; secondly, it has obtained a "forced sale" valuation of this property. From the valuation of the main property it has deducted estate agent's commission at 7% plus value-added tax and interest accrued on the bonds at approximately R34,417.00 per month from the 24th December, 2008 to the date of issue of the applicant's notice of motion three months later on the 25th March, 2009, viz. approximately R100,000.00. The results obtained by means of this exercise may be summarised as follows:

Market valuation			
Main property		R3,200,000	
Less: commission	R255,360		
interest	100,000	355,360	R2,844,640
Plot (at cost)		150,000	
Less: balance owing on bond over plot		116,470	33,530
Net market value of assets			R2,878,170
Liabilities			R2,948,733
Shortfall, market value of assets as against liabilities			(R 70,563)

"Forced sale" valuation			
Main property		R2,250,000	
Less: commission:	R180,000		
interest	100,000	280,000	R1,970,000
Plot, net of balance owing on bond (as above)			33,530
Net "forced sale" value of assets			R2,003,530
Liabilities			R2,948,733
Shortfall, assets as against liabilities			(R 945,203)

By a "forced sale" valuation is presumably meant a sale in circumstances where the unwilling seller has no option but to sell to the highest bidder, such as a sale in execution, and where there has not been sufficient time or resources for the seller to advertise the sale extensively or to market the property properly. Such sales can usually be expected to yield less fruit for the seller than would a normal arms-length sale at leisure.

On either of the above two bases of valuation, the applicant contends that the first respondent is actually insolvent, inasmuch as his liabilities exceed the value of his assets.

As regards the first respondent's interest in Pham Ondernemings BK, the applicant, I think correctly, adopts the attitude in reply that this must be disregarded, as the first respondent has given no indication of the close corporation's liabilities, so that it is not possible to place a net value on his interest. It may be worth nothing. In favour of the applicant I shall ignore any value which this asset may have.

To his opposing affidavit the first respondent has annexed a market valuation of his main property at R4,750,000 and of his plot at R320,000. After deducting the balance owing on the bond over the plot (R116,470), the aggregate of these figures reflects the net value of the first respondent's assets, leaving aside his interest in the close corporation, as R4,953,530, which is more than R2 million in excess of his liabilities. On this basis, the first respondent denies that his estate is insolvent.

In reply, the applicant has annexed yet a further valuation of these assets, on a "forced sale" basis, of R2,150,000 for the main property and R265,000 for the plot, which, if accepted, would also result in a very substantial shortfall in the value of the first respondent's assets as against his liabilities.

The applicant contends that the proper measure by which the first respondent's assets are to be valued for the purposes of this application is to apply the "forced sale" basis. Sooner or later, argues Mr. Sievers, unless the first respondent's estate is sequestrated, his main property will have to be sold so as to liquidate his debt to the applicant. The sale will, in all likelihood, be a sale in execution after the applicant has obtained a judgment against the first respondent for payment of the debt - the first respondent has no other known assets, apart from his plot, which may be capable of ready liquidation, certainly not so as to yield a sufficient sum to satisfy the debt owing to the applicant. So runs the argument.

I am afraid that Mr. Sievers' contentions are, in my opinion, not consistent with authority. In Venter v. Volkskas Ltd., supra the Court dealt with a disposition which was alleged to have been made with the intention of preferring one creditor above another within the meaning of section 30(1) of the Insolvency Act. At 179 G – 180 C Boshoff, J. as he then was, said:

> "Sec. 30(1) refers to a disposition of property by a debtor made at a time when his liabilities exceeded his assets. In the nature of things liabilities can only exceed assets in relation to the value of the assets and in the context of the Insolvency Act assets have significance as property which can be applied to

discharge the liabilities of the debtor. Whether liabilities exceeded assets at a particular point of time, is something which has to be determined objectively and involves amongst other things the determination of the value of the assets. 'Value' as appears in the remarks of de Villiers, J.P., in Pietermaritzburg Corporation v. South African Breweries Ltd., 1911 A.D. 501 at p. 522, has two meanings. It sometimes expresses the utility of some particular object and sometimes the power of purchasing other goods which is its value in exchange. The value in exchange refers to the amount of money for which the property can be exchanged or sold. Exchange value is in the circumstances of a particular case either the temporary or market value of the property or the permanent or natural value to which the market value after every variation tends to return. Market value of property has been variously described as the full and fair price or sum which such property would be likely to realise if brought to voluntary sale and sold upon the usual terms and conditions, the price which a willing vendor might reasonably expect to obtain for it from a willing purchaser, and what it will fetch or what could be obtained for it. It is indeed a temporary value because of its tendency to change with fluctuations in the market and is usually determined as at a particular point of time.

Where in sec. 30(1) the value of assets is to be assessed in order to determine whether it is exceeded by the liabilities of a debtor at a particular point of time, it is only the temporary or market value that can be of any relevance. In the instant case the Court had to determine the market value of an immovable property. It is well established that comparable transactions afford the most satisfactory guide in determining market value of immovable property."

I am of the view that, mutatis mutandis, these remarks are of equal application to the measure by which assets must be valued for the purposes of section 9(1) of the Act in order to determine whether or not a debtor "is insolvent" within the meaning of that sub-section. As the learned Judge said in the Venter case, supra, at 179 G:

> "..... in the context of the Insolvency Act assets have significance as property which can be applied to discharge the liabilities of the debtor".

In my view, this means "applied in the normal course" rather than applied by forced means, such as by way of a sale in execution. I say this because when a man liquidates an asset in order to enable him to pay one or more of his creditors, he does not, as a rule, do so by means of a so-called "forced sale", where time and, perhaps, other constraints such as shortage of funds may preclude effective advertisement or marketing of the asset concerned, and where a potential purchaser will probably be aware that the seller has no option but to sell in a hurry, and that consequently he might be compelled to accept a price which is below the asset's market value. Generally speaking, as a bonus paterfamilias a solvent debtor will see to it that such a situation does not arise: he will set about converting the asset concerned into money in good time, and will take all reasonably

necessary steps to ensure that it realises its market value, or as close to its market value as possible. The sale which he conducts will be orderly and properly planned, and will be a voluntary one, "upon the usual terms and conditions", and the price which he can expect to obtain for his asset will be "the price which a willing vendor might reasonably expect to obtain for it from a willing purchaser....." (Venter's case, supra, at 180 A), i.e. the temporary or market value. To apply to such a debtor a measure of valuation based on a notional "forced sale" would, to my mind, be to subvert the intention of the legislature when it employed the term "is insolvent" in section 9(1), and would be tantamount to importing the notion that even solvent debtors pay their debts only when they are compelled to do so, by realising their assets on a "forced sale" basis. That, of course, is not true, and it does not appear to me to have been what the legislature could have intended when it enacted section 9(1) of the Insolvency Act. In considering, for the purposes of section 9(1), whether a debtor "is insolvent" one must, in my view, avoid falling into the trap of begging the question whether he is, indeed, already in insolvent circumstances, which is what the applicant seems to me to have done. See, in this regard, Meskin, "Insolvency Law", 2-17 where the learned author says in discussing "actual insolvency":

> "In relation to the valuation of assets, it is submitted that the same principles obtain as in the case of determining whether

liabilities exceed the value of assets for the purposes of the application of sections 26, 29 and 30 of the Insolvency Act."

I agree.

I conclude that the proper measure of valuation of the first respondent's assets for the purposes of this case is their fair market value at the relevant time, viz. when the application was launched, and not the price which they could be expected to realise on a "forced sale". It follows that the various "forced sale" valuations of the first respondent's property are, in my judgment, not relevant.

On the applicant's market valuation of the first respondent's assets he is actually insolvent: on the first respondent's valuations, he is not. The dispute is, of course, one of fact, and it is material. It is trite that, generally speaking, where material disputes of fact arise in motion proceedings the matter must be decided on the version advanced by the respondent, unless the dispute concerned is not real, genuine or bona fide, or where the respondent's allegations or denials are "so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers" (Plascon-Evans Paints Ltd. v. van Riebeeck Paints (Pty.) Ltd., 1984(3) SA 623 (AD) at 634 H – 635 C).

The applicant's first valuation was carried out in August, 2008 by a Mr. A.C. Laubser, a professional associated valuer with national diplomas in property valuation and agriculture. This was the only attempt made by the applicant to prove the market value of the first respondent's main property. As I have said, he assessed its market value at R3.2 million. He arrived at this figure by the comparable sales method.

Against this, the first respondent relies on a valuation dated the 7th April, 2009 by a Mr. J.S. Hugo, also a professional associated valuer, who assessed the market value of the first respondent's main property at R4.75 million, and of the plot at R320,000. He, too, employed the comparable sales method in arriving at his valuations, but he appears to have attached greater weight than Mr. Laubser did to the replacement value of the improvements on the main property.

The difference between these two valuations, that of Mr. Laubser, on the one hand, and that of Mr. Hugo, on the other, clearly raises disputes of fact which cannot be dismissed as being otherwise than real, genuine or bona fide, nor did Mr. Sievers contend the contrary. Nor, in my

view, can Mr. Hugo's opinions on the market value of the respective properties be rejected merely on the papers as being far-fetched or clearly untenable. It follows that this conflict of fact cannot be resolved on the papers, and the application must be decided on the basis of the latter's valuations.

Mr. Sievers submits, in the alternative, that the first respondent's insolvency can and should be inferred from the fact that he has paid no periodical instalments on the bonds since the 12th September, 2007. He correctly points out that, generally speaking, a solvent debtor pays his debts as and when they become payable. It seems to me that there is a twofold answer to this. The first is that the first respondent has denied that he has at any time fallen into arrears with his payments. That is a question which, no doubt, will be one of the central issues in the pending trial. Secondly, in his opposing affidavit, which was deposed to on the 23rd April, 2009, the first respondent made the following tender:

> "Hangende die beregting van die dispuut in die aksie-verrigtinge, en bloot om my bona fides te illustreer, bied ek nou aan en tender ek om daardie verbandspaaiement wat die applikant beweer R35 771.19 per maand beloop, voortaan te betaal."

As Mr. Sievers correctly concedes, the tender is completely unconditional, and was not made as an offer in settlement of this dispute. Against this background it is not possible, in my judgment, to draw the inference, on a balance of probabilities, that the first respondent is unable to pay his debts, and is consequently insolvent, merely because he has not hitherto paid what the applicant says he owes. The sum or sums which are presently due and payable to the applicant remain in dispute. The first respondent's mere unwillingness to pay what is being claimed by the applicant cannot be elevated to inability to do so.

On the basis of Mr. Hugo's valuations, as I have said, the first respondent is not actually insolvent, and the application must consequently fail.

Mr de Vries has asked for a special order as to costs on an attorney-and-client scale, but in my view no paper basis has been laid for such an order.

The application is therefore dismissed, with costs.

THRING, J.