



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A23/106542

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

29/11/2024

Date

ML TWALA

FIRST RAND BANK LIMITED

APPELLANT

[Acting through its RMB Private Bank Division]

And

FRANS LODEWYK MUNNIK BASSON N.O.

FIRST RESPONDENT

LINDA BASSON N.O.

SECOND RESPONDENT

[In their capacities as trustees of the Karmighael Trust
Master's reference number IT4038/1995]

JUDGMENT

TWALA J with (Mahosi and Raubenheimer AJJ Concurring)

- [1] This appeal concerns the judgment of this court (per Redman AJ) handed down on the 7 February 2023 dismissing the appellant's application for the final sequestration of the Kamighael Trust, number IT4038/1995 (*"the Trust"*). The respondents are the joint trustees of the Trust. This appeal is with leave of the Supreme Court of Appeal.
- [2] The central issue in this appeal is whether the trust is factually insolvent in that its liabilities exceed its assets, and if so, whether there is reason to believe that it would be to the advantage of the creditors that the trust is sequestrated.
- [3] The facts foundational to this case are mostly common cause in that, the respondents are the joint trustees of the Trust. The appellant is a creditor of the Trust and has obtained two judgments against the Trust in the following terms:
- 3.1 a judgment in the amount of R4,5 million together with interest at the prime rate from 13 June 2014 to date of final payment under case number 2014/35431 [*"the Autohaus debt"*].
- 3.2. a judgment in the amount of R17 432 841,63 together with interest at the rate of 9,45% per annum calculated daily and compounded monthly in arrears from 1 May 2019 to date of final payment under case number 13813/2018 [*"the Basson debt"*].
- [4] The Trust is the owner of two immovable properties known as Erven 3644, 3645 and 3646 Northcliff Extension 33, Registration Division IQ, The Province of Gauteng, in extend measuring 735 square meters each, held by deed of Transfer

T15674/2001 (*“the Northcliff property”*) and the property described as Portion 8 (a Portion of Portion 1) of the Farm Mullers-Rust, Parys NO 352, District of Parys, Province of Free State, measuring in extent 3, 5464 hectares and held by deed of transfer T8612/2006 (*“Parys Property”*). The appellant had passed a mortgage bond of R4 500 000 and R17 000 000 respectively over these properties as security for a facility in favour of the respondents and the Trust signed sureties on behalf of the respondents in favour of the appellant.

- [5] It is further undisputed that the appellant has issued a writ of execution against the movable property of the Trust and the sheriff has attached movable property to the value of R188 000.00 in respect of the Parys property and R20 000.00 in respect of the Northcliff property. Realising that the value of the attached movable property would be insufficient to satisfy the debt, the appellant proceeded with an application and obtained an order declaring both immovable properties of the Trust especially executable. Both immovable properties of the Trust were placed under judicial attachment.
- [6] Further, it is undisputed that the two judgments remained unsatisfied as a result whereof the appellant launched the sequestration proceedings and obtained a provisional order sequestrating the estate of the Trust. On the return day of the provisional order, the Trust filed its opposition to the order being made final. The Trust averred that its assets far exceeded its liabilities and that it owed the City of Johannesburg an amount of R286 507.98 as opposed to the R1 961 359.99 as alleged by the provisional liquidators. Further, the Trust averred that it owned a database which was worth R64 000 000.
- [7] It is on record that the appellant engaged the service of a property valuator to conduct a valuation of both the Northcliff and Parys properties. The property valuator estimated the value of the properties as R11 000 000 and R8 500 000 respectively.

- [8] It further appears from the record that the appellant in its further affidavit attached an updated certificate of balance in respect of the two judgments which reflected the Trust's indebtedness in favour of the appellant in the sum of R9 000 000 and R20 878 804.76. Furthermore, there was an amount of R1 741 324.43 owing to the City of Johannesburg, an amount of R160 970 owing to the Metsimahalo Municipality and R13 972.16 owing to the Homeowners' Association. Added together, these amounts bring the total liabilities of the Trust to a sum of R31 795 070.35.
- [9] Discontent with the valuations of the immovable properties and movable assets of the Trust submitted by the appellant, the Trust filed a supplementary affidavit and attached the valuator's affidavits which estimated the market value of the Parys property in the sum R25 000 000 and the Northcliff property to be R17 000 000 with the total of both properties being R42 000 000. Further, the Trust attached a signed offer to purchase for the Parys property in the sum of R20 000 000 and the movable assets on the Parys property in the sum of R14 000 000. The offer to purchase was made and signed by one Edmund Pitso Madibo. However, the offer to purchase the property at a sum of R20 000 000 did not materialise.
- [10] It is trite that for a creditor to succeed in an application for the sequestration of the estate of a debtor, it needs to establish that it has a claim which is not less than the sum of R100 which the debtor is unable to contest on reasonable and bona fide grounds. Further, in the alternative, the creditor must establish that the liabilities of the debtor exceed its assets or that the debtor has committed an act of insolvency and that there is reason to believe that it will be to the advantage of the creditors that the estate of the debtor be sequestrated.
- [11] It is apposite at this stage to restate the relevant provisions of the Insolvency Act¹, (as amended) (*"the Act"*) which provides as follows:

"Section 8. Acts of insolvency"

A debtor commits an act of insolvency—

¹ 24 of 1936

- a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;
- b) if a Court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;
- 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;
- e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;
- f) if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section 6 or 7, he fails to comply with the requirements of subsection (3) of section 4 or lodges, in terms of that subsection, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on which such application is to be made;
- g) if he gives notice in writing to anyone of his creditors that he is unable to pay any of his debts;
- h) if, being a trader, he gives notice in the *Gazette* in terms of subsection (1) of section 34 and is thereafter unable to pay all his debts.

Section 12

“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 sequester 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.

- [12] It has long been established that motion proceedings are designed for the resolution of legal issues based on common cause facts. Put differently, motion proceedings are to be decided on the papers and only in a case where there is a factual dispute between the parties which cannot be resolved on the papers and could have been foreseen, then it is appropriate that action proceeding should be instituted unless the factual dispute is not real or genuine or bona fide.
- [13] The principle was laid down in *Plascon-Evans Paints (TVL) v Van Riebeck Paints (Pty) Ltd*² where the Court, quoting from *Stellenbosch Farmers Winery Ltd v Stellenvale Winery*³ stated the following:

“.... where there is a dispute as to the facts a final interdict should only be “granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order ... where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.”

This rule has been referred to several times by this court (see *Burnkloof Caterers Ltd v Horseshoe Caterers Ltd* 1976 (2) SA 930 (A), at 938; *Tamarillo (Pty) Ltd v BN Aiteken (Pty) Ltd* 1982 (1) SA 398 (A) at 430-1; *Associate South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923. It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on affidavit, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard- *Room Hire Co.*

² (53/8; 1984 (3) SA 620 (21 May 1984)4) [1984] ZASCA 51; [1984] 2 All SA 366 (a); 1984 (3) SA 623.

³ *(Pty) Ltd* 1957 (4) SA (C)

(Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA at 1163 (T); Da Mata v Otto NO 1972 (3) SA 585 (A) at 882).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6()(g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see Rikhoto v East Rand Administration Board 1983 (4) SA 278 (W) at 283. Moreover, there may be exceptions to this general rule, B as, for example, where the allegations or denial of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the Associated South African Bakeries case, supra at 949.”

- [14] The principle was expanded upon in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁴ where the court stated the following:

“[13] Areal, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty

⁴ (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008).

imposed upon a legal adviser who settled an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

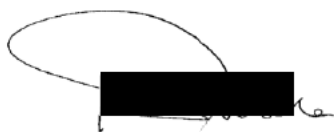
- [15] I can find no reasons to falter the Court a quo with its finding that there is a material dispute of fact in this case which cannot be resolved on the papers. The experts’ affidavits filed by both parties are at odds with each other and that can only be resolved by leading evidence in the trial court. The dispute as raised in the Trust’s affidavit cannot be said to be far-fetched and untenable for the valuers on either side are professionals with years of experience in the field. There is such a vast difference in the valuations of both properties which cannot be resolved on these papers.
- [16] It can be accepted that the property valuator of the Trust has not explained how she came to the value of R17 000 000 for the Northcliff property when she initially said that the value is between R12 000 000 and R17 000 000 inclusive of vat. She has not furnished any factual material and the thought process in arriving at that figure, but the conclusion reached cannot simply be said to be illogical. The valuation by the appellant of this property is R11 000 000 and the difference in the figures furnished by the valuers on either side is most telling. These are issues which would have been properly debated in a trial and not in motion proceedings.
- [17] Further, according to the valuers of the appellant the Parys property is valued at R16 250 000 whereas the valuers of the Trust value it at R25 000 000. The valuator of the Trust places a total value of these two assets at between R37 000 000 and R42 000 000 – whereas the appellant’s valuers returned a valuation of all the assets of the Trust at R26 108 000 and the total liabilities at R31 700 000. Thus, in order to determine whether the Trust is factually insolvent, the determination of the value of the Parys property is of utmost importance. The difference in the values given to the Parys property create a dispute of fact which cannot be resolved on these papers.

- [18] It should be recalled that initially, the valuers of the appellant were not given access to both these properties and had to use the selling prices of and valuations of other properties in the same vicinity to arrive at their valuations. The credibility of the evidence of the valuers can only be tested in the trial court. It cannot simply be said the valuations of the Trust are illogical. The moveable property in the Parys property is valued by the Trust at R14 000 000 as confirmed by the offer to purchase of Madibo, whereas the sheriff's inventory put the value at R188 000. These differences are material and can only be resolved in a trial.
- [19] I am unable to disagree with counsel for the appellant that the sheriff's return stands as *prima facie* evidence unless it is rebutted by the respondent. However, the Trust has submitted an offer to purchase the movable on the Parys property for a sum of R14 000 000 which creates a vast difference in the value of the movable property as compared to that of the sheriff. I am of the respectful view therefore that the Court a quo correctly found that, on the papers before the Court, the appellant has failed to establish that the Trust was factually insolvent.
- [20] It is noteworthy that the Court a quo did not dismiss the application on the basis of the dispute of fact that is extent in this case but proceeded to deal with the other issues of whether the Trust has committed an act of insolvency and whether it would be to the advantage of the creditors that the Trust be sequestrated. However, at the hearing of this case, counsel for the appellant specifically stated that the appeal concerns the issue of factual insolvency and whether it would be to the advantage of creditors that the estate of the Trust be sequestrated.
- [21] Since I am unable to disagree with the finding of the Court a quo that there is a material dispute of fact in this case which cannot be resolved on the papers, I hold the view that the issue whether it would be to the advantage of the creditors that the estate of the Trust be sequestrated does not arise. Although in my view the appellant had better prospects in the appeal if it also relied on the ground that the Trust has

committed an act of insolvency, I am constrained to dismiss the appeal with costs without considering the issue.

[22] In the result, the following order is made:

1. The appeal is dismissed with costs on the Scale B.



TWALA M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

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Date of Hearing: **20 November 2024**

Date of Judgment: **29 November 2024**

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 29 November 2024.