



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

24 October 2023



A handwritten signature in blue ink, likely of the judge, written over the redacted area.

CASE NO.: 19653/2021

Case Heard: 23 October 2023

Judgment Delivered: 24 October 2023

In the application between:

REINETTE STEYNSBURG N.O.

1st Applicant

GONASAGREE GOVENDER N.O.

2nd Applicant

[cited in their capacities of liquidators of

Shutters and Blinds CC (in liquidation)]

and

QUINTIN WESSELS

Respondent

JUDGMENT

VAN DEN BOGERT AJ:

1. The applicants are the liquidators of Shutters and Blinds CC, which close corporation is in liquidation. The respondent is the sole member of the liquidated close corporation.
2. The applicants, in their capacities as liquidators, seek the sequestration of the respondent. This is mainly premised on what the liquidators believe constitutes deeds of insolvency.
3. The first of these acts of insolvency is alleged to be the document, attached as annexure "RS7" to the founding affidavit, which is a handwritten note whereby, according to the applicants, the respondent acknowledged his indebtedness and claimed his inability to repay amounts due. It is propagated as being an act of insolvency as envisaged in section 8(g) of the Insolvency Act, 24 of 1936.
4. The note reads as follows:

"I Quintin Carl Wessels state as follows:

1. *I acknowledge private expenses paid from the account of QC Shutters and Blinds CC for my benefit. I am unable to repay these amounts.*
2. *I acknowledge that R378 000 was paid in respect of Unit 18 kububal, Shelley beach when I purchased the property. I am not able to repay these expenses."*

5. It is then signed by the respondent, and it is dated 23 May 2018.
6. Numbered paragraph 1 of the respondent's note is not, by any stretch of the imagination, an acknowledgement of indebtedness of a debt. There is not even a reference to what the alleged indebtedness may be (i.e., the quantum thereof). The applicants must demonstrate that a debt of more than R100.00 is owing, that the respondent acknowledges liability for it, and that the respondent also acknowledges that he is unable to pay such specified debt.
7. The respondent merely states that he concedes that private expenses were paid from the account of the liquidated close corporation for his benefit. He never said that he acknowledged liability for the debt. At law, it would also not make him liable for expenses paid by the close corporation, unless declared to be liable therefore by a court of law. It is also not pleaded by the applicants what these alleged private expenses paid were, and what the amount or quantum of the private expenses are.
8. In respect of the second paragraph in the written note of the respondent, the respondent again simply acknowledged that an amount was paid to purchase a property in Shelly Beach but did not admit liability to repay the amount. He merely states that he is unable to pay the expenses, and not that he is liable to do so. Again, no case has been pleaded that the respondent somehow became liable to pay that amount to the liquidated close corporation.
9. Be that as it may, the respondent attached to his answering affidavit, as annexure "QW3" a deeds search of the property in Shelly Beach, being Unit 18 Kubu Bali. The present owner of the property is CAJ Kotze, not being the respondent. Should

the applicants have had a claim, it was a claim against Kotze and not the respondent.

10. In this respect counsel for the applicants, Mr. Roux, told me that according to annexure "RCC1", attached to the replying affidavit, the respondent was owner of the property as of 29 September 2016. Yet, the applicants, at whose request the insolvency enquiry was conducted, do not tell this Court in their papers when the payment in respect of Kubu Bali was made. Nothing is said about the circumstances under which the payment was made and/or what the arrangement between the close corporation and the respondent or Kotze might have been.
11. The close corporation was liquidated by means of a special resolution on 7 February 2017. Considering annexure "QW3" to the answer Kotze became owner of the Shelly Beach property in February 2017. On the flimsiest of averments made in the founding papers, this court is requested to infer that Wessels intended by means of his written note to assume liability and become a debtor of the close corporation or the applicants.
12. As such, the written note of the respondent does not assist the applicants. It does not constitute a notice given to a "creditor" that the respondent is unable to pay his debts as envisaged in section 8(g) of the Insolvency Act. To get to that point, the applicant must first make out a case that it is in fact a creditor of the respondent. It failed to do so.
13. As a second proposition the applicants rely on a letter, dated 6 July 2018, which was sent by the respondent's attorney, Van Rensburg Koen & Baloyi, and was marked *without prejudice*. Although not relevant at this stage, I am of the view that

it was inadmissible to have disclosed this letter, because it does not contain a deed of insolvency and *bona fide* settlement proposals are made. The respondent, however, did not object. I quote the, for purposes hereof, relevant paragraph of the letter:

“12.2 Without admitting any liability but in an attempt to make a contribution towards payment of creditors of QC, which we believe is SARS and Stalcor, our client approached Mrs Kotze and it was agreed between them that the property in Shelly Beach can be sold...”

14. The letter then proceeds to set out that Mrs. Kotze would pay over the proceeds of the sale to the insolvent estate and that, if acceptable, the property would forthwith be placed on the market. The respondent unequivocally confirmed that he did not admit liability. He premised the remainder of paragraph 12.2 on the introduction of the sentence, which states “*without admitting any liability*”. How that is to be accepted as an admission escapes the mind.

15. In any event, it seems that the settlement proposal is rather made by Mrs. Kotze, who is the owner of the property to be sold, instead of the respondent.

16. The applicants further rely strenuously on paragraph 12.7 of the without prejudice letter, which states:

“12.7 If the offer is not accepted, your client may proceed with the necessary sequestration application against our client. As stated hereinbefore our

client does not possess over any funds or assets to make any contribution."

17. Although it seems to be a strange proposal made by the respondent, in the circumstances of the case, the mere acknowledgement that the respondent is not able to pay anything does not make the close corporation (in liquidation) a creditor of the respondent. To succeed, the applicants must prove to be a creditor failing which they do not have *locus standi* to pursue any claim against the respondent. It is for the applicants to establish that they are creditors of the respondent. In my view they failed to do so.
18. Premised on this, I find that the two documents relied upon, being the note of the respondent and the consequent without prejudice letter of the respondent's attorney do not constitute acts of insolvency as propagated by the applicants.
19. Even if I am wrong in this respect, the debt, if ever any existed, relied upon by the applicants, has prescribed. I deal with this aspect.
20. On 16 September 2021 the respondent deposed to a supplementary answering affidavit. In paragraph 6 thereof the respondent says that the applicants rely on the purported acknowledgement of debt, annexure "RS7" to the founding affidavit, and the subsequent letter of the attorney, annexure "RS8" to the founding affidavit, with which two documents I have dealt with hereinabove.
21. In paragraph 8 of the supplementary answering affidavit, the respondent then claims that the purported claims, which are denied, have in any event prescribed

and cannot be enforced against the respondent. In this respect a timeline is provided in paragraph 9, which I repeat:

- 21.1. the creditor of the liquidated close corporation obtained judgment against the close corporation on 9 September 2016.
- 21.2. the close corporation was liquidated on 4 May 2017 (this is probably rather 10 April 2017).
- 21.3. the applicants were appointed as liquidators on 7 July 2017 whereafter an enquiry was held.
- 21.4. the respondent made the purported acknowledgement on 23 May 2018.
- 21.5. the attorney for the respondent sent the letter, relied upon by the liquidators, on 6 July 2018.
- 21.6. the debts, to the extent that they existed, therefore on the applicants' version became due and the cause of action for repayment thereof arose on 23 May 2018 and 6 July 2018 respectively.
- 21.7. in accordance with the Prescription Act, prescription commences as soon as the debt is due. Prescription in respect of the purported causes of action would have run for 3 (three) years after the debts became due.
- 21.8. the 3-year prescription periods would have expired on 22 May 2021 and 5 July 2021 respectively.

22. The respondent then confirms that, although prescription is suspended until a liquidator is appointed, it is trite that the debts became due, and the causes of action arose after the appointment of the liquidators. It is alleged that there is no other superior force which temporarily interrupted the running of prescription. It is confirmed that the applicants did not issue summons or served summons upon the respondent and that no judgment was obtained.
23. To the extent that the acknowledgements of debts are to be considered by this court as being valid, the respondent claims that the debt has prescribed.
24. In paragraph 12 of the replying affidavit, only the following is said in respect of prescription:

"12. The Respondent belatedly raises (again disingenuously) the issue of prescription, and claims that the admission and acknowledgement of indebtedness has "prescribed". The Respondent loses sight of the fact that those proceedings are prefaced upon the liquidation of the Close Corporation, and the Respondent remains obligated to the insolvent estate in consequence of his admissions of indebtedness made in the insolvency enquiry."

25. A party is entitled to raise the defense of prescription. In circumstances, such as in this case, where it has been raised fairly and squarely, the use of the word *"disingenuously"* in an indiscriminate fashion, as done by the applicant's attorney, who deposed to the affidavit, is unfortunate and unbecoming. The word implies

that the respondent is dishonest, deceitful, underhanded, etcetera. There exists no basis for such a harsh allegation, and litigants should desist from utilizing words in papers that have no purpose, but to tarnish or vilify their adversary.

26. Considering the replying affidavit, I do not know if this court is simply to assume that, once some acknowledgement is made in an insolvency enquiry, prescription does not run against the person who made the acknowledgement. It seems to be the only answer to the defense of prescription though. Such a proposition is obviously untenable.
27. The applicants fail to engage in any sensible manner with the timeline provided by the respondent in the supplementary answering affidavit. They do not allege that they issued summons that would interrupt prescription. They do not allege that they somehow obtained judgment. They simply leave the important issue of prescription unanswered. No interruption or delay is pleaded.
28. It is trite that sequestration proceedings do not interrupt prescription. In this respect, I refer to *Naidoo v ABSA Bank Ltd 2010 (4) SA 597 (SCA)*, where the Supreme Court of Appeal had the following to say, in paragraph 4 of its judgment:

"[4] Mr Reddy's submission, as I understand it, implicitly contains a concession that sequestration proceedings are not in and of themselves 'legal proceedings to enforce the agreement' within the meaning of s 129(1)(b). That his concession is correct is clear from the recent judgment in Investec Bank Ltd and Another v Mutemeri and Another where Trengove AJ concluded that an order for the sequestration of a debtor's estate is not an

order for the enforcement of the sequestrating creditor's claim and sequestration is thus not a legal proceeding to enforce an agreement. He did so after carefully considering the authorities which have held that 'sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent' – they are not proceedings 'for the recovery of a debt'..."

29. See also *WP Koöperatief Bpk v Louw* 1995 (4) SA 978 (C). I quote from page 986 C-E:

*"Die kernvraag wat hier beoordeel moet word, is dus of die betekening van die sekwestrasiestukke op die respondente die loop van verjaring gestuit het. Hierdie vraag het reeds vantevore die aandag van ons Howe geniet. In *Prudential Shippers SA Ltd v Tempest Clothing Co. Ltd* 1976 (2) SA 856 (W) veral op 863F tot 865D en *Misnun's Heilbron Roller Mills Holdings (Pty) Ltd v Noble Street Central Investments (Pty) Ltd* 1979 (2) SA 1127 (W) is beslis dat 'n aansoek vir sekwestrasie nie 'n prosesstuk is soos beoog in artikel 15(1) van die Verjaringswet nie, en gevolglik nie verjaring stuit nie..."*

30. The above portion of the judgment is in Afrikaans, but I quote the relevant part from the English headnote of the judgment:

"Held, that since the service of a sequestration application was not a process by which a creditor claimed payment of a debt, the service of a sequestration application on the respondent did not interrupt prescription, and that the

applicant's claim against the respondent, insofar as it exceeded R2.4M had prescribed."

31. At the hearing of this application, Mr. Hershensohn, who appeared for the respondent also provided a case of the Eastern Cape Division, Grahamstown, being *Boshoff Visser Paarl (Pty) Ltd v Oudewoning Boerdery (Pty) Ltd* with case number 4373/2017. In that case the court relying on *Misnun's Heilbron Roller Mills Holdings (Pty) Ltd v Noble Street Central Investments (Pty) Ltd 1979 (2) SA 1127 (W)*, confirmed the trite position.
32. It seems to be common cause that the last so-called acknowledgement of debt, relied upon by the applicants, is dated 6 July 2018. It is more than 5 years later. The sequestration application does not interrupt the running of prescription. There is no evidence before me that summons has been issued. Instead, the only evidence which I must accept is that what has been set out in the answering affidavit, namely that that never occurred. As such, although it is uncertain what indebtedness the applicants rely upon, if there is or was any indebtedness, it has prescribed.
33. The applicants are therefore not a creditor of the respondent. They do not have the required *locus standi* to seek a sequestration of the respondent's estate and the application must be dismissed.
34. Insofar as the question of costs is concerned, I am of the view that the sequestration application was ill-considered and indeed frivolous as alleged by the respondent.

35. At the very best, having received the answering papers, the applicants should have earnestly reconsidered their position and not prosecuted their somewhat hopeless case to finality.
36. Save for this, Mr. Hershensohn argued that I should consider findings made in the previous dismissal of a prior sequestration application launched by the creditor of the liquidated close corporation. The creditor also relied on the respondent's note and the subsequent letter of the respondent's attorney. Although different considerations apply, the Honourable Madam Justice Teffo found in paragraph 47 of that judgment, which preceded this sequestration application that:

"47 The applicant has not brought an application in terms of section 64(1) for a declaratory order that the respondent is liable for the debts of QC and neither have the liquidators done same prior to the launching of this application."

[my underlining]

37. The applicant in that application was Stalcor, being one of the creditors of the liquidated close corporation. QC is the liquidated close corporation. Section 64 is a reference to section 64 of the Close Corporations Act, 69 of 1984. The latter section makes provision therefore that a member of a close corporation may be declared to be personally liable if the business was carried on recklessly, with gross negligence or for fraudulent purposes. The principle being that without prior declaratory relief that a member is personally liable for the debts of a close

corporation, being a separate and distinct legal entity separate from its members, there is no personal liability.

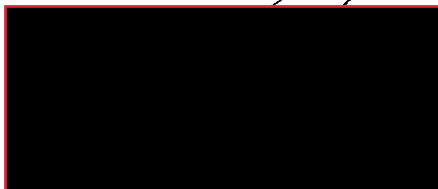
38. Although the present applicants, the liquidators, were not granted leave to intervene in the previous application, which they attempted to do, they were fully appraised of the judgment. They attached it to the present application. They were therefore forewarned that they lacked standing as a creditor of the respondent. Yet, they pursued this application, and the argument by the respondent that such conduct is inappropriate and *mala fide* seems to be sound.

39. In these circumstances, I hold the view that the respondent should not be out of pocket and that a punitive costs order is warranted.

40. I therefore issue the following order:

40.1. the application for sequestration is dismissed.

40.2. the applicants shall pay the respondent's costs on an attorney and client scale.



D VAN DEN BOGERT
Acting Judge
High Court of South Africa
Gauteng Division, Pretoria

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CD Roux

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