

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 076126/2023

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

13 MAY 2025

DATE

SIGNATURE

In the matter between:

RAYAL INDUSTRIAL (PTY) LTD

Applicant

and

HAROON ABDUL MAGID KHAN

Respondent

JUDGMENT

DOMINGO, AJ

Introduction

- [1] This is an application brought by the applicant for the sequestration of the estate of the respondent into the hands of the Master of this Honourable Court.
- [2] The applicant relied thereon that it is a creditor of the respondent as contemplated in section 9 of the Insolvency Act of 1936 ("Insolvency Act"), for a liquidated amount in the excess of R90 million.

- [3] The applicant contended that the relief sought is based thereon that the respondent is actually insolvent. He has also admitted that he is unable to pay the amount owing to the applicant. Further and/or in the alternative the applicant relied thereon that the respondent also indicated that he is willing to sign an acknowledgement of debt and admitted being indebted to the applicant.
- [4] On the day of the hearing, the respondent appeared in court without legal representation and informed the court that he had elected to represent himself. The respondent submitted that if this application was left unopposed, it would have adverse consequences on his future as well as that of his family.
- [5] The respondent contended that the applicant had failed to make out a *prima facie* case that the respondent is a debtor of the applicant as contemplated in section 9 of the Insolvency Act, for a liquidated amount in excess of R90 million. The respondent denied having admitted that he is unable to pay the sum of R90 million as alleged by the applicant and neither was there any willingness indicated by the respondent to sign an acknowledgement of debt for R90 million.

Issues

- [6] The issues to be determined in this matter are as follows:
- 6.1 Whether the late filing of the respondent's answering affidavit should be condoned.
- 6.2 Whether the application meets the requirements for a provisional sequestration.

Point in limine

- [7] The respondent raised the issue of the condonation of the late filing of the applicant's answering affidavit as a point *in limine*. The applicant contended that the respondent had failed to file his answering affidavit within the prescribed period and submitted that the issue of condonation should be dealt with first.
- [8] The respondent had not filed a condonation application but had briefly in his answering affidavit dealt with the issue of condonation. The applicant contended

that no proper case had been made out for the late filing of the answering affidavit, and that condonation for the late filing should be refused. Furthermore, the applicant contended that the respondent had failed to set out a valid defence against the requested relief in the answering affidavit.

[9] In the *Grootboom v National Prosecuting Authority and Another*¹ the court stated:

“In this Court the test for determining whether condonation should be granted or refused is in the interest of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry will include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.

[10] This sequestration application was served on the respondent on 5 September 2023. The respondent served a notice to oppose on 21 September 2023. The notice of final enrolment was served on the respondent’s attorney on 24 January 2024 and the matter was enrolled for hearing on 16 February 2024. It is submitted by the applicant that the respondent’s erstwhile attorney only sent an electronic copy of the respondent’s answering affidavit to the applicant’s attorney on 11 February 2024 (a Sunday), less than a week before the hearing of the matter on the unopposed motion court roll. The late service of the answering affidavit of the respondent caused that the matter had to be postponed for hearing on the opposed motion court roll.

[11] The applicant contended that the respondent’s failure to file a notice of intention to oppose timeously, and thereafter failing to file an answering affidavit, which

¹ (C696/08) ZALCCT 15 (18 December 2009) at para 51.

was due in October 2023 clearly constituted delaying tactics, and an abuse of the court's process.

[12] The respondent submitted that his answering affidavit was filed late due to a break down in his mental and health well-being. The respondent submitted that he was arrested on the 22 September 2022 and obtained bail on 10 October 2022; he was arrested for a second time on 1 December 2022 and obtained bail in 9 December 2022. The poor condition and lack of halal food at the prison negatively impacted on his health and mental wellness. The respondent contended that the multitude of civil and criminal actions instituted against him by the applicant added to his stress, anxiety, fear, mental well-being and health. The respondent adduced in court that due to his faith he had not sought the services of a mental health practitioner and therefore could not provide any proof of his mental well-being. The respondent explained that in his faith mental well-being is dealt with through spiritual means rather than medical western methods. During this challenging time the respondent submitted he was not able to make sound judgments.

[13] Despite the late filing of the respondent's answering affidavit, the applicant has however filed a replying affidavit *ex abundante cautela*, which the applicant submitted it would rely on insofar as the court may decide to allow the answering affidavit despite the lateness thereof and the lack of proper explanation.

[14] In avoiding an overly technical approach in determining whether to grant the condonation, I am reminded of the dictum in the case of *Louw v Grobler and Another*² which is often cited as the "universal compass in cases in which court orders, rules and process are abused, manipulated and not observed"³; the dictum is as follows:

"The purpose of the uniform court rules is to regulate the litigation process, procedure and the exchange of pleadings. The entire process of litigation has to be driven according to the rules. The rules set the parameters within the course of litigation has to proceed. The rules of engagement, must, therefore, be obeyed by litigants. However,

² (3074/2016) [2016] ZAFSHC 206 (15 December 2016) at para 18.

³ *Wolhunter N.O. and Others v Mtetwa Investments (Pty) Ltd* (4542/2023; 4543/2023) [2024] ZAFSHC 98 (4 April 2024).

dogmatically rigid adherence to the uniform court rules is as distasteful as their flagrant disregard by the litigants. Dogmatic adherence, just like flagrant violations, defeats the purpose for which the court rules were made. The prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead of enhancing the civil justice system. The court rules are not an end in themselves.”

[15] While I am mindful of the almost four month delay in filing of the answering affidavit; in the pursuit of a just outcome in this matter, weighing up the interest of both parties, and taking into account the nature of this matter, I am of the view that granting the condonation will not severely prejudice the applicant. The applicant has filed a replying affidavit and filed heads of argument taking cognisance of the submissions made in the respondent’s answering affidavit. Thus, in the premises, having read the papers filed on record and having heard the applicant’s counsel and the respondent himself, in the interest of justice, I grant the condonation of the late filing of the answering affidavit.

Background

[16] The applicant’s main business involves the manufacturing of ceramic tiles. The applicant uses large quantities of coal in its business to bake tiles in firing glass.

[17] It is submitted by the applicant that the respondent had been employed by the applicant since 2010, and the respondent was *inter alia* responsible for sourcing and procuring coal and other items from suppliers, and for preparing payment requisitions for payment to coal suppliers, as well as to other suppliers who supplied other goods to the applicant. The respondent was also responsible for dealing with environmental consultants and for receiving invoices from such suppliers and requisitioning payments from the applicant in respect thereof.

[18] It is submitted by the respondent that he commenced employment with the applicant from 1 December 2012. The respondent in his answering affidavit stated that he was initially employed as an assistant general manager of the applicant with the primary responsibility of assisting the deponent of the applicant’s founding affidavit, a director of the applicant, with all the health and safety requirements and obligations in connection with the applicant’s business

operations. Thereafter, the respondent's responsibilities increased over time to the sourcing, procuring, testing and purchasing of all coal requirements for the applicant's manufacturing operations in accordance with the specifications of its manufacturing plant and equipment.

[19] The applicant stated that it trusted the respondent completely with the execution of his duties. The applicant further submitted that the respondent used and abused his position of trust by defrauding and stealing from the applicant and misappropriating vast amounts of money from the applicant. The respondent primarily followed a *modus operandi* whereby he fabricated fictitious invoices. On such invoices it is alleged by the applicant that the respondent included higher amounts than the amounts on the real invoices of suppliers, and he also changed the real banking details of suppliers and replaced it with banking details of bank accounts of *inter alia* his family members.

[20] The applicant further submitted that the respondent then signed and submitted payment requisitions for the amounts of fictitious invoices (which were higher than the amounts of the invoices actually received from suppliers) as if same were real invoices from suppliers, and so misrepresented the real position to the applicant, causing the applicant to effect payment of the inflated amounts of the fictitious invoices which were received in bank accounts of persons nominated by the respondent, such as his wife, son, daughter-in-law and a company.

[21] The applicant submitted that when it obtained knowledge of the respondent's unlawful conduct, it proceeded to apply for and successfully obtained various interim and final interdicts, to *inter alia* freeze accounts of family members of the respondent which were mentioned on fraudulent invoices, and to prohibit the disposal of assets by the respondent and his family members. Copies of these interdicts were filed on record to the applicant's founding affidavit.

[22] The applicant also laid criminal charges against the respondent. It is submitted by the applicant that the respondent has made out no case that the existence of criminal proceedings should prevent the court from exercising its discretion to grant a provisional sequestration.

[23] The applicant also informed the court that before this application was filed, the applicant issued a summons in this court against the respondent and six other defendants in November 2022, claiming the amounts mentioned in this application, on the same basis as set out in this application. As at the date of this application the applicant submitted that it had already through investigation established that an amount of at least R90 219 465.99 was involved, which the applicant unlawfully invoiced and cause unlawfully to be paid by the applicant.

[24] In this matter, the applicant presented proof of various monetary claims against the respondent. The nature, calculation and compilation thereof were set out in detail in the applicant's founding affidavit. I am in agreement with the applicant that these amounts were not challenged by the respondent by way of different calculations or proof to the contrary and were in essence met by a blanket denial by the respondent.

Respondent's defence

[25] The respondent has responded to the allegations regarding the compilation and calculation of the amount alleged owing with a blanket denial and repeatedly referred to the contents of paragraph 17.1 and 17.2 of the plea pending in the action against him and six others. The respondent submitted that his stands by his defence set out in the those paragraphs in his plea in that pending action.

[26] It is submitted by the applicant that in such paragraphs in the plea in the pending action, the respondent has *inter alia* alleged and admitted the following:

26.1 The respondent had admitted that he participated in a scheme devised to fabricate inflated and fictitious invoices which was then presented to the applicant for payment.

26.2 The accounts of his family members and entities under his control were then used to channel funds from the applicant to those funds from the applicant to those accounts.

26.3 The true suppliers of coal and/or other items were then paid from those nominated accounts.

26.4 The respondent then distributed the difference between the value of the fictitious invoices and the legitimate invoices.

26.5 He withheld/received 20% of the proceed of the fraudulent scheme as compensation.

[27] The respondent further contended that the deponent to the founding affidavit allegedly approached him to conduct the unlawful scheme in terms whereof the respondent acted as described above. In essence the respondent admitted that he did act unlawfully and generated fictitious invoices as mentioned above, but said that he paid (part of) the inflated amounts received in the various accounts (of *inter alia* his family members as aforesaid) to the deponent to the founding affidavit, in cash, whilst 20% of such unlawfully acquired proceeds was taken for himself as it was allegedly so agreed between him and the applicant's deponent.

[28] The applicant averred that the respondent's allegations regarding the deponent of the applicant's alleged involvement should be rejected as a mere belated and unsupported conjecture, and that his version in any event does not provide him with a defence against the applicant's claims.

[29] I am in agreement with the applicant, that the respondent's allegations clearly show that, on his own version that he admits generating false invoices and requisitioning the applicant with inflated amounts. Even on his own version, the respondent would at least have unlawfully, as submitted by the applicant, amassed an amount of at least about R18 million unlawfully from payments made by and to the detriment of the applicant (on the respondent's 20% version).

[30] The allegations that the deponent to the founding affidavit was involved was denied by the deponent. It is submitted by the applicant that such allegations should be rejected *inter alia* in view of the following:

30.1 The respondent had failed to completely to take the court into his confidence and explain the nature and extent of his own involvement with the scheme, the amounts involved, and how it was dealt with.

- 30.2 Why would the applicant or its shareholders act to their own detriment?
The respondent's fraudulent invoicing would have had no benefit to the applicant or its shareholders.
- 30.3 The fact that the respondent misappropriated monies, on his own version, also appears from the transcript of a meeting that took place on 31 August 2022. The transcript of this meeting was filed on record. The respondent never mentioned the alleged involvement of of the applicant's deponent at that meeting.
- 30.4 The respondent has not presented any proof of the alleged agreement relied on by him, nor any particulars thereof. It is trite that a party relying on an agreement bears the onus to prove the agreement and the terms thereof.⁴ The respondent had failed to do so. The existence of the alleged agreement is vehemently denied by the applicant's deponent, and who presented evidence, which support on the probabilities that the respondent's allegations must be rejected.

[31] In the premises, I am in agreement with the applicant that the respondent failed to present a valid defence against the applicant's application.⁵ Furthermore, I am in agreement with the applicant's submission that there exists no real dispute of fact regarding any material aspect in this application, as the respondent has admitted his participation in the unlawful conduct. I am also of the view that the respondent has not challenged the applicant's evidence with facts and evidence to the contrary and thus has presented a very weak defence.

Requirements for provision sequestration

[32] Section 10 of the Insolvency Act read as follows:

"If the court to which the petition for the sequestration of the estate of the debtor has been presented is of the opinion that *prima facie* –

⁴ *Badenhorst v Van Rensburg* 1985 (2) SA 321 (T) at 335.

⁵ See *Reynolds v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 80F-81E.

(a) The petitioning creditor has established against the debtor a claim such as mentioned in subsection (1) of section nine; and

(b) There is a reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.”

[33] In *Provincial Building Society of South Africa v Du Bois*⁶ it was held that section 10 of the Insolvency Act determines that a provisional sequestration order should be made in every case in which a court is satisfied that a *prima facie* case has been made out.

[34] In *First Rand Bank Limited v Evans*⁷ it was held that if the conditions for a provisional sequestration order are satisfied, “then in the absence of special circumstances, the court should ordinarily grant the order.” It is thus for the respondent to establish such circumstances that warrant the exercise of the court’s discretion in his favour. I am in agreement with the applicant’s submission that no special circumstances were established that would inform the court in the exercise of its discretion to not grant the provisional sequestration order.

Jurisdiction

[35] It is common cause that the respondent is domiciled within the court’s jurisdiction and has immovable property within such area of jurisdiction. Thus, I find that section 149(1) of the Insolvency Act has been complied with.

Locus Standi

[36] I am in agreement with the applicant that it has shown that it is a creditor of the respondent, at least in the amount of R100.00 as contemplated in section 9(1) of the Insolvency Act.

[37] It is submitted by the applicant that it appears from the transcript of the meeting of 31 August 2022 that the respondent has admitted being indebted to the applicant saying that he can only make down payments. Having read the

⁶ 1966 (3) SA 76 (W).

⁷ 2011 (4) SA 597 (KZD) at para 27.

transcript I am of the view that one can infer that the respondent has admitted to being indebted to the applicant.

[38] I am in agreement with the applicant's submission that the applicant's claims are fixed amounts of money and are liquidated.⁸ That even on the applicant's own version, the amount that he would have retained is at least equal to 20% of monies that were fraudulently procured from the applicant.

[39] The respondent did not dispute neither did he present any evidence to show that he did not receive the alleged amounts of money or that he did not defraud the applicant. I am of the view that in the absence of evidence to the contrary, and in view of the respondent's admissions and his participation in the unlawful appropriation of monies from the applicant, in the premises I am satisfied that the applicant is a creditor of the respondent, at least in the amount of R100.00.

Security

[40] It is common cause that the applicant holds no security for its claim.

Insolvency

[41] In the *Provincial Building Society of South Africa*⁹ case it was held that in an application for provisional sequestration an applicant is only called upon, in terms of section 10 of the Insolvency Act, to establish a *prima facie* case for insolvency.

[42] Applicant's counsel directed the court to the case of *Ullman Sails (Pty) Ltd and Others v Jannie Reuvers Sails (Pty) Ltd and other Related matters*¹⁰ where the court stated that an "applicant relying on actual insolvency is not required to adduce evidence that would enable the respondent's assets and liabilities to be finitely determined in rands and cents", and an applicant may discharge the onus of establishing a *prima facie* case by way of sufficient evidence to justify the inference at least as a matter of probability, that the respondent is insolvent. Evidence (proof) of factual insolvency need not be direct. It is sufficient if facts

⁸ See for example *Irvin & Johnson Ltd v Basson* 1977 (3) SA 1067 (T) at 1072B/C-F; *Kleynhans v Van der Westhuizen N.O.* 1970 (2) SA 742 (A) at 749; Mars, *the Law of Insolvency* (10th ed) at p120.

⁹ *Supra* note 6 at 78 A-E.

¹⁰ [2002] 3 All SA 290 (WCC) at para 48.

are provided from which the inference of insolvency is fairly and probably deductible.¹¹

[43] Where such a *prima facie* case has been established, the onus is on the respondent to rebut the inference by showing that he has sufficient assets to be able to settle his liabilities.¹² I am in agreement with the applicant that the respondent has not done so; he has provided no particulars of his assets and liabilities to show the contrary.

[44] The evidence regarding the respondent's assets and financial affairs of the respondent, which were made available to the applicant, was presented in the founding affidavit of the applicant. It showed that the respondent owned, or was the co-owner, of various immovable properties and a luxury motor vehicle worth an estimated value of R1.2 million, and the properties jointly owned by the respondent were valued at approximately between R6-7 million.

[45] The respondent did not deny that he has such assets, and he has not presented any evidence to show that he is in fact actually solvent, with or without the debt claimed by the applicant. Furthermore, the respondent has presented no evidence to refute the correctness of the amounts claimed by the applicant. It is therefore submitted by the applicant, that the applicant's version should be accepted.

[46] In the premises, I am of the view that the applicant has adduced sufficient evidence to at least make out a *prima facie* case for insolvency of the respondent in view of the amounts of the applicant's claims and the assets of the respondent. I am therefore in agreement with the applicant's submissions that the considerable amount of the debt which the respondent owes to the applicant, his admission mentioned by the applicant, and the fact that he asked for time to pay, in itself constitutes presumptive proof of the respondent's insolvency.

Advantage to creditors

¹¹ Mars *supra* note 8 at 150; see also *Fedco Cape (Pty) Ltd v Meyer* 1988 (4) SA 207 (E).

¹² *Supra*.

[47] It is submitted by the applicant that unlike in the case of voluntary surrender, in an application for compulsory sequestration, advantage to creditors need not be established, but only that there is reason to believe that sequestration will be to the creditors advantage.

[48] The applicant directed the court to the case of *Meskin & Co v Friedman*¹³ where the court in considering the meaning of “reason to believe”, stated:

“The phrase ‘reason to believe’, is used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the court must be ‘satisfied’, it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so.”¹⁴

[49] Furthermore, the standard of proof differs in respect of a provisional and a final sequestration order. In *London Estates (Pty) Ltd v Nair*¹⁵ the court held:

“[T]he standard of proof differs in respect of a provisional and final order (cf. *Sacks Morris (Pty) Ltd v Smith*, 1951 (3) at p.170). This must relate to the proof of the facts giving rise to the belief - not the degree of conviction the belief endangers. In both cases the facts must show that there is a reasonable prospect – that some pecuniary likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors, But in the case of a provisional order there need only be *prima facie* proof of those facts; in the case of a final order the Court must be satisfied that those facts exist, presumably on a balance of probabilities.”

[50] It is submitted by the applicant that there is indeed “reason to believe” that it will be to the advantage of creditors of the respondent if his estate is provisionally sequestrated.

[51] It is submitted by the applicant that there are reasonable grounds for concluding that, upon a proper investigation of the respondent’s affairs, a trustee may discover (or recover) assets which might be realised or recouped for the benefit

¹³ 1948 (2) SA 555 (W) at 558.

¹⁴ See also *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC) at para 45.

¹⁵ 1957 (3) SA 591 (N) at 593.

of creditors.¹⁶ It is further submitted by the applicant that the provisional sequestration of the respondent's estate would allow for the appointment of a trustee to investigate the respondent's affairs, and in particular to determine fully and precisely the nature and extent of the respondent's assets and liabilities, which he has failed to divulge. The applicant averred that it is imperative that a trustee be appointed to take control of the respondent's assets which fall in his estate, to ensure that same are safeguarded for the benefit of the respondent's creditors.

[52] In the premises, I am satisfied that the applicant has made out a case that the respondent does have at least some valuable assets which can benefit creditors, which if liquidated, could result in an advantage to the respondent's creditors.

Security for costs

[53] The applicant has submitted that a certificate in terms of section 9(3) of the Insolvency Act has been procured.

Service of the application

[54] It has been submitted by the applicant that the application has been served on the necessary parties, and it will further be served insofar as the court may decide to grant the provisional sequestration order.

Conclusion

[55] In the premises, taking into account the totality of evidence, the oral submissions made by the applicant's counsel and the respondent, the applicant's relief sought for a provisional sequestration is hereby granted.

Order

[56] In the circumstances, I hereby make the following order:

56.1 The estate of **HAROON ABDUL MAGID KHAN**, ("the Respondent"), is placed under provisional sequestration in

¹⁶ *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) at 583 D-E.

the hands of the Master of the High Court, Gauteng Division, Pretoria.

- 56.2 The Respondent is called upon to advance reasons, if any, why the Court should not order final sequestration of the said estate as soon as the matter may be heard.
- 56.3 A copy of this order must be served on the Respondent.
- 56.4 A copy of this application and the provisional court order must further be served on:
- 56.4.1 any registered trade union that as far as the Sheriff can reasonably ascertain represented any of the employees of the Respondent;
 - 56.4.2 the Respondent's employees, if any, by affixing a copy of the application and provisional court order to any notice board to which the employees have access inside the Respondent's premises, or if there is no access to the premises, by affixing a copy to the front gate, where applicable, failing which, to the front door of the premises from which the Respondent conducts any business;
 - 56.4.3 the South African Revenue Service;
 - 56.4.4 the Master of the High Court, Pretoria.
- 56.5 The costs of this application, on an attorney and client scale, to be costs in the administration of the insolvent estate of the Respondent.



W DOMINGO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. This matter was heard in open court on the 12 February 2025. The date for hand down is deemed to be 13 May 2025.

APPEARANCES

For the Applicant: ADVOCATE JS STONE SC instructed by
GROSSKOPF ATTORNEYS, MR R LOURENS

For the Respondent: MR H. A.M KHAN (self representation/appearance)

