THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 6570/2014

INVESTEC BANK LTD **APPLICANT**

And

HUGO AMOS LAMBRECHTS N.O. **FIRST RESPONDENT**
JOHANNA MAGDALENA LAMBRECHTS N.O. **SECOND RESPONDENT**
ERNEST DEREK TAYLOR N.O. **THIRD RESPONDENT**

Coram: ROGERS J

Heard: **18 NOVEMBER 2014**

Delivered: **27 NOVEMBER 2014**

JUDGMENT

Rogers J:

Introduction

[1] This is an opposed application by the applicant ('Investec') for the provisional sequestration of the trust estate of which the respondents are trustees ('Muscat'). Everything is in issue: Investec's claim and whether it is *bona fide* disputed on reasonable grounds; Muscat's alleged factual insolvency; benefit to creditors; and the appropriate manner for exercising the court's residual discretion. Mr Manca SC, leading Ms Reynolds, appeared for Investec. Mr van Riet SC, leading Mr W van Niekerk, appeared for Muscat.

[2] Muscat's sole asset of any substance is an immovable property (made up of two adjoining erven) in Saxenburg Park, Kuilsriver ('the property'). The property is leased out as a truck/bus depot. The property comprises three buildings with a mix of office, workshop and warehouse facilities as well as a large paved yard area.

[3] The first respondent ('Lambrechts') is the leading figure in Muscat's affairs and made the answering affidavit. He has property interests apart from Muscat. The vehicles for these other interests include the Huganel Trust ('Huganel') and Plasto Properties 5 Pty Ltd ('Plasto').

[4] Lambrechts says that during 2006 he was approached by Gary Palmer of Investec regarding a short-term loan product. The loan would be structured in such a way that the instalments would comprise almost exclusively interest, with most of the capital to be repaid in a final balloon payment at the end of the loan's term. Lambrechts alleges that Palmer told him that Investec would restructure such loans at the end of their term so that the capital would not have to be repaid upon expiry of the initial period.

[5] The first loan which Lambrechts concluded with Investec was done through Plasto. This was during November 2006. The loan was for an 18-month period. The Plasto loan was restructured (rolled over) on three occasions – during June 2008 for

24 months, during June 2010 for another 24 months and during September 2012 for another 24 months.

[6] During April 2008 Lambrechts caused Muscat, which had been recently established, to conclude an agreement for the purchase of the property at a price of R17,1 million. It appears that Muscat intended to finance the purchase price through a short-term loan with Investec. The said loan was concluded in October 2008, a few months after the first renewal of the Plasto loan. The principal was R19 225 720, comprising R17 million in respect of the purchase of the property, R2 million as an additional advance (for renovations and improvements, so it seems), R216 000 for Investec's fees and R9120 for the valuation fee. The period of the loan was five years. The balloon payment, due in October 2013, was R14,25 million, from which one can see that the monthly instalments covered interest plus a small portion of the capital.

[7] It was a special condition of the loan agreement that a valuer appointed by Investec should give a minimum valuation of the property of R24,88 million in its current condition and of R26,5 million upon completion (presumably meaning the completion of renovations and improvements then intended to be carried out). The valuations were duly obtained and the money advanced. As security for the loan, a mortgage bond of R20 million was registered over the property.

[8] During March 2012 Investec and Muscat concluded a second loan agreement which superseded the first. The principal debt in terms of the second loan agreement was R14,9 million, described as a restructuring of the first loan agreement. The period of the second loan was 20 months, meaning it would expire in November 2013, which was more or less when the initial loan would have expired. The instalments over the 20 months were lower than those specified in the initial loan agreement, and the residual balloon payment due in November 2013 was R14,55 million.

[9] Investec explained in its replying papers that during September 2010 Muscat had started defaulting on its monthly instalments and was in arrears by more than R1 million in early 2011. Muscat found a new tenant for the property in mid-2011.

This, according to Investec, was the background to the conclusion of the second loan agreement. Investec agreed to reduce the monthly instalments in order to give Muscat breathing space to recover. This meant that the portion of capital included in the last 20 monthly instalments of the initial five-year period was less than under the first loan agreement.

[10] By March 2012 the person at Investec dealing with Lambrechts was William MacRobert. Lambrechts claims that MacRobert made the same representation to him as Palmer had done regarding the fate of the loan upon expiry.

[11] Muscat did not on 1 November 2013 make the balloon payment allegedly due in terms of the second loan agreement. Although the residual payment specified in the agreement was R14,55 million, Muscat had made certain advance payments, the result of which was that on Investec's view of the position the amount due on 1 November 2013 was R12 475 832.

[12] During November 2013 there was email correspondence involving MacRobert regarding property transactions which Muscat and Lambrechts' other property vehicles intended concluding with subsidiaries of Freedom Property Fund Ltd ('Freedom Property'), an entity to be listed on the JSE. These transactions, if they came to fruition, would or may have resulted in the settlement of Muscat's indebtedness to Investec. I shall return to these transactions presently.

[13] In January 2014 representatives of Investec met with Lambrechts, conveying to him that Muscat was in breach of the second loan agreement and that Muscat had to make the residual payment. Lambrechts says that he was taken aback at Investec's stance, as it was at odds with what had been represented to him by Palmer and MacRobert. This meeting was followed by a formal letter of demand on 24 January 2014. Muscat's attorneys responded, stating that it was always Investec's practice to renegotiate the terms of the loans upon expiry and that Muscat was not in arrears. Reference was also made to imminent property transactions which were likely to be finalised shortly. In their reply Investec's attorneys disputed the content of the letter.

[14] Investec launched the sequestration application on 14 April 2014 for hearing on 2 May 2014. By virtue of a payment made by Muscat in December 2013, the balance allegedly owing at the time the application was issued was R12 138 347 plus interest as from 27 March 2014. A notice of opposition having been delivered, the application was postponed on 2 May 2014 with a timetable. Muscat failed to deliver its answering papers in accordance with the timetable. The answering papers in the event were only served on 7 August 2014. This led to a further postponement on 12 August 2014, Muscat being liable for the wasted costs. Investec filed its replying papers on 3 November 2014. These papers were also late, having regard to the timetable set in the order of 12 August 2014. At the hearing before me, Muscat did not press its opposition to condonation.

Investec's claim

[15] There are two related questions relating to Investec's claim. The first is whether Investec has established its claim on a *prima facie* basis, ie whether the balance of probability on the affidavits is in its favour in that regard. If that question is affirmatively answered, the further question is whether Investec's claim has been shown by Muscat to be *bona fide* disputed on reasonable grounds, in which case sequestration proceedings would be regarded as inappropriate (see, for example, *Hülse-Reutter & Another v HEG Consulting Enterprises Pty Ltd (Lane & Fey NNO Intervening)* 1998 (2) SA 220 (C) at 218D-219H).

[16] In my view, the balance of probability on the affidavits is in Investec's favour and Muscat has not demonstrated a *bona fide* dispute on reasonable grounds.

[17] The contractual relationship between the parties is governed by the terms of the second loan agreement. The contract unambiguously requires the residual amount to be repaid on the expiry of 20 months, ie 1 November 2013. The contract contains no provision obliging Investec to restructure the contract upon the expiry of the 20 months. Clause 4.3.9 of the standard terms and conditions states that upon the occurrence of an 'event of default' one of the options open to the bank in its sole discretion is 'to direct the borrower to renegotiate the terms of' the agreement and by written notice extend its term pending such renegotiation. I need not decide

whether this provision is legally enforceable. What should be noticed, however, is that it applies only in the event of default. For present purposes, the only relevant event of default as defined in clause 4.1 of the standard terms and conditions was Muscat's failure to make the balloon payment 1 November 2013. This presupposes that the debt was indeed due and payable on that date. Any extension pending renegotiation was a matter for Investec's sole discretion.

[18] Leaving aside fraud, the alleged oral statements by Palmer and MacRobert can be of no assistance to Muscat, because clause 34 of the standard terms and conditions states that the documents comprising the loan agreement constituted the whole agreement between the parties, with neither side being bound by any undertaking, representation or warranty not recorded therein.

[19] Although in its answering papers and heads of argument Muscat deployed the alleged oral statements by Palmer and MacRobert in various different legal ways, the only one Mr van Riet pressed in oral argument was the following. Palmer and MacRobert told Lambrechts that upon expiry of the initial term the parties would restructure the loan so that Muscat would not be obliged to repay the capital. It was only on this basis that Muscat was willing to conclude the first and second loan agreements. Investec in its replying papers has not only denied that Palmer and MacRobert said what Lambrechts claims but has also alleged that what they are claimed to have said did not accord with Investec's attitude to these types of loans. There is a *bona fide* dispute, which is not unreasonable, as to whether or not Palmer and MacRobert said what Lambrechts alleges. If it could be the case that they made the alleged oral statements, Investec's own replying affidavit shows that Palmer and MacRobert deliberately misrepresented their own state of mind as to what would occur upon expiry, because according to Investec neither they nor anyone else at Investec viewed a restructuring upon expiry as an automatic event. There was thus a fraudulent misrepresentation, as a result of which the loan agreements are void or voidable. Although this might give rise to reciprocal claims for restitution or unjust enrichment, Investec has not based its claim on such causes of action.

[20] I do not intend to comment on all of the convoluted features of this reasoning. In my opinion, its factual substratum does not rise to the level constituting a

reasonable *bona fide* dispute. Both loan agreements were perfectly clear as to their period and as to the contractual obligation to make the balloon payment on the final date. The loan agreements contained no hint of the regime which, on Muscat's case, formed the basis of its concluding the agreements. It is commercially implausible, to the point of absurdity, to suppose that Investec's representatives would have said, or that Lambrechts could have believed, that there would be an automatic restructuring upon the expiry of the loan agreement.

[21] Muscat did not allege, and Mr van Riet did not argue, that Muscat was entitled to rectification of the loan agreements. Although rectification usually occurs where parties honestly make the same mistake in the recordal of their contract, rectification can also be granted where a party knows that the other is under a misapprehension as to the content of the document and fraudulently induces the other party to sign the document (Christie *The Law of Contract in South Africa* 6th Ed at 335-336 and cases there mentioned). That, I emphasise, is not Muscat's case. It is difficult to see how such a claim could plausibly have been advanced. The terms of the loans were, as I have said, perfectly clear. Lambrechts does not say that he was unaware of the terms and their meaning. Furthermore, an agreement automatically to restructure a loan appears to me to be void for vagueness. For how long would it be extended and on what terms as to interest and capital? Would the capital ever need to be repaid or would it be a loan in perpetuity?

[22] Given the absence of a claim for rectification, these rhetorical questions do not arise directly here but they bear heavily on an assessment of the plausibility of Lambrechts' assertion that Investec's representatives said what was alleged and of Lambrechts' supposed basis for concluding the agreements.

[23] I am prepared to accept that there were discussions along the lines that loans of this kind would often be rolled over. However, no experienced business person would have said or understood that such a consequence would be automatic. Lambrechts may have expected that Investec would agree to restructure the loan but he could not reasonably have believed that Investec would be obliged to do so notwithstanding the clear terms of the loan agreement.

[24] Mr van Riet submitted that Lambrechts' version as to what was said and what he understood was not implausible, having regard to certain other facts alleged by Lambrechts of which Investec was said to have been aware. These were that Muscat had been established for the specific purpose of buying the property, that its only source of income would be rent from leasing the property, that the rent would not initially have been enough to pay the full monthly instalments and that Muscat would have to make up the difference from other sources, that Muscat's intention was to keep the property rather than sell it and that unless the property were sold or new finance raised Muscat would not be in a position to make the final payment.

[25] An acceptance of these facts does not, to my mind, make Lambrechts' version any more plausible. If Muscat was only willing to purchase the property on the basis that it would have a loan of indefinite or lengthy duration under which it was essentially required only to service interest, it is difficult to understand why it did not insist on concluding an agreement on those terms rather than an agreement which so plainly stated the opposite. I can well imagine that a bank would not have been willing to lend on the terms Lambrechts may have desired but that fortifies me in my view that the bank would not have represented or been understood as representing that it would act in that way by repeatedly rolling over the agreement.

[26] In terms of the initial loan agreement Muscat had a five-year period during which it could try to persuade Investec to renew the loan agreement or try to raise finance from another bank or sell the property. The second loan agreement was concluded against the background of Muscat's having defaulted on its monthly instalments. Although there was a restructuring of sorts, Investec did not agree to extend the period agreed at the outset. This would have reinforced the understanding that, come November 2013, Muscat was obliged to make the balloon payment. The five-year loan afforded Muscat the opportunity of acquiring the property and establishing it as a profitable rental enterprise. One would expect that, if it succeeded in doing so and had rentals sufficient to service its debt, it would have been able to raise new finance or sell the property profitably. I have no doubt that this was the business judgement which Lambrechts made and the business risk he accepted.

Insolvency

[27] There having been no alleged act of insolvency, the question is whether Investec has shown, on a balance of probabilities on the affidavits, that Muscat's liabilities exceed its assets, both fairly valued (*Ohlsson's Cape Breweries Ltd v Totten* 1911 TPD 48 at 50; *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) at 179A; *Uys NO en 'n Ander v CMW Lewendehawe (Edms) Bpk h/a CMW Elite* [2011] ZAFSHC 205 paras 3-6). Investec averred in its founding papers that the property, which was Muscat's sole asset of any significance, had an open market value of R11 million and a forced-sale value of R7,6 million. Investec relied in that regard on a valuation performed by Mr Richardt Snyman of WesternPro Valuers. Since Investec's claim at the time the application was issued was about R12.14 million, Muscat's liabilities were said to exceed its assets by at least R1,14 million.

[28] Muscat did not include an independent valuation as part of its opposing papers. Lambrechts denied, however, that the property was worth only R11 million. He expressed this opinion based on his years of experience in commercial property and with reference to certain circumstances mentioned below.

[29] Lambrechts annexed to his answering affidavit Muscat's balance sheet as at 30 June 2014. For some reason this reflected the amount owing to Investec as R11 989 722 rather than the amount alleged by Investec but I did not understand Muscat to dispute Investec's computation (assuming the existence of a valid debt). The balance sheet indicated a loan indebtedness of R2 158 743 to an unidentified lender. Investec did not refer to this indebtedness as part of its founding papers but pointed out its existence in reply. After the hearing Muscat filed a supplementary affidavit stating that this was a loan advanced to Muscat by Huganel, the latter being Muscat's sole income beneficiary. According to the affidavit, the loan is a 'friendly' one which is not presently due and payable.

[30] Leaving aside for the moment the insider loan indebtedness of R2 158 743 to Huganel, it is apparent, even on Investec's case, that the margin by which Muscat's liabilities exceed its assets is relatively modest if the property is valued at its open market value rather than at a forced-sale value. I see no reason not to use an open

market value. That is the ordinary way in which value is determined (see *Uys NO supra*). Furthermore, in the context of benefit to creditors Mr Manca said that an important reason why a bank in Investec's position would prefer sequestration to judicial execution is that the property does not have to be sold by public auction but can be realised to best advantage by the trustee.

[31] There are a number of circumstances which cause me to question Snyman's valuation and to regard it as unduly conservative.

[32] The first is that Muscat bought the property in April 2008 for R17,1 million. In addition, it thereafter effected renovations or improvements, R2 million of the Investec loan being apparently earmarked for this purpose. It appears from Investec's replying papers that renovations or improvements were indeed carried out. In the balance sheet previously mentioned, the property is carried at a figure of R18 388 746, which is likely to be the total cost of purchase and improvements.

[33] There has been no suggestion that Muscat's purchase of the property in April 2008 was not an arm's length transaction. Lambrechts, an experienced businessman, evidently thought at that time that the property was worth R17,1 million and that expenditure on renovations and improvements was commercially justified. It would be most surprising if the property had, in the six years since 2008, lost 35% of its 2008 value. While the global financial crisis which struck in the last quarter of 2008 may have placed a brake on the large annual increases in property values which South Africa had for some years seen, one's experience tells one that property, if it is reasonably maintained, will generally show a modest increase in value or at least not lose value. Snyman's valuation report did not deal with the 2008 purchase price nor attempt to explain it. Even after Lambrechts highlighted the 2008 purchase price in his answering affidavit, Investec did not as part of its replying affidavits file a supplementary report or affidavit by Snyman.

[34] Related to this point is the further circumstance that Investec agreed to lend Muscat R19 225 720 on the security of the property, over which it registered a mortgage bond of R20 million. One would not have expected Investec to lend this amount unless it were satisfied that the property was worth somewhat more than the

sum advanced. Indeed, one knows that it was an express condition of the first loan agreement that an Investec-appointed valuer should give an as-is valuation of R24 880 000 and an improved valuation of R26,5 million. This suggests that Investec was willing to lend about 70% of the market value (which would be consistent with what Lambrechts said in his answering affidavit in the context of the Nedbank finance to be mentioned hereunder). The valuations were duly obtained in 2008.

[35] Once again, Snyman did not in his valuation report deal with Investec's 2008 valuations and its willingness to lend R19 225 720 on the strength of the security afforded by the property. These features were highlighted by Lambrechts in criticising the Snyman valuation. No supplementary valuation report or affidavit from Snyman was filed as part of Investec's replying papers.

[36] Another factor to which Lambrechts pointed in disputing Snyman's valuation was a transaction concluded between Muscat and Rain Mile Blue Properties (Pty) Ltd ('Rain Mile') on 25 October 2013. Rain Mile is a subsidiary of Freedom Property, which was intended to be listed on the JSE and which was subsequently so listed during June 2014. It appears that Huganel concluded a similar agreement in respect of its property with another subsidiary of Freedom Property, Lily Pride Properties (Pty) Ltd. In terms of the contract between Muscat and Rain Mile, Muscat sold the property to Rain Mile for a price of R22,5 million (excluding VAT). The price was to be paid by a transfer to Muscat of Freedom Property shares at an agreed value of R1,00 per share.

[37] Clause 15 of the sale agreement referred to the existing mortgage bond. It was recorded that the proceeds from the sale of the Freedom Property shares would be applied first to settle the mortgage bond. Muscat agreed to instruct brokers nominated by Rain Mile to execute this provision on its behalf. The shares were to be kept in trust by an attorney nominated by Rain Mile until the bond was settled in full, whereafter the remaining shares would be released to Muscat. The property was to be transferred to Rain Mile as soon as possible after the settlement of the bond. Clause 4.4 imposed restrictions on Muscat's sale of and trading in the Freedom Property shares. Although the point was not canvassed in the papers

before me, it appears to me that these restrictions must have been intended to apply only to the remainder of the Freedom Property shares which were to be released to Muscat after settlement of the mortgage bond.

[38] Lambrechts relied on the Rain Mile transaction as an indication that the property was worth considerably more than Snyman's valuation. Investec's reply on this aspect was to observe that as at late October 2014 Freedom Property shares were trading on the JSE at only 36 cents per share, meaning that the consideration to be received by Muscat was in truth only worth R8,1 million.

[39] I do not think Investec's reply on the Rain Mile transaction renders that transaction irrelevant as an indicator of the property's value. The transaction was concluded in October 2013, not October 2014. It has not been suggested that Lambrechts and Rain Mile/Freedom Property were not at arm's length or that the price of R22,5 million and the value ascribed to the Freedom Property shares (though not guaranteed) were not genuine. The current value of Freedom Property shares is a reflection of the stock market's current assessment of the value of the Freedom Property business as a whole, ie its entire property portfolio (which does not as yet include Muscat's property, since the sale has not been implemented). It makes no more sense to say, based on the current share price of 36 cents per share, that Muscat's property is worth only R8,1 million than it would be to say, if the current share price were R1,50 per share, that Muscat's property is worth R33,75 million.

[40] I am willing to accept that a price payable in cash is more attractive than a price payable in so many shares at a specified value per share, though it is also conceivable that, if Lambrechts thought that Freedom Property shares would open upon listing at a premium to R1,00 per share, he would have regarded the manner of settlement of the price as an attractive business opportunity. Be that as it may, the transaction is one to which I ascribe some weight in assessing whether Snyman's valuation of R11 million is unduly conservative. Investec did not file, as part of its replying papers, a supplementary report or affidavit by Snyman dealing with the Rain Mile transaction.

[41] I mentioned earlier that during November 2013 MacRobert was party to correspondence in connection with the Freedom Property transactions. From this correspondence it appears that the transactions between Lambrechts' interests and Freedom Property, which had already been signed, were to be modified so as better to secure Investec's position. As applied to Muscat's transaction with Rain Mile, the modifications would have amounted to the following. Upon transfer of the property, Rain Mile would sign a suretyship for Muscat's indebtedness to Investec and the suretyship obligation would be secured by a mortgage bond in favour of Investec in substitution for the existing Muscat mortgage bond. The Freedom Property shares would be sold to settle the Investec debt. Investec would only release Rain Mile from its suretyship and mortgage bond upon settlement of the Investec debt in full. In an email of 20 November 2013 MacRobert asked Lambrechts to confirm that his understanding of these modifications was correct. Lambrechts gave this confirmation after checking with Freedom Property's Mr Stavridis.

[42] Lambrechts did not say in his answering affidavit what had become of these proposed modifications. Investec in its replying papers also did not elaborate except to deny that the email correspondence reflected an agreement on MacRobert's part to extend the date for repayment by Muscat on the strength of the modified transaction. I do not think there is any merit in Muscat's reliance on the email exchange as a defence to Investec's claim. However, the correspondence does, in the absence of further explanation from Investec, suggest the latter was taking the Freedom Property transactions seriously and did not regard the price or manner of its discharge as self-evidently artificial.

[43] Another circumstance mentioned by Lambrechts in relation to the value of the property was Nedbank's willingness to lend Rain Mile R12 million on the security of the property. It seems that, with the institution of the sequestration application, Muscat and Freedom Property must have concluded that the transaction they had signed in October 2013, with the proposed modifications in the email correspondence of November 2013, could not proceed, since it depended on Investec's cooperation. Freedom Property thus sought to raise hard cash. On 29 July 2014 Nedbank wrote to Rain Mile to say that the bank was considering the merits of Rain Mile's funding request for R12 million in relation to the acquisition of

the property. This would be subject to confirmation of the open market value of the property. Lambrechts made his answering affidavit about a week later. He said that Nedbank had now indeed approved the loan of R12 million and that although he had not seen Nedbank's valuation he knew from personal experience that no bank would make an advance secured by commercial property in excess of 70% of the value of commercial property, meaning that Nedbank's valuation must have exceeded R17 million.

[44] Lambrechts added that, in view of Nedbank's approval of the loan, the transfer of the property to Rain Mile was likely to take place within the next six weeks, at which point the amount owing to Investec would be paid in full. He also said that due to time constraints he had been unable to obtain written confirmation from Rain Mile or Nedbank regarding the approval of the loan. Investec pointed out, in its replying affidavit, that more than ten weeks had passed without such payment. Mr Manca added by way of submission that Lambrechts had not sought to place written confirmation of the Nedbank loan before court by way of a supplementary affidavit.

[45] However, I do not think I can reject as untrue Lambrechts' assertion that Nedbank approved a loan of R12 million and for that purpose valued the property at considerably more than R12 million. I should perhaps add that Rain Mile's obtaining of a loan of R12 million from Nedbank is not, on my understanding, an indication that Rain Mile would now be buying the property from Muscat at a reduced price of R12 million. Rather, Rain Mile wished to raise so much of the purchase price in cash as was necessary to discharge the debt to Investec.

[46] I have thus far alluded to various indications of market value which call Snyman's conclusion into doubt. I have not analysed Snyman's methodology. In general, he described Saxenburg Park as a 'fairly popular industrial node'. Demand for similar accommodation in the immediate area was 'average to good'. His open market value of R11 million was arrived at by applying a capitalisation rate to a market-related annual rent net of expenses. He provide particulars of five comparable rental properties and four comparable sales. The most recent comparable sales had been concluded at capitalisation rates of 8% to 9,5% (the

lower the capitalisation rate, the higher the resultant value). His valuation of R11 million was based on a capitalisation rate of 9%. Given that insolvency here is marginal even on Investec's version, I point out that, accepting all of Snyman's other assumptions, the market value of the property would be R12,34 million if one used a capitalisation rate of 8% and R10,39 million if one used a capitalisation rate of 9,5%. This, on Snyman's approach, provides the fair range of market value.

[47] The key assumption is, however, the market rent. Snyman regarded the rent paid by the primary tenant as somewhat below market value and made a modest upward adjustment. He took the office, workshop and wash bay areas at R35/m^2 and the paved areas at R12 and R11,85/m^2. This yielded a gross monthly rent of R99 397,50. However, in the case of two of Snyman's four comparable rental properties, office space was let at R40/m^2 and R50/m^2 , and the yard space of one of these properties was let at R12,50/m^2. If one were to take the office/workshop areas of Muscat's property at R45/m^2, the gross monthly rent rises to R117 593. Using Snyman's assumptions regarding the vacancy factor, expenditure and capitalisation rate, the property would have a value of R12,94 million. If the capitalisation rate were 8% rather than 9%, the market value rises to R14,56 million.[1]

[48] The question may be asked why one should assume that the market rent for the property is significantly higher than the actual rent paid by the current two tenants. There are several answers.

[49] Firstly, one knows from Snyman himself that the actual current rents are somewhat below market value.

[50] Second, Lambrechts has provided a not implausible explanation. He says that Muscat has for some time been focusing on selling the property into the Freedom Property portfolio. To this end, he wanted to ensure that the current tenants could be given a month's notice. Because the current tenants do not have

[1] See annexure "A" to Snyman's report at record 104. The office and workshop areas affected by the assumed higher market rent are 1150m^2 and 666m^2.

security of tenure, they are paying substantially below market rates. (Snyman confirms that the current leases are by the month.)

[51] Third, the tenant as at 2008, Van Zuydam Holdings (Pty) Ltd ('Van Zuydam'), was at that time paying a monthly rent of R212 500, which increased by about R20 000 after the renovations and improvements carried out by Muscat. Investec, which itself referred to this lease and amounts in its replying papers, did not say that Muscat and Van Zuydam were not at arm's length. On the contrary, Investec says that the valuations it obtained for the property in 2008, namely R24,88 million as is and R26,5 million as improved, were based on the Van Zuydam lease, so the Investec valuer must have regarded the rent as market-related. Snyman did not allude to this lease in assessing a market rent for the property. It may well be that Van Zuydam was 'paying over the top' because according to Investec the reason Muscat fell into default during September 2010 was Van Zuydam's demise. Nevertheless, the fact that an arm's length tenant was willing in 2008 to pay more than R230 000 per month for the improved premises calls into doubt a supposed market rent in 2014 of less than R100 000 per month.

[52] Fourth, Lambrechts annexed to his answering affidavit a lease in respect of the property concluded on 4 June 2014 between Muscat and Shipwreck Beach (Pty) Ltd ('Shipwreck'). The lease is for five years commencing 1 July 2014 at R160 000 per month escalating at 8,5% annually. Although not so stated in the contract, Lambrechts explained in the answering affidavit that Shipwreck would only take occupation upon transfer of the property to Rain Mile. Lambrechts says that the shares in Shipwreck are held by a Mr Gerhard Erasmus, a businessman who is involved in a joint venture with a partner who specialises in the management of business premises similar to Muscat's property and who operates a number of such businesses throughout South Africa. Erasmus is connected with Freedom Property, and according to Investec's replying affidavit Shipwreck's sole director, Sean Rule, is also a director of Freedom Property. For these reasons the new lease may be said not to be an arm's length transaction. Nevertheless, I cannot brush it aside as a sham. Although Muscat is a party to the lease, the lease, it seems, is intended to operate only after transfer of the property to Rain Mile, so that the transaction in substance is to apply between the Freedom Property group and Shipwreck. I have

no reason to think that the persons associated with Freedom Property and Shipwreck would contrive a bogus lease to help Muscat.

[53] In all the circumstances, I do not have sufficient confidence in the correctness of Snyman's valuation to regard it as establishing, on a balance of probability on the papers, that Muscat's property is worth less than the amount owing to Investec or even that amount together with the insider loan from Huganel.

Benefit to creditors

[54] In the light of the conclusion I have reached on insolvency, it is not strictly necessary to deal with the questions of benefit to creditors and the court's residual discretion. I content myself with the following brief observations.

[55] If I had been satisfied on a balance of probability on the papers that Muscat's liabilities exceeded the value of its property, the shortfall would only have been marginal. Investec, as the holder of a mortgage bond, would on this hypothesis be the only creditor who could recover anything in the estate. Sequestration would seem in the circumstances not to hold any material advantage over ordinary execution following upon judgment. Mr Manca referred me in that regard to the judgment of Didcott J in *Gardee v Dhanmanta Holdings & Others* 1978 (1) SA 1066 (N), which he sought to distinguish on the basis that the learned judge was dealing with a single creditor who already had judgment in his favour. In those circumstances, the petitioning creditor would need to demonstrate some reasonable expectation that sequestration would yield more than the likely proceeds of ordinary execution: 'Unless he does that, the laborious and substantially more expensive remedy of sequestration can hardly be thought advantageous' (at 1070A). In the present case, by contrast, so Mr Manca argued, Investec did not yet have judgment.

[56] I accept that, in the absence of sequestration, Investec would have to incur costs and time in obtaining judgment against Muscat. However, the cost and time in doing so would, particularly given my view on the lack of merit in Muscat's opposition to Investec's claim, not be greater than in the case of getting opposed provisional and final sequestration orders. (In this case, opposition by Muscat on the

return day is a real possibility, particularly regarding the value of the property, a question on which Muscat might adduce further evidence and which will need to be judged by a different test.) Although it is sometimes said that sequestration is always urgent, there is in truth no particular urgency here, Investec being the only external creditor and enjoying the security of a mortgage bond. The costs Didcott J presumably had in mind were the fees of the Master (here they would be capped at R25 000) and trustee (mainly the 3% fee on the gross proceeds from the sale of the property – R330 000 on Snyman's valuation).[2] These fees would be additional to any commission paid by the trustee to a property broker engaged to market the property. (The fee which a sheriff can charge for the sale in execution of immovable property is, by contrast, capped at R9 655.)[3]

[57] Mr Manca submitted that one of the reasons that banks prefer sequestration to ordinary execution is the greater flexibility enjoyed by a trustee in realising the property to best advantage. This was not stated in the founding affidavit as one of the reasons for believing that sequestration would be to the benefit of creditors. I also do not think it is correct in the circumstances of the present case. The only creditor apart from Investec is Huganel, another of Lambrechts' vehicles. Lambrechts would have as much interest as Investec in ensuring that the property were sold to best advantage. Indeed, Lambrechts would have a keener interest than Investec in maximising the price, because Huganel and Muscat could only derive benefit from a sale if it yielded more than the amount owing to Investec. In achieving a good price Investec would, of course, be entitled to cause the property to be attached and sold by the sheriff in execution but it would not be bound to follow that course. Given its mortgage bond, Investec would not need the comfort of an attachment in order to obtain legal preference over Huganel and any other creditors who might emerge. A sale by private treaty in discharge of the judgment debt would be perfectly feasible; there would be no need to incur the costs either of the sheriff or a trustee.

[58] Mr Manca mentioned, without overemphasising, the proposition that creditors can be taken to be the best judge of their own interests. However, it is the court

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[2] See the tariffs reproduced in Meskin *Insolvency Law* Appendix at 112-113.
[3] Erasmus *Superior Court Practice* at B1-414 tariff item (xiv).

which must ultimately be satisfied that sequestration is to the benefit of creditors; the *ipse dixit* even of a sole creditor cannot be decisive. I simply add that although Huganel's attitude as a creditor has not formally been placed before the court, it is reasonable to suppose that Huganel, represented by Lambrechts, does not regard Muscat's sequestration as being to its advantage.

[59] I would thus have concluded, if it were necessary, that sequestration here is not to the benefit of creditors.

Discretion

[60] In regard to the court's residual discretion, Mr Manca referred me to *FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) where the court observed that there was little authority on how the court's discretion should be exercised, 'which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor'. The learned judge considered that the discretion could be described as a power combined with a duty, so that once the grounds for provisional sequestration have been established the court must grant an order unless the debtor shows special circumstances which warrant the refusal of an order (para 27). In that case the court declined to exercise its discretion in favour of the debtor. There, however, the debtor did not dispute the petitioning creditor's claim or that sequestration would be to the benefit of creditors. The court found that there were matters worthy of investigation. Although the debtor disputed that he had committed an act of insolvency, the court found that he had indeed in writing admitted his inability to pay his debts. The plea for a discretionary refusal of sequestration was based on the existence of a provisional debt rearrangement order in terms of the National Credit Act. In other words, that was a case where the mandatory requirements for a provisional order were clearly present and where, if sequestration were to be refused, it would have to be based on some extraneous circumstance.

[61] In the present case, by contrast, the case for provisional sequestration, if it has been established, is marginal insofar as the extent of the insolvency and the benefit to creditors are concerned. A marginal excess of liabilities over assets coupled with an at best modest benefit to creditors might combine, it seems to me,

to justify the exercise of a discretion against sequestration. One knows from experience that provisional orders for sequestration and liquidation tend to become self-fulfilling prophecies. In borderline cases decided purely on the affidavits justice might better be done by leaving a creditor to his usual remedies. However, in view of my conclusion on the question of insolvency and benefit to creditors, I am not in the position of having finally to decide this issue or to exercise my discretion.

Conclusion

[62] Both sides engaged two counsel and sought the costs of two counsel if they succeeded.

[63] I thus make the following order: The application is dismissed with costs, including those attendant on the employment of two counsel where employed and including the costs reserved by the order of 2 May 2014.

ROGERS J

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