



REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A 314/2014

In the matter between:

ABSA BANK LIMITED

Appellant

And

EBRAHIM BRIAN COLLIER

Respondent

Date of hearing: 30 January 2015

JUDGMENT DELIVERED 12 MARCH 2015

SAVAGE J:

Introduction

[1] This is an appeal against the refusal of Blignault J to grant to the appellant, Absa Bank Limited, as creditor, a final order of sequestration against the estate of the respondent, Mr Ebrahim Brian Collier on the basis that the appellant had failed to establish an act of insolvency within the meaning of s 8 (b) of the Insolvency Act 24 of 1936 (as amended).

[2] The appellant launched the application for sequestration in the court *a quo* as creditor of the respondent for an amount in excess of R800 000,00, including a judgment debt of R169 342,81. The sheriff rendered a return of *nulla bona* following an attempt to serve a writ of execution against the respondent's movable property to satisfy the judgment debt. Recorded in the

sheriff's return was that the respondent had indicated on 27 November 2012 at 08:55 that '*it was impossible to pay the amount claimed or any sum*' and that:

'....(e)xcept property exempted by law in terms of Section 39 of Act 59 of 1959, as amended, no property or assets could, after enquiry, be pointed out to satisfy this writ. Despite a diligent search and enquiry I could not find sufficient disposable property to satisfy this writ. I therefore make a return of NULLA BONA. The debtor was requested to declare whether HE has any immovable property which is executable, on which the following answer has been furnished: 'I DO NOT OWN MOVABLE OR IMMOVABLE PROPERTY'.

[3] Mr Ashraf Roker, a manager of the appellant, deposed to the appellant's founding affidavit in the sequestration application, relying on the sheriff's *nulla bona* return as *prima facie* proof of the commission of an act of insolvency by the respondent under s 8(b) of the Act. In this affidavit Mr Roker stated that the respondent is '*permanently domiciled*' at 19 Marsden Road, Walmer Estate, Woodstock, Cape Town, Western Cape and is the co-owner, with his wife to whom he is married according to Muslim rites, of immovable property described as erf 2778 Sandbaai, Western Cape over which a covering mortgage bond in the amount of R858 000,00 has been registered in favour of the appellant as security for the obligation of the respondent.

[4] The respondent opposed the sequestration application, admitted the judgment debt but disputed the appellant's *locus standi* to bring the application. He denied having informed the sheriff that it was impossible for him to pay the amount due and stated that he had indicated to the sheriff that with Perl Zips CC, a close corporation of which he is sole member, he holds a damages claim against the appellant for a sum exceeding R50 million arising from a negligent misstatement made by the appellant that Perl Zips CC was in liquidation and against which damages claim the appellant's claims against him should be set off. The respondent stated that he currently resides at both 19 Marsden Road, Walmer Estate and at erf 2778 Sandbaai and that—

'...It should be noted....that I at no stage advised the sheriff that I do not own any movable and/or immovable property, I advised him that I live

temporary at No. 19 Marden Road, Walmer Estate, Woodstock for work purposes as all of my business are in the Cape Town area, I however retreat to my own home namely Sun Breeze, Hermanus, commonly known as Erf 2778 Sandbaai, when I am not busy with my businesses, weekends and holidays.'

[5] Filed together with the appellant's replying papers was an affidavit deposed to by Mr Johan Erasmus, the sheriff who attended to the service of the warrant of execution, in which he confirmed the veracity of the contents of the return and stated that:

'I confirm that the nulla bona return followed upon the respondent's inability to make payment of the amount claimed and his failure to point out any movable assets to satisfy a judgment or any portion thereof as I requested him to do.'

[6] On 2 September 2013 a provisional order of sequestration was granted against the respondent. On the return date of that order the appellant contended that it had discharged the onus of proving an act of insolvency under s 8(b) *prima facie* by way of the sheriff's return and that the onus thereafter shifted to the respondent to impeach the return on '*the clearest and most satisfactory evidence*'.¹ The respondent persisted that the sheriff's return was factually incorrect as he had advised the sheriff of his ownership of the immovable property and that the return was not congruent with the true facts known to the appellant that the respondent owned the property against which a covering mortgage bond was registered in favour of the appellant.

[7] The court *a quo* refused a final order of sequestration against the respondent on the basis that the appellant had failed to establish an act of insolvency on the part of the respondent within the meaning of s 8(b). The court concluded that the appellant as mortgagee was able to dispose of the property and that the respondent's undivided half share did not render it immune from execution.

¹ *Deputy-Sheriff v Goldberg* 1905 TS 680 at 684 referred to in *Sussman & Co (Pty) Ltd v Schwarzer* 1960 (3) SA 94 (O) at 96D, as quoted in *Van Vuuren v Jansen* 1977 (3) SA 1062 (T) at 1062H

Evaluation

[8] Section 8 of the Act provides that:

‘8. A debtor commits an act of insolvency –

...

(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; ...’

[9] This provision refers to two acts of insolvency. The first is committed when the debtor fails to satisfy the judgment or to indicate sufficient disposable property to satisfy it; and the second when the sheriff fails to find sufficient property to satisfy the judgment.²

‘Disposable property’

[10] With no dispute between the parties that the appellant is the holder of a first mortgage bond over the Sandbaai property co-owned by the respondent, the appeal turns, in the first instance, on whether the respondent’s immovable property constitutes *‘disposable property’* within the meaning of s 8(b) or not.

[11] The court *a quo* relying on *Western Bank Ltd v Els*,³ in which reference is made *inter alia* to the Cape full bench decision of *Van der Poel v Langerman*,⁴ concluded that given that the appellant is first mortgagee of the property, regardless of the fact that it is an undivided half share and had not been declared specially executable under rule 46(a)(ii), the immovable property amounted to *‘disposable property’* under s 8(b).

[12] Our courts have consistently found that *‘disposable property’* for purposes of s 8(b) may include immovable property, irrespective of whether

² *Rodrew (Pty) Ltd v Rossouw* 1973 (3) 137 (O) at 138B-C and the authorities cited there

³ 1976 (2) SA 797 (T) at 799E-800B

⁴ 3 Menz 307

the writ is directed against movables only.⁵ Divergent views have however arisen regarding whether bonded immovable property in respect of which the applicant is the first mortgagee is disposable under s 8(b).

[13] In *Van der Poel v Langerman*⁶ immovable property in respect of which the judgment creditor held a first mortgage bond was found to constitute ‘sufficient disposable property’ within the meaning of s 4 of Ordinance 64 of 1843 and that:

‘...the word “property” included real as well as movable property – (vide Burton’s Insolvent Law, p. 44); that as the affidavit stated, and the plaintiff did not deny the allegation, that the property was worth upwards of £2,000, the defendant had shown he was possessed of sufficient property to satisfy the plaintiff’s judgment; and that as the plaintiff held the first mortgage, not only was this property disposable for the satisfaction of that judgment, but that it could be disposed of by the plaintiff for that purpose, by attachment and judicial sale, as easily, and in as short a time, as under a sequestration of the defendant’s estate.

That in this case it was unnecessary for the defendant to have pointed out the hypothecated real property to the Sheriff’s officer, seeing that the plaintiff’s own bond informed him of it; and that he ought, after the return made on the writ against the defendant’s goods and chattels, to have sued out a writ for attaching the immovable property...’⁷

[14] In *De Waard v Andrew & Thienhaus Ltd*,⁸ in which immovable property was bonded to a third person, Innes CJ stated that -

‘And I gather from the case of Dell v McHattie⁹ that the principles which underlay Van der Poel v Langerman were approved by the late High Court – though I may point out that the circumstances in the two cases differed. Still, I think the High Court intended to affirm the principle of Van der Poel v Langerman, and we ought not now to lay down a different rule. We must assume that the pointing out of land would be a sufficient pointing out of disposable property within the meaning of the section. But the land must be

⁵ *Nedbank Ltd v Norton* 1987 (3) SA 619 (N) at 622E with reference to *Amalgamated Hardware & Timber (Pty) Ltd v Wimmers* 1964 (2) SA 542 (T) and *Rodrew (Pty) Ltd v Rossouw* 1975 (3) SA 137(O). See too *Saber Motors (Pty) Ltd v Morophone* 1961 (1) SA 759 (W) and *Moodley v Hedley* 1963 (3) SA 453 (N) at 455C.

⁶ 3 Menz 307

⁷ At 308

⁸ 1907 TS 727 at 732

⁹ 1 SAR 113

freely disposable. And land mortgaged to a third person would not fall within that category, because the consent of the mortgagee would have to be obtained.'

[15] The decision in *Van der Poel v Langerman* was followed in *Marsh v Makein*,¹⁰ in which the judgment creditor had obtained provisional sentence as first mortgagee on a mortgage bond and the property had been declared executable. Noting that in *Van der Poel*'s case the applicant as first mortgagee '*had obtained an order declaring the property executable*'¹¹, as was the case in *Marsh v Makein*, Innes CJ distinguished the facts in *De Waard* finding that the immovable property was bonded to a third person whose consent had not been obtained, and that the return of *nulla bona* was therefore a correct return and that an act of insolvency had been committed.¹²

[16] Solomon J in a separate concurring judgment stated that:

'I think we ought to consider ourselves bound by the cases of Van der Poel v Langerman and Marsh v Makein. In those cases the extent to which the court went was this, that where a first mortgagee of land had obtained judgment, and the property had been declared executable, if it appeared that the value of the property was sufficient to satisfy the exigency of the writ, no order of sequestration could be granted. All the cases on this point which have been decided in the Cape court were cases in which the first mortgagee was the creditor, and where the property had been declared executable at his suit...

*...But the case is very different where the landed property which has been pointed out is mortgaged property. For we must take disposable property to mean property which can be realised at once; because the creditor is entitled to immediate payment of his debt, and, consequently, where the property is mortgaged, and where the consent of the mortgagee has not been obtained to the sale of the property, in my opinion the property is not disposable within the meaning of sub-sec (b) of sec. 8 of the Insolvency Law.'*¹³

[17] Bristowe J, in his concurring judgment, put it this way:

'Mortgaged property is not property which is immediately disposable. It can only be sold after certain processes have taken place, or at all events after certain consents have been obtained. Whether it would be disposable property

¹⁰ 2 SC 104, a decision of this Court in 1883-4

¹¹ *De Waard* (*supra*) at 732

¹² At 732-3

¹³ At 735

if, when the insolvent pointed it out, he also handed a consent or a power of attorney from the mortgagee to sell, is another question; but, at all events, where that has not taken place I do not think mortgaged property is “disposable property” within the meaning of section. That being so, an act of insolvency has been committed.’¹⁴

[18] In *Fourie v Bezuidenhout*¹⁵ it was found that where the creditor is not the mortgagee, mortgaged property is not ‘disposable property’ and the sheriff is not required to mention it in his return.¹⁶ In *Matthiessen v Glas*,¹⁷ with reference to *De Waard* and *Fourie v Bezuidenhout*, it was noted that despite the debtor being the owner of various immovable properties –

‘...the decisive point is that property which is bonded is not disposable property. This means that the debtor, the owner of the property, has not got the free right to dispose of it, because the bondholder can control its disposal, so that he has to get the consent of the bondholder before he can dispose of it; therefore, it is not disposable property...’.

[19] Broome JP in *Tewari v Secura Investment*,¹⁸ a Natal full bench decision, relying on *De Waard* and *Matthiessen v Glas* came to the same conclusion that bonded immovable properties did not constitute disposable property ‘because they were mortgaged and so not freely disposable’.

[20] In *Van der Poel and Marsh v Makein* the creditor was the first mortgagee in respect of immovable property held by the debtor, while in *De Waard*, *Fourie v Bezuidenhout* and *Matthiessen v Glas* the creditor was not the first mortgagee. It is this distinction upon which the court in *Western Bank v Els*¹⁹ relied, with reference to *Van der Poel* and *De Waard*, finding that –

‘... only where the mortgagee is a third party will the bonded property be excluded from the category of disposable property in terms of sec 8 (b) of the Insolvency Act’.

¹⁴ At 738

¹⁵ 1932 TPD 110

¹⁶ Discussed by Nathan in his Commentary on the Insolvency Act, 1936 at 43

¹⁷ 1940 TPD 147 at 149

¹⁸ 1960 (3) SA 432 (N) at 434D

¹⁹ 1976 (2) SA 797 (T) at 800E-G

[21] In *Barclays National Bank v Badenhorst*,²⁰ without reference to either *Van der Poel* or *De Waard*, immovable property was found not to constitute ‘disposable property’ for purposes of s 8(b) when subject to a first mortgage bond given that an order declaring the property to be specially executable was required before the property could be attached and sold in execution.

[22] A number of writers have reflected the legal position as that set out in *Van der Poel* and *De Waard*, to which reference is made in *Western Bank*. In 1937 Davidson,²¹ referring to *Johnson v Papas*,²² stated that disposable property meant property freely disposable and not mortgaged to a third person. This same view was expressed by Nathan in 1936.²³ Meskin²⁴ and Mars note, with reference to *Western Bank* that as an exception mortgaged property will be regarded as disposable if the applicant is the first mortgagee, noting that the case of *Barclays National Bank* was decided differently.

[23] The purpose of the Insolvency Act is stated in general terms as being ‘to consolidate and amend the law relating to insolvent persons and to their estates’ with s 8 providing a *numerus clausus* of acts of insolvency committed by a debtor, of which s 8(b) is one. The purpose of s 8(b) is to determine whether the debtor holds disposable property sufficient to satisfy a debt. The Oxford English Dictionary defines ‘disposable’ as ‘readily available for...use as required’.

[24] Rule 46(1) provides that:

‘(a) No writ of execution against the immovable property of a judgment debtor shall issue until –

...

(ii) such immovable property shall have been declared to be specially executable by the court ...: Provided that, where the property sought to be attached is the primary residence of the

²⁰ 1973 (1) SA 333 (N) at 338F

²¹ Practice and Procedure under the Insolvency Act, 1937 at 68

²² 1926 OPD 8

²³ South African Insolvency Law, 1936 at 44

²⁴ Insolvency Law (2014) at 2-8

judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.'

[25] In terms of rule 46(5), immovable property subject to a claim preferent to that of the execution creditor shall not be sold in execution unless written notice of the intended sale is served by registered post upon the preferent creditor and the local authority concerned, if the property is rateable, '*calling upon them to stipulate within 10 days of the date to be stated a reasonable reserve price or to agree in writing to sale without reserve...*'.

[26] The court in *Gerber v Stolze and others*²⁵ examined the purpose of seeking the issue of a writ against immovable property, stating that:

'The only reason for applying to Court at all is to have a short-cut in the one case where a money judgment has been obtained and the money judgment is secured to the plaintiff by specially hypothecated immovable property; then, in the normal course, the court is asked, in advance, to dispense with the circumlocution of having to take execution against the movable property first and only on that property failing to realise the money sum, then to have recourse against the immovable property. When an order is granted declaring executable the property specially hypothecated, the order permits the grantee, the creditor, to take his execution straight away against the immovable property.'

[27] A judgment creditor may under rule 45(1) sue out of the office of the registrar a writ against movable property. A writ directed against movable property requires the sheriff in terms of rule 45(3) to demand of the debtor in '*satisfaction of the writ...so much movable and disposable property be pointed out as he may deem sufficient to satisfy the said writ*', failing which the sheriff is to search for such property. Our courts have consistently found '*disposable property*' for purposes of s 8(b) to include immovable property, irrespective of whether the writ is directed against movables only.²⁶ It is immaterial that if the property found by the sheriff is unbonded immovable property, an order of

²⁵ 1951 (2) SA 166 (T) at 172F-H

²⁶ *Nedbank Ltd v Norton* 1987 (3) SA 619 (N) at 622E with reference to *Amalgamated Hardware & Timber (Pty) Ltd v Wimmers* 1964 (2) SA 542 (T) and *Rodrew (Pty) Ltd v Rossouw* 1975 (3) SA 137(O). See too *Saber Motors (Pty) Ltd v Morophone* 1961 (1) SA 759 (W) and *Moodley v Hedley* 1963 (3) SA 453 (N) at 455C.

special execution against such property under the provisions of rule 46(1) remains a requirement regardless of the identity of either the judgment creditor or the debtor, whether the property is a primary residence or not, or is owned by an individual or a company.

[28] If immovable property by its nature were to fall outside the definition of ‘*disposable property*’ for purposes of s 8(b) unless an order of special execution had been granted in terms of rule 46(1) declaring the property executable and therefore ‘*disposable*’, the search for ‘*disposable property*’ by the sheriff executing a writ against movables in terms of s 8(b) would practically be limited to a search for movable property. The relative ease with which a writ against movables is capable of being obtained supports a conclusion that the process of execution is aimed at encouraging a judgment creditor to execute against movables first and in the event that insufficient movables are found to be available to satisfy the debt, then only against immovable property. Were it to be required under s 8(b) that for immovable property found to be considered ‘*disposable*’ an order of special execution must already have been granted against the property, this could encourage execution against immovable property even before a writ had been executed against movables.

[29] Furthermore, if immovable property was not to be disposable without an order of special execution having been granted, a *nulla bona* return would be capable of being rendered under s 8(b) even when the provisions of rule 46(1) would not reasonably have posed an impediment to the disposal of such immovable property, such as when the property was not the primary residence of the debtor.

[30] A judgment creditor who is first mortgagee in respect of the debtor’s immovable property is placed in a position materially distinct from that of other judgment creditors and subsequent mortgagees insofar as the first mortgagee as preferent creditor may seek the issue of a writ of execution

against the immovable property in order to satisfy a judgment debt without notice such as that required by rule 46(5). Execution against the immovable property may therefore ensue at the instance of the first mortgagee, an advantage not open to other creditors in the absence of the consent of the first mortgagee.²⁷ For this reason the position of the first mortgagee is materially different from that of all other judgment creditors or subsequent mortgagees.

[31] Mr Vivier contended for the appellant that the court *a quo*'s reliance on *Van der Poel* was misplaced given that in that matter no order of special execution had been granted. It is so that Innes CJ in *De Waard* incorrectly stated that in *Van der Poel* an order of special execution had been granted against the debtor's immovable property when it had not. However, the judge distinguished the facts in *De Waard* from *Van der Poel* and based his conclusion that the immovable property was not disposable on the fact that it was bonded to a third person whose consent had not been obtained and that a *nulla bona* was therefore the correct return. It follows that the distinguishing feature between *De Waard* and *Van der Poel* was that in the former matter a third party mortgagee's consent had not been obtained and in the latter no consent was required given that the judgment creditor was the first mortgagee.

[32] In interpreting what constitutes '*disposable property*', the purpose and context of the provision are important guides.²⁸ While a definition is not to be given that '*...leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration*':²⁹

'...Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation...The 'inevitable point of departure is the language of the provision itself', read in context and

²⁷ *Qui prior est tempore potior est iure* (cf D 20 4 11 et seq)

²⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 26

²⁹ At para 26

having regard to the purpose of the provision and the background to the preparation and production of the document'.³⁰

[33] Our law has long recognised a distinction between the rights of a first mortgagee and those of a subsequent mortgagee.³¹ To find no distinction between property in respect of which the judgment creditor is first mortgagee and that in which the judgment creditor is a subsequent mortgagee and that all mortgaged property is not disposable within the meaning of s 8(b), would amount to an interpretation that is impractical, unbusinesslike and is likely to stultify the broader operation of the legislation. As much as the fact that an asset is subject to a mortgage does not immunise it from execution at the instance of an unsecured creditor, execution by a subsequent mortgagee may proceed subject to there being a yield to the preferent claim of the prior mortgagee. What permits a conclusion that immovable property in respect of which a preferent creditor may obtain a writ and execute is '*disposable*' is that there exists no restriction on such execution, save for that the requirements of rule 46(1) having been met, and no consent of other mortgagees or judgment creditors required in order to proceed against the property.

[34] In the circumstances of the current matter, the immovable property held by the judgment debtor is therefore disposable at the instance of the judgment creditor, being the first mortgagee, for purposes of s 8(b) regardless of the fact that the property had not been declared specially executable. It follows that the decision in *Van der Poel* is correct and that it is binding upon this Court.

[35] There can be no issue taken with the court *a quo*'s conclusion that a writ of execution is capable of being issued against an undivided half share in immovable property. An undivided half share may constitute disposable property within the meaning of s 8(b)³² and the court *a quo*'s conclusion in this regard was correct. There was no suggestion in this matter that the immovable

³⁰ At para 18

³¹ See footnote 27

³² LAWSA 27 at 412

property of the respondent, if found to constitute ‘*disposable property*’ within the meaning of s 8(b), would be sufficient to meet the respondent’s indebtedness to the appellant. It follows that the respondent holds ‘*disposable property sufficient to satisfy*’ his indebtedness to the appellant. The appellant did not show there have been committed an act of insolvency within the meaning of the provision and the court *a quo* was correct in discharging the provisional order of sequestration made against the respondent.

Sheriff’s return

[36] While the court *a quo* made no findings with regards to the veracity of the sheriff’s return, the appellant persisted on appeal that the return evidenced an act of insolvency under s 8(b). A sheriff’s return is *prima facie* proof of its contents by virtue of s 43 of the Superior Courts Act 10 of 2013 which provides that:

‘...(2) *The return of the sheriff or deputy sheriff of what has been done upon any process of court provides, shall be prima facie evidence of the matters stated therein*’.

[37] *Prima facie* evidence calls for an answer and places an evidential burden on the respondent. It follows that where a respondent seeks to impeach a return of the sheriff this must be done on ‘*the clearest and most satisfactory evidence*’.³³ It is not open to a respondent to impeach a return on flimsy grounds or when there exists no reasonable basis on which to do so. In *Sussman & Co (Pty) Ltd v Schwarzer*³⁴ it was stated that:

‘...If the respondent then wishes to impeach those facts then the onus shifts to him to show by clear evidence that although the return shows that the requirements of sec. 8(b) have been complied with they were in fact not complied with and that the return is not a proper return. Where, however, the return itself does not show that the requirements of the sub-section have been

³³ As stated in *Deputy-Sheriff v Goldberg* 1905 T.S. 680 at 684 to which reference is made in *Sussman & Co (Pty) Ltd v Schwarzer* 1960 (3) SA 94 (OPD) at 96D-H; *Meskin Insolvency Law* 2-6(6); *Saber Motors (Pty) Ltd v Morophane* 1961 (1) SA 759 (WLD) at 761D; *Van Vuuren v Jansen* 1977 (3) SA 1062 (TPD) at 1062H

³⁴ At 96C-F quoted with approval in *Van Vuuren v Jansen* 1977 (3) SA 1062 (T) at 1062H-1062C

complied with, then the onus is not shifted and it rests on applicant to show that in fact the requirements have been complied with and that the return is in fact a nulla bona return.' ³⁵

[38] In disputing the veracity of the sheriff's return, the respondent indicated that he had informed the sheriff of his ownership of the immovable property at Sandbaai. The sheriff in his affidavit both denied that the return of service was wrong and the respondent's allegations made in his opposing affidavit. However, the sheriff's statement under oath that the *nulla bona* return followed the respondent's inability to pay and his failure to point out any movable assets to satisfy the debt when requested does not accord with the return which attributes an express statement regarding both movable and immovable property to the respondent. This lack of precision on the part of the sheriff, when provided with an opportunity to clarify, does not aid the appellant in that it fails with the exactitude required to confirm the contents of the return insofar as the statement is made that only movable assets were unable to be pointed out by the respondent.

[39] Motion proceedings concern the resolution of legal issues based on common cause facts and cannot be used to resolve factual issues because they are not designed to determine probabilities.³⁶ It is trite that in terms of the *Plascon-Evans*³⁷ rule where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. This is so unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. Faced with the dispute of fact regarding the veracity of the sheriff's return and without the matter having been referred to oral evidence, the court *a quo* was obliged to resolve the dispute on the basis of *Plascon-Evans* against the applicant. This

³⁵ *Sussman & Co (Pty) Ltd v Schwarzer* at 96G-H

³⁶ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D

³⁷ *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E-635D

was so given that the respondent's version is not untenable, palpably implausible or far-fetched.

[40] In *Ngqumba & 'n Ander v Staatspresident & Andere*³⁸ and *National Director of Public Prosecutions v Zuma*³⁹ it was made clear that *Plascon-Evans* rule does not operate in reverse against a respondent even where the onus rests upon the respondent. Rogers AJ (as he was then) put it this way in *Morgenster 1711 v De Kock NO*⁴⁰

*'The respondents bear the burden of proving possession of the requisite character and duration. However, and because the applicant chose to institute the proceedings on motion, any disputes of fact relevant to that question must be resolved in favour of the respondents unless the assertion in question is so untenable or far-fetched that it can be dismissed on the papers.'*⁴¹ I note in this regard that neither side sought a referral of the matter to oral evidence despite my having drawn to counsel's attention the obvious dangers for each side in having the question decided on paper without the benefits of trial proceedings (including the right to subpoena witnesses who might have been unwilling to provide affidavits, the cross-examination of witnesses, discovery and the like).

[41] An applicant who presses for a decision on the papers in the face of a factual dispute by necessary implication consents to the matter being decided on the basis of the rule in *Plascon-Evans*. The reason for this is not because the onus is on the applicant but because the applicant is *dominus litis* and must be taken to know that a court cannot decide factual disputes on probabilities or on onus in opposed motion proceedings.⁴² A respondent who bears the onus is not *pro tanto* regarded as applicant for purposes of the rule in *Plascon-Evans*, which does not work in reverse against the respondent, regardless of the incidence of the onus.⁴³

³⁸ 1988 (4) SA 224 (A) at 259C-263D

³⁹ 2009 (2) SA 277 (SCA) paras 26-27

⁴⁰ 2012 (3) SA 59 (WCC) at par 19.

⁴¹ *Ngqumba & 'n Ander v Staatspresident & Andere* 1988 (4) SA 224 (A) at 259C-263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 26-27.

⁴² *Ngqumba (supra)* at 243G-H

⁴³ *Ngqumba* at 244A-C and 259C-262B

[42] It follows for these reasons that the dispute with regards to the sheriff's return fell to be determined on the application of the rule in *Plascon-Evans* in favour of the respondent.

Order

[43] In the result, I propose an order in the following terms:

1. The appeal is dismissed with costs.

K M SAVAGE

Judge of the High Court

I agree and it is so ordered.

A H VELDHUIZEN

Judge of the High Court

I agree.

P A L GAMBLE

Judge of the High Court

Appearances:

Appellant: Mr P de B Vivier
Instructed by Sandenbergh Nel Haggard

Respondent: Mr W Fisher
Instructed by N Allen Attorneys