

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.
 2 JUNE 2023 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.

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

Second Respondent

MONICA ISABEL LOURO N.O.

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

Third Respondent

MASTER OF THE HIGH COURT, JOHANNESBURG

Fourth Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Fifth Respondent

Neutral Citation: *R. Sekgala v Firstrand Bank Limited t/a First National Bank*

(2023-014203) [2023] ZAGPHJHC 618 (2 June 2023)

J U D G M E N T (Application for Leave to Appeal)

WINDELL, J

[1] This is an application for leave to appeal. During February 2023 the applicant, an unrehabilitated insolvent, approached the urgent court for an order restoring his access to a bank account held with the first respondent ("First Rand Bank") and to permit him to operate the said account as he did immediately prior to the freezing of the account (Part A). The spoliation order was sought in the form of an interim order pending a review application (Part B) and two high court matters.¹ In the first high court matter the trustees of the applicant's insolvent estate seek an order against the applicant to pay over the rental income he has been collecting to the estate account, and in the second high court matter the applicant seeks orders, *inter alia*, for the removal of the trustees, and declaring sections of the Insolvency Act 36 of 1924 unconstitutional.

[2] In Part B of this application, the applicant seeks orders, *inter alia*, declaring the decision of the trustees (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. Alternatively, declaring ss 20 and 23 of the Insolvency Act unconstitutional, to the extent that these 'sections authorise a trustee of an insolvent estate to place a hold on an insolvent's bank account and to access the insolvent's

¹ The outcome of case number 018278/2022 (Gauteng Local Division, JHB) and case number 25150/2022 (Gauteng Division, Pretoria).

bank statements behind the insolvent's back and without judicial oversight.' Only Part A was before the urgent court.

[3] The relief sought by the applicant in Part A was refused as it was found that the trustees' actions in taking hold of the bank account was lawful. In my written judgement dated 7 March 2023, I discussed the effect of sequestration on an insolvent person's estate and set out the reasons for making such a finding.

[4] The applicant raised several grounds for appeal. I do not intend to deal with all the grounds as most of the issues raised by the applicant has been dealt with in the written judgment. I will, therefore, only deal with three of the arguments raised during the application for leave to appeal in separate headings down below.

Test for spoliation

[5] The applicant contends that the wrong test for spoliation was applied and that the court's decision to decline to grant a spoliation order was based on findings of "ownership" and "lawfulness". In the heads of argument, the applicant states as follows:

'At par 4 of the judgment, the learned judge correctly holds that "It is common cause that the applicant's bank account was frozen without his knowledge or consent and without any prior notice to him." And yet, the impugned judgment holds that I have failed to satisfy the requirements for a spoliation order. The learned judge reasons as follows at para 22 of the judgment:

"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"

[6] Relying on *Stocks Housing v Department of Education and Culture Services and Others* 1996 (4) SA 231 at 240B-D, the applicant argues that the court should only

have enquired into whether the applicant was in peaceful and undisturbed possession prior to the spoliation, and not whether his possession was based on any right.

[7] The argument is misconceived. It was common cause that the applicant was in possession of the bank account before it was 'frozen', and the court did not pronounce on the lawfulness of such possession. The court, however, found that the trustees *lawfully* took possession of the bank account, and as a result the applicant failed to establish the requirements of a spoliation order.

Is section 23 (11) applicable?

[8] The applicant submits that section 23(11) of the Insolvent Act is applicable, and that the trustees failed to comply with the section. 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.'

[9] In paragraph 20 to 23 of the judgment I found that section 23(11) is not applicable for the following reasons:

(a) 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'.

[b] 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*,² 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'.

[c] 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.

[10] In my view, there is no merit in this argument.

"Usurping" the powers of the review court

[11] The applicant contends that this court 'usurped' the function of the review court, in finding that the 'freezing' of the bank account was lawful.

[12] In Part A, the applicant sought relief in the form of a spoliation order. It is trite that the applicant must prove two requirements to succeed with a spoliation order. One, he was in undisturbed and peaceful possession of the bank account, and two, he was dispossessed.

[13] A complete defence to an application for a spoliation order is if the dispossession was lawful. To deal with the application for a spoliation order the court therefore had to make a finding on the lawfulness of the trustees' actions. In doing so, I did not 'usurp' the function of the review court.

² 1992 (1) SA 9 (A).

Sections 40(1) and 18(4) of the Insolvency Act were disregarded.

[14] The applicant contends that s 40(1) of the Insolvency Act are peremptory. The section provides that on the receipt of an order of the court sequestrating an estate finally, the Master shall immediately convene by notice in the Gazette, a first meeting of the creditors of the estate for the proof of their claims against the estate and for the election of a trustee. Section 40(2) reads:

‘The Master shall publish such notice on a date not less than ten days before the date upon which the meeting is to be held and shall in such notice state the time and place at which the meeting is to be held’

[15] It is submitted that non-compliance with section 40(1) and (2) would vitiate the appointment of the trustees under section 18(4). The applicant argues that he raises this issue as a "defensive" or a "collateral" challenge to the validity of the appointment of the trustees.

[16] The trustees averred that they were appointed as provisional joint trustees in the insolvent estate of the applicant on 24 August 2020. On 28 May 2021, the applicant was finally sequestrated and on 25 January 2023 the trustees were finally appointed as trustees. They annexed a certificate from the Master as proof thereof. They further averred that a first meeting of creditors was convened but that the applicant did not attend the first meeting of creditors. They dispute that their appointment as trustees was unlawful.

[17] In Part A, the applicant sought final relief in the form of a spoliation order. In proceedings for final relief the approach to determining the facts was set out by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C. Generally speaking, factual disputes are resolved on the papers by

way of an acceptance of those facts put up by an applicant that are either common cause or are not denied as well as those facts put up by the respondent that are in dispute. The unlawfulness of the appointment of the trustees was disputed by the respondents on genuine and *bona fide* grounds.

[18] In the high court matter instituted by the applicant against the trustees as well as in Part B of this application the appointment of the trustees, amongst other things, is challenged. The applicant will have the opportunity to properly ventilate this issue in those forums.

Conclusion

[19] The applicant elected to launch proceedings in the urgent court based on a spoliation order which is final in nature. The fact that the spoliation order was sought pending the outcome of Part B, does not make it interim in nature. I am not convinced that there are reasonable prospects that another court will find in the applicant's favour.

[20] In the result, the following order is made:

- 1 Leave to appeal is refused.
2. No order as to costs.



L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG
(Electronically submitted, therefore unsigned)

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 2 June 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:	23 May 2023
Date of judgment:	2 June 2023