



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

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

7 November
DATE 2022

[Signature]
SIGNATURE

CASE NO: 40848/20

DATE: 7 November 2022

In the matter between:-

ABSA BANK LIMITED

Applicant

V

IVAN NEWELL BJORKMAN

Respondent

JUDGMENT

KOOVERJIE J

- [1] This is an application for the sequestration of the respondent's estate. It is the applicant's case that the respondent is indebted to it in terms of a written loan agreement that had been concluded on 16 October 2007.¹ The sequestration proceedings were instituted on 20 August 2020.
- [2] The issue for determination is whether the sequestration application is appropriate and justified in the circumstances. For the purposes of this judgment the applicant will also be referred to as "ABSA".
- [3] A supplementary affidavit was further filed by the respondent at the late hour and before the hearing. No leave was sought as to why a court should condone same. In determining this matter, I am inclined not to consider the said supplementary affidavit.
- [4] Furthermore, various points *in limine* were raised by the respondent. However, they were not persisted with at the hearing of this matter. I will not therefore burden this judgment with the points raised.

BACKGROUND

- [5] The respondent's initial indebtedness was due to four mortgage bonds registered over two immovable properties, namely property 1 which is known as Portion 258 as well as property 2 known as Portion 63.

¹ Annexure 'JK1'

- [6] The respondent is a sole member of a close corporation, Her Majesty Guesthouse CC and executed a written suretyship in favour of ABSA in an unlimited amount for the debts and obligations owing to ABSA.²
- [7] The applicant instituted action proceedings in 2013, seeking properties 1 and 2 specially executable. In such summons the applicant claimed an amount of R2,824,618.84 (together with interest therein). While the action proceedings was in progress, the respondent sold property 1 and managed to settle the loan by making payment of R1.9 million. Consequently the bond over property 1 was cancelled by ABSA. Such cancellation was effected around 25 July 2016.³ Thereafter the loan indebtedness was reduced to R1,805,981.39.⁴

THE ACTION PROCEEDINGS

- [8] Currently there are pending action proceedings under case number 3332/2013 which have not been finalized as yet, in particular, the counterclaims have not been ventilated. The said action proceedings emanated from the respondent's failure to pay his monthly instalments in accordance with the loan agreement entered into with ABSA. Simply put, he failed to honour his monthly instalments on 29 May 2013. This caused ABSA to initiate action proceedings in order to recover the debt. These proceedings were instituted in respect of both property 1 and 2.
- [9] The respondent filed his plea and counterclaims. The applicant argued that the defences raised in the counterclaims have no merit. The said action proceedings

² Annexures 'JK1(1)' to 'JK10'

³ Pages E25 & 26 of Caselines

⁴ Annexure 'JK11'

were set down for hearing on 3 May 2016 but did not proceed as the respondent sought a postponement.

- [10] The first counterclaim was for the payment of R3 million premised on, *inter alia*, the applicant's delays in the registration of the bonds. As a result, the respondent claims that he has suffered damages for loss of profit, wasted expenses, escalated costs and other expenses amounting to R3 million.
- [11] ABSA contends that the first counterclaim has no basis, in fact and in law. It was argued that the delay was caused by the applicant not registering the mortgage bonds timeously. Furthermore the first counterclaim prescribed. The counterclaim was instituted on 30 March 2015 which was more than three years after the date on which the debt arose.
- [12] The second counterclaim concerned the auction that the respondent arranged with High Street Auctions during March 2015. The respondent contended that ABSA purportedly interfered with prospective purchasers, estate agents and auctioneers concerning the sale of the respondent's property. As a result, both property 1 and property 2 could not be sold for a fair and reasonable amount.
- [13] ABSA further contends that there is no merit in this counterclaim and denies that it interfered with the prospective buyers and estate agents and/or auctioneers. The action was enrolled for hearing on 3 May 2016 but was postponed at the respondents' request. The postponement was sought on, *inter alia*, ABSA being advised that the respondent was in the process of selling property 1 and payment of R1.9 million would be made to ABSA. The respondent further indicated that he does

not wish to defend the action proceedings but settle the debt.⁵ These proceedings remain pending.

- [14] The applicant argued that the respondent would have to persuade the court that his counterclaims have merit in order to properly oppose the sequestration application. The applicant, in its papers, at length, set out why the defences were meritless.

SEQUESTRATION PROCEEDINGS

- [15] These sequestration proceedings was instituted on 20 August 2020. The applicant's case is that the respondent was either factually insolvent or committed acts of insolvency in terms of section 8(e) and 8(g) of the Insolvency Act. The respondent has however challenged these proceedings as well. At the time that these proceedings was instituted, the indebtedness claimed was R2,123,928.42, the amount in accordance with the certificate of balance.⁶

- [16] The following facts are common cause, namely that: there was a conclusion of the respective loan agreements; the applicant advanced loans to the respondent and the respondent failed to pay his monthly instalment in terms of such loan agreements. Lastly, the certificate of balance constitutes *prima facie* proof of the amount of indebtedness.⁷

- [17] The respondent's main contentions were the following, that:

⁵ E42

⁶ Annexure 'JK15', Page E232

⁷ Senekal v Trust Bank of South Africa 1978 (3) SA 375A

- (i) he is not insolvent. He explained that the current estimated value of the property exceeds his liabilities;
- (ii) these proceedings are not appropriate as there is a dispute on the valuation of the property in question. Furthermore ABSA's valuation of the property is incorrect;
- (iii) he was not able to realise the full value of his property due to ABSA's failure to consent to the subdivision of his property 2;⁸
- (iv) the applicant is circumventing the Rule 46A process. The applicant should have proceeded to have the bonded property declared specially executable.

[18] During the hearing, one of the core contentions raised was ABSA's failure to consent to the subdivision of property 2. The respondent pointed out that he had since 2016 requested ABSA's consent to subdivide the property. If consent was granted at the time, he could have sold the subdivided portions and settled his debt with ABSA. It was due to ABSA's negligence and unwarranted delay that he was unable to proceed with the said process.⁹

[19] He also argued that ABSA failed to act in a diligent and professional manner. It was pointed out that they were ignorant of the administrative processes in place concerning the subdivision. For instance:

- (i) ABSA initially refused the subdivision because the respondent did not supply the Surveyor-General drawing. However such document was only required at the end of the subdivision process;

⁸ G17, G18, G19 of the answering affidavit

⁹ Annexure 'JK35', pages G15, G16, G17 and G18 of the answering affidavit

- (ii) ABSA further refused to grant consent on the basis that the respondent was required to have zoning permission. It was again pointed out that the respondent had in fact obtained such zoning permission and ABSA was duly informed thereof;
- (iii) it was only in 2020 that ABSA indicated that it would consent to the subdivision. (It is noted that the subdivision was conditional);
- (iv) the issue whether or not one could subdivide property located in an agricultural zone was of no relevance as ABSA's understanding was misconstrued.

RULE 46A PROCEEDINGS / SEQUESTRATION PROCEEDINGS

[20] It was further argued that the Rule 46A proceedings should not have been circumvented. The property is the primary residence of the respondent and his daughter¹⁰. In the Rule 46A proceedings, the court would be required to consider an alternative means of satisfying the judgment debt. In particular, that the subdivision of the property would be in both parties' interest. Simply put, it was argued that the proceedings constitute an abuse of the sequestration process and used as a debt collecting measure.

[21] It was further argued that sequestration proceedings would not be advantageous since the only creditor that would benefit, is ABSA.

[22] The applicant, on the other hand, argued that these sequestration proceedings are distinct and have no bearing on the Rule 46A application. The applicant was entitled

¹⁰ Par 9.4 of the opposing affidavit

to institute the sequestration proceedings. In these proceedings it is not ABSA's intention to enforce the debt. The applicant pointed out that the application for sequestration is not a process whereby the creditor enforces a debt and, therefore, it does not amount to a legal proceeding to enforce an agreement under the National Credit Act (NCA). It relied on the authorities of *Mutemeri*¹¹ and similar cases such as *Naidoo*¹².

[23] In *Mutemeri*, the court illustrated that sequestration proceedings are excluded from Section 129(1) of the NCA, and stated that:

- (a) under Section 9(2) of the Insolvency Act an application for sequestration may be made on a claim that is not yet due or enforceable because the purpose of a sequestration order is not merely to enforce a claim. Its primary purpose is to bring about a concurrence of claims in an insolvent estate in an orderly manner to ensure that the creditors are treated equally;
- (b) the requirement that an applicant for sequestration must have a liquidated claim is above all to ensure that applications are brought by creditors with sufficient interest in the sequestration and not because the application is for the enforcement of the claim.¹³

[24] The court in *Mutemeri* relied on *Collett*,¹⁴ which aptly described why sequestration proceedings are not proceedings simply to enforce a singular claim by a creditor.¹⁵ I take no issue with this distinction.

¹¹ Investec Bank v Mutemeri 2010 (1) SA 265 (GSJ) 266

¹² Naidoo v ABSA Bank 2010 (4) SA 579 (SCA), par 4

¹³ Mutemeri matter, par 31

¹⁴ Collett v Prest 1931 AD 290 at 299

¹⁵ "Sequestration 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

- [25] However, the issue for determination in this matter is whether these proceedings were appropriate under the circumstances.

REQUIREMENTS FOR SEQUESTRATION MET

- [26] It is the applicant's case that the jurisdictional requirements in terms of the Insolvency Act have been met and thereby it is entitled to its sequestration order.

- [27] Section 8(g) of the Insolvency Act stipulates *"a debtor commits an act of insolvency when he offers to make any arrangement with any of his creditors for releasing him wholly or partially of his debt."*

Section 8(g) of the Insolvency Act provides:

"A debtor commits an act of insolvency if he gives notice in writing to any of his creditors that he is unable to pay his debts."

In terms of Section 8(e):

*"The debtor commits an act of insolvency if it is indicative of his inability to pay his debts or otherwise inference of the debtor's insolvency cannot be made."*¹⁶

- [28] The applicant further referred to various correspondence forming part of its papers, namely **annexures 'JK25', 'JK28', 'JK29', 'JK35', 'JK37', 'JK38', 'JK40', 'JK41',**

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."

¹⁶ Laeveld se Kooperasie Beperk v Joubert 1980 (3) SA 1170 at 1126A-B

'JK42', 'JK43' and 'JK45' which illustrated the respondent's admission of his indebtedness and where he sought time to settle the amount outstanding.

[29] It was demonstrated that the respondent had in fact made or offered to make arrangements in order to settle his debt. This was evident from its affidavit, particularly **annexures 'JK37', 'JK38', 'JK40', 'JK41', 'JK42', 'JK43' and 'JK45'**. It was submitted that each of the correspondence constitute separate and independent acts of insolvency.

[30] In summary, it was submitted that the respondent was factually insolvent for the following reasons, namely:

- (i) the respondent admitted its debt by virtue of the loan agreement entered into between the parties;
- (ii) although it was not incumbent on the applicant to prove its indebtedness, it, in any event, furnished the necessary proof of the debt by way of statements;
- (iii) the respondent further conceded to the arrears on the account.¹⁷
- (iv) the respondent failed to pay the monthly instalments to the applicant;
- (v) the respondent was unable to service the interest accruing on the loan account despite demand/notice in terms of Section 129 of the National Credit Act;
- (vi) notwithstanding the sale of property 1 and the consequent reduction of the indebtedness owing to the applicant, the respondent was still unable to pay the monthly instalments together with the accruing interest;

¹⁷ 'JK11', 'JK12', 'JK13', 'JK14'

- (vii) the revenue generated by the close corporation was minimal resulting in the respondent not being able to sustain the debt. In fact, it was pointed out that the close corporation was unable to pay the rental to the respondent;
- (viii) the respondent conceded that he was experiencing cash flow difficulties;
- (ix) property 2 has been in the market since 2015 and remains unsold;
- (x) the three costs orders have also not been settled;
- (xi) the respondent also finds himself in a predicament as he is also not able to sustain the legal action;
- (xii) the respondent has also requested that the applicant reduce the interest rate applicable to the loan amount;
- (xiii) the applicant's plea was struck out and it is evident that his defence is not sustainable;
- (xiv) lastly, the valuations obtained by the respondent constitutes inadmissible hearsay evidence and are unreliable.

[31] It was further motivated that there is reason to believe that the sequestration of the respondent's estate would be to the advantage of creditors. The respondent owns property 2 that is encumbered in favour of the applicant. Hence the proceeds of this property will yield sufficient value to ensure that all administration and sequestration costs are paid.

[32] All the applicant has to establish is a *prima facie* case as there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated. The court has to be satisfied that there is a reasonable prospect, not necessarily a likelihood, that there would be a benefit to the creditors.

- [33] It was further submitted that the court can exercise a discretion in the respondent's favour if the respondent is able to place evidence before the court which illustrates that his debts could be paid within a reasonable time.¹⁸ It has been submitted that no such evidence has been placed before court.

ANALYSIS

- [34] I am mindful that there is no exhaustive list of facts from which an inference of insolvency may be drawn. Even an oral admission of a debt may, in appropriate circumstances, be enough to establish insolvency for the purpose of the *prima facie* case which the creditor is required to initially make out. It is for the debtor to rebut this *prima facie* case and show that his assets have a value exceeding his liabilities.
- [35] The test where a provisional order is being sought, as is the case here, is not whether the sequestrating creditor has established the requirements on a balance of probabilities, (namely the standard of proof to obtain a final order). The provisional sequestration stage is designed to afford the creditor a simple and speedy remedy for preserving the debtor's estate and enforcing its claim.¹⁹
- [36] Section 9(1) of the Insolvency Act provides that where a creditor has a claim of not less than R100, namely a liquidated claim against the debtor who has committed an act of insolvency or is insolvent, the creditor may petition the court for the sequestration of the estate of the debtor.

¹⁸ The Kona case at paragraph 5

¹⁹ Provincial Building Society of South Africa v Dubois 1966 (3) SA 76 (N) at 80

- [37] The respondent takes no issue with his indebtedness but raises various disputes, *inter alia*, that: he is not insolvent, he disputes the amount of indebtedness, he was dissatisfied with the manner in which ABSA failed to furnish its consent to subdivide property 2, which has caused his current financial predicament.
- [38] In exercising my discretion, I may grant a provisional order once the jurisdictional requirements for insolvency are met.²⁰ *Prima facie* the applicant can apply for the sequestration of the debtor's estate if the respondent has committed an act of insolvency or is insolvent and there is reason to believe that the sequestration would be to the advantage of creditors. There is no doubt that the respondent owns realizable property sufficient to defray the costs of the sequestration and sequestration in this instance would be to the advantage of ABSA.
- [39] It must, however, be emphasized that the main aim of the sequestration process, in terms of the Insolvency Act, is to provide for a collective debt collecting process that will ensure a fair distribution of the debtor's assets in circumstances where the assets are insufficient to satisfy all the creditors' claims. That is to make sure that the interests of all the creditors are protected and that one creditor is not favoured before another, also known as "*concursum creditorium*".
- [40] The respondent indicated that ABSA is one of the only two creditors he is indebted to. The second debtor identified was Mr Noel Andrews, who owed R2 million.²¹ The respondent submitted that Mr Andrews is of the view that the sequestration of the

²⁰ Amod v Khan 1947 (2) SA 432 (N) at 435

²¹ Page G22

respondent would not be to the advantage of the creditors. In fact, only ABSA would benefit. This allegation, however, was not substantiated by the respondent.

[41] I have also noted that the applicant, at paragraph [56.6] of the founding affidavit, merely stated that sequestration would be to benefit creditors as it will avoid the incurring of further legal costs to the detriment of creditors.²²

[42] It is also not in dispute that the last payment was made on 18 June 2019.

[43] However, even if this court is satisfied that the debtor has committed an act of insolvency, the court still has the discretion to grant or refuse a final order of sequestration. There is no exhaustive rule laid down as to how a court should exercise its discretion other than that the discretion must be exercised judicially.²³ I am expected to, in the exercising my judicial discretion, have regard to all the facts presented to me.

[44] The litigation between the parties commenced around 2013. ABSA instituted action proceedings in 2013 seeking payment of the outstanding debts in respect of both property 1 and property 2. The defendant sought a postponement prior to the hearing date, being 3 May 2014.

[45] Prior thereto, on 13 April 2015, the respondent, *inter alia*, advised that he experienced cash flow issues and instead of incurring legal costs, he opted to

²² PE63 par 56.6

²³ MARS, The Law of Insolvency in South Africa 9th Edition, P141

consider alternatives to litigation. He further advised that he intended to immediately sell his properties and enter into discussion to settle the action.²⁴

[46] On 12 November 2015, the respondent advised ABSA that he would settle the outstanding bond in the amount of R1.9 million and requested ABSA to release the bond registration over property 1. On 26 January 2016 ABSA agreed thereto.²⁵ The bond amount was indeed settled.

[47] I have particularly taken cognisance of the interaction between the parties concerning the subdivision of property 2. The defendant undertook to settle this debt and in so doing, communicated with ABSA on numerous occasions regarding property 2 as well.²⁶

[48] Notably there is correspondence of 2 November 2016 where SFP Town Planning (Pty) Ltd advised the respondent that they had already on 7 April 2016 requested ABSA to submit a subdivision application. He was also advised that *"in terms of the new SPLUMA regulations, the bondholder's consent from ABSA is required before the subdivision application can be submitted. We have been waiting for the bondholder's consent from April 2016. Deon Ras have requested the bondholder's consent from ABSA on various occasions.*

The last reply from ABSA was that the Regulation 38 certificate must be provided. It is common knowledge that the Regulation 38 can only be obtained once the subdivision application has been approved by the relevant Local Authority and by the

²⁴ Annexure 'JK28'

²⁵ Annexure 'JK29 and page E360

²⁶ PE47 paragraph 36 of the founding affidavit

Surveyor General's Office. Thus the Regulation 38 cannot be obtained without the bondholder's consent being issued by ABSA Bank first".

[49] They went further on to state:

"At this moment in time, ABSA Bank is delaying the submission of the subdivision application by not issuing the bondholder's consent. From previous experience the issuing of a bondholder's consent should not take more than 30 days. We have been waiting now four months for the issuing thereof.

Our client is being severely prejudiced by ABSA Bank at the moment, as he cannot unlock the value of his property if the subdivision is not undertaken."

(Annexure 'IB03')²⁷

[50] From the record there seems to be no reply to this letter.

[51] On 20 August 2018, the respondent's attorneys advised the applicant's attorney that they still required consent from ABSA to proceed with the subdivision. ABSA was further advised that there were prospective buyers for the subdivided property. The respondent once again undertook to settle the debt from the proceeds of the said sale **(Annexure 'JK35')**²⁸.

[52] On 1 October 2019 **(Annexure 'JK39')** ABSA advised the respondent that it would be willing to consent to the subdivision if the respondent agreed to service the interest on the account whilst the subdivision process is concluded and further requested that the

²⁷ G32 of the record (my underlining)

²⁸ E368

parties sign a settlement agreement (**Annexure 'JK39'**).²⁹ Furthermore that the settlement agreement would only be signed if the respondent admitted his indebtedness.

[53] On 8 October 2019, the respondent informed ABSA that he agreed to its proposal but requested a meeting in order to finalize the agreement (**Annexure 'JK41'**).³⁰

[54] On 8 November 2019, ABSA once again enquired from the respondent if he still persisted in the subdivision. He confirmed his wish to subdivide and sell (**Annexures 'JK42' and 'JK43'**).³¹

[55] On 28 January 2020, ABSA advised that they would be willing to consider subdivision subject to the defendant confirming that he is liable for payment of the full outstanding amount and interest thereon (**Annexure 'JK44'**).³²

[56] On 25 February 2020 (**Annexure 'JK46'**)³³, the respondent's new attorney of record, placed herself on record and proposed that the parties work towards a settlement.

[57] In reply, on 3 March 2020, the applicant's attorney advised that further settlement on the matter is not possible since the parties in the past had attempted settlement discussions which were to no avail (**Annexure 'JK47'**).³⁴ It was thereafter, on 20 August 2020, that these sequestration proceedings were instituted.

²⁹ E373

³⁰ E375

³¹ E376 to E377

³² E378

³³ E380

³⁴ E381

[58] In a letter of 16 November 2020 the respondent, through its attorney, Mary Jardim, once again attempted to settle the matter and put forward a proposal.³⁵

[59] It has become apparent that ABSA has taken stance not to consent to the subdivision and persists in sequestering the respondent.

[60] ABSA, in particular, argued that the subdivision would not be possible if one has regard to the Deed of Transfer. From the wording in the Deed of Transfer³⁶ I have

³⁵ ... The relevant extract from the letter reads **Annexure 'IB12'** p. G50

"6. *Our client proposes the following solution:*

6.1 *He will pay R200 000.00 to settle the interest and any other accrued interest as above from April through to 30 November; and*

6.2 *He will pay a further R800 000.00 to cover the future monthly interest payments pending obtaining subdivision and selling off one or two of the portions as may be required at the time to settle the outstanding amounts due to your client.*

6.3 *One effect of the above is that any excess of the above payment not immediately used for interest purposes will go to reducing the capital amount eventually due.*

6.4 *Further, the lump sum interest amount paid in advance will have a positive effect on the actual interest due although the impact of that will decrease with the decreasing balance of that tranche of funds.*

6.5 *This proposal is based on the fact that there are amounts owing but for the purposes hereof, our client does not accept the above figures as necessarily accurate and reserves his rights to debate the account at a time when it is relevant, viz., when the debt is actually settled.*

7. *In return for this payment, our client will require that*

7.1 *Your client immediately grants our client consent to subdivide; and*

7.2 *Gives him until 31 December 2023 to either settle any outstanding balance or provide suitable guarantees from a buyer of one or more of the subdivided portions, sufficient to settle any outstanding amount. It is obvious that the upfront interest payment will easily take him past such date.*

8. *Our client will*

8.1 *Undertake to proceed immediately with the necessary subdivision process and to keep your client apprised of progress in that regard; and*

8.2 *Engage with the estate agent to find a buyer or buyers for one or more of the proposed subdivisions; and*

8.3 *Give your client a power of attorney to sell one or more portions of the subdivided property in the event that he is unable to settle or provide suitable bank guarantees by 31 December 2023. Clearly, it is within his own interests to settle as soon as he can because then the capital amount due will be reduced by any balance of the upfront payment.*

8.4 *It would also be in our client's interests to make further interim lump sum payments to further reduce the capital balance and he has every intention of doing so. He advises us that his goal is to be able to pay all amounts due to your client well before 31 December 2023 as he anticipates that those funds will become available."*

noted that the Deed makes provision for subdivision, provided written permission is sought from the administrators if the infrastructure and business interests are not in accordance with the conditions set out in the Deed. In any event, SFP Town Planning indicated that similar subdivisions had previously been approved and that in this case the property could be divided in line with the Regional Spatial Development Framework.³⁷

[61] I am of the view that in these circumstances, if consent to subdivide was granted way back in 2015, the respondent may have settled his indebtedness. The applicant had settled his debt in respect of Property 1, where payment of R1.9 million was in fact made, resulting in the cancellation of the bond on Property 1. There could have been no reason why he could not have done so with Property 2 as well.

[62] As alluded to above, as far back as November 2016 (Annexure 'IB03'), SFP Town Planning advised that ABSA was the cause of the delay in the submission of the subdivision application, resulting in the respondent being prejudiced. They also advised that they have been waiting since April 2016 to obtain ABSA's consent.

³⁶ JK53 –

“SUBJECT TO THE FOLLOWING CONDITIONS” ...

B. Behalwe met die skriftelike toestemming van die Administrateurs as beherende gesag soos omskryf in Wet 21 van 1940

(i) mag die grond vir woon en landbou doeleindes gebruik word. Op die grond of op enige behoorlike goedgekeurde onderverdelings daarvan mag daar nie meer as een woonhuis tesame met die buitegeboue wat gewoonweg vir gebruik in verband daarmee nodig is en sulke geboue en bouwerke as wat vir landboudoeleindes nodig mag wees nie.

(ii) mag geen winkel of besigheid of nywerheid van watter aard ookal op die grond geopen of gedryf word nie.

³⁷ 07-19

- [63] Surely in this instance, the respondent, as a debtor, should not be forced to lose his assets and be declared an insolvent when he was proactive in attempting to settle his indebtedness.
- [64] The respondent informed ABSA that he required ABSA's consent and that he had interested purchasers in respect of the proposed subdivided portions. The respondent undertook that the debt would be settled and that the sales would exceed his outstanding debt³⁸. I have noted that as far back as 4 July 2018, the respondent, informed Mr Beyers that the only way to settle his debt was to subdivide property 2. He also requested ABSA's consent to subdivide.³⁹
- [65] In my view, ABSA had a hand in the predicament the respondent finds himself in. The subdivision of the property and the eventual sale of the subdivided properties was dependent on the consent of ABSA. Despite the request in 2016 already, ABSA had only in 2020 agreed to grant consent, albeit conditionally. ABSA's initial consent to subdivide was conditional on the respondent admitting to his full indebtedness which included the interest accrued.
- [66] Ultimately I have a discretion to grant an order of sequestration on the facts presented to me. Once the jurisdictional factors for insolvency are met, an applicant would ordinarily be entitled to its order unless certain factors come into play and which I am required to take into consideration.

³⁸ Annexure 'JK35'

³⁹ PE47, paragraph 36 of the founding affidavit

[67] Our courts have refused to grant sequestration orders in instances where such special considerations exist. This court should not grant a sequestration order if there appears to be an improper and ulterior motive for instituting sequestration proceedings. This court can also refuse to grant a sequestration order if special considerations are present. In **Millward v Glaser**⁴⁰ the court listed special factors which included:

“(a) *The respondent is not insolvent, her inability to pay due to the fact that the executor of the estate of the deceased finds himself unable to pay her what is due to her....*”

“(f) *There is no suggestion that any other creditors are pressing the respondent for payment.*”

[68] In the matter, apart from the subdivision issue, the respondent also contended that he is not insolvent. With regard to the value of the property, he presented certain valuations illustrating that the property value exceeds the debt owed. ABSA, however, argued that such valuations constitute “inadmissible opinion evidence”. Hence at this point in time, the true valuation of the property remains a bone of contention. I have also noted that the applicant argued that the sequestration would be to the advantage of the creditors. It does so without canvassing how this order will benefit the other identified creditor. The interest of the other creditors was not canvassed by ABSA (*concursum creditorium*).

[69] I find it apt to refer to **Wackrill v Sandton International Removals (Pty) Ltd and Others 1984 (1) SA 282 W at p.293** where the court stated:

⁴⁰ 1950 (3) SA 547 at 554

“In the case of sequestration proceedings the principle is clearly established that the court has a discretion to refuse a sequestration order if the application is not made for the bona fide purpose of bringing about a concursus creditorum and a distribution of the respondent’s assets by a trustee in insolvency, but is made mala fide and with an ulterior and improper motive. Such a mala fide application is an abuse of the process of the court....”

[70] The court in **Lundy v Beek 2019 (5) SA 503 GJ at par 41** held:

“This sequestration started off as a frustrated eviction ...”

At paragraph [43] and [44] the court continues to state:

- ”43. This brings the sequestration application within the category of cases with ulterior purpose such as envisaged in Wackrill v Sandton International Removals (Pty) Ltd and Others 1984 (1) SA 282 W at 293 and cases considered there.*
- 44. I do not know what the precise status is of the war about the property, and whether the summons have yielded any further pleadings or progress. They are dated July 2015, soon after the alleged conviction. That is now almost four years ago. Be that as it may, a sequestration application should not be a front in an eviction and damages war.”*

[71] The court, in **FirstRand Bank Limited v Evans**⁴¹, gave guidance on how a court should exercise its discretion against refusing to grant a provisional sequestration order:

“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 the discretion

⁴¹ 2011 (4) SA 597 (KZD) at paragraph 27

whether to grant the order. There is little authority on how this discretion should be exercised which indicates that it is unusual for the court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within that class of cases generally described as involving a power combined with a duty. In other words, 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. It is for the respondent to establish the special and unusual circumstances that warrant the exercise of a court's discretion in his or her favour."

[72] I am mindful that the discretion of this court should not be exercised lightly and where an act of insolvency has been proved, the onus is upon the debtor who wishes to avoid sequestration is a heavy one. If such debtor can demonstrate special factors, then the applicant would not be successful in obtaining such sequestration order.⁴²

[73] In my view, these proceedings were instituted after a frustrated attempt in the action proceedings and which action proceedings currently remain pending. In **C C v D C**⁴³ the court pointed out that should sequestration proceedings be launched by an applicant with the sole or predominant purpose of bringing an end to the proceedings against the applicant, that may constitute an abuse and justify the dismissal of the application.

[74] In this instance, I am satisfied that the respondent had demonstrated in his papers that special considerations have come into play. Under these circumstances, I find

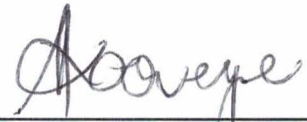
⁴² Millward v Glaser supra at page 553

⁴³ [2020] ZAGPJHC 225 (12 August 2020) at paragraph 32

that granting a sequestration order is not justified. In the premises, then this application must fail.

[75] The following order is made:

1. The application is dismissed with costs.



H KOOVERJIE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:

Instructed by:

Counsel for the respondent:

Instructed by:

Date heard:

Date of Judgment:

Adv L Meintjies

Rorich Wolmarans and Luderitz Inc

Adv D Shaw

Mary Jardim Attorneys

2 September 2022

7 November 2022