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

Reportable: YES/NO
Of interest to other judges: YES/NO
Circulate to Magistrates: YES/NO

Case Number: 3759/2023

In the matter between:

MAHOMED FAROOK BANA **APPLICANT**
(IDENTITY NUMBER:[…])

and

MICHAEL GEORGIOU **RESPONDENT**
(IDENTITY NUMBER:[…])

CORAM: **BUYS,AJ**

HEARD ON: **29 FEBRUARY 2024**

DELIVERED ON: **16 MAY 2024**

[1] This is the court's judgment in the opposed application in terms of which the applicant seeks a provisional sequestration order of the respondent.

[2] The applicant relies in founding on the following allegations in support of the relief he seeks:

[2.1] The applicant is a creditor of the respondent and he seeks an order of provisional sequestration based on several acts of insolvency committed by the respondent and furthermore because the respondent is factually and commercially insolvent.

[2.2] The respondent is indebted to the applicant the sum of R41 500 000.00 (forty-one million five hundred thousand rand) in terms of an written Acknowledgement of Debt *("the AOD")* concluded between the applicant and the respondent on 1 November 2022.

[2.3] The AOD premised from an indebtedness in the sum of R40 000 000.00 (forty million rand) to the applicant by the respondent's late farther, Mr Nic Georgiou in respect of past dealings between the applicant and Mr Nic Georgiou. Mr Nic Georgiou initially agreed to settle the debt by utilising funds which were due to him from a listed entity known as Amaanaat. The indebtedness was not settled by Mr Nic Georgiou. However, on 21 September 2021, the respondent assumed responsibility for the payment of this indebtedness.

[2.4] The respondent failed to make payment as assumed and agreed. This resulted in the respondent offering to sell a property in his portfolio to the applicant for a price in excess of the indebtedness - the applicant would only be liable for payment of the shortfall. A written agreement was purportedly signed by the respondent, but the on the applicant's assumption that it is irrelevant, the agreement was not attached to the application.

[2.5] The AOD was entered into, because the respondent requested and required a reasonable period of time to attend to the sale of the property and to procure sufficient funds to settle the indebtedness.

[2.6] In terms of the AOD, the respondent acknowledged that he was lawfully and truly indebted to the applicant in the sum of R40 000 000.00 (forty million rand) and undertook to pay R30 000 000.00 (thirty million rand) thereof upon the sale of an immovable property referred to in clause 2 of the AOD, but by no later than 30 June 2023. The balance, namely R11 500 000.00 (eleven million five hundred thousand rand) was to be paid over a period of 23 months at R500 000.00 (five hundred thousand rand) per month - commencing from the end of July 2023.

[2.7] The respondent failed to comply with the terms of the AOD, resulting in the entire indebtedness becoming due, owing and payable to the applicant.

[2.8] The applicant has established himself as a creditor of the respondent for a liquidated amount in excess of the minimum requisite in sequestration applications. Further to the above, the respondent committed an act of insolvency as contemplated ins 8(e) and or s 8(g) of the Insolvency Act[1] *("the Insolvency Act'),* alternatively the respondent is factually insolvent as contemplated in s 9(3)(v) of the Insolvency Act.

[2.9] The applicant relies further on additional indebtedness in terms of an oral agreement concluded between the respondent and the applicant on 7 October 2021 in terms of which the respondent undertook to make payment to the applicant a sum of R50 000.00 (fifty thousand rand) monthly until the indebtedness has been paid to the applicant in full. The respondent initially complied with its obligations in terms of this oral agreement and made a payment of R150 000.00 (hundred and fifty thousand rand) to the applicant on 23 December 2021 - this payment was for the monthly instalments of October 2021, November 2021 and December 2021.

[2.10] Payment in terms of the oral agreement was demanded in writing through the applicant's attorneys of record on 17 May 2023. The respondent was also requested in the demand to advise the applicant as to the steps he had taken to sell the property referred to in the AOD.

[2.11] Subsequent to the letter of demand, the applicant received a text message from the respondent's personal assistant (Phoebe Malan) on 19 May 2023 enquiring whether the applicant was able to meet the respondent. The applicant only reacted to this request through his attorneys of record. No response was received from the respondent.

[2.12] In support of the allegation that the respondent committed acts of insolvency referred to *supra,* the applicant relies on the respondent's failure to pay the indebtedness agreed to and makes a further allegation

[1] Act 24 of 1936.

that, on the respondent's own version, "he is both factually and commercially insolvent and has, for some time now, been structuring his affairs to prejudice creditors, which a trustee must investigate and ensure that there is an equitable distribution to all creditors." The conduct by the respondent "constitute arrangements with creditors for releasing him wholly or partially from his debts and/or he has given notice in writing to anyone of his creditors that the is unable to pay any of his debts".

[2.13] Although the applicant alleges that the respondent is an "individual of considerable means", in dealing with the respondent's financial position and assets, the applicant alleges that as far as he is "aware the respondent owns no assets (save for one immovable property) in his name which is not of considerable value: certainly, none to the value of the indebtedness owed" to the applicant. The allegation goes further in that the applicant states that the respondent is consequently factually and commercially insolvent. The municipal value of the immovable property is R260 000.00.

[2.14] The applicant suspects that the respondent utilizes various entities to house all his assets and to secure same to the prejudice of his creditors by shifting and moving assets between the different entities in which the respondent holds directorship. The suspicion goes further, namely, that the respondent moved assets from his name into other entities. The applicant refers specifically to the entities known as Accelerate Property Fund of whom he was the erstwhile Chief Executive Officer, and which is listed on the Johannesburg Stock Exchange as a real estate investment trust with a market value of R1,2 billion and the Michael Family Trust, being the vehicle through which the respondent owns shareholding in Accelerate Property Fund. The applicant draws the conclusion that the likelihood exists that the respondent has funds stashed away.

[2.15] The applicant suspects further that the respondent is utilising the Michael Family Trust as his own, namely his alter ego, or he is hiding behind the veil of the Michael Family Trust to conduct business and derive and income. The trustee/liquidator will be able to establish if the respondent utilised the various entities as a front to abuse their separate legal *personae* and secondly whether the respondent has made any dispositions which may be set aside under the Insolvency Act.

[2.16] The applicant has good reason to believe that it will be to the advantage of creditors if the estate of the respondent is sequestrated. This allegation, according to the applicant, finds support in the contention that the respondent's affairs are convoluted and needs investigation, because, on the respondent's own version, "there will be, or may be dispositions of assets, the proceeds of which will be utilised to settle • the indebtedness." This investigation will enable the trustee to investigate whether certain creditors have been preferred over others, "as certainly appears to have been the case, it being evident that the Respondent has settled with various creditors, to the exception of the general body of creditors." According to the applicant, a reasonable prospect exists, which is not too remote, that there will be a pecuniary benefit to creditors.

[2.17] The respondent, being a director of 44 commercial entities, a reasonable prospect exists that he is the owner of shares in these entities and further that he possesses loan accounts, standing to his credit.

[2.18] It is evident that the respondent's assets are being concealed through the various commercial entities and corporate structures in which he remains the key controlling person of all. The immovable property referred to *supra,* valued at R260 000.00, will be a benefit not only to the applicant but also to the body of creditors.

[3] The respondent requested various documents from the applicant in terms of a notice in terms of rule 35(12) and (14) of the Uniform Rules of Court *("the rules"),* served on the applicant on 11 September 2023. Of importance in this request is the request by the respondent to be provided with the following documents:

[3.1] A copy of the agreement entered into between the applicant and Mr Nic Georgiou pursuant to which Mr Nic Georgio would settle an indebtedness allegedly due to him to the applicant.

[3.2] The document evidencing the indebtedness of the *"listed entity known* as

Amaanaat" to Mr Nic Georgiou.

[3.3] All written documentary proof evidencing the assumption of liability by the respondent on behalf of Mr Nic Georgiou to the applicant.

[3.4] The written agreement reflecting the arrangement / agreement in terms of which the respondent agreed to sell a property to the respondent, and which agreement the applicant undertook to make available at the hearing of the application, should the need arise.

[3.5] All documents in which the allegation is made that "on the Respondent's own version he is both factually and commercially insolvent and has, for some time now, been restructuring his affairs to prejudice creditors ...".

[3.6] The notice given by the respondent "in writing to any one of his creditors that he is unable to pay any of his debts".

[3.7] The valuation upon which the applicant relies to conclude that the immovable property registered in the respondent's name is not of any considerable value.

[3.8] All documentary evidence upon which the allegation is made by the applicant that"... the Respondent owns his shareholding in APF ..." through "the vehicle" known as the Michael Family Trust.

[3.9] Copies of all documents which support the allegation by the applicant that "there will be, or may be a disposition of assets, the proceeds of which will be utilised to settle the indebtedness".

[3.10] All documents upon which the applicant has made the allegation that certain creditors have been preferred above others"... as certainly appears to have been the case, it being evident that the Respondent has settled with various creditors, to the exception of the general body of creditors".

[3.11] The surety the applicant alleges the respondent has concluded.

[3.12] The commercial transactions with third parties the applicant alleges the respondent"... must reasonably be concluding ... ".

[3.13] The written valuation of the immovable property in the amount of R260 000.00.

[4] Simultaneously with the notice in terms of rule 35(12) and (14) referred to *supra,* the respondent also delivered a Notice of Application to Strike-Out in terms of which the respondent seeks certain documents and paragraphs to be strike out for the following reasons:

[4.1] On the basis that it amounts to irrelevant hearsay evidence:

[4.1.1] Annexure FB1;

[4.1.2] The second sentence of paragraph 16 of the founding affidavit which reads "The Respondent advised me that he merely required (and requested) a reasonable period of time to attend to the sale and to procure sufficient funds to settle the indebtedness."

[4.1.3] Annexures FB3, FB4, FB5, FB6, FB7, FB8 and FB10.

[4.1.4] Paragraphs 34 and 37 of the founding affidavit.

[4.2] On the basis that the contents are scandalous, vexatious and irrelevant in terms of, *inter a/ia,* rule 6(15):

[4.2.1] The first sentence of paragraphs 8 of the founding affidavit which reads "In summary, the essence of this application is that I am a creditor of the Respondent, and I seek the sequestration of the Respondent on account of several acts of insolvency he has committed, and also on the ground that he is factually and commercially insolvent.".

[4.2.2] Paragraphs 22, 30-31, 37, 39-41, 44.1, 44.4-44.6, 44.9-44.10, 44.12-44.14 and 45 of the founding affidavit.

[5] In a written response, dated 25 August 2023, to the respondent's notice in terms of rule 35(12) and (14) referred to *supra,* the applicant held the view that no exceptional circumstances exist which warrant the use of the application of sub-rules 35(12) and (14), and is the delivery of the said notice nothing more than "a stratagem designed to delay the inevitable and to delay the delivery" of the respondent's "answering affidavit within the time periods contemplated in the rules of court". However, regardless of the aforementioned contention by the applicant, the applicant responds to the various requests without providing any of the documents requested. I will deal with the relevant responses later in this judgment.

[6] The respondent opposition of the application is based on the following:

[6.1] The founding affidavit does not contain any evidence upon which a court can grant the relief the applicant seeks. No case has been made out that the respondent is indeed indebted to the applicant in the amount claimed or that it is due owing and payable. Further to the above, no case has been made out that the respondent is even insolvent and that it is in the interest of the respondent's creditors to sequestrate the estate of the respondent.

[6.2] The allegations are flimsy, speculative, baseless and contradictory. The application is an abuse of process and brought for the ulterior and illegitimate purpose of exercising pressure on the respondent to discharge a debt which his late farther incurred.

[6.3] The founding affidavit is replete with incorrect facts and wild unsupported generalisations, and unsubstantiated and egregious defamatory allegations about the respondent are made intentionally to damage the respondent's reputation.

[6.4] The AOD on which the applicant relies is *void* and unenforceable against the respondent for the following reasons:

[6.4.1] The applicant was not registered as a credit provider with the National Credit Regulator ("NCR") at the time when the respondent's late farther was afforded time by the applicant to repay the indebtedness to the applicant. For "want of compliance with the National Credit Act" the respondent's father's indebtedness to the applicant was *void* and unenforceable.

[6.4.2] It "amounts to a credit agreement as referred to in the National Credit Act", and at the time it was concluded "and all times thereafter the applicant was not registered as a credit provider with the National Credit Regulator in terms of section 40(1 (a} (sic} of the National Credit Act ... In the result, the acknowledgement of debt is an illegal unenforceable agreement in terms of section 40(4} thereof'.

[6.5] The respondent denies that he is the applicant's debtor and that the applicant is his creditor.

[6.6] The respondent further denies that he committed any acts of insolvency and that he is factually and commercially insolvent. The respondent also denies that he avoided to make payment to the applicant of a legitimate debt.

[6.7] The respondent pose no risk to members of the public or any unidentified body of creditors and any suggestion that he is doing so is false, reckless with no factual or other backing or basis - the quotations by the applicant are mere "stock phraseology utilised in sequestration applications".

[6.8] Although the respondent admits signing the AOD, the applicant challenges the validity and enforceability thereof based thereon that the AOD agreement constitutes a <u>credit facility</u> contemplated by s 8(1)(a) read with s 8(3) of the National Credit Act[2] *("the National Credit Act'),* alternatively, a <u>credit transaction</u> as contemplated by s 8(1)(b) read with s 8(4)(d) of the National Credit Act, alternatively, a credit guarantee as contemplated by s 8(1)(c) read withs 8(5) of the National

[2] Act 34 of 2005.

Credit Act. The latter relates to the debt owed to the applicant by the respondent's late farther, which the applicant contends that the respondent has to pay. The debt owed to the applicant by the respondent's late farther amounts to a credit agreement in terms of s 8(1)(a) or s 8(1)(b) read with the corresponding provisions in ss 8(3) and 8(4) of the National Credit Act.

[6.9] The applicant was not and is not registered as a credit provider with the NCR, consequently, in terms of s 89(2)(d) of the National Credit Act, the acknowledgment of debt is an unlawful agreement and *void* and unenforceable. As a result, the applicant has no claim against the respondent.

[6.10] It is denied that the total indebtedness emanating from the AOD is the sum of R41 500 000.00. In support of this denial, the respondent relies on the applicant's concealment of two pages of the AOD. As per the these two pages, additional payments of R50 000.00 per month were provided for in addition to the the total sum recorded in the AOD. The first monthly payment has to be made from January 2022 until October 2022. Further monthly payments of R50 000.00 per month were to be made from November 2022 until payment of the total sum of R30 million. If these additional payments are taken into account, the total indebtedness emanating from the acknowledgment of debt is the sum of R42 million.

[6.11] The capital sum in terms of the AOD is R40 million. All other charges as provided for in the AOD are for interest.

[6.12] The respondent's late farther was unable to pay his alleged indebtedness to the applicant and asked the respondent to assist him by arranging for payment of this debt. The respondent did not take on and assume his late father's indebtedness to the applicant in his personal capacity, all he did was to agree with his late father to endeavour to procure for payments to be made to the applicant in discharge of his late father's indebtedness.

[6.13] The respondent further has no knowledge of his late father's alleged loan account in a company known as Amaanaat and further whether his late farther agreed to settle his indebtedness to the applicant by utilising the loan account. In terms of rule 35(12), the respondent requested copies of the agreement entered into between applicant and Mr Nic Georgiou in terms whereof Mr Nic Georgiou agreed to settle the alleged indebtedness, and the document evidencing the indebtedness of Amaanaat to Mr Nic Georgiou. In response to the request for copies of these documents, the applicant advised respectively that"... no document of this description exists" and "The document requested is not identified with specificity. Further even is (sic) such document did exist, such is not required for purposes of preparing your client's answering affidavit.".

[6.14] According to the applicant, the respondent agreed to sell him a property from his portfolio of which the purchase price was in excess of the indebtedness to the applicant. The applicant would have been liable for payment of the shortfall. A copy of this alleged sale agreement of the immovable property was requested by the respondent in terms of rule 35(12). The copy provided by the applicant does not record a sale of immovable property by the respondent. The agreement provided by the applicant is an agreement between Khumonetix (Pty) Ltd ("Khumonetix") and the applicant in terms of which a *pro-rata* of the share in the Letting Enterprise is sold to the applicant. This agreement is not an assumption by the respondent to be personally liable for his late father's indebtedness to the applicant.

[6.15] The applicant failed to establish himself as the creditor of the respondent and consequently that he has the necessary *locus standi* to bring this application.

[6.16] The application is an abusive proceeding against the respondent and *in terrorem* to somehow scare, induce or force the respondent to pay monies he does not owe to the applicant.

[6.17] The respondent denies that:

[6.17.1] he made any offers or any arrangements with any of his creditors to release him wholly or partially from his debts (s 8(e) of the Insolvency Act);

[6.17.2] he gave notice in writing to any of his creditors that he is unable to pay any of his debts (s 8(g) of the Insolvency Act).

[6.18] The allegations referred to *supra* are false, fabricated and made solely to comply with the requirements of ss 8(e) and (g) of the Insolvency Act in an attempt to satisfy the court that the respondent's estate should be sequestrated and further to mislead the court. These sections require from the respondent to address in writing to his creditors and/or make offers to them to pay his debts to them. Without knowledge of the respondent's creditors, the applicant is unable to make this latter allegation.

[6.19] In respect to the allegation in terms of s 9(3)(v) of the Insolvency Act, namely that the respondent is "factually insolvent", the respondent denies that he is factually insolvent and further:

[6.19.1] denies that the applicant has set out any information pertaining to the respondent's assets and liabilities;

[6.19.2] that the applicant has failed to set out the respondent's personal balance sheet nor is the applicant able to do so, because he has no knowledge thereof.

[6.20] The allegation of the applicant, namely that the respondent, on his "own version", is both factually and commercially insolvent, is incorrect and a fabrication. The respondent never provided such a version. This statement is reckless and without any facts or evidence. This allegation is also defamatory of the respondent's good name and reputation.

[6.21] The alleged oral agreement entered into between the applicant and the respondent for payment of R50 000.00 per month under the heading **"ADDITIONAL INDEBTEDNESS"** and the subsequent payments made by the respondent in terms thereof in the sum of R150 000.00 on 23 December 2021 for the months October, November and December 2021 are denied. Payment of the amount of R150 000.00 was not paid by the respondent personally, but was made in terms of the written agreement entered into between the applicant and Khumonetix on 7 October 2021 (annexure AA2 to the answering affidavit).

[6.22] The letter of demand on behalf of the applicant was received by the respondent. The meeting that was requested by one of the respondent's employees was to provide the applicant an update and further information of how he intended to "try and procure that Khumonetix would endeavour to sell one of their properties to pay" his late father's indebtedness to the applicant.

[6.23] Considering the applicant's own version, namely that applicant has no knowledge whether the respondent has any creditors, the applicant is in no position to allege that the respondent is "commercially insolvent" or even that the respondent is "factually insolvent". These allegations should be struck out and rejected.

[6.24] The applicant's own version is that the respondent is "... an individual of considerable means", meaning that the respondent is a very wealthy man. This allegation not only contradicts each and every allegation that the respondent is factually and commercially insolvent, it also contradicts the allegation that the respondent owns no assets save for one immovable property.

[6.25] No details or evidence of the respondent's alleged conduct are forthcoming, namely that the respondent is prejudicing his creditors "by shifting and moving assets between different companies where he is a director, and moving assets from his name into other entities" and further that "the respondent is very likely to have funds that belong to him stashed away".

[6.26] The respondent admits that he has only one immovable property registered in his name. However, the value thereof, as alleged by the applicant, is denied, because not only is the valuation not properly before court, Municipal valuations are not at all reflective of market value. The alleged valuation by the applicant is based on hearsay evidence and should be struck out.

[6.27] The article of a journalist referred to be the applicant is hearsay evidence and inappropriate and should be struck out.

[6.28] The respondent denies holding "indirectly" 30% of the shares the Michael Family Trust owns in Accelerate Property Fund. This allegation is without merit and should be struck out.

[6.29] The allegations that the respondent (a) utilizes both the Michael Family Trust and Accelerate Property Fund to house all his assets and to secure the same to the prejudice of his creditors by shifting and moving assets between the different companies where he is a director, (b) is moving assets from his name into other entities, alternatively into Accelerate Property Fund, (c) is very likely to have funds that belong to him stashed away and (d) is utilising the Michael Family Trust as his own (his alter ego), alternatively, he is hiding behind the veil of the said trust to conduct business and derive an income, are denied and based on mere suspicion. These allegations are harmful, injurious, insulting, defamatory and incorrect.

[6.30] No evidence exists of any disposition alleged by the applicant. The applicant furthermore failed to establish a benefit, in the form of a dividend, to the respondent's creditors. The dividend has also not been quantified. Save for the respondent's immovable property valued at R260 000.00 referred to *supra,* no reference has been made to any other assets. The applicant relies on recklessly made generalisations and the allegation that the respondent is a director of "44 commercial entities".

[6.31] The allegation that the respondent's estate should be placed in the hands of trustees to investigate the respondent's affairs to uncover dispositions, impeachable transactions etc. are horrendous, injurious, false, unsubstantiated defamatory allegations and egregious. The application for provisional sequestration has been brought by the applicant *"in terrorem* and thus for ulterior purpose and motive". The respondent is a well-known businessman, especially in the property arena, and an application of this nature and the allegations contained therein have and will cause the respondent considerable harm.

[7] The applicant delivered his replying affidavit, incorporating an application for condoning the late delivery of the replying affidavit.

[8] The replying affidavit was due to be delivered on 27 September 2023, but was only delivered, according to the applicant, on 17 November 2023 (36 days late according to the applicant). It should be pointed out that from the filing notice filed on behalf of the applicant, the replying affidavit was delivered on 21 November 2023, namely 39 days late.

[9] In his application for condonation of the late filing of his replying affidavit, the applicant relies on the following explanation:

[9.1] A draft replying affidavit was prepared by the applicant's attorney and sent timeously to Senior Counsel on 20 September 2023 to be settled. Due to Senior Counsel's "excessive workload and prior urgent commitments", Senior Counsel could not attend to the settling of the replying affidavit during the two weeks following 20 September 2023. Further consultations and documents were required during a consultation with the applicant, and during a consultation with Junior and Senior Counsel on 24 October 2023 was it decided that "certain of the unforeseen legal contentions raised in the answering affidavit (the contentions regarding the National Credit Act) required further consideration and advise by counsel. The applicant received advise on 27 October 2023 on what is required to finalise the replying affidavit. The further information and documents were provided by the respondent to his attorney whereafter a final consultation was held on 8 November 2023 with Junior Counsel. The replying affidavit was settled a few days later.

[9.2] The respondent refused a request for an indulgence to deliver the replying affidavit late.

[9.3] The respondent will suffer no prejudice by the late filing of the replying affidavit, compared to the grave prejudice the applicant stands to suffer if the replying affidavit is not allowed.

[9.4] With reference to the case made out against the respondent in the papers, the applicant states that he has excellent prospects of success.

[9.5] It is in the interest of justice that any party with a justified and *bona fide* claim or defence should be entitled to ventilate a claim before a court of law. A refusal to allow the replying affidavit will result in the matter being adjudicated on an incomplete and artificial basis - this is not in the interest of justice.

[10] The respondent delivered a conditional further affidavit under Rule 6(5)(e) on 7 February 2024 in terms of which the respondent opposes the applicant's application for condonation of its replying affidavit, and, in the event the late delivery of the replying affidavit is condoned, the respondent seeks leave to deliver a further affidavit in response to allegations made by the applicant in his replying affidavit.

[11] The respondent's opposition of the applicant's application for condonation of the late delivery of the replying affidavit is summarised as follows:

[11.1] The applicant failed to deliver his replying affidavit timeously. This resulted in the respondent's attorneys to set the application down for hearing on 30 November 2023.

[11.2] A few days before the hearing of the application, the applicant delivered his replying affidavit on 21 November 2023.

[11.3] The applicant failed to provide a comprehensive and reasonable explanation for his delay in filing his replying affidavit. The blame is squarely placed on the shoulders of his Senior Counsel. This explanation is insufficient to justify the condonation of the late delivery of the replying affidavit. The periods between 27 September 2023 (the date the replying affidavit was supposed to be delivered) and 24 October 2023 (when the consultation with Junior and Senior Counsel regarding the replying affidavit took place) and between 24 October 2023 and 21 November 2023 (when the replying affidavit was delivered) have not been explained by the applicant.

[11.4] The month it took for the applicant's counsel to consider the dispute the applicant has raised in his answering affidavit and the request to procure further documents and information to deal with the respondent's version advanced in his answering affidavit confirm that the respondent has raised a *bona fide* and reasonable answer to the claim the applicant seeks to enforce in this application.

Application to Condone the Late Delivery of the Applicant's Replying Affidavit

[12] At the commencement of the hearing of the application, Mr Spiller on behalf of the applicant, handed up a Note: Condonation and the Admission of the Respondent's of the Supplementary Answering Affidavit. It should be mentioned that this Note is in form nothing other than supplementary heads of argument and deals mainly with the applicant's condonation application. Mr Symon SC correctly objected to this Note being handed up. However, consented later during argument by Mr Spiller to the Note being handed up for the Court's convenience. Heads of argument are for the assistance of court and Applicant's and when appropriate, supplementary heads of argument are necessary to deal with a specific issue that may arise and which is of such importance that a court's attention should be drawn thereto. A disturbing practice has started to develop where legal partitioners during argument refers to case law not canvased or referred to in their heads of argument or where legal practitioners attempts to hand up supplementary heads of argument. This not only may cause the opposing legal representative to be caught off guard with new legal argument not canvassed in initial heads of argument it also put a court in a peculiar position, because a court, without having sight of the supplementary heads of argument and/or new case law referred to prior to the commencement of the hearing, may not be able to engage with legal representatives thoroughly on the new issues raised. Although the Note handed up by Mr Spiller has been allowed, legal representatives should refrain from these practices, because it may result in unnecessary postponements with unnecessary costs and delays.

[13] Mr Spiller, with reference to the Note, submitted that the essential question in

an application for condonation is whether it is in the interest of justice to grant condonation. He further submitted that lateness is not the only consideration in determining whether an application for condonation should be granted. The applicant's prospects of success on the merits and the importance of the issues to be determined are relevant factors.[3]

[14] I was referred to the case of Pangbourne Properties Ltd v Pulse Moving CC and Another[4] in support of the submission by Mr Spiller that the applicant's replying affidavit should be admitted "in order to decide the merits of the dispute between the parties unfettered by technicalities".[5]

[15] With reference to various case law,[6] Mr Spiller further submitted, when adjudicating applications for condonation, that:

[15.1] In exercising a discretion in relation to procedural matters, such a discretion must be exercised in a manner which facilitates the determination of the real dispute between the parties on its real merits.

[15.2] A court will not exclude relevant evidence simply because there has been non-compliance with the Rules. The court will always endeavour to determine the real issues on the basis of all of the relevant factors.

[15.3] In deciding whether to admit an affidavit filed out of time, the central consideration is prejudice. Unless prejudice has been caused to a party by the late filing of the affidavit, the affidavit will be admitted so that the true dispute can be decided having regard to all relevant facts.

[15.4] The court's discretion should be exercised so as to ensure the expeditious (and if possible inexpensive) determination of the real dispute between the parties.

[16] Mr Spiller further submitted that the explanation provided by the applicant for the delay, although not comprehensively detailed, covers the whole period of

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[3] Ferris and another v FirstRand Bank Ltd 2014 (3) SA 39 (CC) at 43G-44A.
[4] 2013 (3) SA 140 (GSJ) at paras 16 and 18.
[5] At para 19.
[6] Venter v Van Wyk, case number 30323/04 delivered in the north Gauteng High Court on 27 June 2005; Trans-Africa Insurance Co Ltd v Maluleka 1956 (2) SA 273 () at 278F-G; Federated Trust Ltd v Botha 1978 (3) SA 645 (A) at 654C-F and Hart and Another v Nelson 2000 (4) SA 368 (ECD) at 374G-375F.

the delay. He further submitted that:

[16.1] If condonation is not granted, then the court will proceed to consider the application on the basis of an incomplete picture of the facts. The interest of justice require that a court determine the real issues between the parties.

[16.2] The absence of prejudice is determinative of whether to grant condonation or not. I was also referred to Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd[7] where the words of Brand JA are apposite:

"I am not entirely sure what is meant by the description of the application as 'totally irregular'. If it is intended to convey that the application amounted to a deviation from the Uniform Rules of Court, the answer is, in my view, that, as has often been said, the rules are there for the Court, and not the Court for the rules. The Court a *quo* obviously had a discretion to allow the affidavit. In exercising this discretion, the overriding factor that ought to have been considered was the question of prejudice. The perceived prejudice that the respondent would suffer if the application were to be upheld, is not explained. Apart from being deprived of the opportunity to raise technical objections, I can see no prejudice that the respondent would have suffered at all. At the time of the substantive application the respondent had already responded - in its rejoining affidavit - to the matter sought to be included in the founding affidavit. The procedure which the appellant proposed would have cured the technical defects of which respondent complained. The respondent could not both complain that certain matter was objectionable and at the same time resist steps to remove the basis for its complaint. The appellant's only alternative would have been to withdraw its application, pay the wasted costs and bring it again supplemented by the new matter. This would merely result in a pointless waste of time and costs."

[16.2] With reference to Pangbourne Investments *supra,*[8] the contemporary approach is that an affidavit filed out of time should be admitted unless its admission will result in prejudice to the other side, so that merits of

[7] 2007 (2) SA 363 (SCA) at para 32.
[8] At para 19.

the dispute be decided "unfettered by technicalities". No genuine prejudice has been raised by the respondent.

[16.3] The applicant has excellent prospects of success on the merits, particularly if the replying affidavit is admitted.

[17] Mr Symon SC, on behalf of the respondent, submitted with reference to Grootboom v National Prosecution Authority[9] that the court has a discretion whether to grant condonation in the interest of justice. The Constitutional Court held in Grootboom as follows when determining what is in the interest of justice:

> "I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer* and *Van Wyk,* the standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant." (footnotes omitted)

[18] Relying on the relevant factors set out in Grootboom *supra,* Mr Symon submitted that it is not in the interest of justice to condone the late delivery of the applicant's replying affidavit based on the following:

[18.1] The degree of the applicant's failure to comply with Rule 6(5)(e) is extensive and inordinate.

[18.2] The applicant's disregard of the Uniform Rules of Court invariably succeeded in derailing the timely hearing of this application, causing the respondent prejudice as he was anxious and had the right to have this

[9] 2014 (2) SA 68 (CC) at para 22.

sequestration application timeously adjudicated within the prescribed timelines. This delay has an effect on the administration of justice and the respondent.

[18.3] The applicant did not properly explained his delay, and the excuses proffered by the applicant are unconvincing and unreasonable. No account has been given for the month between the date the answering affidavit was delivered and 20 September 2023 when the draft replying affidavit was send to Counsel to be settled. It took five weeks from the date the answering affidavit was delivered until the consultation with Senior Counsel and Junior Counsel on 24 October 2023. Advice was received from counsel on 27 October 2023 on the way forward, resulting in further unexplained delays of eleven days and thirteen days until a further consultation and delivery of the replying affidavit. The applicant claimed that he procured "further information and documents" from an unidentified source at an unspecified time after receiving advise on 27 October 2023. The materiality of the unidentified additional documents and information cannot be assessed and no rationale is provided for why the materiality thereof did not prompt the applicant's earlier attention.

[18.4] The applicant has very weak, if any, prospects of succeeding with this application for sequestration.

[19] It is trite that an applicant who seeks condonation for the non-compliance of the Uniform Rules of Court must show good cause.[10] This requires an affidavit dealing with the merits[11] and setting out the defence.[12]

[20] What is meant by *"good cause"* has not being defined,[13] but a court confronted with the question whether *"good cause"* has been shown exercises a discretion according to the circumstances of each case.[14] The tendency is to grant such an application where:

[20.1] The applicant has given a reasonable/satisfactorily explanation of

[10] Irvin v Nefdt 1950 (1) SA 431 (T). As to the meaning of "good cause" generally see Madinda v Minister of Safety and Security [2008] 3 All SA 143 (SCA).
[11] Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (0).
[12] Markides v Levendale 1954 (4) SA 181 (SR), Gordon v Robinson 1957 (2) SA 549 (SR), Dalhouzie v Bruwer 1970 (4) SA 566 (C) and Broadley v Stevenson 1973 (1) SA 585 (R).
[13] Du Plooy v Anwes Motors (Edms) Bpk *supra.*
[14] Nathan (Pty) Ltd v All Metals (Pty) Ltd 1961 (1) SA 297 (D).

his/her delay;

[20.2] The application is *bona fide* and not made with the object of delaying the opposite party's claim;

[20.3] There has not been a reckless or intentional disregard of the rules of court;

[20.4] The applicant has a *bona fide* defence and/or the action or defence is not ill-founded; and

[20.5] Any procedural prejudice caused to the opposite party can be compensated for by an appropriate order as to costs.[15]

[21] I am in agreement with the submissions made by Mr Symon SC, with reference to the relevant factors to be considered as set out in Grootboom v National Prosecution Authority *supra* when determining whether the condonation is in the interest of justice, namely:

[21.1] The applicant's explanation for the delay in delivering its replying affidavit is unreasonable. No satisfactory explanation for the delay has been provided by the applicant, leaving various and long periods of delays without any explanation. I also align myself with what the Constitutional Court held in Grootboom, namely:

"[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

[15] Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A and Smith v Brummer 1954 (3) SA 352 (O) at 358A; Silverthorne v Simon 1907 TS 123 at 124; Ford v Groenewald 1977 (4) SA 224 (T) at 225G-H and 226A-C; Oostelike Tvlse Ko-op Bpk v Aurora Boerdery 1979 (1) SA 521 (T); Flugel v Swart 1979 (4) SA 493 (E) at 497G-H; Feldman v Feldman 1986 (1) SA 448 (T); Grand v Plumbers (Pty) Ltd 1949 (2) SA 470 (0) at 476-477; Dalhouzie v Bruwer *supra* at 571F, 572C and 574H-575A and Du Plooy v Anwes Motors *supra* at 217H. See also Ferris v FirstRand Bank Ltd 2014 (3) SA 39 (CC) at 43G-44A.

…

[34] The language used in both Van Wyk and eThekwini is unequivocal. The warning is expressed in very stern terms. The picture depicted in the two judgments is disconcerting. One gets the impression that we have reached a stage where litigants and lawyers disregard the rules and directions issued by the court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the court is self-evident. A message must be sent to litigants that the rules and the court's directions cannot be disregarded with impunity.

[35] It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case."

[21.2] The applicant has a right to have this application for sequestration adjudicated timeously under the timelines prescribed by the Uniform Rules of Court. The applicant's disregard of the prescribed timelines invariably succeeded in derailing the timely hearing of this application to the prejudice of the respondent. Any submission on behalf of the applicant that no genuine prejudice exists finds no support. The prejudice is self-evident.

[21.3] For reasons set out *infra,* the applicant has no prospects of success with this application for sequestration.

[21.4] As remarked in Grootboom, "A message must be sent to litigants that the rules and the court's directions cannot be disregarded with impunity". The applicant has a duty to adhere to the Uniform Rules of Court, which are set in place to "regulate the litigation process, procedures and the exchange of pleadings". [16] The insufficient/flimsy explanation for failure to comply with the Uniform Rules of Court, as proffered by the applicant, is not accepted. In this case, the applicant

[16] Lauw v Grabler and Another (3074/2016) (2016] ZAFSHC 206 (15 December 2016) at para 18.

has not made out a case entitling him to an indulgence. It follows that the application for condonation must fail.

[22] I deem it unnecessary to deal with the respondent's application to deliver a further affidavit.

Application to Striking Out

[23] Subrule 6(15) makes provision that a "court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs ... The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted".

[24] The court has a discretion in an application to strike out a matter from an affidavit[17]

[25] In Vaatz v Law Society of Namibia,[18] the court, dealing with the grounds for striking out and more specifically with the terms "scandalous", "vexatious", "irrelevant" and "prejudice" held as follows:

> "In Rule 6(15) the meaning of these terms can be briefly stated as follows:
>
> Scandalous matter - allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.
>
> Vexatious allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.
>
> Irrelevant matter - allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter."

[26] Subrule 6(15) is not exhaustive of the grounds upon which an

[17] Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T) at 368G.
[18] 1991 (3) SA 563 (NM) at 566C-E.

application to strike out a matter from an affidavit may be brought.[19] Inadmissible evidence, for example hearsay evidence, can also be struck out. However, inadmissible evidence appearing in affidavits may be struck out without invoking subrule 6(12) and notice of such an application to strike out may be given in terms of rule 6(11). Such an application is in essence an objection against the admission of evidence which is only made at the hearing of the main application.[20] In Cultura 2000 and Another v Government of the Republic of Namibia and Others[21] it was held:

> "Rule of Court 6(15) provides that on application the Court can order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant but that such matter shall not be struck out unless the Court is satisfied that the applicant will be prejudiced in his case if such matter were allowed to remain. <u>The Rule concerned does not refer to hearsay statements in affidavits. Such statements can be struck out irrespective of whether there is prejudice or not."</u> (own emphasis)

[27] To succeed with an application to strike out, the applicant must show that the matter sought to be struck out is be scandalous, vexatious or irrelevant, and secondly, the court must be satisfied that if such matter is not struck out the parties seeking such relief would be prejudiced.[22] In Weber v Vermaak[23] full court held:

> "Ek dink egter nie dat Hofreel 6 (15) bedoel is om 'n party in staat te stel om vryelik irrelevante bewerings te maak wat slegs deurgehaal kan word indien benadeling ten opsigte van 'n aangevraagde bevel bewys kan word Nic. Reeds in *Anderson and Another v Port Elizabeth Municipality,* 1954 (2) SA 299 (OK) te bl. 309, het REYNOLDS, RP., verklaar dat die deurhalingsprosedure nie bedoel is om gebruik te word vir bloot tegniese besware wat tot voordeel van Nicmand strek nie, maar slegs koste vermeerder. Dit, na my mening is wat Hofreel 6 (15) beoog. Ek dink nie dat die woord "saak" in Hofreel 6 (15) te eng vertolk meet word nie."

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[19] Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd *supra.*
[20] Wiese v Joubert en Andere 1983 (4) SA 182 (0) at 196F-197E.
[21] 1993 (2) SA 12 (NM) at 27H. See also Wiese v Joubert and Andere *supra.*
[22] Helen Suzman Foundation v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) at para [27] and Breukel and Another v Department of Home Affairs and Another 2023 (4) SA 583 (WCC) at para [88].
[23] 1974 (3) SA 207 (O) at 216A-D.

[28] In Vaatz v Law Society of Namibia *supra,*[24] the court dealt with prejudice in scandalous or irrelevant matters which may be defamatory of the other party as follows:

> "The phrase 'prejudice to the applicant's case' clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other party's allegations and a party does not do so at his own risk. <u>If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party."</u> (own emphasis)

[29] During argument, Mr Symon SC persisted with the respondent's application to strike out the following documents and paragraphs:

[29.1] The Windeed search, marked as annexure FB6 and the Lightstone valuation, marked as annexure FB7. The applicant relies on these two documents in support of the allegations that the respondent is the owner of the immovable property situated at Lakeview, Bloemfontein and secondly that this property is valued at R260 000.00. The respondent's complaint against these documents is based thereon that it amounts to irrelevant hearsay evidence. I am in agreement with this contention, and accordingly, the application to strike out these documents should succeed.

[29.2] Paragraph 37 of the founding affidavit and the article published in the Daily Investor, marked as annexure FB8. The applicant relies on this article in support of the allegation that the respondent created Accelerate Property Fund "by purchasing properties from his own personal portfolio and that of family members". The respondent's complaint against the allegations in paragraph 37 and annexure FB8 is based thereon that it amounts to irrelevant hearsay evidence. I am in agreement with the respondent's contention, and accordingly, the application to strike out

[24] At 566J-567B.

these allegations and document should succeed.

[29.3] The first sentence of paragraph 8 of the founding affidavit wherein the applicant alleged "In summary, the essence of the application is that I am a creditor of the Respondent, and I seek the sequestration of the Respondent on account of several acts of insolvency he has committed, and also on the ground that he is factually and commercially insolvent". The respondent's complaint against this portion is based thereon that the contents thereof are scandalous, vexatious and irrelevant. I am not satisfied with the respondent's contention, nor has the respondent showed any prejudice that he will suffer prejudice if this portion is not struck out. Accordingly, the application to struck out this portion should not succeed.

[29.4] Paragraph 22 of the founding affidavit wherein the applicant alleged that the respondent "has committed an act of insolvency as contemplated in Section 8(e) and/or (g) of the Act, alternatively he is factually insolvent, as contemplated in Section 9(3)(v)". The respondent's complaint is based thereon that the allegations contained in paragraph 22 *supra* are defamatory of his good name and reputation. I am not satisfied with the respondent's contention, that the allegations referred to *supra* are defamatory. Accordingly, the application to struck out these allegations should not succeed.

[29.5] Paragraph 30 of the founding affidavit wherein the applicant alleged that the respondent "is both factually and commercially insolvent and has, for some time now, been structuring his affairs to prejudice creditors, which a trustee must investigate and ensure that there is equitable distribution to all creditors". The respondent's complaint against this portion is based thereon that the contents thereof are scandalous, vexatious and irrelevant.

[29.6] Paragraph 31 of the founding affidavit wherein the applicant alleged that the "conduct of the Respondent falls within the ambit (sic) section 8 (e) and (g) of the Insolvency Act, in that such constitute arrangements with creditors for releasing him wholly or partially from his debts and/or he has given notice in writing to anyone of his creditors that he is unable to pay any of his debts". The respondent's complaint against this portion is based thereon that the contents thereof are scandalous, vexatious and irrelevant.

[29.7] Paragraphs 39, 40, and 41 of the founding affidavit wherein the applicant alleged that the respondent "is very likely to have funds that belong to him stashed away" and he utilize both Accelerate Property Fund and the Michael Family Trust as a front to house all assets and to secure same to the prejudice of his creditors by shifting and moving assets between the different companies of which the respondent is a director and moving assets from his name into other entities, alternatively into Accelerate Properties Fund. The essence of the applicant's allegation is that the respondent utilise the Michael Family Trust "as his own, and his alter ego, alternatively he is hiding behind the veil" of the said trust "to conduct business and derive an income". The respondent's complaint against the allegation in paragraphs 39, 40 and 41 is based thereon that the allegations contained therein are "egregious, ... harmful, hurtful, injurious, defamatory". I am in agreement with the respondent's contention. The retention of the allegations in paragraphs 39, 40 and 41 will be prejudicial to the respondent, and accordingly, the application to strike out these paragraphs should succeed.

[29.8] Paragraphs 44.1, 44.4, 44.5, 44.6, 44.9, 44.10, 44.12, 44.13 and 44.14 of the founding affidavit wherein the applicant attempts to make out a case why it will be to the advantage of creditors if the estate of the respondent is sequestrated, the applicant alleged that the respondent's "convoluted affairs" must be investigated by a trustee, with the "result in the setting aside of impeachable transactions". It is also alleged that the respondent preferred certain creditors over others, and, being a "director of some 44 (forty-four) commercial entities and the CEO" of Accelerate Properties Fund, the general body of the public needs to be protected - especially because of the uncertainty with the manner and the sort of business dealings the respondent has embarked upon or will in future embark upon in his personal capacity. According to the applicant, the respondent's assets are "evidently being concealed through the various commercial entities" and "corporate structures" referred to *supra.* The respondent's complaint against the allegation in the paragraphs referred to *supra* is based thereon that the allegations contained therein are "horrendous, injurious, false and unsubstantiated defamatory". I am in agreement with the respondent's contention. The retention of the allegations in paragraphs 44.1, 44.6, 44.9, 44.10 and 44.12 *supra* will be prejudicial to the respondent, and accordingly, the application to strike out these paragraphs should succeed. I am not satisfied with the respondent's contention that the complaints in paragraphs 44.4, 44.5 and 44.14 are defamatory, and as a result the application to strike out these paragraphs should not succeed.

[29.9] The complaint raised in paragraph 44.13 relates to the valuation of the immovable property referred to in annexure FB7 supra and constitutes inadmissible hearsay evidence. Accordingly I am satisfied that the application to strike out paragraph 44.13 should succeed.

[29.10] In paragraph 45 of the founding affidavit the applicant alleges that he is unaware of further creditors of the respondent, but that the granting of a provisional sequestration order will result in the order being published in the Government Gazette and local newspapers with the aim to give creditors to join the proceedings. The respondent's complaint against this portion is based thereon that the contents thereof are scandalous, vexatious and irrelevant.

[30] I am not satisfied that the respondent has made out a case to strike out the allegations in paragraphs 30, 31 and 45 *supra,* and accordingly, the application to strike out these paragraphs should not succeed.

Legal Principles in Sequestration Applications

[31] In terms of s 10 of the Insolvency Act, a court "may make an order sequestrating the estate of the debtor provisionally" if it is *prima facie* satisfied that:

"(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) od section 9; 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".

[32] The onus of satisfying a court on the three requirements referred to in s 10 of the Insolvency Act rests throughout on the sequestrating creditor and no *onus* is on the debtor to disprove any element.[25]

a. Liquidated Claim:

[33] In terms of s 9(1) of the Insolvency Act, a creditor (or his/her agent) who has a liquidated claim against the debtor for not less than R100.00, or two or more creditors (or their agents) who have liquidated claims against the debtor amounting, in aggregate, to not less than R200.00, "who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor".

[34] The first hurdle the applicant has to cross is whether its monetary claim against the respondent is fixed and determined, either by agreement, judgment or otherwise.[26]

[35] The applicant relies first and foremost on the AOD in terms of which the respondent allegedly agreed and undertook to pay the capital amount of R41 500 000.00 and secondly on an oral agreement under the heading "ADDITIONAL INDEBTEDNESS" in terms of which the applicant undertook to make monthly payments to the applicant in the sum of R50 000.00 until the indebtedness to the applicant was paid in full. As a result of these agreements, according to the applicant, he established himself as a creditor of the respondent for a liquidated amount.

[36] According to the respondent, the ostensible debt owed by the respondent's late farther, the AOD and the ostensible oral agreement are invalid and void and as a result did the applicant fail to make out a *prima facie* case that he has a liquidated claim against the applicant. The respondent's opposition is specifically based on the contention that the underlying indebtedness and the AOD are invalid and void credit agreements.

[25] Braithwaite v Gilbert (Volkskas Bpk Intervening) 1984 (4) SA 717 (W) at 718.
[26] Stephan v Khan 1917 CPD at 24, Kleynhans v Van der Westhuizen NO 1970 (2) SA 742 (A).

[37] S 8 of the National Credit Act defines credit agreements as follows:

"(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is-

(a) a credit facility, as described in subsection (3);

(b) a credit transaction, as described in subsection (4);

(c) a credit guarantee, as described in subsection (5); or

(d) any combination of the above.

…

(3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4 (6) (b), constitutes a credit facility if, in terms of that agreement-

(a) a credit provider undertakes-

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to-

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of-

(i) any amount deferred as contemplated in paragraph (a) (ii) (aa); or

(ii) any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement.

(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is-

(a) …

(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-

(i) the agreement; or

(ii) the amount that has been deferred.

(5) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies."

[38] In Carter Trading (Pty) Ltd v Blignaut[27] the court dealt with the question whether a written acknowledgement of debt amounts to a credit agreement in terms of s 8 of the National Credit Act. The court held that:

"[16] From the aforegoing it, in my view, follows that the payment of the amount owing was deferred to 24 December 2008 and that the defendant undertook to pay, in addition to the amount owing, at least the cost of preparing the acknowledgment of debt (whatever it may have been) and, in the event of a failure to pay the sum owing, also collection commission and legal fees.

[17] In the application of these terms of the acknowledgment of debt to the provisions of s 8(4)(f) of the Act it would appear that those terms are exactly what is envisaged in the Act to be a credit agreement, namely an agreement in terms of which payment is deferred and at least a fee or charge is payable in respect of the acknowledgment of debt, and interest and legal fees are payable in the event of a failure by the defendant to pay the amount as agreed therein.

[27] 2010 (2) SA 46 (ECP). See also Fourie v Geyer 2020 (6) SA 569 (NWM).

[18] For this reason alone the acknowledgment of debt in my opinion clearly falls within the ambit of the provisions of s 8 of the Act and, therefore, constitutes a credit agreement as envisaged in the Act."

[39] S 40 of the National Credit Act provides further that:

"(1) A person must apply to be registered as a credit provider if the total principal debt owed to the credit provider under all outstanding agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).

…

(4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89."[28]

[40] The prescribed threshold in terms of s 42(1) of the National Credit Act is "nil R0".[29]

[41] S 89 of the National Credit Act deals with unlawful credit agreements and provides as follows:

"(2) Subject to subsections (3) and (4), a credit agreement is unlawful is-

…

(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered;

(5) If a credit agreement is unlawful in terms of this section, despite any other legislation or any provisions of an agreement to the contrary, a court must make a just and equitable order including but not limited to the and order that-

(a) the credit agreement is void as from the date the agreement

[28] Du Bruyn NO v Karsten 2019 (1) SA 403 (SCA) at para 26. See also Fourie v Geyer *supra.*
[29] GN 513 of 11 May 2016: Determination of a Threshold for Credit Provider Registration (Government Gazette No. 39981).

was entered into."

[42] In Desert Star Trading 145 (Pty) Ltd and Another v NO 11 Flamboyant Edleen CC and Another[30] the Supreme Court of Appeal in dealing with the *locus standi* of the applicant creditor in proceedings for the winding-up of a close corporation, more specifically where the *locus standi* is disputed on the grounds that the indebtedness to the creditor arose out of agreements that are void for failure to comply with certain provisions of the National Credit Act, held as follows:

> "(16) On the view that I take of the matter it is not necessary that any firm conclusion be reached at this stage on the respondents' contentions. It suffices that the indebtedness is disputed on bona fide and reasonable grounds for, as Corbett JA made plain in *Kalil v Decotex (Pty) Ltd and Another.*
>
> > 'In regard to locus standi as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding-up order. The *onus* on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds.'" (footnotes omitted)

[43] The alleged indebtedness to the applicant by the respondent's late farther is the sum R40 000 000.00. The total sum allegedly due and payable by the respondent to the applicant in terms of the AOD is R41 500 000.00, and payment of this amount was to be effected by the respondent as follows:

[43.1] R30 000 000.00 not later than 30 June 2023 (clause 2 of the AOD).

[30] 2011(2) SA 266 (SCA).

[43.2] R11 500 000.00 at R500 000.00 monthly payments over a period of 23 months.

[44] Clause 2.4 of the AOD makes provision that all monies received by the applicant from the respondent in terms of the AOD shall first be used for payment of legal costs, if any, then for payment of interest, and then for the reduction of the outstanding capital amount.

[45] Clause 2.5 of the AOD records further that should the "Capital amount and Interest not be paid on the dates mentioned in paragraph 2" of the AOD, "then the full outstanding amount of the Capital plus interest will become due and payable by the" respondent, "immediately and without any notice". This provision is also confirmed by the applicant in his founding affidavit where the applicant specifically states that should "any payment of the capital amount not be paid on due dates, then then (sic) the full capital amount (plus interest) would become due, owing and payable" to the applicant.

[46] Clause 10 of the AOD imposes liability on the respondent for all costs and disbursements, including legal costs that are incurred by the applicant in "enforcing or securing compliance by the Debtors of the stipulations of this agreement, or which may flow from any legal action arising out of this agreement, which shall include but not be limited to collecting or endeavouring to collect any or all of the amounts payable by the Debtors or otherwise, shall be due and payable by the Debtors to the Creditor on demand".

[47] It is the respondent's case that the AOD constitutes a credit transaction and regulated credit agreement under ss 8(1)(b) and 8(4)(f) of the National Credit Act, because it provides for the deferred payment of the amount allegedly owed by respondent to the applicant, and further that interest is payable to the applicant in respect of the AOD or the amount that has been deferred. The respondent's defence goes further, namely, the AOD, being a credit agreement, is in terms of ss 40(4), 89(2)(d) and 89(5)(a) of the National Credit Act unlawful and void, because the applicant is not a registered credit provider.

[48] The alleged oral agreement between the applicant and the respondent on which the applicant relies under the heading "ADDITIONAL INDEBTEDNESS" and the subsequent three payments made in terms thereof by the respondent in the

total sum of R150 000.00 are denied by the respondent. The respondent attached to his answering affidavit a copy of a handwritten agreement (annexure AA2) with the further allegations that this handwritten agreement is an agreement entered into on 7 October 2021 at Fourways between the applicant and Khumonetix. In terms of this handwritten agreement, Khumonetix agreed to pay the applicant R50 000.00 per month for 24 months. The payments received by the applicant were not made by the respondent, but were made by Khumonetix in terms of the handwritten agreement.

[49] Mr Bhana SC, on behalf of the applicant, referred me to the "Badenhorst principle"[31] and correctly submitted that it is trite that winding-up proceedings are not to be used to enforce payments of a debt that has been disputed on *bona fide* and reasonable grounds. With reference to Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd,[32] Mr Bhana SC submitted that the formulation of a legal dispute is not sufficient to defeat a sequestration application. In applying what has been stated in Trinity Asset Management to the dispute raised by the respondent, namely that the AOD is invalid and void, Mr Bhana SC submitted that the Badenhorst principle does not apply where the dispute raised is based on legal principle.

[50] The Constitutional Court stated in the Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd *supra* as follows:

> "[87] When the dispute about the debt is not about whether it exists or its amount but about its exigibility, things are different. Then the doubt arises from a disputed principle, not contested facts. This means that the liquidating or sequestrating court is not diverted into a time-consuming and complex factual enquiry. The only point before it is a law point. That law point can be determined with precision and with dispatch.
>
> [91] A good analogy is when an applicant at risk of harm seeks an interim interdict. When the facts are unclear, the interdicting court must weigh prospects, probabilities and harm. But when the respondent, who is sought to be interdicted, has a killer law point, it is just and sensible for the court to decide that point there and then.

[31] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (D at 347-348.

[32] 2018 (1) SA 94 (CC) at paras [28], [86], [87) and [93).

The court is in effect ruling that, whatever the apprehension of harm and the factual rights and wrongs of the parties' dispute, an interdict can never be granted because the applicant can never found an entitlement to it.

[92] Exactly the same here. The High Court found that Trinity could never enforce its claims against Grindstone, regardless of any factual dispute or rights and wrongs. The question then is whether the High Court was wrong, as a matter of law, to decide this law point. I do not understand the Badenhorst principle to preclude a determination, by a liquidating or sequestrating court, of a killer law point based on common-cause facts. As Rogers J pointed out in Orestisolve:

> '(T)he rule, which is not inflexible, would not generally be an obstacle to liquidation if the court felt no real difficulty in deciding the legal point. . . . (T)he equivalent rule in England finds application where the dispute is shown to be one whose resolution will require the sort of investigation that is normally within the province of a conventional trial. A purely legal question would not have that character.'

[93] This is not to say that a liquidating or sequestrating court can never rely on Badenhorst to refer legal issues, even on common-cause facts, to a trial court. First-instance courts may have many reasons for kicking for touch. But Badenhorst does not preclude a court from deciding a straightforward legal issue based on common-cause facts. And that is what the High Court did here. The prescription point was therefore properly before the SCA and was understood as being so by both the majority and minority. And it is properly before this court." (footnotes omitted)

[51] My interpretation of Trinity Asset Management is that a sequestrating court is not prohibited by the Badenhorst principle from deciding a straightforward legal issue. My understanding of Trinity Asset Management is also that a legal issue raised does not preclude the sequestrating court from deciding the matter

where a *bona fide* and reasonable dispute has been raised by the respondent. I do not find any prohibition to apply the Badenhorst principle where the dispute is based on a legal principle. However, the defence raised by the respondent, namely that the AOD is a *void* and invalid credit agreement turns upon a legal principle and not a dispute of fact, and, as correctly submitted by Mr Bhana SC, this defence can be disposed of on papers before me.

[52] With reference to Carter Trading (Pty) Ltd v Blignaut *supra,*[33] the AOD constitutes a credit transaction and regulated credit agreement under ss 8(1)(b) and 8(4)(f) of the National Credit Act, because it provides for the deferred payment of the amount allegedly owed by respondent to the applicant, and further that interest is payable to the applicant in respect of the AOD or the amount that has been deferred. The AOD, being a credit agreement, is in terms of ss 40(4), 89(2)(d) and 89(5)(a) of the National Credit Act unlawful and *void,* because the applicant is not a registered credit provider.

[53] In applying the Badenhorst principle, the defence raised by the respondent against the alleged oral agreement relied upon by the applicant is based on a dispute of fact on *bona fide* and reasonable grounds.[34]

[54] Accordingly, the applicant has failed cross the first hurdle and satisfy that he has a liquid claim against the respondent. The application for this reason alone should fail.

[55] In the premise of the above finding, I find it unnecessary to deal with the remaining requirements referred to *supra,* namely, whether the respondent has committed an act of insolvency or is insolvent, and secondly whether there is reason to believe that it will be to the advantage of creditors of the respondent if his estate is sequestrated.

[56] Accordingly I make the following order:

1. The application to condone the late delivery of the replying affidavit is dismissed.

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[33] See also Du Bruyn NO v Karsten *supra* and Fourie v Geyer *supra.*

[34] Desert Star Trading 145 (Pty) Ltd and Another v NO 11 Flamboyant Edleen CC and Another *Supra.*

2. Annexures FB6, FB7 and FB8 to the founding affidavit are struck out.

3. Paragraphs 37, 39, 40, 41, 44.1, 44.6, 44.9, 44.10, 44.12 and 44.13 of the founding affidavit are struck out.

4. The application for provisional sequestration is dismissed.

5. The applicant is ordered to pay the costs of the application for provisional sequestration, including the costs of the condonation application referred to in paragraph 1 *supra* and the application to strike out referred to in paragraphs 2 and 3 *supra.* Costs to include costs of two counsels.

JJ BUYS, AJ

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