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

Case Number: 2024-144235

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

In the matter between:

ANTHONIS WESTSTRATE **Applicant**

and

ABEL ALBERTUS BOTHA **Respondent**
(Identity Number: 7[...])

Summary

Provisional sequestration – attachment of disposable property of insufficient value to satisfy a judgment debt satisfies the requirements of section 8(b) of the Insolvency Act 24 of 1936 – defences and issues rendered res judicata not available to the respondent in disputing the debt – benefit to creditors to be determined on the basis of there being reason to believe, not as a likelihood, but a prospect not too remote, that as a result of investigation and inquiry assets might be unearthed that will benefit creditors

JUDGMENT

DANIELS AJ

[1] This is an application for the provisional sequestration of the respondents' estate.

The uncontroversial facts

[2] During April 2018, the parties concluded an agreement for the sale and purchase of shares. The applicant would acquire 1% of the issued share capital in the entity, Talgar Ltd (Mauritius) for R3 million and 15% of the share capital in BillBee Ltd (Mauritius) for R1, 5 million.

[3] The applicant paid the purchase price for the shares (to the respondent). In terms of their agreement, the applicant was entitled to exercise an option, that, once exercised, would oblige the respondent to repurchase the shares. The option was exercised and the payment (or repayment) transpired to be problematic.

[4] The respondent offered 5% of the shares in Synchroplex (Pty) Limited as a part payment towards the amount owed to the applicant for the BillBee Limited shares. The Synchroplex shares were allocated a value of R1 million, and the respondent made a further payment of R250, 000.

[5] This left the amount of R3, 250, 000 as due and payable, and this amount remained unpaid.

[6] The dispute as to the respondent's non-payment was referred to arbitration. Adv Helberg SC was appointed as the arbitrator and on 27 July 2021 an award was published, by agreement between the applicant and the respondent. In terms of the award, the respondent would *inter alia* pay to the applicant R3, 250, 000 by 31 August 2021 and interest (calculated at the prime rate) from 30 September 2019 to 31 August 2021.

[7] The respondent did not pay any amount towards the awarded amount and the applicant, on 1 December 2021, launched an application for the award to be made an

order of court in terms of section 31 of the Arbitration Act, 42 of 1965.

[8] The respondent gave notice of his intention to oppose the application, but no answering affidavit was delivered and ultimately, on 9 November 2022, the award was made an order of court and the respondent was ordered to pay to the applicant R3, 250, 000 together with interest calculated at 7% from 1 September 2019 to date of payment.

[9] No payment has been made pursuant to the court order and the respondent was (when the founding affidavit was deposed to) indebted to the applicant in the amount of R4, 478, 145.14 (being the capital amount of R3, 250, 000 together with accrued interest).

[10] It is common cause that this debt remains unpaid and this is the debt on which the applicant relies for *locus standi* to seek the order for provisional sequestration.

[11] The respondent (an advocate) appeared in person. Whilst the facts as they have been set out above are uncontroversial, the respondent did not, at the hearing, meaningfully participate. The points and issues raised in the respondents' answering affidavit and the heads of argument that were delivered on his behalf were, however, not abandoned and those points and issues are accordingly addressed below.

[12] The respondent – at least with reference to the founding affidavit and heads of argument – contends that:

- 12.1. whilst the “underlying debt” (which I understand to be a reference to the 2018 share transaction) was made up of credit agreements as contemplated in the National Credit Act 34 of 2005 (“the NCA”), the applicant ought to have been registered as a credit provider and the failure to have done so, impacts on enforceability (of the “underlying debt”);
- 12.2. the applicant has not established that the respondent committed an act of insolvency; and
- 12.3. the applicant has not established an advantage to creditors.

The issues raised in opposition to the application

The NCA and the underlying debt

[13] In the arbitration, the respondent placed reliance on the NCA as a defence to the claim by the applicant. This is apparent from the respondent's arbitration pleadings that were attached to the affidavits in this application. That notwithstanding, the disputes were settled and the award was accordingly published, by agreement (on 27 July 2021).

[14] Whilst the settlement presumably puts paid to any entitlement to rely on the NCA as a defence, the NCA related issues were in any event also not raised in the subsequent application that resulted in the award being made an order of court. The court order is clear in its terms and it is simply not open to the respondent, to again contend for an unenforceable underlying debt.

[15] The settlement, the arbitration award and thereafter, the court order (individually, or collectively) renders any dispute about the enforceability of the underlying debt *res judicata*.

[16] The *exceptio rei iudicatae* is founded on public policy, which requires that litigation should not be endless and on the requirement of good faith, which does not permit of the same thing being demanded more than once.¹ It is considered an abuse and vexatious to try and obtain the re-trial on a decided issue by simulating a different cause of action.

[17] The same principle applies to raising new, or different defences when proceedings (where it was open to a respondent or defendant, to raise such defences) have been finally determined.

[18] Thus, whilst it is not open to the respondent to contend, again, for non-compliance on the part of the applicant with the NCA, the respondent has also not challenged the court order. No appeal was noted against the order, and no steps have been taken to rescind, or vary the order. The order is accordingly evidence of the debt in its own terms and reliance

¹ African Farms & Townships Ltd v. Cape Town Municipality 1963 (2) SA 555 (A) at 564

on issues that might have impacted on the underlying debt is without merit. Fundamentally, in view of the court order, any debate about the nature, extent or enforceability of the underlying debt is wholly irrelevant.

Act of insolvency

[19] The applicant relies on a number of acts of insolvency. For present purposes, section 8(b) Insolvency Act no 24 of 1936 will suffice.

[20] This section provides, as follows:

‘(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...’

[21] The applicant has provided a copy (attached to the founding affidavit) of the Sheriff’s return, after a warrant of execution (following on the court order) had been issued, and having attempted to execute on the judgment on the respondent’s residential address, on 22 May 2023.

[22] In the return of service, the Sheriff says this:

‘I demanded the payment of the judgment debt from the EXECUTION DEBTOR. As the EXECUTION DEBTOR was unable to pay the judgement debt and costs in full or in part, I judicially attached the movable property of the EXECUTION DEBTOR as discribed [sic] in the attached notice of attachment’

[23] An inventory of attached movables is then provided, as follows:

1 x SONY TELEVISION SET 1550.00

1 x DEFY FRIDGE 1250.00

1 x 3 PIECE LOUNGE SUITE WITH COFFEE TABLE 3500.00
 1 x YELLOW WOOD WALL UNIT 7500.00
 1 x YELLOW WOOD DINING ROOM SUITE (8 X CHAIRS AND TABLE) 12500.00
 5 x ROSE WOOD CABINETS 3500.00
 1 x WOODEN TABLE 1000.00
 1 x L-SHAPED DESK 850.00
 6 x OFFICE CHAIRS 1200.00
 1 x MAHOGANY TABLE AND 4 X CHAIRS 7000.00
 1 x ANTIQUE OAK WALL UNIT 4500.00
 1 x BEDROOM SUITE (HEADBOARD AND DRESSER) 2000.00
 1 x THINKCENTRE COMPUTER WITH MONITOR 1350.00
 1 x HP PRINTER 450.00
 1 x ANTIQUE 5 PIECE COUCHES WITH 6 COFFEE TABLES 6500.00
 2 x DSTV DECODERS 1000.00
 3 x DVD-PLAYERS 1400.00
 1 x PLAYSTATION 4 CONSOLE 1850.00
 2 x ANTIQUE TABLE AND STAND 3500.00

[24] A “Total Estimated Value” (of the attached goods) in the amount of R62, 400.00 is recorded thereafter. The value of the attached goods (in this, or any other value) is nowhere near sufficient to satisfy the debt in question, and the respondent does not say otherwise.

[25] Instead, the respondent contends, in the heads of argument, that because *some* property was attached, the return could not be considered to be *nulla bona*, and then (it follows) that an act of insolvency had not been committed. This contention is without merit. The judgment debt is (without interest added) the amount of R3, 250, 000 and in Mars: The Law of Insolvency, the following is said (with my emphasis added):

‘If, notwithstanding the debtor’s failure when required so to do to satisfy the writ or indicate disposable property, the execution officer himself finds disposable

property, no act of insolvency has been committed. Therefore, if the debtor either satisfies the writ or indicates disposable property to satisfy it, or if the execution officer himself finds disposable property, there is no act of insolvency.

[26] It would make no sense if, as the respondent suggests, an attachment of *some* disposable property (even in a negligible amount) could thwart the operation of section 8(b). This section, on a proper construction, contemplates the availability of disposable property of a value that is sufficient to satisfy a judgment debt.

[27] The applicant, in any event, is not obliged to rely only on an act of insolvency. Section 10(b) of the Insolvency Act contemplates actual, factual insolvency as an alternative to an act of insolvency and I do not believe that, on the papers before me, there can be any doubt about the respondent's inability to pay his debts, and his factual insolvency. The respondent's contention to the effect that the proposed sequestration of his estate will not yield a benefit to creditors supports this fact and, in any event, the failure to pay a debt that is due is in itself indicative of an inability to do so. The respondent, notably, has not presented any evidence that could support a finding to the effect that he is able to pay the debt and the fact that this sizable debt has remained unpaid, for years, similarly bears testimony to an obvious inability to pay it.

Benefit to creditors

[28] In Commissioner, South African Revenue Services v. Hawker Aviation Partnership & Others² it is held, as follows:

'[29] The question is whether the Commissioner has established that sequestration would render any benefit to creditors, given that the partnership is now defunct. The answer seems to lie in those decisions that have held that a Court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The Court need be satisfied only that there is

² 2006 (4) SA 292 (SCA) at [[29] and Lynn & Main Inc v. Naidoo and Another 2006 (1) SA 59 (N) at [31] and further, Meskin & Co v. Friedman 1948 (2) SA 555 (W) at 558, London Estates (Pty) Ltd v. Nair 1957 (3) SA 591 (N) at 592F, and Lotzof v. Raubenheimer 1959 (1) SA 90 (O).

reason to believe - not necessarily a likelihood, but a prospect not too remote - that as a result of investigation and inquiry assets might be unearthed that will benefit creditors.'

[29] Hawker Aviation is on point and the question of a benefit to creditors ought to be considered against this background.

[30] The respondent has presented no evidence of his financial affairs, despite being a director or shareholder of companies and practicing as an advocate.

[31] Notably, the respondent did receive (in 2018) a substantial amount of money from the applicant, and whilst this has not been repaid, it is not known whether the respondent, instead of repaying the amount he received, appropriated it towards the acquisition of any asset, or, for that matter, whether it was used to settle other obligations.

[32] The respondent has (and at least, historically, had) interests in companies and when the applicant sought an order to declare an immovable property executable, a third party intervened claiming to have purchased the property, and paid for it in 2018. However, the property remained registered in the respondent's name at the time and this may be indicative of an arrangement that was designed to place assets beyond the reach of creditors.

[33] It is obviously not possible to find, at this stage, whether this arrangement was in fact intended to avoid creditors, and such a finding, at this stage, is not required. I am, however, satisfied that there is a prospect (not too remote) of disposable assets and/or impeachable transactions being unearthed, that will benefit creditors.

Conclusion

[34] For these reasons, I am satisfied that a proper case has been made, and that the applicant is entitled to an order for provisional sequestration of the respondent's estate.

Order:

I accordingly make the following order:

1. The estate of the respondent is placed under provisional sequestration and the respondent (and any party with an interest) may show cause on 2 February 2026 at 10:00 or so soon thereafter as the application may be heard, why:
 - 1.1. the respondent's estate should not be finally sequestrated; and
 - 1.2. the costs of this application be costs in the sequestration.
2. This provisional order of sequestration is to be served as follows:
 - 2.1. On the respondent at his residential address and by e-mail to 4[...];
 - 2.2. On any employees of the respondent and trade unions representing the employees of the respondent, if any, at the respondent's residential address;
 - 2.3. On the South African Revenue Service; and
 - 2.4. By publication in the Government Gazette and in a newspaper circulating in the area of the respondent's residential address.

J. DANIELS

Acting Judge of the High Court

GAUTENG DIVISION, JOHANNESBURG

This judgment was prepared by Acting Judge Daniels. It is handed down electronically by

circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 17 November 2025.

HEARD ON: 12 November 2025

DELIVERED ON: 19 November 2025

REASONS: 19 November 2025

For the Applicant: Adv. R Stevenson

Instructed by: Truter Jones Inc.

For the respondent: Appearance in person