IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 4918/2017

In the matter between:

FIRST RAND BANK LTD Applicant

and

SAREL JACOBUS VAN DER WALT Respondent

CARGILL RSA (PTY) LTD (Intervening creditor)

CORAM: DAFFUE, J

HEARD ON: 01 NOVEMBER 2018

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 27 NOVEMBER 2018

I INTRODUCTION

[1] The continuous drought has seriously impacted on several regions of South Africa and in particular some areas within the jurisdiction of the Free State Division of the High Court. It is apparent from our court rolls that sequestration applications are on the increase and even macro businesses and farming enterprises are affected.

[2] The respondent in these sequestration proceedings was a well-established and affluent farmer who conducted his farming activities on an enormous scale. He might well have been, as suggested by him, one of the largest maize farmers in the Free State.

[3] I used the past tense in paragraph [2]. The respondent was provisionally sequestrated more than a year ago and it is now my task to adjudicate whether or not a final sequestration order should be issued.

II THE PARTIES

[4] Applicant is FirstRand Bank Ltd ("FNB"), a public company and registered commercial bank and credit provider, trading *inter alia* as RMB and FNB. Adv M A Badenhorst SC appeared on behalf of FNB before me.

[5] Respondent is Mr Sarel Johannes van der Walt ("respondent"), a major male person married out of community of property. He was represented by Advv D B du Preez SC and U Lottering.

[6] The intervening creditor is Cargill RSA (Pty) Ltd ("Cargill"), a private company and registered credit provider. It was represented by Adv P Zietsman SC.

III THE RULE *NISI* AND EVENTS THEREAFTER

[7] On 4 October 2017 a rule *nisi* was issued by agreement in the following terms which I quote *verbatim*:

"1.The estate of the respondent, is placed under PROVISIONAL SEQUESTRATION in the hands of the Master of the High Court.

2. A Provisional Order is hereby issued calling upon the Respondent to show cause if any, to the Court on the 27th day of MARCH 2018 at 09:30 why a FINAL ORDER of SEQUESTRATION should not be granted against Respondent's estate.

3. This order, together with a copy of the Notice of Motion and annexure thereto must be served on the Respondent personally.

4. A copy of the order must be served on:

4.1 Any registered trade union that as far as the Sheriff can reasonably ascertain, represents any of the employees of the Respondent.

4.2 the Respondent's employees, if any, by affixing a copy of the order and application to any notice board to which the employees have access inside the Respondent's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the Respondent conducted any business at the time of the presentation of the application papers.

4.3 the South African Revenue Services and .

4.4 The Masters of the High Court.

5. The sheriff must 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.
6. The auction of the movable and immovable property planned for 10 and 11 October 2017 is cancelled.
7. The costs of the application will be costs in the sequestration."

[8] It should be pointed out that, contrary to the rule of practice in this Division, the return date was not four weeks from the date of the rule nisi, but almost six months. More than ample time was provided to respondent to get his finances in order if that was at all possible.

[9] On 27 March 2018 the rule *nisi* was extended to 24 May 2018. Several further extensions followed and eventually it was extended to 1 November 2018 when the matter was heard by me.

[10] On 22 April 2018 respondent filed his answering affidavit in order to oppose the final sequestration of his estate.

[11] On 18 May 2018 Cargill filed an application for leave to intervene and on the same date the Master filed his report. On 4 June the provisional trustees filed a comprehensive report which was attached to FNB's replying affidavit filed on 13 June 2018.

[12] Respondent filed his answering affidavit to Cargill's founding affidavit on 7 August 2018. He complained about source documents not produced by Cargill and simultaneously filed an application to compel discovery in terms of rules 35(12) & (14). On receipt of Cargill's response a supplementary affidavit was filed by respondent on 27 September 2018.

[13] FNB filed a supplementary affidavit in response to Cargill's papers on 21 September 2018. Cargill filed its replying affidavit on 19 October 2018.

[14] The parties did not agree that the supplementary affidavits may be permitted as part of the record. FNB indicated when it filed its supplementary affidavit that the court's leave would be requested at the hearing of the application and respondent was called upon to respond thereto if he so wished. I ruled that the parties should address me on the merits and permission to filing of the

supplementary affidavits whereupon I shall deal with all aspects in my judgment.

IV THE APPLICATION FOR LEAVE TO INTERVENE

[15] As said, Cargill filed an application for leave to intervene to which respondent responded with an answering affidavit as well as a supplementary answering affidavit upon Cargill's filing of documents sought by respondent in terms of rules 35(12) and (14). Cargill also filed a replying affidavit.

[16] It should be mentioned at this stage that respondent has not only raised four points *in limine,* but also attacked Cargill's application on the merits thereof. It is in essence respondent's defence that what was owing to Cargill has been settled. The evidence by the parties and various arguments will be considered *infra.*

[17] The intervention of a creditor in sequestration proceedings is a unique practice which differs from conventional intervention and may be described as a *sui generis* procedure. Any creditor may intervene in sequestration proceedings, *e.g* in order to apply for the discharge of a provisional sequestration order, or where the original applicant for sequestration does not proceed or drags his feet, to obtain a fresh provisional order. If the existing provisional sequestration order is discharged, the intervening creditor may apply for a fresh provisional sequestration order and if a proper

case has been made out, a rule *nisi* may be issued in his favour. Such intervening creditor may rely on facts appearing from the original application. See: *Fullard v Fullard* 1979 (1) SA 368 (T) at 371H – 372C.

[18] The court considering a sequestration application is entitled to also consider the facts deposed to in the intervening application in coming to its conclusion. See: *Uys and another v Du Plessis (Ferreira intervening)* 2001 (3) SA 250 (C) at 251 I – 252D.

V **ISSUES IN DISPUTE**

[19] The following issues are in dispute:

1) respondent's alleged insolvency;

2) the value of respondent's assets and in particular the alleged inadmissible evidence relating to valuations as well as the method of valuation with reference to whether the forced sale or market values of the immovable properties should be accepted;

3) the extent of respondent's liabilities;

4) Cargill's claim and therefore its *locus standi* as creditor;

5) four points *in limine* in respect of Cargill's application to intervene to be discussed briefly.

VI MATERIAL ISSUES NOT IN DISPUTE OR NOT SERIOUSLY CONTESTED

[20] The following evidence is uncontested and/or not seriously contested:

1.) FNB is a creditor of respondent in an amount of R75m plus interest and costs as surety for Karis Boerdery together with the amount of R11 999 547.95 plus interest and costs as surety for SRE Trust. The total amount due and payable as surety is therefore R87m plus interest at the rate of 10.25% *per annum* from 1 September 2017 and costs.

2.) Respondent's farming operations have terminated on 4 October 2017, more than a year ago.

3.) Respondent's previous employees, 53 in total, and contrary to respondent's version that he employed many more, have been retrenched by the provisional trustees with the consent of secured creditors. One employee was not retrenched.

4.) Respondent's immovable properties were leased in November 2017 in respect of the 2017/2018 harvesting season for R3.2m to the Luna trust of which his wife is a trustee. This lease has been extended for another year, *i.e.* for the 2018/2019 harvesting season.

5.) Respondent has not farmed in his personal capacity and/or yield any income during the last twelve months to settle his debts and/or to make any offers, meaningful or otherwise, towards the settlement of his debts.

6.) FNB's claims of about R87m plus interest from 1 September 2017 and costs are not in dispute. This is clear from respondent's answering affidavit, confirming in paragraph 8 the extent of his liabilities (on his version) which includes the FNB claims, as well as his implied concession of the correctness of FNB's certificates of balances.

7.) On 23 August 2017, and after Cargill established that respondent disposed of 8 800 tons of maize to the value of R13.8m belonging to it, to third parties, the parties entered into a written agreement wherein respondent confirmed that he breached his contract with Cargill by disposing of maize to third parties and also admitted owing at that stage some R26m to Cargill.

8.) Respondent caused an advertisement to be published in a national magazine in terms whereof his assets, inclusive of his farms and movable assets, would be sold by Park Village Auctions by public auction on 10 and 11 October 2017.

9.) Cargill intended to bring an application against respondent on 5 October 2017 to *inter alia* perfect its notarial bond; however, FNB brought an urgent application as a consequence of the advertised public auction for the provisional sequestration of respondent and obtained an order by agreement on 4 October 2017. It should be mentioned that respondent is dissatisfied with the manner in which his previous attorneys conceded to the granting of the order, but nothing turns around this at this stage.

10.) Based on the valuations of Mr Mulder, a valuer mandated by respondent and/or his attorney/auctioneer, FNB made certain calculations in order to prove respondent's insolvency. FNB decided to make use of the valuer's forced sale values, although the valuer also determined the market values. For purposes of the common cause facts, it needs to be pointed out that FNB relied on the forced sale values of the movables in a total amount of R45 367 241.50 – the market value was determined to be R69 416 313.00 – and this is the amount that respondent accepted as the basis to show his solvency. However, when respondent deposed to his affidavit on 22 April 2018, it was already established in co-operation with his own attorney that the total value of movable assets that remained, after a sale of some and removal of others by secured creditors such as Wesbank and Kempston, was a mere R1 130 412.92. Several assets could not be accounted for. Respondent overvalued his movable assets by more than R68m.

11.) Although Mulder's valuations of the immovable properties were criticised as will be shown *infra*, respondent was quite prepared to use these to show his solvency, but by referring to market value instead of forced sale value. The different calculations will be dealt with *infra.*

12.) Although Cargill's claim is disputed, it is apparent that Cargill provided much needed financial assistance to respondent to enable him to plant and eventually harvest the crop.

Respondent admitted his liability and he has to prove that he has settled his debt.

13) In conclusion, respondent as one of the largest maize farmers in the Free State Province, has failed to settle his admitted debt to his major creditor, FNB, notwithstanding an effective moratorium of more than a year.

VII FILING OF SUPPLEMENTARY AFFIDAVITS

[21] The general rule is that in motion proceedings the applicant must make out his case in the founding affidavit and that new matter shall not be introduced in the replying affidavit. This is not an inflexible and/or absolute rule. In *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205E and further the full bench dealt with the general rule, but stated, relying on *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O) that it may be apposite to allow new matter in a replying affidavit. This will *inter alia* be the case when it appears that "the ramifications of respondent's affairs were extensive and complex, and that it was impossible for applicant to have all the facts fully at his disposal before he launched his application."

[22] At 206D –E the court in *Shepherd* found that there could not be any objection that material information be placed before it by way of the provisional trustee's affidavit on the return date of a provisional sequestration order. Although new matter is placed before the court in such instance as the trustee reports on what he

has ascertained during the execution of his statutory duties, it should be considered insofar as it is relevant to issues canvassed in the affidavits. Respondent was fully entitled to respond thereto.

[23] As mentioned, the court may in its discretion permit the filing of further affidavits. See rule 6(5)(e) of the Uniform Rules of Court and *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) at para [10]. It is true that in the absence of leave being granted by the court, parties are not allowed, even by agreement, to file further affidavits. It is stated in *Hano Trading* at para [11] that the court hearing the application, "…as arbiter, has the sole discretion whether to allow the affidavits or not" and "…will only exercise its discretion in this regard where there is good reason for doing so."

[24] *In casu* the application for leave was not applied for in a separate application preceding the return date of the provisional order. In my view it would be an unnecessary waste of time and expense to follow such route, bearing in mind that the matter has been dragging on for over a year. Respondent was invited to respond and cannot claim any prejudice if the further affidavit is allowed. He decided to file an application for the striking out of several paragraphs of the supplementary affidavit, but elected to respond in detail to the averments contained in the supplementary affidavit. I am satisfied that FNB has made out a proper case for the admission of its supplementary affidavit. It mainly relies on aspects emanating from Cargill's application to intervene and FNB in essence merely wanted to put the record straight. It also invited respondent timeously to respond thereto which he did. The

application for striking out is dismissed. Respondent's supplementary affidavit in the intervening application should also be allowed. In so doing, the full factual matrix is before the court in order to properly consider all relevant aspects.

VIII THE PROVISIONAL TRUSTEES' REPORTS

[25] A detailed but unsigned report of the provisional trustees dated 31 May 2018 is relied upon by FNB. It is attached to FNB's replying affidavit as annexure "RMB4". The one provisional trustee, Mr Cloete Murray, later on deposed to an affidavit confirming the correctness of this report. On 12 September 2018 the Master filed a further report to which he attached a supplementary trustees' report, signed by Mr Murray, wherein it is reported with the required proof that Absa Bank intended to file a claim in the amount of nearly R7.5m against the insolvent estate. FNB referred to this claim in its supplementary affidavit and attached copies of the summons issued against Karis Boerdery for the aforesaid amount and respondent's Deed of Suretyship in favour of Absa.

[26] In insolvency and winding up matters courts as a rule rely on reports from the Master and trustees/liquidators which are presented to them without such reports having been attested to under oath. I agree with the observations of Tsoka J in *Hannover Reinsurance Group Africa (Pty) Ltd v Gungudoo* 2012 (1) SA 125 (GSJ) at paras [41] and [42]. I shall consider the reports *infra*

when I evaluate the evidence and submissions made by the parties. Suffice to say at this stage that respondent could not disregard the two reports, especially the first and detailed one. He should have responded thereto.

IX SECTION 12 OF THE INSOLVENCY ACT, 24 of 1936

[27] Section 12 of the Insolvency Act, 24 of 1936 reads as follows:

Final sequestration or dismissal of petition for sequestration

(1) If at the hearing pursuant to the aforesaid rule *nisi* the court is satisfied that-

(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 sequestrate the estate of the debtor.

(2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*.

[28] It is evident from the wording of s 12(1) that the court has a discretion to grant a final order for sequestration once the applicant has proven the three requisites, but in terms of ss 12(2) it must dismiss the application and set aside the provisional sequestration order or require further proof and postpone the hearing if it is not so satisfied as set out in ss 12(1).

[29] I shall adjudicate the issues flowing from s 12 *seriatim* in the next paragraphs.

X **<u>RESPONDENT'S POINTS *IN LIMINE*</u>**

[30] Respondent took four points *in limine* in respect of the intervening application. I ruled that all issues be argued at once and undertook to deal with the points during my judgment on the merits. I must say that Mr Du Preez did not, unlike the remainder of his argument, enthusiastically argue these issues. Therefore I intend to be brief. The first point is that Cargill is not entitled to intervene as it is not a creditor. This issue is dealt with in the next paragraph and nothing more needs to be said at this stage. Secondly, the authority of Cargill's deponent is attacked. Nothing turns on this. The deponent presented facts and it is not respondent's case that she is not *au fait* with the facts. Respondent failed to make use of rule 7 procedure, but in any event, Cargill made assurances doubly sure and filed a further resolution and insofar necessary, to ratify what has been done by its deponent. Thirdly, respondent relies on Cargill's alleged non-compliance with the statutory requirements of the Insolvency Act. At the time when Cargill lodged its application there were no more employees, save one. At this stage failure to serve on such employee is not a bar to intervention. Proper security was provided prior to the hearing of the application and the Master

issued the required certificate. There is no merit in this point. The fourth point is one of the old tricks of debtors that find themselves in financial difficulty. Respondent's case is that reckless credit has been granted to him. This is a ridiculous argument by a person that boasts that he is one of the largest maize farmers in the Province. This averment caused Cargill to attach the credit application with all relevant documents in that regard to its replying affidavit. The application was properly considered on the facts presented to it by respondent and if he misled the creditor, he should not be heard to complain that Cargill should never have extended credit to him. If it did not do so, respondent would not be able to plant in the hope of making R150m from his harvest as he wants the court to believe he is used to. All these technical points taken by respondent fail.

XI THE *LOCUS STANDI* OF FNB AND CARGILL AS CREDITORS

[31] There cannot be any doubt about FNB's *locus standi* as creditor. Respondent bound himself as surety for the debts of Karis Boerdery, subject to the limit of R75m plus interest and costs, and SRE Trust. Karis Boerdery owes FNB in excess of R92m plus interest and costs and the amount owing by SRE Trust is about R12m plus interest and costs. Interest at the rate of 10.25% *per annum* must be added on these amounts from 1 September 2017. Respondent tried to indicate that FNB's deponent contradicted himself pertaining to the exact amount outstanding, but this is a feeble attempt to distract the court's attention from the real issue:

he does not deny his liability to FNB in a total amount of approximately R87m plus interest and costs. The certificates of indebtedness relied upon by FNB are not denied in paragraph 31 of the answering affidavit. If interest alone is added for a further year, the outstanding amount would have increased to close to R100m. Respondent made a bald statement without any factual foundation that FNB was not entitled to terminate the credit agreements with Karis Boerdery and the SRE Trust. This is unsustainable. See: *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 372 (SCA) at para [13].

[32] Respondent tried to show that no valid and binding credit agreement was entered into with Cargill. It was never before his version. He was too keen to accept the credit provided and in writing admitted liability in the amount of about R26m earlier. I refer to annexure "AA12" read with annexure "AA7" to respondent's answering affidavit to FNB's application and his version at paragraph 5 of the answering affidavit to Cargill's application. However, when the shoe pinched, he firstly insisted that Cargill should provide him with all source documents pertaining to the amount claimed and then tried to avoid liability in attacking the validity of the credit agreement. I do no deem it necessary to consider his version as it is nothing but a smokescreen. Cargill provided clear and unambiguous evidence, substantiated by documentation, to show that a valid and binding credit agreement had been entered into. It is clear that respondent applied for credit from Cargill and that he was granted credit to allow him to plant and harvest his maize. Respondent queried

source documents and even suggested that he had no knowledge of drawings, which can only mean cash payments advanced to him, mentioned in the statements. Surely he should have played open cards with the court in light of his earlier admission of liability. I have reason to believe that respondent deliberately caused smoke and mirrors, but unfortunately this attempt failed.

[33] Respondent, well knowing that he in writing admitted liability towards Cargill in an amount in excess of R26m, averred that his debt has been settled. The *onus* was on him to prove this. See: *Pillay v Krishna and another* 1946 AD 946. He stated the following in order to prove his defence: In paragraph 12.15 of his answering affidavit to FNB's founding affidavit he stated that the shortfall equating to approximately R19m has since been paid in full from firstly, the remainder of the harvested crops and secondly, from the proceeds of an auction of redundant implements which was mandated by the provisional trustee. In paragraph 33.3 of the same affidavit he stated that "there is… no indebtedness to Cargill in view of the auction that has taken place (as arranged by the provisional trustee)…." In his answer to Cargill's founding affidavit he stated in paragraph 5.8 that he could not substantiate the exact quantities of maize delivered pursuant to the Cargill agreement due to lack of documentation, but then stated in the next sub-paragraph that approximately 30 980 tons of maize were put in storage by him, challenging the trustees to disclose who removed and received same. In paragraph 6.5 of this affidavit he suggested that "(t)o the best of my knowledge there were still 30 980 tons of maize available in the silo bags and silo on the farm, which is more than sufficient to fulfil my contractual obligations towards Cargill."

[34] Respondent's version is as opaque as a typical Western Free State sandstorm. He failed to persuade me. His response in this regard must be considered with the totality of the facts and his version in particular. He is evasive throughout his affidavits, trying his best to point out alleged weaknesses in the cases against him, but at the same time failing to show what his assets are really worth. I have referred to his opportunistic denial of Cargill's claim. He still insists that he is one of the largest maize farmers in the Free State who employees hundreds of permanent and temporary employees, whilst he has not been farming for more than a year.

[35] Cargill has clearly shown that respondent owes it R24 690 579.87 and it has not received settlement as alleged. Respondent's version is so untenable that it can be rejected on the papers.

XII <u>ACTUAL INSOLVENCY</u>

[36] The court must be satisfied at this stage of the proceedings that FNB has proven the three requisites set out in s 12 quoted *supra* on a balance of probabilities. The clearest proof of actual insolvency is not required and such proof need not be direct. The following well-known and often repeated *dictum* of Innes CJ in *De Waard v Andrew & Thienhaus Ltd* 1907 TS 727 at 733 remains apposite:

"To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

[37] Bertelsmann *et al*, *Mars: The Law of Insolvency in South Africa* 9th ed provides a convenient summary with reference to authorities at para 5.34. I paraphrase from the summary with omission of the footnotes:

"Instead of or in addition to relying on the commission of an act of insolvency by the debtor, the sequestrating creditor may rely on the fact that the debtor's estate is actually insolvent in that his liabilities exceed his assets. This factual state of affairs must be established on a balance of probabilities.
To determine whether a debtor is insolvent is often a very difficult matter, especially as it has usually to be done on affidavits without the advantage of oral evidence. To establish insolvency it must be shown that the debtor's liabilities as a fact exceed his assets and not merely that they might do so, and clear proof of this must be adduced, but not necessarily the clearest proof.
Such proof need not be direct. It is enough if facts are proved from which the inference of insolvency is fairly and properly deducible. As far as the debtor is concerned, the best proof of his solvency is payment of his debts and consequently his failure to pay is itself of significance, particularly if he fails to pay a judgment debt. Thus the facts that considerable debts are due and unpaid and that the debtor has asked for time to pay, or has made default in paying by instalments, or has failed to pay interest on his bond,….though not conclusive, are presumptive proof of insolvency……. If the debtor's liabilities fairly valued exceed his assets fairly valued he is insolvent, and in assessing liabilities merely contingent debts are not included, whereas debts accrued but not yet payable are included. If once it is shown that the debtor's liabilities exceed his assets, it is not open for him to say that he is not insolvent merely because he is in a position to pay each demand made on him as it comes in. 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. Only

cash and negotiable instruments, shares, securities, bonds that are sufficiently secured by the hypothecated property and articles such as coinage that are traded at a fixed or predetermined value need not be assessed on the basis of a forced disposal…… Even if the debtor shows that he is solvent the court can sequestrate his estate on the ground that he has committed an act of insolvency and that sequestration will be to the advantage of creditors, if these grounds are relied on in the application.

Whether or not the debtor is in fact insolvent is decided on the balance of probabilities. General insolvency may be proved *prima facie* by indirect means, the onus then shifting to the debtor to prove that assets exceed liabilities. If he does so the onus again returns to the creditor, who might then furnish a sworn appraisement of assets and liabilities. Goods purchased under an instalment sale transaction should figure in the list of movables hypothecated, with an intimation of the terms under which they are held."

[38] The manner in which expert evidence must be placed before the court is nothing new. Wessels JA put it as follows in *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft* 1976 (3) SA 352 (A) at 371G-H:

> "As I see it, an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."

[39] In *Botha v Botha* 4457/2016 [2016] ZAFSHC 194 (14 November 2016 at paras [18] – [22] I made some scathing remarks pertaining to so-called valuations obtained in friendly sequestrations in order to prove an advantage to creditors and also referred to several similar remarks by colleagues in other

Divisions. Mr Du Preez referred me to this judgment, but my remarks are not applicable *in casu*, save insofar as the valuations are not under oath. Unlike *Botha* and other friendly sequestration and voluntary surrender applications referred to in the judgment, we are here concerned with a compulsory and hostile sequestration in the true sense of the word between parties who contracted with each other at arms' length.

[40] *In casu,* the valuations have been obtained at the request of respondent and/or his agent, an attorney and auctioneer. Respondent also paid for the services rendered. In fact, respondent is quite keen to use the valuer's valuations in an attempt to show his solvency, notwithstanding the criticism by Dr DGB Boshoff, a person who holds himself out as an expert in valuation of properties. He failed to provide his own valuations and in my view his criticism is abstract, theoretical, highly technical and consequently meaningless. Mulder's valuations, although not under oath and generally speaking inadmissible evidence, are common cause and acceptable in the circumstances, it being obtained by respondent and even attached to the answering affidavit. The market value, and not the forced sale value, arrived at by the valuer were found to be acceptable by respondent, although his counsel suggested during argument that the market values arrived at in respect of the various farms should be increased to R50 000.00 per hectare, based on a recent sale relied on by respondent. If this is done, and with acceptance of Mulder's valuations in all other aspects, the total value of all farms should increase by R15m. It must be mentioned that Mulder valued the properties at market values

ranging from R30 000.00 to R45 000.00 per hectare and in each instance gave a meaningful and cogent explanation for arriving at a particular figure. Save for the submissions by his counsel, respondent's only basis for rejecting the case presented by FNB is the acceptance by the bank of the forced sale values arrived at by the valuer.

[41] The valuer dealt with relevant facts and presented cogent reasons for the conclusions arrived at. His valuations cannot be seen as "an exercise in futility". In fact, his reports are well reasoned and clearly not a "copy and paste" piece of work. The attributes of the individual farms were considered and he explained with reference to the type of farm land and improvements together with comparable sales how and why he arrived at his valuations. FNB elected to rely in its founding affidavit on a summary of the forced sale values arrived at by the valuer, but made it clear that the full valuations were available for inspection. Bearing in mind the acceptable definition of "forced sale" value, there can be little doubt, save for the observations *infra,* the liquidation of assets during insolvency falls within such definition. The trustees of insolvent estates must liquidate the assets as soon as possible and do not have funds and/or the luxury of renovating or improving properties to get them market-ready and/or of keeping them on the market for six to twelve months, making use of several estate agents who are all of them too willing to advertise the property to the best of their ability. However, as stated *infra,* and without detracting from the cogency of reliance on "forced sale" values, I shall consider the application based on the market value of the respondent's assets.

[42] Mr Du Preez submitted that the two applications are "bankrupt" and not his client. He argued that the Absa claim was instituted against Karis Boerdery on 24 July 2018 and long after respondent delivered his answering affidavit. There is also no claim against respondent in his personal capacity. Respondent did not play open cards with the court. He was supposed to provide a full picture of all his assets and liabilities. Surely, he should have been fully aware of his and Karis Boerdery's indebtedness towards Absa Bank when he deposed to his affidavit.

[43] Mr Du Preez insisted that I should consider the case based on the factual position when the provisional sequestration application served before the court and the same should apply pertaining to the intervening creditor's application, *i.e.* it must be adjudicated as on the date when the rule *nisi* was issued more than a year ago. He also submitted that FNB did not make out a case in its founding affidavit and now endeavours through its counsel to make a quantum leap, relying on insolvency by inference, whilst all the time relying on actual insolvency. The authorities are clear. An applicant is not prevented from relying on inferences in order to prove actual insolvency.

[44] Respondent insists that his financial position must be considered based on movable assets valued at about R69m, notwithstanding clear proof to the contrary. He is intentionally trying to mislead the court in this regard. His attorney and auctioneer and Cargill's

attorney did an investigation of the movable assets and it eventually appeared that the valuation of R69m was hopelessly wrong and based on incorrect information fed to the valuer and relied upon by FNB when it brought the application. I refer to the common cause facts set out *supra* and do not intend to repeat same.

[45] I am prepared to accept that in adjudicating whether respondent is insolvent or not, the fair value of his assets should be accepted and this means the market value thereof. See: *Mars su*pra and *Uys & Weyers NNO v CMW Lewendehawe (Pty) Ltd*, case no A258/2011, an unreported judgment of the full bench of this Division delivered on 15 December 2011 and authorities quoted at para [3]. In para [4] the full court criticised the suggestion in Mars that the court should consider the forced sale values of properties. Mr Badenhorst did not try to persuade me to accept the forced sale values in order to establish whether or not respondent is insolvent, but submitted with much force that even if the market values are accepted, respondent is factually insolvent.

[46] Mr Zietsman on behalf of Cargill presented me with detailed summaries of the respondent's financial position according to FNB and his client based on the facts presented by the parties. He also relied on respondent's own version as set out in paragraph 8 of the answering affidavit to FNB's application. According to respondent his liabilities amounted to approximately R147 418 835.00 as at date of the provisional order. He denied owing Cargill any amount

and claimed that Laeveld Agrochem's claim should be reduced to R8m. Absa Bank's claim of R7.5m was not taken into consideration and also not Cargill's claim of R24 690 579.87. According to Mr Zietsman's calculations which appear to be correct, respondent's total liabilities amount to R179 609 130.30. The total assets, inclusive of immovable properties at market value and the movable assets of just over R1m, amount to R121 336 412.92, leaving a shortfall of R58 272 717.38 if FNB and Cargill are correct in respect of respondent's debts.

[47] Insofar as respondent's calculations are concerned, he misled the court in respect of the value of his movables in order to show that his assets exceed his liabilities by R18 692 862.00 if the creditors' claims as stated by FNB and Cargill (R170 926 451.76) are accepted. On his version his assets amount to R189 622 313.00 which includes movables of R69m. This is incorrect. Even if the valuations of the immovable properties are increased by R15m as Mr Du Preez submitted should be done, respondent is still insolvent based on his admission of debts in the amount of R147 418 835.04. This is so because if the sum of all assets is increased from R121 336 412.92 with R15m, one arrives at a total of R136 336 412.92, leaving a shortfall of more than R11m.

[48] I am satisfied that FNB has proved on a balance of probabilities that respondent is insolvent. Even if there might be any doubt in this regard, insolvency has been proved by way of inference from the following proved facts: (1) respondent has failed to settle the

debts of two major creditors, (2) other creditors have attached movable properties sold in terms of instalment sale contracts, (3) respondent ceased farming activities more than a year ago (unless he is actually conducting same in the name of the Luna trust of which his wife is a trustee), 4) respondent resorted to improper conduct and breach of contract by disposing of 8 800 tons of maize to the value of over R13m which belonged to and was to be delivered to Cargill – he apparently act as such in order to stabilise his cash flow and/or to settle other debts - 5) respondent advertised his immovable and movable properties for sale without the prior consent of secured creditors, indicating an acknowledgement that he could not continue with normal farming activities and 6) more than a year has lapsed since the provisional order of sequestration. In doing so, no quantum leap has taken place as Mr Du Preez accused FNB of doing. Factual insolvency may be established indirectly as stated in *Mars supra.* See also: *Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd intervening)* [1998] 2 All SA 433 (W) at para [51].

[49] *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and others* 1993 (4) SA 436 (C) is also a typical case in point in order to rely on insolvency by way of inference. Much weight should be attached to a respondent's unexplained failure to pay his debts. The learned judge dealt with this aspect at 446H – 447D, relying on the *dictum* of Innes CJ, mentioned *supra*.

[50] In conclusion on this topic, respondent had sufficient time to settle his admitted debt, but failed to do so. The best proof of solvency is to settle one's debts. Respondent, through his wife's trust, had a great opportunity to plant and harvest maize during the 2017/2018 season in order to make a substantial profit. A mere R3.2 was paid as rental to the trustees for the immovable properties. On respondent's version he is used to making R150m profit from his annual harvests. Although his wife's trust is a separate entity, I would have thought that he, as the *de facto* farmer on all probabilities, would have arranged that some of the proceeds of the harvest be utilised to settle his debts to keep the wolf from the door and to avoid final sequestration.

XIII **<u>DEEDS OF INSOLVENCY</u>**

[51] FNB and Cargill rely on several grounds of insolvency committed by respondent in terms of s 8 (c) and/or 8 (d) of the Insolvency Act. These two subsections read as follows:

> "8. A debtor commits an act of insolvency-
>
> *(c)* if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;
>
> *(d)* if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;"

[52] In the case of s 8 (c) the deed of insolvency is committed when the debtor disposes of or attempts to dispose of his property which has or would have the effect of prejudicing his creditors or preferring

one above another. In the case of s 8(d) the removal or attempted removal of his property by a debtor with the intent to prejudice creditors or prefer one above the other is a deed of insolvency. In the first instance intent is not relevant and in the second instance a disposition does not have to be proven, although the debtor's intent must be proven.

[53] The contractual construction relied upon by Cargill is to the effect that it becomes the owner of the maize upon harvesting. Therefore, respondent's counsel submitted that any disposition of the 8 800 tons of maize could never be a deed of insolvency as respondent did not dispose of his property. In fact, Mr Du Preez argued that on a proper interpretation of the contract between the parties, insofar as it could be found to be valid and binding which respondent put in dispute, respondent was not even contractually bound to deliver all maize harvested and in particular the 8 800 tons to Cargill. Mr Badenhorst on behalf of FNB submitted that the disposition of the maize fell within the parameters of s 8(c) or s 8(d), whilst Mt Zietsman presented an interesting argument. He submitted that the Cargill contract makes it clear that respondent was obliged to deliver the 8 800 tons of maize, that he failed to do so, resulting in respondent stealing Cargill's maize in order to become owner thereof whereupon he disposed of the maize as owner to third parties to the prejudice of his creditors and Cargill in particular, alternatively that he removed the maize with the intent as set out in s 8(d). In the light of the conclusion arrived at pertaining to actual insolvency, I deem it not necessary to consider these arguments further.

[54] FNB relies on further deeds of insolvency. According to it respondent could not obtain finance from a third party and allow registration of a special notarial bond over his movables in favour of Cargill, bearing in mind the terms of the credit agreement entered into between Karis Boerdery and FNB to which respondent was a signatory, he having represented Karis Boerdery. He also entered into a Deed of Suretyship with FNB in respect of the principal debtor's debt subject to a limit of R75m. Mr Du Preez submitted that Karis Boerdery, and not respondent, made such undertaking to FNB and therefore, respondent's application for credit and granting of credit facilities by Cargill can never be a deed of insolvency in terms of s 8(d) by respondent. It is also FNB's case that respondent attempted to dispose of his assets by selling same by public auction without the consent of his creditors and FNB in particular. Respondent disputes that he intended to sell his assets without such consent. Again, for the reason mentioned previously, I deem it not necessary to adjudicate these disputes.

XIV <u>ADVANTAGE TO CREDITORS</u>

[55] The court must be satisfied that there is reason to believe that sequestration of respondent will be to the advantage of his creditors. Generally, creditors' views are important and they know what is in their best interests. *In casu* FNB is by far the biggest creditor and it insists that the third requirement for a final order of

sequestration has been proven on a balance of probabilities. Cargill is a substantial creditor and its views cannot be ignored. There is no indication that any creditor is against the granting of a final sequestration order.

[56] Williamson JP said the following in *Realizations Ltd v Ager* 1961 (4) SA 10 (D & C.L.D.) at 14H in respect of the advantages attached to an investigation of the insolvent's affairs: "The best judges of their interest in this regard are the creditors." Respondent has in my view already obtained a moratorium of over a year which is unheard of. The sequestration proceedings should have been finalised many months ago. The major creditors seek a final order now and such order will be to their advantage.

[57] I have reason to believe that the trustees to be appointed may be able to trace further assets. One aspect not considered by any of the two creditors is respondent's allegation in his management statements of 2016, presented to Cargill when applying for credit during 2017, a few months before the provisional sequestration order, that he was the owner of nearly three hundred cows to the value of about R4m. Only a few cows were found after his provisional sequestration. Respondent has much to explain in this regard. The same applies to the 8 800 tons of maize which he admitted disposing of, either to pay other creditors or for his personal use, as well as more than 30 000 tons which on his version should have been on the farms when he was provisionally sequestrated.

[58] I therefore agree with FNB that there is a reasonable prospect that the trustees will be able to unearth further assets which will yield a pecuniary benefit to creditors. Respondent also had deals with Maree and Bernard attorneys which should be further investigated. It may be found that certain creditors were unduly benefitted to the disadvantage of others. We also know now that several movable properties such as farming equipment listed on respondent's inventory could not be found after the provisional order was granted. An investigation may yield positive results for creditors. Anyone of sections 26, 29 to 31 of the Insolvency Act may be invoked.

XV <u>DISCRETION OF THE COURT</u>

[59] As indicated, even if a creditor has proved all three requisites set out in s 12, the court still has a discretion not to grant a final order of sequestration. There is no hope that respondent will be able to get out of his financial predicament. A postponement of the matter, serving as some sort of moratorium will be of no assistance. If the application is to be dismissed, Cargill would be entitled to a fresh provisional order in its favour. This will cause unnecessary further delay which will not serve any purpose, and most importantly, will not present respondent with a realistic opportunity to settle his debts.

XVI CONCLUSION

[60] I am satisfied that FNB has made out a proper case for a final order of sequestration. Respondent is insolvent and I have sufficient reason to believe that a final order will be to the advantage of his creditors. I have considered whether to exercise my discretion against granting final relief, but this would be a futile exercise.

[61] Cargill's application to intervene caused the papers to become voluminous, but in my view the factual information provided by it together with respondent's feeble attempts to justify his opposition presented more certainty in respect of respondent's financial collapse and inability to escape the consequences thereof. Cargill shall be entitled to its costs and both FNB and Cargill shall be entitled to the fees of senior counsel.

XVII ORDERS

[62]

1.) The rule *nisi* issued on 4 October 2017 is confirmed and

Sarel Jacobus van der Walt is hereby finally sequestrated.

2.) The applicant's costs of the application as well as Cargill RSA (Pty) Ltd's costs in respect of the intervening application, such costs to include in both instances the fees of senior counsel, shall be costs in the sequestration.

____

J P DAFFUE, J

On behalf of Applicant: Adv MA Badenhorst SC
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Bloemfontein

On behalf of Respondent: AdvV DB Du Preez SC and U Lottering
Instructed by: MJ Lombard Inc
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On behalf of Intervening Creditor: Adv P Zietsman SC
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