

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
 	
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SIGNATURE DATE	

Case No: 2023-014203

In the matter between:

RAMMUTLANA BOELIE SEKGALA

Applicant

And

**FIRSTRAND BANK LIMITED T/A FIRST
NATIONAL BANK**

First Respondent

JACQUES ANDRE FISHER N.O.

Second Respondent

*(In his capacity as the duly appointed provisional joint
trustee of RB Sekgala)*

MONICA ISABEL LOURO N.O.

Third Respondent

*(In her capacity as the duly appointed provisional joint
trustee of RB Sekgala)*

MASTER OF THE HIGH COURT, JOHANNESBURG

Fourth Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Fifth Respondent

J U D G M E N T

WINDELL, J

INTRODUCTION

[1] This is an application brought in two parts. In part A, the applicant, Mr Rammutlana Boelie Sekgala, (the applicant), an unrehabilitated insolvent, seeks an urgent order restoring his access to his bank account, held at the first respondent, First National Bank (“FNB”), pending the outcome of Part B and two high court matters. In Part B the applicant seeks orders, *inter alia*, declaring the decision of the second and third respondents of the applicant’s insolvent estate (“the trustees”) to ‘freeze’ the applicant’s bank account, to be unlawful, unconstitutional and invalid. Only Part A is before the urgent court.

[2] The applicant was provisionally sequestrated on 3 July 2020 and the trustees were appointed as provisional trustees of his insolvent estate. The applicant opposed the sequestration application on the return date, but a final order was ultimately granted on 28 May 2021 and the applicant was finally sequestrated. On 25 January 2023, the trustees were appointed by the fourth respondent (“the Master”) as joint trustees in the insolvent estate of the applicant.

[3] On 13 February 2023 the trustees instructed FNB to place a hold on the applicant’s bank account (to ‘freeze’ it). The following note was appended to his account:

‘Hard hold placed on account as per request from IDA. Client sequestrated and trustee unable to get him to co-operate. Client to make contact with trustee Simone Knipe’.¹

[4] It is common cause that the applicant’s bank account was frozen without his knowledge or consent and without any prior notice to him. The applicant submits that

¹ Ms Knipe is employed with Van Rooyen Fisher Trustees and assists the trustees in the administration of several estates.

the freezing of his account was unlawful, and as a result of the trustees' conduct, he has no facilities to his name, neither at FNB or with any other bank. He therefore cannot transact, nor can he, as a self-employed person, carry out any business activities without a bank account. He is further unable to access the funds in his FNB bank account for self-sustenance and to support his family. He finally submits that his right to dignity had been violated as a result of the decision and/or conduct of FNB and the trustees.

[5] The facts are largely common cause. The crisp issue that arises in this application is whether the trustees were entitled to freeze the applicant's bank account without prior notice to the applicant.

BACKGROUND FACTS

[6] The applicant is the registered owner of 12 immovable properties. Most of these properties are occupied by tenants and the applicant has been collecting the rental income derived from these properties, from date of sequestration to present. The trustees had on numerous occasions requested the applicant in writing to refrain from collecting the rental income and to pay the rental already collected over to the estate bank account. The estate account was opened by the trustees on 22 September 2022 at Standard Bank in terms of s 70 of the Insolvency Act, 36 of 1924 ("the Insolvency Act"). The applicant is aware of the estate bank account and has lodged a criminal complaint against the trustees for opening the estate account and 'creating a false impression that it was my [his] new bank account and asking them to deposit money therein'.

[7] Although the applicant denies that he was requested by the trustees to pay over the rental income, it is common cause that the applicant had not once paid over the

rental income into the estate account. On 22 August 2022, the trustees instituted an application in this court,² in which an order is sought against the applicant to pay over the rental income he has been collecting to the estate account. The application is opposed.

[8] Prior to the institution of the matter by the trustees referred to above, the applicant instituted an application on 9 May 2022 against the trustees in the High Court, Pretoria,³ which application is opposed by the trustees. The relief sought by the applicant includes the removal of the trustees, the amendment of the Insolvency Act and declaring sections of the Insolvency Act unconstitutional.

[9] The trustees submit that the applicant has not given any co-operation and has been frustrating the trustees in their duties. It is contended that the applicant has been acting to the prejudice of the concursus creditorum and in contravention of the Insolvency Act since the provisional order for sequestration was granted. The applicant had, for instance, refused to provide the trustees with his residential and postal addresses despite being requested to do so on numerous occasions (contravention of s 23(13)). He did not attend the first meeting of creditors, even though he was obliged to do so. He did so without consultation with his trustees nor with permission of the presiding officer (contravention of s 64(1)). He further failed to lodge his statement of affairs within 7 days of service of the sequestration order, duly verified by affidavit, nor did he provide the trustees with details of his accounts with financial institutions and where they are held (contravention of s 16(2)(a) and (b)). On 24 February 2022, the trustees,

² Case number 18278/22

³ Case number 25150/22

once again, sent correspondence to the applicant in an attempt to obtain his statement of affairs. The applicant did not respond.

[10] The trustees then did their own investigations into the affairs of the applicant. They found an account in the name of the applicant with FNB, which was opened in 2008. They immediately instructed FNB to place a hold on the account and to provide them with bank statements for the last four months. The trustees state that it is evident from the statements that the account is funded, almost exclusively, by the rental income relating to the immovable properties which form part of the estate.

[11] The trustees submit that the applicant is not entitled to this income, as it is the income of the estate that should, eventually, be applied to the benefit of the estate's many creditors. It is further denied that the applicant is self-employed and it is believed that the applicant's only income is the rental income to which the estate is entitled. The trustees, however, submit that the applicant is not without a remedy as at any time before the second meeting of creditors the trustee may, in terms of s 23(12) of the Insolvency Act, with the consent of the Master, allow the applicant such moderate sum of money or such moderate quantity of goods out of the estate, as may appear to the trustee to be necessary for the support of the insolvent and his dependents.⁴ Such arrangement will, however, require the participation and co-operation of the applicant. This did not occur.

⁴ Section 23(12): The insolvent shall at any time before the second meeting of the creditors of his estate held in terms of section *forty*, at the request of the trustee assist the trustee to the best of his ability in collecting, taking charge of or realising any property belonging to the estate: Provided that the trustee shall, during the period of such assistance, give to the insolvent out of the estate such an allowance in money or goods as is, in the opinion of the Master, necessary to support the insolvent and his or her dependants.

POINT IN LIMINE

[12] The applicant disputes the trustees' entitlement to oppose the urgent application. It is submitted that s 73 of the Insolvency Act was not complied with, and as a result, the answering affidavit of the trustees should not be permitted.

[13] Section 73 provides that:

'73(1) Subject to the provisions of this section and section 53(4), the trustee of an insolvent estate may with the prior written authorization of the creditors engage the services of any attorney or counsel to perform the legal work specified in the authorization on behalf of the estate: Provided that the trustee-

(a) if he or she is unable to obtain the prior written authorization of the creditors due to the urgency of the matter or the number of creditors involved, may with the prior written authorization of the Master engage the services of any attorney or counsel to perform the legal work specified in the authorization on behalf of the estate; or

(b) if it is not likely that there will be any surplus after the distribution of the estate, may at any time before the submission of his or her accounts obtain written authorization from the creditors for any legal work performed by any attorney or counsel, and all costs incurred by the trustee, including any costs awarded against the estate in legal proceedings instituted on behalf of or against the estate, in so far as such costs result from any steps taken by the trustee under this subsection, shall be included in the cost of the sequestration of the estate.

[14] The applicant's argument is misconceived. In *Patel v Paruk's Trustee*,⁵ the Appellate Division (as it then was), held that the absence of authorisation by creditors would not be fatal to the action and would not invalidate the proceedings. A proper resolution can be obtained after the trustee has been substituted on the record and

⁵ 1944 AD 469 at 475.

after he has commenced or continued the proceedings, and without the necessity of proceeding *de novo* in the case of pending proceedings.

[15] The point *in limine* is dismissed.

THE TRUSTEES POWERS

[16] The trustees complain that they have, on numerous occasions, requested the applicant to assist them by providing various types of information but without any success. In contrast they were met with obstructive behaviour. The trustees submit that they were entitled to take control of the insolvent estate in terms of s 20(1) of the Insolvency Act, which permits them to instruct FNB to freeze the bank account. It is submitted that the applicant has, unlawfully, received the rental income of numerous immovable properties owned by the estate and the relief sought by the applicant would, particularly, allow the applicant access and control over a bank account which vests in his trustees.

[17] The effect of sequestration is that the insolvent person is divested of his or her estate, which is then vested in the Master until a trustee has been appointed to take control of the administration and sequestration of the estate for the benefit of the creditors. Upon the appointment of a trustee, the estate vests in the trustee (s 20(1)(a)). In the words of Innes JA in *Walker v Syfret NO* 1911 AD 141 at 166:

'The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'

[18] The insolvent's estate shall consist of all of the insolvent's property at the date of sequestration, all property or the proceeds thereof in the hands of the sheriff under a warrant of execution (s 20(2)(a) and (b)) and all property which the insolvent may acquire or which may accrue to him during the sequestration of his estate (s 23(1)). If the trustees establish that any property or money should fall into the insolvent's estate, they may pursue that claim and seek to recover what is due to the estate.

[19] The applicant submits that the trustees had to comply with s 23(11) before they could freeze the account. Section 23(11) reads as follows:

'23(11) Any property claimable by the trustee from the insolvent under this section may be recovered from the insolvent by writ of execution to be issued by the registrar upon the production to him of a certificate by the Master that the property stated therein is so claimable.'

[20] Section 23(11) is not relevant in the present matter for the following reasons. Firstly, s 23(1) provides that all property acquired by the insolvent, subject to the provisions of s 23 and s 24, shall belong to his estate. The applicant did not divulge to the trustees that he has a bank account at FNB that has been in operation since 2008. This is in contravention of s 23(12) that provides that the 'insolvent shall at any time before the second meeting of the creditors of his estate held in terms of section *forty*, at the request of the trustee assist the trustee to the best of his ability in collecting, taking charge of or realising any property belonging to the estate: Provided that the trustee shall, during the period of such assistance, give to the insolvent out of the estate such an allowance in money or goods as is, in the opinion of the Master, necessary to support the insolvent and his or her dependants'.

[21] Secondly, the trustees did not seize and take in possession any monies in the bank account. The estate of the insolvent vests in the trustees and they merely took

control of the bank account as it is entitled and required to do in terms of the Insolvency Act. In *De Villiers NO v Delta Cables (Pty) Ltd*,⁶ the Appellate Division held that it 'has always been accepted that a trustee becomes the owner of the property of the insolvent. The Legislature did not say so in so many words, but a transfer of *dominium* is clearly inherent in the terminology employed in s 20(1)(a) which provides that a sequestration order shall divest the insolvent of his estate and vest it first in the Master and later in the trustee'.

[22] The trustees therefore became the 'owner' of the bank account and were entitled to instruct the bank to freeze the account. It is entitled to do so without notifying the applicant. The applicant failed to satisfy the requirements of an interim interdict or spoliation order.

[23] The monies in the bank account might well be what is referred to in s 23(4) as 'assets' received by the insolvent from 'whatever source',⁷ and if so, the trustees would have to comply with s 23(11) to recover the monies in the account. But the dispute about the rental income paid into the FNB bank account is already the subject of pending litigation and the freezing of the bank account will only prevent the applicant from operating a bank account that vests in the trustees without the consent of the trustees.

⁶ 1992 (1) SA 9 (A)

⁷ '(4) The insolvent shall keep a detailed record of all assets received by him from whatever source, and of all disbursements made by him in the course of his profession, occupation or employment, and, if required thereto by the trustee, shall transmit to the trustee in the first week of every month a statement verified by affidavit of all assets received and of all disbursements made by him during the preceding month. The trustee may inspect such record at all reasonable times and may demand the production of reasonable vouchers in support of any item in such accounts and of the expenditure of the insolvent for the support of himself and those dependent upon him.'

[24] FNB also opposes the application on separate grounds. In light of the conclusion I have come to above, namely that the freezing of the bank account was lawful, I do not deem it necessary to examine FNB's reasons for doing so.

[25] In the result the following order is made:

1. The application is dismissed.
2. No order as to costs.



L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 March 2023.

APPEARANCES

Counsel for the applicant:	R. Sekgala (in person)
Attorney for the second and third respondents:	Richards Attorneys Inc
Counsel for the second and third respondents:	Advocate M. Jacobs
Date of hearing:	21 February 2023
Date of judgment:	7 March 2023