

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

Case No: **8898/2023**

In the matter between:

ABSA BANK LIMITED

Applicant

versus

NIGEL OLIVER CUPIDO N.O.

First Respondent

THERESA JOHANNA CUPIDO N.O.

Second Respondent

*In their capacities as sole trustees of the TJ & NO CUPIDO FAMILY TRUST
Registration number IT 2940/2009, 12 Kogelberg Close, Welgevonden Estate
Durbanville.*

**Coram: Adhikari AJ
Heard: 29 January 2024
Delivered: 31 January 2024**

JUDGMENT DELIVERED ELECTRONICALLY ON 31 JANUARY 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the hand-down is deemed to be on 31 January 2024.

ADHIKARI, AJ

[1] This is an opposed application for the provisional sequestration of the *TJ & NO Cupido Family Trust* ('the Trust'). The application was on the roll for hearing on 11 July 2023. It appears from the record that shortly before the hearing on 11 July 2023, the Trust delivered a notice of intention to oppose, and consequently the matter was postponed by agreement between the parties to 29 January 2024, and a timetable regulating the further conduct was agreed and made an order of court. In terms of that order, the Trust was required to deliver its answering affidavit by 31 August 2023.

[2] The Trust did not adhere to the agreed order, and instead delivered its answering affidavit almost five months later, on 26 January 2024. The answering affidavit contains perfunctory submissions in which the Trust seeks condonation for the late delivery of its answering affidavit. In addition, the Trust delivered a formal condonation application supported by an affidavit deposed to by the Trust's instructing attorney. The condonation application was also delivered on 26 January 2024.¹ The condonation application is opposed by the applicant ('ABSA').

[3] The issues which I am called upon to determine are first, whether condonation should be granted for the late delivery of the answering affidavit and second whether ABSA has made out a case for the provisional sequestration of the Trust.

¹ It appears from email correspondence annexed to the founding affidavit in the condonation application that the answering affidavit was served electronically on ABSA's attorneys on 24 January 2024 and that the condonation application was served electronically on ABSA's attorneys on 26 January 2024. However, both the answering affidavit and the condonation application were only placed in the court file late on 26 January 2024.

CONDONATION

[4] It is by now trite that condonation is not a mere formality, nor is to be had for the asking. An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable.² The factors which usually weigh with a court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.³

[5] In the founding affidavit in support of the application for condonation, deposed to by the Trust's instructing attorney, it is incorrectly contended that the Trust's answering affidavit ought to have been delivered on 31 October 2023 and is therefore approximately two and a half months late. The postponement order, however, required the Trust to deliver its answering affidavit by 31 August 2023, and consequently the answering affidavit is in fact, as aforesaid, nearly five months out of time.

[6] It is contended on behalf of the Trust that the delay was occasioned by the fact that the Trust anticipated being awarded certain contracts alluded to in the answering affidavit, and that it was only in the latter part of 2023 that these contracts were awarded. It is further contended that the answering affidavit could only be prepared once the Trust's attorneys had been provided with "*bone (sic) fide grounds and proof of [its] intention and commitment to comply with its financial commitments*", and that

² *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para [22].

³ *Federated Employers Fire & General Insurance Co Ltd & Another v McKenzie* 1969 (3) SA 360 (A) at 362F-G.

this was only possible once the Trust's financial position had *"reached a point of significant improvement and it became abundantly clear that [the Trust would] be able to meet [its] future commitments"*.

[7] The explanation for the delay is less than satisfactory. No attempt is made either in the affidavit in support of the condonation application, or in the answering affidavit, to comprehensively set out the Trust's current financial position which was allegedly materially affected by the award of contracts which apparently caused the delay. Instead, the contracts on which the Trust seeks to rely are described in the vaguest of terms in the answering affidavit and copies of the contracts are not annexed to the papers. I am thus unable to determine whether the contracts have in fact been concluded (and when they were concluded), whether the Trust is a party to the contracts, whether the contracts explain the delay, and more importantly whether the contracts provide a basis on which to conclude that the Trust is in a position to meet its financial obligations. Further, the Trust's explanation for the delay does not cover the entire period of the delay as there is no allegation in the affidavit in support of the condonation application, or in the answering affidavit as to when the contracts were concluded or when the financial position of the Trust *"reached a point of significant improvement"* as alleged.

[8] At the commencement of the hearing, I enquired from Mr Wessels who appeared for ABSA, whether ABSA sought an opportunity to deliver a replying affidavit, and whether he was in a position to deal with the merits of the matter. Mr Wessels confirmed that ABSA did not seek to deliver a replying affidavit and that his instructions were to proceed to argue the matter on the papers before the court. In light of the fact that ABSA has had sight of the answering affidavit and has elected

not to deliver a replying affidavit and to argue the matter on the papers as they stand, I must accept that ABSA does not deem itself to be materially prejudiced by the late delivery of the answering affidavit. Further, given the consequences of a provisional sequestration order, I am mindful of the fact that notwithstanding the Trust's recalcitrant conduct, it would not be in the interests of justice for this application to be determined without reference to the Trust's answering affidavit.

[9] For these reasons, I am prepared to condone the late delivery of the answering affidavit.

[10] Before dealing with the merits, one further aspect bears mention. The Trust in the application for condonation sought to rely on the fact that it had sought a short postponement of the matter due to the late delivery of its answering affidavit in order to allow ABSA the opportunity to deliver a replying affidavit and to allow for the parties to deliver heads of argument, but that ABSA's attorneys had declined the request notwithstanding a tender of costs. The Trust's conduct in delivering its answering affidavit almost five months out of time, appears to have been designed to bring about a postponement. Its conduct in this regard is manifestly self-serving. ABSA and its attorneys cannot be faulted for their stance in refusing the postponement in these circumstances. The tender of costs would in any event be meaningless, if as ABSA contends, the Trust is unable to pay its debts and is insolvent.

THE MERITS OF THE SEQUESTRATION APPLICATION

[11] In an application for provisional sequestration, the court is called to determine whether the applicant has made out a *prima facie* case that the respondent is insolvent. As the Trust has introduced evidence in rebuttal of ABSA's claim, I am

called on to have regard to all the evidence adduced by both parties and in light of the evidence decide whether a case for provisional sequestration has been made out. Section 10 of the Insolvency Act 24 of 1936 ('the Insolvency Act') provides that a court to which the petition for the sequestration of the estate of a debtor has been presented, may make an order sequestrating the estate of the debtor provisionally if the court is of the opinion that, *prima facie*, the petitioning creditor has established against the debtor a claim such as is mentioned in s 9(1) of the Insolvency Act;⁴ the debtor has committed an act of insolvency or is insolvent; and there is reason to believe that it will be to the advantage of creditors of the debtor if the debtor's estate is sequestrated.

[12] Consequently, in order to obtain a provisional sequestration order, ABSA must satisfy this court on a *prima facie* basis,⁵ that it has a liquidated claim in excess of R100, that the Trust is factually insolvent or has committed an act of insolvency, and that there is reason to believe that sequestration will be to the advantage of the Trust's creditors.⁶

[13] Where the allegations of fact relied upon by the petitioning creditor are disputed by the respondent, it has been held that the dispute should not ordinarily be referred to evidence, although it may be so referred where circumstances of an exceptional nature show such a step to be appropriate. In proceedings for a provisional sequestration order, the court is required to take the unusual step of considering whether, so far as can be determined from the affidavits, there is a balance of probabilities which favours the conclusion that the requirements of s 10 of the

⁴ Section 9(1) of the Insolvency Act refers to a claim of at least R100.00.

⁵ *Mercantile Bank (A division of Capitec Bank Limited) v Ross* [2021] ZAGPJHC 149 at para [41].

⁶ *Investec Bank Ltd v Lambrechts NO and Others* 2019 (5) SA 179 (WCC).

Insolvency Act have been satisfied. If so, the requirements of s 10 will have been satisfied '*prima facie*', and a provisional sequestration order may be issued.⁷

[14] There is no dispute between the parties that ABSA has established the necessary *locus standi* to seek a provisional sequestration order (in that ABSA has a claim against the Trust in excess of R100). The Trust is indebted to ABSA in terms of a mortgage loan agreement, as well as in terms of a term loan agreement concluded between ABSA and ATN Group (Pty) Ltd ('ATN') in respect of which the Trust stood as surety for ATN's obligations to ABSA ('the suretyship agreement').

[15] In respect of the term loan agreement, ABSA contends in the founding affidavit that it issued summons out of this court against ATN and against the first and second respondents, in their capacity as trustees of the Trust, based on the suretyship agreement ('the action').⁸ The Trust does not dispute in the answering affidavit that it is indebted to ABSA, but merely disputes the quantum of its indebtedness. I return to this dispute below.

[16] ABSA contends in the founding affidavit that the Trust has committed an act of insolvency as contemplated by s 8 of the Insolvency Act in that the Trust has made an offer in writing to make payment of less than is currently due to ABSA in respect of the debt owed to ABSA, and that the Trust acknowledged in writing to its creditor, ABSA, that it was unable to pay the full debt due at the time. ABSA relies on a letter addressed to its attorneys by the Trust's attorneys, dated 24 April 2023, in which the Trust offers to make payment of its obligations to ABSA in terms of the suretyship

⁷ *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 978D-E. See also *Renyolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 80G – 81A.

⁸ The first and second respondents were also sued in their personal capacities in the action, as sureties for ATN.

agreement, as the basis on which it contends that the Trust has committed an act of insolvency.

[17] The letter contains a tender to make payment of the Trust's obligations in terms of the suretyship in increasing monthly instalments commencing on 31 July 2023 until the full outstanding amount due to ABSA is paid. In particular the Trust offered to make payment as follows:

[17.1] R180 000.00 for the period from 31 July 2023 to 31 December 2023 in instalments of R30 000.00 per month;

[17.2] R210 000.00 for the period from 31 January 2024 to 30 June 2024 in instalments of R35 000.00 per month;

[17.3] R240 000.00 for the period from 31 July 2024 to 31 December 2024 in instalments of R40 000.00 per month;

[17.4] R600 000.00 for the period from 31 January 2025 to 31 December 2023 in instalments of R50 000.00 per month; and

[17.5] Thereafter payments of R50 000.00 per month *“until full and final settlement of the outstanding amount due to ABSA”* in respect the action proceedings.

[18] ABSA relies on s 8(g) of the Insolvency Act which provides that a debtor commits an act of insolvency if it gives notice in writing to any one of its creditors that it is unable to pay any of its debts. In essence, ABSA contends that the letter of 24 April 2023 constitutes an act of insolvency in that the letter (and the tender contained therein) constitutes a notice to a creditor of the Trust that it is unable to pay

a debt owed by the Trust. The Trust disputes that it has committed an act of insolvency. In support of this contention, the Trust states in the answering affidavit that it has made regular monthly payments since June 2023 totalling R207 000 in respect of the mortgage loan agreement, and totalling R100 000 in respect of the term loan agreement. The Trust, however, misapprehends the nature of the test to be applied.

[19] It is trite that proof that any act of insolvency has been committed, as distinct from proof of actual insolvency, is a sufficient ground for the purpose of obtaining a sequestration order, provided that the other requisites for the grant thereof are established. Further, a debtor that gives notice that it will only be able to pay its debt in the future, gives notice in effect that it is unable to pay. A request for time to pay a debt which is due and payable will ordinarily give rise to an inference that the debtor is unable to pay a debt and such a request contained in writing will accordingly constitute an act of insolvency as contemplated by s 8(g) of the Insolvency Act, this is particularly so where the request is coupled with an undertaking to pay the amount due and payable by way of instalments.⁹

[20] In cases where there is a request for time, the inquiry which the court is called upon to engage in, is whether the content of the written statement viewed together with the circumstances to which it may be permissible to have regard, is such as to negative the inference arising from the request for time to pay and to justify the conclusion that the debtor would be able to pay at once if pressed to do so.¹⁰

⁹ *Standard Bank of SA Ltd v Court* 1993 (3) SA 286 (C) at 293.

¹⁰ *Id.*

[21] It appears from the papers that the Trust's obligations in terms of the suretyship agreement arose as a consequence of ATN's failure to pay the amounts due in terms of the term loan agreement, and that the amount of R1 066 739.91 was due by the Trust in terms of its obligations as surety at the time that summons was issued in the action. Although the Trust disputes the quantum of ABSA's claim, the basis on which the quantum is disputed is not clearly set out in the answering affidavit. It appears from the founding affidavit that in response to a complaint about the calculation of the quantum, ABSA in proceedings in terms of Rule 37 in the action, provided the Trust's attorneys with a detailed calculation of the quantum of the claim. The detailed calculation is annexed to the founding affidavit and appears to show that the outstanding amount due as at March 2020, was R1 126 536.05.

[22] ABSA contends that after receipt of the detailed calculation, the Trust's attorneys on 5 February 2023 responded, contending that the calculation was outdated as it did not include all payments made by the Trust. Thereafter, on 14 April 2023 the letter on which ABSA relies, was sent. Despite delivering an answering affidavit in these proceedings, no further detail as to the supposed basis on which the quantum of ABSA's claim is disputed has been provided to the court. It is telling that nowhere in the answering affidavit does the Trust state what it contends the quantum of ABSA's claim is.

[23] It is clear from the letter of 14 April 2023, that the Trust accepted that it was indebted to ABSA in an amount of at least R1 230 000; that it was unable to pay the full amount at the time; and that it offered to make payment in instalments. Having regard to all the relevant and admissible facts and circumstances, I am satisfied that a reasonable person in the position of ABSA would not understand the letter to mean

that while Trust was unwilling to pay its debt forthwith, it could nonetheless do so if pressed. Indeed, the letter demonstrates clearly that the Trust was unable to pay its debt to ABSA at the time. Consequently, there is no basis on which to negative the inference arising from the request for time to pay and or to justify a conclusion that the Trust would be able to pay at once if pressed to do so.

[24] Further, the Trust's contention that it subsequently made payments to ABSA, does not take the matter any further, in that a notice of inability to pay debts does not cease to be an act of insolvency as a result of circumstances obtaining subsequent to the giving thereof.¹¹

[25] In any event, it appears that to date, payment of R100 000 has been made in respect of the Trust's obligations with respect to the term loan agreement/suretyship agreement since June 2023, in circumstances where the Trust offered to make payment of a sum of R180 000 for the period 31 July 2023 to 31 December 2023. Further, as Mr Wessels correctly pointed out, the proofs of payment annexed to the answering affidavit do not demonstrate that the Trust has in fact made the payments on which reliance is placed. It appears that the payments have been made by an entity referred to as "*ATNGROUP*". There is no explanation in the answering affidavit as to what this entity is or what its relationship to the Trust is. Mr de Wet for the Trust correctly accepted that the answering affidavit does not deal with the basis on which the payments made by "*ATNGROUP*" can be attributed to the Trust.

[26] Further, it is not disputed that as a consequence of the Trust having defaulted on the mortgage loan agreement, the full amount due in terms of that agreement is now due and payable. The certificate of balance annexed to the founding affidavit

¹¹ *Chenille Industries v Vorster* 1953 (2) SA 691 (O) at 696D-E.

demonstrates that the full amount due in terms of the mortgage loan agreement as at 12 May 2023 was R2 393 887.26. On the Trust's version as contained in the answering affidavit, it is not in a position to pay this amount and is only able to make payment in instalments.

[27] Further, the Trust has failed to set out its current financial position. It has not placed any financial or income statements before the court. Save for vague unsubstantiated allegations, it has not placed any evidence before the court that it is generating an income or indeed has the ability to generate an income that will allow it to repay the debt due to ABSA.

[28] On a conspectus of the evidence, I am satisfied that ABSA has demonstrated that the Trust has committed an act of insolvency.

[29] Insofar as the benefit to creditors is concerned, it appears from the papers that the Trust has a valuable asset, being the property in respect of which ABSA holds the mortgage bonds as security for the Trust's indebtedness in respect of the mortgage loan agreement, and that the asset can be realised for the benefit of the Trust's creditors. On the papers as they stand it appears that ABSA is the only creditor. The Trust, however, contends that it has other creditors although the identities and the debts owed to those creditors is not set out in the answering affidavit. Further, the Trust does not meaningfully dispute in the answering affidavit, ABSA's contention that the realisation of the property which it holds as security would be to the benefit of creditors.

[30] Once the applicant for a provisional order of sequestration has established on a *prima facie* basis the requisites for such an order, the court has a discretion whether

to grant the order.¹² Where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then, in the absence of some special circumstances, the court should ordinarily grant the order, and it is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.¹³

[31] Mr de Wet in argument urged me to exercise the discretion vested in the court in favour of the Trust. The Trust sought to place reliance on the contention that the sequestration of the Trust would not be to the benefit of creditors because (a) the Trust is presently servicing its debts and its sustainable future income will allow it to continue to do so and (b) the sale of the Trust's immovable property at auction will not be to the benefit of creditors since it will likely achieve a far lower sale price than on the open market.

[32] Given that ABSA case's is based on the commission of an act of insolvency, at the level of a provisional order of sequestration, it was incumbent on the Trust to place evidence before the court that clearly establishes that its debts will be paid if a sequestration order is not granted, and further if that contention is based on a claim that the Trust is in fact solvent, then that should have been shown by acceptable evidence.

[33] For the reasons already addressed there is no evidence before the court that establishes that the Trust's debts would be paid within a reasonable time. On the contrary, the evidence shows that the Trust is unable to do so, and that the Trust did not comply with the terms of repayment that it proposed in the letter of 24 April 2023,

¹² *FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) at para [27].

¹³ *FirstRand Bank Ltd v Evans* at para [27].

and there is no evidence that the Trust has any sustainable income stream. The Trust owns a property that is encumbered in favour of ABSA. There is no evidence before the court that the Trust has sought to sell the property on the open market or what the proceeds of a sale on the open market would be and consequently there is no evidence before the court that a sale at auction will yield a lower sale price than a sale on the open market.

[34] I am not satisfied, on the information placed before me, that the Trust is commercially solvent as submitted by Mr de Wet. I am further satisfied that ABSA has established a *prima facie* case as there is a reasonable prospect that it will be to the advantage of creditors of the Trust if its estate is sequestrated. Further, there is no basis on the papers for me to exercise my residual discretion in the Trust's favour in the face of ABSA's fulfilment of the requirements of s 10 of the Insolvency Act.

[35] For these reasons I am satisfied that a proper case has been made out for the granting of a provisional sequestration order.

In the result I make the following order:

1. The respondents' estate is placed under provisional sequestration.
2. A rule *nisi* is issued calling upon the respondents and all other interested parties to show cause to this Court on _____ 2024 why:
 - 2.1. The respondents' estate should not be placed under final sequestration;

and

- 2.2. The costs of this application should not be costs in the sequestration of the respondents' estate.
3. Service of this Order shall be effected:
- 3.1. By one publication in each of the Cape Times and Die Burger newspapers;
- 3.2. By the Sheriff delivering a copy of the application to:
- 3.2.1. The respondents at 12 Kogelberg Close, Welgevonden Estate, Durbanville;
- 3.2.2. The Master of the High Court;
- 3.2.3. The South African Revenue Services;
- 3.2.3.1. Any employees that the respondents may have, as prescribed in s 11(2A)(b) of the Insolvency Act 24 of 1936; and
- 3.2.3.2. Any trade unions representing the respondents' employees.

ADHIKARI, AJ

APPEARANCES:**Applicant's Counsel:****Adv L Wessels****Instructed by:****Sandenberg Nel Haggard****Respondents' Counsel:****Adv DR de Wet****Instructed by:****HT De Villiers Attorneys**