

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: 2709/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrate: YES/NO

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

(Registration number: 1962/000738/06)

Applicant

and

CHAKANE PROPERTIES (PTY) LTD

(Registration number: 2017/273536/07)

Respondent

CORAM:

Opperman, J

HEARD ON:

1 September 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 29 September 2022. The date and time for hand-down is deemed to be 29 September 2022 at 15h00.

SUMMARY Sequestration/liquidation proceedings are not legal proceedings for enforcement of a credit agreement under the National Credit Act 34 of 2005 or *ex contractu*

JUDGMENT

[1] The applicant applies for an order in terms of which the respondent must be placed under provisional liquidation in the hands of the Master of the High Court: Free State.

[2] The allegation is that the respondent is unable to pay their debt and it will be just and equitable to order the interim relief sought.

[3] Crucial is to state what this application is not concerned with: It is not legal proceedings to enforce a credit agreement under the National Credit Act 34 of 2005 and liquidation proceedings are not legal proceedings for enforcement of a credit agreement under the National Credit Act 34 of 2005 or purely *ex contractu*. The Law of Insolvency is applicable and not the Law of Contract or law in terms of the National Credit Act. The matter of *Collett v Priest* 1931 AD 290 at 299 stated the law and the National Credit Act did not amend the situation.

[S]equestration cannot fittingly be described as an order for a debt due by the debtor to the creditor. 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. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. The order sequestrating his estate affects the civil status of the debtor and results in vesting his estate in the Master. No doubt, before an order so serious in its consequences to the debtor is given the Court satisfies itself as to the correctness of the allegations in the petition. It may for example have to determine whether the debtor owes the money as alleged in the petition. But while the Court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the Court asked to give any judgment, decree or order against the debtor upon any such claim.

[4] The Supreme Court of Appeal in *Naidoo v ABSA Bank* 2010 (4) SA 597 (SCA) ruled on the issue with reference to *Investec Bank Ltd and another v Mutemeri and another* 2010 (1) SA 265 (GSJ). The discussion of Maghembe, N: “*The appellate division has spoken – sequestration proceedings do not qualify as proceedings to enforce a credit agreement under The National Credit Act 34 of 2005: Naidoo v Absa Bank 2010 4 SA 597*” brings the issue to light.¹

[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 section 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

¹ PER / PELJ 2011 VOLUME 14 No 2, pages 171 to 180, ISSN 1727-3781.

law in motion to have the debtor declared insolvent” – they are not proceedings “for the recovery of a debt”. The learned Judge’s reasoning accords with this court’s description of a sequestration order as a species of execution, affecting not only the rights of the two litigants but also of third parties, and involves the distribution of the insolvent’s property to various creditors, while restricting those creditors’ ordinary remedies and imposing disabilities on the insolvent – it is not an ordinary judgment entitling a creditor to execute against a debtor.² (Accentuation added)

[5] The respondent opposes the application on the grounds set out in their Notice in terms of Rule 6(5)(d) of the Uniform Rules of Court.³ The Rule 6(5)(d) - Notice is in fact based on the non-compliance by the applicant to the relevant clauses of the three agreements that all contains similar provisions regarding a written notice to rectify default. The argument for the respondent, without denying their indebtedness and inability to honour the debt, is that the applicant may only commence with the proceedings subject and pursuant to giving the *inter partes* contractually prescribed default notices. This, according to the respondent, bars the applicant from instituting any legal proceedings and make them to fail as creditors *ex contractu* and in terms of the National Credit Act.

[6] The above is not the cause of action and law applicable here. The cause of action is a deed of insolvency and the Law of Insolvency is the scope wherein the judgment must be decided. The questions of law raised in terms of Rule (6)(5)(d) of the Uniform Rules of Court do not find application.

² *Naidoo v ABSA Bank supra.*

³ Rule 6(5)(d): Any person opposing the grant of an order sought in the notice of motion must;

- (i) within the time stated in the said notice, give applicant notice, in writing that such person intends to oppose the application, and in such notice appoint an address within 15 kilometres of the office of the registrar, at which such person will accept notice and service of all documents, as well as such person’s postal, facsimile or electronic mail addresses where available;
- (ii) within fifteen days of notifying the applicant of intention to oppose the application, deliver such person’s answering affidavit, if any, together with any relevant documents; and
- (iii) if such person intends to raise any question of law only, such person must deliver notice of intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.

[Substituted by GNR.3 of 19 February 2016 and by GNR.2133 of 3 June 2022.]

[7] The respondent is indebted in the amount of R2 981 144.33 in respect of three accounts located at The Standard Bank of South Africa Limited; the applicant.⁴

1. On 10 June 2019 the respondent concluded a written Business Revolving Credit Plan Agreement. There was also a variation agreement concluded on 20 June 2020. The agreement was implemented and the applicant made the loan amount of R2 000 000.00 available for use to the respondent. The respondent breached the agreement by not making timeous payments or any payments. A Certificate of Balance dated 5 April 2022 shows the amount outstanding to be R1 745 036.86 together with interest at the rate of 16,6% per annum calculated from 25 February 2022.

2. The second agreement is one of a Credit Card Facility. The agreement was entered into on or upon 18 November 2018 between the parties. The respondent failed to pay any instalments due and is indebted to the applicant as per a Certificate of Balance dated 4 April 2022 in the amount of R738 935.19 plus interest at 18,5% calculated from 4 April 2022.

3. The third agreement is an Overdraft Agreement entered into on 30 July 2020. The respondent breached the terms of the agreement by failing to make payments and is in arrears in the amount of R497 172.28 plus interest at 25,5% calculated from 25 February 2022. The Certificate of Balance dated 31 March 2022 is confirmation of the above.

[8] The respondent is unable to pay their debt.⁵ They do not deny the indebtedness nor the inability to meet the debt. As said; their defence is that the contracted process to establish default was not complied with by Standard Bank.

[9] Notifications of the indebtedness were served on the respondent by registered post and Sheriff. Service was among others effected personally on the Director of the respondent. It was done in terms of section 345 of the Companies Act 61 of 1973.

⁴ Founding Affidavit at paragraph 6.1 on page 10.

⁵ Founding Affidavit at paragraph 24 on page 27.

[10] The respondent is unable to pay their debt in terms of section 345 of the Companies Act 61 of 1973 because, notwithstanding notifications, the respondent has not made any payments of the instalments or any amounts due to the applicant. In addition; there is not any explanation for the neglect to do so. The respondent is well aware of their responsibilities but they do not comply and do not explain the non-compliance.

345. When company deemed unable to pay its debts.

(1) A company or body corporate shall be deemed to be unable to pay its debts if:

(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment,

decree or order or that any disposable property found did not upon sale satisfy such process; or

[Para. (b) substituted by s. 26 of Act No. 59 of 1978.]

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.

[11] The inability of the respondent to pay and the lack of any response or explanation are strongly indicative of the fact that the business is operated at a loss. It is, on a balance of probabilities, commercially insolvent.

[12] It will not be to the benefit of the applicant and other creditors if the court allows the respondent to operate on an insolvent basis. The reality is that if the creditors recover their debt when time is allowed to run, time might diminish what is recoverable. The respondent should be prevented from disposing of their assets and incurring further liabilities without the supervision of the Master of the High Court. Legal fees for collection of debt on a random basis will be prevented. The respondent may still show their solvency and soundness on the return date of the provisional order.

[13] The respondent relies exclusively on the Rule 6(5)(d) – Notice and the allegations in the Founding Affidavit must therefore be taken as established facts by the court.⁶ The respondent did not indicate or seek any relief for an opportunity to file an

⁶ Paragraphs 1 & 2 of the Heads of Argument for the respondent. Harms, D: Civil Procedure, Civil Procedure in the Superior Courts, Part B High Court, UNIFORM RULE 6 APPLICATIONS, Respondent's Options, Last Updated: July 2022 - SI 74, <https://www.mylexisnexis.co.za/Index.aspx> on 26 September 2022:

"B6.35 Points of law Where a respondent wishes to rely on a point of law only, he must deliver a notice to that effect in lieu of an affidavit setting forth such point. If the respondent wishes to rely on the merits as well as, or in the alternative, on a point of law he ought to file affidavits on the

Answering Affidavit on the merits. The application is by its mere nature urgent and justice demands that the application be granted. The applicant complied with the further statutory requirements for the provisional liquidation of Chakane Properties (Pty) Ltd.⁷

[14] **ORDER**

It is ordered that:

1. The questions of law raised in terms of Rule 6(5)(d) of the Uniform Rules of Court are dismissed.
2. The respondent company, Chakane Properties (Pty) Ltd (Registration number: 2017/273536/07), is hereby placed under PROVISIONAL LIQUIDATION in the hands of the Master of the High Court: Free State.
3. A PROVISIONAL LIQUIDATION ORDER is thus issued calling upon all interested parties to show cause, if any, to the court on Thursday the 10th day of November 2022 at 09h30 why a FINAL ORDER OF LIQUIDATION should not be granted against the respondent company.
4. SERVICE of this rule *nisi* and a copy of the notice of motion and annexures shall be effected on the respondent company at its registered office or its principal place of business within the court's jurisdiction.

merits and argue the legal point (*in limine* if appropriate). Failure to file affidavits under these circumstances does not deprive the court of its discretion to allow the late filing of affidavits but the respondent is at risk that the court may hold that the failure to file affidavits was to gain time and that, in consequence, late affidavits ought not to be allowed thus a respondent should file affidavits on the merits irrespective of whether a preliminary point is to be raised. Only in appropriate or exceptional circumstances will a court allow the late filing of affidavits where a preliminary point has failed.

Where a respondent wishes to raise an objection *in limine* that the application discloses no cause of action he ought to file affidavits on the merits. If the point *in limine* fails, the failure to file affidavits might also result in the application being granted or in his having to pay the costs of a postponement.”

5. This order shall, without delay, be published in THE CITIZEN and THE GOVERNMENT GAZETTE.

6. The sheriff shall ascertain whether the employees of the respondent are represented by a trade union and whether there is a notice board on the premises to which the employees have access.

7. A copy of this provisional liquidation order shall be served by Sheriff on:⁸ -

7.1 Every registered trade union that, as far as the Sheriff can reasonably ascertain, represents any of the employees of the respondent company;

⁸ Section 346 of the Companies Act 61 of 1973:

Sub - section (4):

- (a) Before an application for the winding-up of a company is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Master, or, if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the *Gazette*.
- (b) The Master or any such officer may report to the Court any facts ascertained by him which appear to him to justify the Court in postponing the hearing or dismissing the application and shall transmit a copy of that report to the applicant or his agent and to the company.

Sub - section (4A)

- (a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application—
 - (i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and
 - (ii) to the employees themselves—
 - (aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or
 - (bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;
 - (iii) to the South African Revenue Service; and
 - (iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.
- (b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with.

[Sub-s. (4A) inserted by s. 7 of Act No. 69 of 2002.]

7.2 The employees of the respondent company by affixing a copy of the application and provisional liquidation order on any notice board to which the employees have access inside the respondent company's premises or if there is no access to the premises by the employees, by affixing a copy to the front gate or front door of the premises from which the respondent company conducted business; and

7.3 The South African Revenue Services.

8. The applicant must, before or during the hearing for the final liquidation order, file an affidavit by the person who furnished a copy of the application which sets out the manner in which service was complied with.

9. The report of the Master of the High Court; Free State, if any and in terms of sub-section 346(4)(a) of the Companies Act 61 of 1973, shall be filed on record.

10. Costs of this application shall be costs in the liquidation.

M OPPERMAN, J

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