

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, GQEBERHA]**

CASE NO.: 2024/2022

In the matter between: -

SEDWIN INVESTMENTS (PTY) LTD

APPLICANT

and

N[...] A[...] D[...]

RESPONDENT

CASE NO.: 3119/2021

SEDWIN INVESTMENTS (PTY) LTD

APPLICANT

and

M[...] J[...] D[...]

RESPONDENT

JUDGMENT

NORMAN J:

[1] Two applications served before me on 16 February 2023. They are sequestration applications brought in terms of the Insolvency Act 24 of 1936 (“the Act”). The respondents in the two applications were once married to each other but got divorced in 2010. The facts and the points of law taken by both respondents, in each of the matters, are largely the same. The only difference is that in the application bearing case No. 2024/2022, involving N[...] A[...] D[...] (“N[...]”) , the applicant seeks a provisional order of sequestration, whereas in case no 3199/2021, brought against M[...] J[...] D[...] (“M[...]”) , N[...]’s former wife, it seeks a final order of sequestration. Both applications are opposed by the respondents.

[2] The founding affidavits supporting the applications were deposed to by one Harold Trevor Jadeiken, who is a Director and the only shareholder of the applicant. N[...] and M[...] are described as a businessman and businesswoman, respectively.

[3] I shall deal first with the application relating to N[...].

Grounds upon which the relief sought is based.

[4] The applicant, in seeking an order of provisional sequestration against N[...], relied on three grounds, namely: that he has committed an act of insolvency as provided for in section 8(b) of the Act; he is, to the best of applicant's knowledge, factually insolvent as contemplated in sections 9 (1) and 10 of the Act; and that applicant has reason to believe that it will be to the advantage of creditors if N[...]’s estate is sequestrated. At the hearing, the applicant was represented by Mr White. Mr Steyn represented both N[...] and M[...].

Background facts

[5] The facts outlined herein apply to both N[...] and M[...], except where it is specifically indicated otherwise. The applicant alleged that:

5.1 It lent monies to N[...] and M[...], between January and February 2014 in Cape Town and two oral agreements were concluded between them. Both M[...] and N[...] acknowledged their indebtedness to the applicant in writing. The applicant complied with its obligations in terms of the agreements. When N[...] and M[...] defaulted, the capital sum, together with the interest thereon, became due and payable. Despite demand, N[...] and M[...] failed to pay the money. That caused the applicant to institute an action against them on 23 May 2017, claiming, *inter alia*, the capital sums advanced, interest thereon and costs of suit on the scale as between attorney and own client. The action was defended by N[...] and M[...]. On 06 May 2019, the parties concluded a settlement agreement. N[...] represented both himself and M[...] in the settlement discussions and they both signed the agreement.

5.2 The terms of the settlement agreement were, *inter alia*, that N[...] and M[...] agreed to pay the applicant, jointly and severally, the one paying the other to be absolved, the sum of R7 000 000.00. That sum was to bear interest at the prime rate per month from 7 May 2019, which interest would be calculated daily and compounded monthly, until the capital amount and interest were paid in full to the applicant. The applicant agreed to defer payment of the capital and interest for a period of twelve months from the date of signature of the agreement, and not later than 7 May 2020.

5.3 During the morning of Tuesday, 7 May 2019, and before the commencement of the trial, N[...] requested one Charl Boshoff of the applicant's attorneys' firm to remove M[...] from the agreement. The applicant refused to do so. Thereafter, N[...] claimed that the agreement had been concluded under duress and that no enforceable settlement had been reached between the parties.

5.4 The applicant subsequently launched an application to have the agreement made an Order of Court. Despite opposition by N[...] and M[...], Revelas J held on 10 November 2022 that a valid settlement agreement had been reached and thus made it an Order of Court. N[...] and M[...] applied for leave to appeal, which application was refused by Revelas J. They sought special leave to appeal from the Supreme Court of Appeal. Upon dismissal of that application, they petitioned the President of the Supreme Court of Appeal for reconsideration of the order without success. Based on these facts, the applicant contends that it has a liquidated claim against both N[...] and M[...] for payment of the amount of R7 000 000.00 together with interest, as provided for in the aforesaid Order.

5.5 Pursuant to the order being granted, the Registrar issued warrants of execution against N[...] and M[...] which were served by the Sheriff on them, personally. The Sheriff concluded that no movable or disposable property could be found and thereafter rendered *nulla bona* returns of service.

Applicant's case against N[...]

5.6 The applicant, relying on the *nulla bona* return, contends that N[...] committed an act of insolvency as envisaged in section 8 (b) of the Act. To the best of its knowledge, N[...] is insolvent as contemplated in sections 9 (1) and 10 of the Act. There is reason to believe that it will be to the advantage of creditors if N[...]’s estate is sequestrated. The applicant relied on, *inter alia*, a search work report and LightStone Scheme Valuations dated 11 February 2021, 26 May 2021 and 21 June 2022 which reflected, *inter alia*, that N[...] is:

(a) a registered co-owner together with M[...] of the property situated at ERF 2[...], K[...] K[...] ROAD, T[...], PORT ELIZABETH, EASTERN CAPE, held under title deed T[...] C[...], registered in the King Williams Town Division. This property is not subject to a bond. Its estimated value is R2 459 000.00.

(b) the owner of two units, namely, Unit 3[...], Scheme No.5[...], under scheme SS S[...] held under title deed S[...] registered in King Williams Town Division, and Unit 3[...] Scheme No. 5[...] SS S[...] under title deed S[...] and registered in the King Williams Town Division. The estimated value of both Units is R1 400 000.00

(c) the owner of ERF 3[...] Paarl, held under title deed T[...] and registered in the Cape Town Division, whose estimated value is R4 250 000.00.

(d) a registered co-owner together with M[...] of a property registered in the Pretoria Division for which a title deed has been lost with the document number VA2538/2018.

The applicant contends that the respondent would have a share in the purchase price of R780 000.00.

5.7 Upon further investigations, it stated that it discovered that the Pretoria property was sold at a purchase price of R780 000.00 and was transferred and registered on 25 April 2018. It contends that it is not aware of what N[...] did with these funds.

5.8 It listed the liabilities of N[...] as:

- (a) a notarial bond held in favour of Firststrand Bank under B[...] that had been registered over the T[...] Property for an amount of R3 000 000.00
- (b) There was also another bond with Firststrand Bank under S[...] C[...] registered over the S[...] Properties for an amount of R753 000.00
- (c) There are two bonds also held in favour of Firststrand Bank that had been registered over the Paarl Property, in the amounts of R1 500 000.00 and R2 400 000.00.
- (d) The applicant's debt of R7 000 000.00.

[6] The applicant submitted that it will be to the advantage of N[...]’s creditors if his estate is sequestrated so that a Trustee can take charge of the estate and conduct the necessary investigations or enquiries in order to locate assets and pay his creditors. In support of this statement the applicant stated that, should the immovable properties be sold, then the creditors, including the applicant, will enjoy at least a not-negligible dividend in an equal distribution.

N[...]’s case

[7] N[...] did not file an answering affidavit instead he took points of law as contemplated in Rule 6 (5)(d)(iii) of the Uniform Rules of Court. I hasten to point out that N[...] disputes the validity of the warrant and the *nulla bona* return.

[8] He raised four points under the following sub- headings, first, applicant’s failure to prove an act of insolvency as contemplated in section 8(b); second, that the *nulla bona* return of service is defective, third, actual insolvency was not evident on papers, and fourth, the applicant’s failure to allege that it is a registered credit provider with the National Credit Regulator and thus it contravened the provisions of section 40 (1) of the National Credit Act , 34 of 2005 (“the NCA”). He submitted that the applicant has failed to make out a case for the relief sought.

Applicant's legal submissions

[9] Mr White submitted that the allegations made by the applicant have not been refuted and should be accepted as correct. Relying on *Boxer Superstores Mthatha and Another v Mbenya*¹ for the submission that because there is no answering affidavit rebutting the applicant's allegations, this court must treat those allegations as established facts.

[10] He further submitted that the point taken about the applicant not being registered with the National Credit Regulator, must fail because, in accordance with the provisions of section 89 (5) of the National Credit Act an unlawful credit agreement is not void unless a court declares the agreement to be unlawful. He further submitted that N[...] is precluded from raising the objection since a period of more than three years has lapsed after the loan agreement was concluded between the parties. In this regard he relied on *SA Taxi Securitisation (Pty) Ltd v National Credit Regulator*².

[11] In so far as the attack on the warrant is concerned, he submitted that the warrant was properly issued. In this regard counsel drew attention to a copy of the warrant, attached to his heads of argument, which had been signed by the Registrar. He went on to state in his heads of argument that the practice in this Division is that the Registrar only signs the original warrant and thereafter puts a stamp on all the copies.

[12] He submitted that the criticism levelled against the *nulla bona* return has no merit because N[...] has not adduced evidence refuting the sheriff's return. He submitted that N[...], upon whom a lawful warrant was executed, committed an act of insolvency. He submitted that the *nulla bona* return and the valuations relied upon by the applicant led it to believe that N[...] is insolvent. He submitted that placing N[...]’s estate in the hands of the Master will be to the advantage of creditors. He urged the court to reject all the points made by N[...] on the basis that they lack merit.

N[...]’s legal submissions

¹ 2007 (5) SA 450 (SCA) at 452 F-G.

² (NCT /31877/2015/56(1)[2018] ZANCT 1.

[13] Mr Steyn submitted that section 8(b) contemplates a situation where a judgment debtor fails to satisfy a judgment debt upon the demand of the officer whose duty it is to execute that judgment. He attacked “the Warrant” on the basis that the Sheriff attempted to execute, on 23 November 2020, a warrant that was not issued by the Registrar because it was unsigned. He submitted that, in order for a demand to fall within the ambit of section 8(b) of the Act, such demand must be lawfully made. If not, a judgment debtor’s failure to accede to the demand does not constitute an act of insolvency to warrant sequestration.

[14] He further submitted that the Sheriff’s return of service is defective because the sheriff recorded: “N[...] A[...] D[...], however, informed me that *SHE* has no money...” He argued that the word “*SHE*” is specially emphasized because it is expressed in capital letters. He submitted that does not constitute evidence that the sheriff in fact demanded payment from N[...], a male person, but rather indicates such demand having been made to a female person. He further submitted that strict compliance with the provisions of section 8 (b) is a jurisdictional requirement, rendering non- compliance therewith, fatal to the application.

[15] He further submitted that no actual insolvency is evident on the papers because the applicant stated that N[...] is, to the best of its knowledge, insolvent, as contemplated in sections 9 (1) and 10 of the Act. That statement, according to Mr Steyn, is insufficient to place the application within the ambit of section 9(1) read with section 10 of the Act.

[16] It was submitted that the applicant failed to lay any factual basis which would warrant the conclusion that N[...] is unable to pay the debt and or that he is insolvent. In this regard, he relied on the allegations made by the applicant, *inter alia*, that : “*I am not privy to the financial affairs of the Respondent and must therefore rely on the information obtained by the Sheriff and through investigation into Search Work records.*”³.

³ Para 39 of the founding affidavit, indexed page 13.

[17] Dealing with the search work records, he submitted that it is apparent that N[...] was the owner of a number of immovable properties, the values of which are not determined. He further contends that the applicant failed to lay a factual basis from which a conclusion could be drawn that N[...] is factually insolvent. It also failed to prove that the refusal by N[...] to pay the amount claimed, is due to inability to pay.

[18] He argued that the fact that the applicant did not state that it was a registered credit provider as envisaged in the NCA renders a claim of repayment under the alleged loan agreement unenforceable and a subsequent consent order does not render lawful that which is prohibited by statute.

[19] On the applicant's own version, he argued, N[...] has disputed enforceability of the claimed debt right from the outset. His refusal to pay demonstrates his firm belief that he was not liable to pay any monies to the applicant. In argument, Mr Steyn raised a point that there was no Master's certificate placed before court and submitted that failure to furnish one was fatal to the application. On the basis of these legal points he moved for the dismissal of the application with costs.

[20] Mr White, replied and addressed the issue of the Master's Certificate, by simply directing the Court to a security bond. He submitted that the security bond served as certification. On the point relating to failure to state whether the applicant is a registered credit provider, he stated that the judgment upon which the claim is based exists and has not been set aside. He submitted that these points must fail as they have no merit.

Discussion

[21] The relevant provisions of the Act provide as follows:

"8. Act of insolvency – a debtor commits an act of insolvency -

(a)

(b) *if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment.*

9. *Petition for sequestration of estate –*

(1) *A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.*

10. *Provisional sequestration. If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie –*

(a) *the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and*

(b) *the debtor has committed an act of insolvency or is insolvent; and*

(c) *there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.”*

[22] It is trite that in the exercise of the court’s discretion as to whether or not to grant a provisional sequestration order, the court may refuse to sequester where, in light of the evidence adduced by the debtor in opposition to the application, it is satisfied that, notwithstanding the act of insolvency, the debtor is in fact solvent.⁴

⁴ Rodel Financial Services Proprietary Limited v O’ Callaghan (2016/23121) [2017] ZAGPJHC 467 (31 March 2017) at para 26.

[23] As aforementioned, Mr White submitted that the unchallenged allegations must be accepted as established facts. Although that may be so, that does not bar this Court from exercising its discretion. If that was so the option given to litigants by the provisions of Rule 6 (5)(d)(iii), would be rendered nugatory . The applicant must still satisfy this court that it has satisfied the jurisdictional requirements in order for it to succeed in this application.

[24] I wish to dispose of the issue raised that the warrant was not signed and thus not issued by the Registrar. It was further argued that whatever demand was made, relative thereto, it was not a lawful one. As aforementioned, a copy of the signed warrant was placed before Court by the applicant, attached to the heads of argument which were delivered on 3 February 2023. I am satisfied that the original warrant was issued in the action (Case no. 1819/2017). The applicant relied on a copy which bore the Registrar's stamp and that of the sheriff. Since a copy of the original was made available, N[...] did not take steps to refute it. Instead, it was argued that it did not constitute evidence since it was attached to heads of argument. In my view, the applicant adopted a most pragmatic approach by putting up a copy of the original warrant, the original whereof which was in the action file. The explanation given about the practice in this Division that the Registrar signs only the original of the warrant and places the stamp on the copies is consistent with what appears on the copies that form part of the record. I accordingly accept the copy of the original furnished in the applicant's heads of argument. It was submitted by the officer of the court and I had no reason to doubt it. I find that the warrant was issued lawfully. This point must accordingly fail.

Was the warrant executed properly?

[25] N[...] sought to impeach the *nulla bona* return by stating that the demand made was not valid.

[26] The nulla bona return of service recorded the following :

‘RETURN OF SERVICE – WARRANT OF EXECUTION

On this 20th day of June 2022 at 10:00 I served this WARRANT OF EXECUTION upon N[...] A[...] D[...] personally at LOT 2[...], K[...] K[...] ROAD,

T[...], PE by handing to the abovementioned a copy thereof after exhibiting the original and explaining the nature and exigency of the said process. (Rule 4(1)(a)(i). Further it is hereby certified that at the above address, an amount of (sic) in satisfaction of this warrant had been demanded from N[...] A[...] D[...].

N[...] A[...] D[...], however, informed me that SHE has no money or negotiable property inter alia, wherewith to satisfy the said warrant or a portion thereof. No movable property/disposable property was either pointed out or could be found by me after a diligent search and enquiry at the given address. Therefore my return is one of NULLA BONA.

It is hereby further certified that N[...] A[...] D[...] has been requested in terms of section 66(8) to declare whether HE has any immovable property which is executable on which the following answer had been furnished: INSUFFICIENT ASSETS TO ATTACH, DEBTOR REFUSED TO SIGN A NULLA BONA CERTIFICATE.

Attempt: 04.05.22 at 12:57 -	Premises Locked – Note Left
Attempt: 18.05.22 at 13:03 –	Premises Locked – Note Left
Attempt: 02.06.22 at 17:18 –	Premises Locked – Note Left

Note: The original return together with the original abovementioned process is dispatched to the mandatory.’ (my emphasis)

[27] On the face of both nulla bona returns there is an omission of the amount demanded by the Sheriff from either M[...] or N[...], as alleged. The argument that the demand could have been made to a female person is, with respect, not far-fetched because the *nulla bona* return in respect of M[...] bears the same wording, same omission of the amount and the same reference to section 66 (8). In my view, if one has regard to the contents of the returns, one is left with an impression that the wording was a copy and paste job of the contents of one return into another, with a few modifications, such as names of the parties. In this regard I find that both *nulla bona* returns are defective and thus impeachable. The applicant was given notice that the returns were impugned. All that it needed to do was to request the sheriff to rectify any errors. It elected to proffer a response by way of legal argument on an

issue that could only be verified by evidence from the sheriff. In the light of that omission, it follows that the certification by the sheriff in this regard was not correct. An amount demanded by the sheriff from a debtor is central to execution and it must be recorded. The omission, in my view, vitiates the validity of the *nulla bona* return. The same findings apply in respect of the *nulla bona* return relating to M[...].

[28] *Ex facie* the *nulla bona* returns, the sheriff seemed to have raised certain enquiries with N[...] and M[...] purportedly in terms of section 66 (8). It is not indicated whether it is section 66 (8) of the Insolvency Act or any other Act. I raised those provisions with Mr White, in argument, but he failed to give a satisfactory answer. The Act, in its current form, does not have a section 66 (8). The section referred to in the *nulla bona* returns is a section that is contained in the Magistrate's Court Act 32 of 1944. This demonstrates that the sheriff relied on, amongst others, an Act that did not apply in a process issued by the registrar of this court. Due to the importance of the *nulla bona* return in sequestration proceedings, a wrong or irrelevant invocation of the law, cannot simply be overlooked. I accordingly find that the *nulla bona* return is not valid for the reasons set out above. The applicant failed to discharge the onus resting on it to prove that N[...] committed an act of insolvency as envisaged in section 8 (b) of the Act. This finding applies equally to M[...]’s case.

[29] The applicant bears the onus to prove an act of insolvency. In *Sussman Co. (Pty) Ltd v Schwarzer*⁵ the court stated:

“The onus is always on the applicant to prove that respondent has committed an act of insolvency. If an act of insolvency in terms of sec .8 (b) is relied upon the onus is discharged if a return is filed which on the face of it is valid and if the facts therein contained are facts which the applicant can rely upon in terms of sec.8(b). If the respondent then wishes to impeach those facts then the onus shifts to him to show by clear evidence that although the return shows that the requirements of sec. 8 (b) have been complied with they were in fact not complied with and that that return is not a proper return...” (my emphasis).

⁵ 1960 (3) SA 94 (O) at page 96.

Is the respondent insolvent as contemplated in sections 9 (1) and 10 of the Act?

[30] The applicant has, relying on the sheriff's return of service and on the search works and LightStone Scheme Valuations attached to the application, stated that it reasonably believes that N[...] is insolvent. N[...] was served with the application for sequestration on 03 August 2022. On 12 August 2022 he filed a notice of intention to oppose the application. As aforementioned, in the notice he raised only certain points of law. He raised the point that the applicant stated that he is not privy to his financial affairs and attacks its sole reliance on the sheriff's *nulla bona return* and search works report.

[31] The fact that N[...] decided to raise points of law only does not relieve this Court of the obligation to satisfy itself that he is insolvent. Some of the facts that have been placed before Court by the applicant were obtained during February and May 2021 and the application was brought on 19 July 2022, more than a year later. For example, the Search Works Lightstone Erf Valuation dated 26 May 2021 for the property, Erf 2[...] T [...], indicates a municipal value of R4 000 000.00. In terms of the automated valuation, it had an expected value of R2 450 000.00. However, in its founding affidavit, the applicant put the estimated value at R2 459 000.00. There is no indication whether the municipal valuation, which is higher, was considered or not. It is not indicated whether the amount represents what would be received in a forced sale, bearing in mind that, on the applicant's version, that property is not subject to a bond.

[32] In respect of the two Unit Numbers 3[...] and 3 [...], SS S [...], in King William's Town, each had a purchase price of R753 000.00. According to the Lightstone Valuation done on 21 June 2022, the municipal value in respect of Unit 3 [...], done in 2013, was R1 050 000.00 and the expected value was R1 400 000.00. However, in its founding affidavit the applicant put the estimated value of both Units 3 [...] and 3 [...] at R1 400 000.00 because there was a 0.00 expected value for Unit 3 [...]. This is despite the value of R100 000,00 attached to it by the municipality. These valuations are not sworn appraisals. As a result, matters such as the qualifications of the valuer; the age and amenities of a particular property; any inspections

conducted; and whether the values relate to a forced sale are not apparent from the valuations attached to the application.

[33] Mars states that:

“It is established practice that all assets of the insolvent estate that are to be liquidated in the process of obtaining a dividend for the creditors must be valued on the basis that they will be disposed of at a forced sale. Such valuation must be effected by a qualified and experienced valuator who must present such valuation under oath, who must be indubitably independent and must have inspected the assets personally.”⁶

[34] In *casu*, the accuracy scores of the valuations range between 47% and 62%. I am not satisfied that the value of N[...]’s properties has been properly determined. What has been placed before the court does not lead to a conclusion that the respondent’s liabilities exceed his assets.

[35] There is another aspect which fortifies my finding in this regard. In the judgment of Revelas J, relied upon by the applicant, the learned Judge stated, *inter alia*:

“9. It is common cause on the papers that prior to the agreement sought to be made an order of court, the first respondent proposed that they settle on the basis that an immovable property owned by the respondent be transferred to the applicant. The value of the property was considerably more than the sum proposed, being in excess of R23 million. The applicant was not amenable to this proposal...”

[36] There is no mention of this valuable property in the applicant’s founding affidavit. One would have expected that it would be dealt with in the assessment of N[...]’s estate, since it is referred to as a common cause fact in the judgment.

⁶ Mars, *The Law of Insolvency*, Tenth edition, page 151; 5.10.3.

[37] In *Absa Bank v Rheboskloof (Pty) Ltd*⁷ the court found that in order for the applicant to establish factual insolvency, it must put up evidence of the debtor's liabilities and the market value of his assets. Actual insolvency means that the debtor's liabilities actually exceed the value of his assets.

[38] In *Ohlssons' Cape Breweries Ltd v Totten*⁸ Wessels J stated:

"When an applicant comes into court to show that the respondent's estate is insolvent, there must be no doubt about the facts. The court must not be left to conjecture."

[39] For all the reasons set out above, I find that the applicant has failed to prove that N[...] is insolvent.

Will the sequestration of N[...]’s estate be to the advantage of creditors?

[40] The onus of establishing advantage to creditors remains on the sequestrating creditor. In this regard the applicant relied on *Wilkins v Pieterse*⁹ for the contention that it is not necessary under this requirement for the applicant to convince this Court either *prima facie* or on a balance of probabilities that there will be some advantage to creditors. All that is required is that it is established that there is reason to believe that there will be an advantage to creditors.

[41] In order for there to be an advantage to creditors, a pecuniary benefit in the form of a dividend, which is not immaterial, must be anticipated. There must be a reasonable prospect of a not negligible dividend, not necessarily a likelihood but a prospect which is not too remote. The courts generally require proof that there will be, or that there is reason to believe that there will be a free residue of not less than 20 cents in the rand¹⁰. In this case, the applicant did not even attempt to place facts before the court or even give an estimate of the dividend which will be distributed to the creditors¹¹.

⁷ 1993 (4) SA 436 (C) at 443.

⁸ 1911 TPD 48at 50.

⁹ 1937 CPD page 165.

¹⁰ Mars, 10th Ed page 153 para 5.10.4.

¹¹ See *Hillhouse v Stott*; *Freban Investments v Itzki*; *Botha v Botha* 1990 (4) SA 580 (WLD).

[42] The applicant has fallen short of satisfying the test laid down in *Body Corporate Empire Gardens v Sithole*¹² that the advantage to creditors is fulfilled where it is established that there is reason to believe that there will be advantage to a 'substantial proportion' or the majority of the creditors reckoned by value¹³.

Applicant not registered as a credit provider in terms of the National Credit Act

[43] The point made is that the applicant is not a registered credit provider as envisaged in section 40 (1) (b) of the NCA. The applicant relied on, *inter alia*, the existence of a judgment that has not been satisfied. I point out that the applicant, by enforcing a liquidated claim through sequestration proceedings, brought the validity of the claim under a microscope. It cannot be heard to complain that, now that there is a judgment, there can be no complaint directed at the claim. There is no substance in that complaint because a debtor should be able to raise what it perceives to be a contravention of the law which may impact on the validity of the claim, at any time, even in sequestration proceedings, otherwise unlawful claims may hide behind judgments. It is how the complaint is brought that will finally occupy the court's mind in deciding whether that legal objection should receive its attention or not.

[44] Mr Steyn referred to *Du Bruyn N.O. v Karsten*¹⁴ wherein the following was said:

"[43] The absence of such registration renders a claim for re-payment under the alleged loan agreement unenforceable, and a subsequent consent order does not render lawful that which was prohibited by statute."

[45] The judgment of Revelas J reveals that the applicant was alive to a possibility that the agreements may be rendered void for non-compliance with the provisions of what it referred to as the Consumer Protection Act 68 of 2008. It crafted the alternative claims as follows: *Claim B (in the alternative to Claim A, and only in the*

¹² 2017 (4) SA 161 (SCA).

¹³ *Empire Gardens v Sithole* 2017 (4) SA (SCA) 161 at page 164 H.

¹⁴ 2019 (1) SCA 403 (SCA) at 7; 18 – 21; 26; 28.

event of a finding that the agreement is illegal and void for non – compliance with the Consumer Protection Act". It catered for that scenario by instituting enrichment claims.

[46] It is also apparent from the judgment that N[...] opposed the application to enforce the settlement agreement on various grounds. Mr Steyn submitted that by raising the NCA point, N[...], does not wish to invoke the provisions of the NCA in these proceedings, but he wishes to demonstrate the existence of a dispute and the failure on the part of the applicant to establish, as a jurisdictional fact, that N[...] is insolvent.

[47] A person challenging a judgment must take steps to have it set aside by way of appeal, review or have it rescinded, but that is not what N[...] has done in the present case. On the face of it, the loans appear to be credits that exceeded the threshold of R500 000.00. If there is no registration as a credit provider, as envisaged in section 40 (1), there may very well be a contravention of the NCA (and an injustice may be uncovered). However, the hands of this Court are tied without a proper challenge by N[...] levelled against the judgment. The dispute to the claim or debt is so inextricably linked to the judgment that it cannot be unscrambled without a proper legal challenge to the judgment.

[48] The Constitutional Court held that, in terms of section 165 (5) of the Constitution a court order is binding until set aside, irrespective of whether it was valid. Judicial orders wrongly issued were not nullities but existed in fact and may have legal consequences. Their enforceability will depend on whether a judge had authority to make the decision at the time he made it¹⁵.

[49] As aforementioned, the applicant relied on *SA Taxi Securitisation*, in addressing the point made by N[...] in terms of section 40 (1) of the NCA. The facts in that case are distinguishable from the present one because, the applicant in *SA Taxi* was registered as a credit provider with the National Credit Regulator in terms of section 40. The issue that the Tribunal dealt with was whether there was a

¹⁵ Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC) at 624.

contravention of section 106 (5) of the NCA, which prohibits a credit provider from adding any surcharge, fee, or additional premium above the actual cost of the insurance. The Tribunal found that the act or omission forming the basis of the complaint before the Tribunal may not be older than three years, and a compliance notice was set aside on that basis. The issue that N[...] and M[...] raise about the registration with the National Credit Regulator is not a timing issue but the lawfulness of the credit agreements, which in my view, is a different issue altogether.

[50] Since there is no collateral challenge to the judgment itself, this point does not require any further attention.

Absence of the Master's Certificate

[51] As aforementioned, Mr Steyn raised the point that the Master's certificate had not been produced at the hearing of the matter. As indicated above, Mr White directed attention to the security bond. Mr Steyn objected on the basis that the security bond was not the Master's certificate. He argued that failure to place one before Court was fatal. I now turn to address this issue.

[52] *Mars*¹⁶, when dealing with a creditor's application, states that a Notice of Motion must be prepared in the prescribed form and must be accompanied by the applicant's founding affidavit or that of his agent and the Master's certificate. The learned authors further provide that the certificate of the Master may be dated after the date of the application but must accompany the application when it is lodged with the court. They contend that a failure to comply with section 9 (3) is a fatal defect and cannot be condoned¹⁷.

[53] Section 9 (3) (b) provides:

"The facts stated in the petition shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all

¹⁶ Tenth Edition, page 127 para 5.5.

¹⁷ Mars page 127 para 5.4.

sequestration proceedings and of all costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.” (my emphasis)

[54] There is only one person who can issue the certificate as contemplated in this section and that is the Master of the High Court. The security bond relied upon by the applicant, neither bears a stamp of the Master nor that of the Registrar or some acknowledgement of its lodgment with the Master. In fact, it is contained in a miscellaneous bundle and not in the bundle containing the application that was served on the Master.

[55] Mr White submitted that as long as there is a security bond that is a certification. In this regard, he relied on *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd*¹⁸. That case does not support counsel’s submission. I believe that counsel erroneously referred to *Hardroad* because at page 363 (where he relied on) , the relevant case ends. *Hardroad* deals with rescission of judgment. The correct citation is *A.Holman Trading Co. v Pipeweld Con & Erection*¹⁹ , where the issue was about the timeous giving of security. It is apparent therefrom that the court dealt with both the giving of security and the filing of the certificate. The court stated the following at 363 B-C:

*“In Rennies Consolidated (Transvaal) (Pty) Ltd v Cooper*²⁰*, it was held that in an application for the provisional sequestration of an estate it is sufficient compliance with the provisions of sec 9(3) of Act 24 of 1936 for the furnishing of security if a certificate is obtained before the petition is filed in court and served, and if the petition is accompanied by the necessary certificate at that stage, the requirements of the section are satisfied. Security cannot, however, be furnished after the application has been served and filed.” (my emphasis)*

¹⁸ 1977 (4) SA TPD 363.

¹⁹ 1977 (4) SA TPD 361 at 363

²⁰ 1975 (1) SA 165 (T).

[56] Mr White also relied on *Court v Standard Bank of SA Ltd; Court v Bester NO and Others*²¹. That decision too, does not support the applicant's contention. At 131 B-C the court stated:

"All that is thus required by the subsection is that security must have been given before the matter is heard and that the security certificate shall then accompany the application." (my emphasis).

There is, in my view, a clear distinction between a bond of security and the Master's certificate. In any event, this submission is unsound because the person who furnishes a bond of security (applicant's attorneys) cannot elevate that into a Master's certificate as provided for in the Act.

[57] Unlike in *Court v Standard Bank of SA Ltd; Court v Bester NO and Others*, in this case, the Master's certificate was not before Court when the matter was heard and thus there was non-compliance with the provisions of section 9 (3) of the Act.

[58] In *Messenger of the Magistrate's Court, Durban v Pillay*²² the court held that if a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that the issuer of the command intended disobedience to be visited with nullity.

[59] I find, based on all the reasons advanced above, and in the exercise of my discretion, that the applicant has not discharged the onus resting on it to have the estate of N[...] sequestrated. The application must accordingly fail. There is no reason to depart from the normal rule that a successful party should be entitled to his or her costs.

[60] I shall accordingly make an Order dismissing the application with costs. I now proceed to deal with Case Number 3119/2021 involving M[...] D[...].

M[...] D[...]’s case

²¹ 1995 (3) SA 123 (AD).

²² 1952 (3) SA page 683 AD paras C-D.

[61] A provisional order of sequestration was granted against M[...] by Nepgen AJ on 30 August 2022. As indicated in the first paragraph, above, I incorporate herein all the facts and legal arguments raised on behalf of N[...] where he makes common cause with M[...]’s case. Those facts and arguments must be read from N[...]’s judgment as if they are specifically incorporated herein.

[62] After the granting of the provisional order of sequestration, the Court issued a Rule Nisi calling upon M[...] to show cause why her estate should not be sequestrated finally and whether the costs of the application should be included in the costs of administration of M[...]’s insolvent estate. The court further directed the manner of service of the provisional order.

[63] M[...], just like N[...], filed a notice in terms of Rule 6 (5)(d)(iii). First, she impugned the warrant of execution on the same basis that it was not signed. On this basis, she contended that a demand based on an unsigned warrant was not lawfully made and a judgment debtor’s failure to accede to the demand does not constitute an act of insolvency. In this regard, the applicant failed to bring the application within the provisions of section 8 (b) of the Act. Second, she raised the point that actual insolvency was not evident on the papers as there was no factual basis laid for the conclusion that M[...] was insolvent. The search works report dated 11 February 2021 recorded that M[...] was the owner of a number of immovable properties, the value of which were not determined. The applicant admitted that it was not privy to the financial affairs of M[...] and relied solely on the search works and the sheriff’s return of service.

[64] Third, just like N[...], she raised the point that the applicant failed to show a factual basis for the conclusion that she is factually insolvent or that her refusal to pay was due to an inability to pay. The applicant in its application has shown that she disputed the claimed debt throughout. Fourth, she contended that the applicant failed to allege that it was registered with the National Credit Regulator in terms of the NCA. A claim for re-payment under the alleged loan agreement is unenforceable, where the applicant is not registered and a subsequent consent order does not render lawful that which was prohibited by statute. She contended that any inference that she refused to pay was not as a result of an inability to do so has no

basis. Her failure to pay was based on a firm belief that she had no liability to pay. Fifth, the absence of a Master's certificate was fatal to the application.

Applicant's case

[65] The applicant relies on the fact that the undisputed allegations must be regarded as established facts. It submitted that M[...] had committed an act of insolvency by making a false statement to the Sheriff in relation to whether or not she had disposable property sufficient to satisfy the judgment. It contends that M[...] committed an act of insolvency and is insolvent. It listed the following as properties where M[...] has an interest:

(a) a registered co-owner together with N[...] of the property situated at ERF 2[...], K[...] K[...] ROAD, T[...], PORT ELIZABETH, EASTERN CAPE, held under title deed T[...] C[...], registered in the King Williams Town Division. This property is not subject to a bond. Its estimated value is R2, 459,000.00, according to the Lightstone Erf Valuation.

(b) in a property she co-owned together with N[...] of a registered in the Pretoria Division , which they sold in 2018 and would have had a share in the purchase price of R780 000.00. It contended that a title deed has been lost with the document number VA2538/2018.

(c) it further stated that it has no further personal knowledge of what assets M[...] might own. It is not privy to the financial affairs of M[...] and relies on the information obtained by the Sheriff and through investigation into search works records.

[66] In dealing with M[...]’s liabilities the applicant stated:

“46.2.1 I attach hereto as Annexure “ HTJ12” a WinDeed Report dated 15 February 2021 which reflects that a Notarial Bond held in favour of Firstrand Bank Ltd under B[...] has been registered over movable property owned by the Respondent.

46.2.2 I have no further personal knowledge regarding the property over which the Bond was registered and the amount in which the Respondent is indebted.

46.2.3 The Respondent is further indebted to the Applicant in the sum of R7,000,000.00, together with interest accrued at the prime interest rate, calculated daily and compounded monthly from 7 May 2019 until the capital sum and interest are paid in full.”

[67] The applicant contends that M[...] is, to the best of his knowledge, factually insolvent in that her liabilities exceed her assets. It further contends that the sequestration of M[...]’s estate will enable the Trustee to investigate if there is a reasonable prospect that an investigation under the Act may result in the discovery of further assets that will be available to creditors. The Trustee will also be able to investigate the financial position of M[...] and to distribute available assets equitably among creditors. The creditors will enjoy at least a not-negligible dividend in an equal distribution.

Applicant’s legal submissions

[68] Mr White made the following submissions: That, absent an answering affidavit from M [...], the Court must grant a final sequestration order, because all the allegations that were put up by the applicant must be treated as established facts as they were not disputed by M [...]. M [...] committed an act of insolvency as reflected on the *nulla bona* return. A Master’s certificate is not relevant when there is a provisional sequestration order and that the court that granted the provisional order would have accepted a bond of security as sufficient. The applicant need not allege registration with the National Credit Regulator because there is a judgment that confirms his claim against M [...]. In any event, he argued that the provisional order of sequestration confirms the debt and the inability of M [...] to pay the applicant. The applicant has proved that M [...] is insolvent and urged this court to grant a final order.

[69] Counsel submitted that the argument about the registration of the applicant as a credit provider is a defence to the legality of the agreement that should have been raised in the action during 2018. It is wrong to raise it because the claim was

confirmed in the judgment by Revelas J by the Supreme Court of Appeal when it dismissed the appeal and also confirmed in the provisional order. He further submitted that raising the point of the registration will, in any event, be barred by the fact that it is raised more than three years after the agreement was concluded. He relied on the same authorities raised in N[...]’s case.

M[...]’s legal submissions

[70] Mr Steyn argued that there are no facts given by the applicant to prove that M[...] is insolvent. He submitted that there was no lawful demand made to M[...] since the warrant of execution was unsigned and did not display the amount demanded from M[...] and, for that reason, M[...] did not commit an act of insolvency. He submitted that the search works and the LightStone valuations do not establish the value of M[...]’s properties. The fact that the applicant indicated that he had no knowledge of M[...]’s assets and is not privy to her financial affairs is sufficient reason to dismiss the application. He submitted that the reason for non-payment of the debt has nothing to do with inability to pay but is about the enforceability of the claimed debt because the applicant has not stated that it is registered with the National Credit Regulator as a credit provider. He submitted that the return was incomplete because the sheriff failed to record therein the amount demanded from M[...].

[71] Relying on *De Wet v Le Riche*²³, he submitted that if the return is defective or inadequate, it should be remitted to the officer concerned for rectification, amendment or amplification before a sequestration application is initiated and a provisional order is procured. Sequestration proceedings based on a defective or an inadequate return may prove an abortive exercise. He contended that the applicant failed to prove that an act of insolvency had been committed.

[72] On the issue of actual insolvency he submitted that the applicant failed to state the reasons for its conclusion of insolvency and relied in this regard on *Amber Falcon Debt Collectors (Pty) Ltd v Vos*²⁴. He urged the court to take into account the fact that the sheriff served the warrant almost a year before the application was

²³ 2000 (3) SA 1118 (T) at 1123 C-D

²⁴ 2014 JDR 0118 (GNP) at page 8.

issued and there is no indication that it was served again after the respondent was refused leave to appeal. He relied in this regard on *Mavromati v Union Exploration Import (Pty) Ltd* ²⁵.

Discussion

[73] As I have found in N[...]’s case and for the reasons advanced therein, the attack on the warrant of execution has no merit. The warrant attached to the applicant’s heads of argument bore the names of both N[...] and M[...]. I am satisfied that a copy presented to court is sufficient proof that the original was signed by the Registrar and therefore the warrant was properly issued.

[74] The point raised in relation to the *nulla bona* return not being a valid demand has merit. If one has regard to the *nulla bona* returns filed by the sheriff in respect of M[...] and N[...], it leads one to an inescapable conclusion, namely, that it was a cut and paste job. There is an omission of the amount and the reference to the non-existent section in both. The wording employed in both returns is similar. Although M[...], too, has not advanced evidence challenging the *nulla bona* return, on the face of it, it is impeachable for the same reasons I advanced in N[...]’s case.

[75] A *nulla bona* return changes the status of a debtor . Most importantly, its natural consequence is that a debtor loses control over his or her property. Section 25 of the Constitution provides: “*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property*”. The effect of enforcing an invalid *nulla bona* return would, in my view, not be in accordance with law and would lead to arbitrary deprivation of M[...]’s property. In light of the view I take in relation to the *nulla bona* return, it is unnecessary, to deal with the service of the warrant after N[...] and M[...] were refused leave to appeal to the Supreme Court of Appeal.

[76] I accordingly find that the applicant failed to prove that M[...] committed an act of insolvency, as envisaged in section 8 (b) of the Act.

²⁵ 1947 (1) SA 604 (T) at 606 A.

Is M[...]’s estate insolvent?

[77] The applicant has stated at paragraph 43 that:

“I have been informed that a Search Works Report dated 11 February 2021 reflected that the Respondent is the registered co – owner, together with N[...] A[...] D[...] of the property situated at ERF 2[...], K[...] K[...] ROAD, T[...], PORT ELIZABETH, EASTERN CAPE, held under title deed T[...]CTN, registered in the King Williams Town Division. Furthermore, the aforementioned property is not subject to a bond. A copy of the aforementioned Report is attached hereto as Annexure “HTJ9”. (my emphasis)

[78] However, when the applicant lists the liabilities of M[...], there is mention of a registered notarial bond over movable property of M[...] but, the deponent to the founding affidavit has no knowledge regarding the property that is the subject of the bond and the amount in which M[...] is allegedly indebted.

[79] In paragraph 4 of the founding affidavit the deponent stated : *“ Where I rely on hearsay evidence, I identify the source of the evidence and verily believe that it is true and correct.”*

[80] The allegations made in paragraph 43 do not identify who informed the deponent of those allegations, who conducted the investigations, who obtained the search works and / or compiled the report. There is no confirmatory affidavit either from the sheriff if he conveyed that information to the applicant or those who generated the reports. It appears from Annexure “HTJ 9” that the report was generated by one Charl Boshoff and one Ganeefa Benjamin who is recorded as a reference.

[81] As indicated when I was dealing with N[...]’s case, these valuations are not sworn appraisals. They do not indicate how the value of the T[...] property was arrived at, the qualifications of the valuer and whether he or she is independent. Furthermore, was the property inspected or was there simply a desk top evaluation, what amenities are there, what is the age of the property, is the value given based

on an estimated forced sale, why are the accuracy scores placed at 62% and what weight must the court attach to those scores? None of these factors is dealt with either in the report or in the founding affidavit.

[82] What compounds the problem is that, on the one hand, in the same affidavit it is stated that there is no bond over the T[...] property. But, on the other hand, there is an allegation of a notarial bond registered over the movable property of M[...] but the details thereof and her indebtedness are unknown to the deponent. The applicant has not taken the trouble of getting this information and supplement its papers in support of the final order that it seeks.

[83] This court is left to speculate, for example, on how much in a rand, will creditors receive as a dividend. It is only through placing of factual material before the court that an assessment of the advantage to creditors can be made. I find that the value of the property of the T[...] property has not been determined. The liabilities of M[...] have not been established. The applicant simply made a bald allegation that the final order of sequestration will be to the advantage of creditors without placing facts to support that contention.

[84] I am not prepared to speculate about the advantage to creditors, given the serious consequences of sequestration proceedings. The applicant failed to prove that the sequestration of M[...]’s estate will be to the advantage of creditors. I find that on this ground too, the applicant failed to prove that M[...] is insolvent.

[85] On the applicant’s failure to allege its registration with the National Credit Regulator, I adopt herein the same attitude I expressed when dealing with N[...]’s application. I have not been asked by means of a counter – application in whatever form to make a finding or issue an order in relation to that point.

[86] I accordingly find that the applicant failed to discharge the onus resting on it, on all the grounds as set out above. It follows that the provisional order of sequestration should be discharged and the application itself be dismissed with costs.

[87] In the result, it is ordered in Case No: 2024 /2022 that:

87.1 The application for the provisional sequestration of N[...] D[...]’s estate is dismissed with costs.

[88] In the result, it is ordered in Case No. 3119/2021, that:

88.1. The provisional sequestration Order granted on 22 August 2022 is discharged.

88.2 The application for the sequestration of M[...] D[...]’s estate is dismissed with costs.

T.V. NORMAN
JUDGE OF THE HIGH COURT

DATE OF HEARING : 16 FEBRUARY 2023

DATE OF JUDGMENT : 07 MARCH 2023

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