

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Abdoola (12673/22P) [2024] ZAKZPHC 104 (14 June 2024) [2024] ZAKZPHC 104

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Henriques

CASE / FILE NUMBER

12673/22P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

NO: 12763/22P

In

the matter between:

FIRSTRAND
BANK LIMITED
(REGISTRATION
NUMBER: 1929/001225/06)
Applicant
and
MOHAMMED
RIAZ
ABDOOLA
Respondent
IDENTITY
NUMBER: 7[...]
DATE

OF BIRTH: 12 OCTOBER 1971
MARRIED
OUT OF COMMUNITY OF
PROPERTY
TO FEMIDA ABDOOLA
ORDER
The

following order is issued:

1.
The estate of the Respondent is placed in provisional sequestration in terms of the provisions of the Insolvency Act, 24 of 1936;
2.
The estate of the Respondent is provisionally sequestrated in the hands of the Master of the Kwa-Zulu Natal Division, Pietermaritzburg (“the Master”);
3.
A rule nisi is issued calling upon all persons interested to show cause, if any, to this court on the 22nd day of August 2024 at 09h30 or so soon thereafter as the matter may be heard, why the estate of the Respondent should not be finally sequestrated in the hands of the Master and why the costs of this application on the attorney and client scale should not be costs in the sequestration;
4.
The order operate, with immediate effect, as a provisional order for the sequestration of the Respondent;
- 5.

The service of the order
be effected by:

- 5.1
service on the Respondent at 5[...] S[...], 1[...] A[...] Road, Greyville, Durban;
- 5.2
service on the employees of the Respondent, if any;
- 5.3
service on every registered trade union that represents any of the employees of the Respondent, if any;
- 5.4
service on the South African Revenue Service; and
- 5.5
service on the Master of the High Court, Pietermaritzburg.

JUDGMENT

HENRIQUES ADJP:

Introduction

- [1] There is a German proverb which says “He who is quick to borrow is slow to pay”. These words aptly describe the conduct of the respondent in this matter. This is an application for an order provisionally sequestrating the respondent’s estate. The applicant is a judgment creditor of the respondent having obtained judgment before Hadebe J on 13 April 2022 for payment of R20 million plus interest and costs which judgment debt has not been satisfied.
- [2] The respondent sought leave to appeal the judgment of Hadebe J on 19 May 2022, which leave to appeal was refused with costs on 11 August
2022. The respondent then petitioned the Supreme Court of Appeal which petition was lodged on 12 September 2022 and refused on 14 March 2023. The respondent subsequently in May 2023 sought leave to appeal to the Constitutional Court which leave to appeal was refused with costs on 21 August 2023.
- [3] It is apposite at this point in time to set out the basis upon which the applicant obtained the judgment against the respondent. The respondent’s indebtedness arose from him having bound himself as surety and co-principal debtor in favour of the applicant for the debts of Check One Supermarkets (Pty) Ltd (Check One) and Wishing Stone Investments (Pty) Ltd (Wishing Stone) (hereinafter referred to as “the companies”), the respondent at the time, being
- the director of both companies.
- [4] Check One is in business rescue and Wishing Stone is in provisional liquidation. The application for a final liquidation order is still pending as the respondent instituted an application to place Wishing Stone in business rescue which is being opposed. Prior to the liquidation of Wishing Stone and Check One being placed in business rescue both companies traded with banking facilities provided by the applicant.
- [5] On 3 April 2017, a facility agreement was concluded between the applicant, Check One and Wishing Stone. A suretyship for joint and several liability limited to R20 million was also concluded on the same day between the respondent and the applicant. Unlimited suretyships were also concluded in Durban on 24 August 1994 between the applicant and Wishing Stone and the applicant and Check One.

- [6] It is common cause that Check One and Wishing Stone as principal debtors were in breach of the Facility Agreements. The applicant approached the respondent to resolve the matter and remedy their default. As a consequence a settlement agreement was concluded on 6 August 2019 between the applicant and the respondent who acted both in his personal capacity and as representative of the companies.
- [7] In terms of the settlement agreement:
- 7.1 the respondent acknowledged liability for the debt and that it was immediately due, owing and payable;
- 7.2 the debt amounted to approximately R47 million;
- 7.3 the respondent and the companies undertook to make payment of the full amount outstanding by 31 October 2019;
- [8] In the event of a breach of the settlement agreement, the full amount of the indebtedness together with costs and interest became immediately due and payable to the applicant.
- [9] The terms of the settlement agreement were not complied with and the debt not repaid by the companies or the respondent. As a consequence, the applicant instituted proceedings to wind up the companies and for

judgment

against the respondent in terms of the limited suretyship in the sum of R20 million.

- [10] Check One was subsequently placed into business rescue by the respondent and Wishing Stone was placed into provisional liquidation pending a business rescue application instituted by the respondent.
- [11] Although the respondent opposed the proceedings before Hadebe J, judgment was granted. Apart from obtaining the default judgment against the respondent, arising from his being surety, the applicant also obtained a costs order against the respondent in the winding up application of Wishing Stone. This was as a result of the respondent issuing an application for business rescue the day before the final winding up order was to be argued. As a result, the court adjourned the winding up application but granted a costs order against the respondent in his personal capacity.
- [12] The applicant subsequently taxed a bill of costs against the respondent in the sum of R59 824.17. On receipt of the taxed bill of costs the respondent's attorneys of record wrote to the applicant tendering payment of the sum of R59 824.17 in three instalments. It is undisputed however, that the debt in respect of the taxed costs has been paid and the respondent did so in a single instalment on 2 November 2022.

Acts of insolvency

- [13] The applicant relies on the following acts of insolvency to found the application for sequestration namely a paragraph from the respondent's answering affidavit in the application for judgment specifically paragraph 64 where he states the following under oath:
- 'To properly grasp, the Applicant's destructive purposes against Check One, Wishing Stone and myself, I point out to this Honourable Court, that the suretyship I signed capped at R20 Million, was untenable because I have never held nor owned assets of that amount at the time of signing or presently.'
- [14] In addition, the applicant conducted a Windeed property search which established that the respondent does not own any immovable property.
- [15] The applicant consequently submits that the excerpt in this answering affidavit constituted a notice in writing that the respondent was unable to pay his debts as contemplated in s 8(g) of the Act.
- [16] The second act of insolvency which the applicant relies on is that envisaged in terms of section 8(b) of the Act as the sheriff has rendered two nulla bona returns dated 28 June 2022 and 30 May
2022. On 18 May 2022 (prior to the respondent delivering the application for leave to appeal) the sheriff attended at the respondent's residential address to execute on the R20 million judgment. The return of service notes that when he made demand for payment of the judgment debt from the respondent it was not paid and insufficient property to satisfy the judgment was pointed out.
- [17] The second nulla bona return relates to the sheriff attending at the residential property of the respondent on 24 May 2022 to execute the writ of execution in respect of the unpaid costs order granted against the respondent. The return of service notes that despite demand for payment of R59,824.27 the respondent did not pay the same and no disposable assets were pointed out or found by the sheriff to satisfy the demand for the amount.
- [18] These two acts of insolvency were committed prior to the application for leave to appeal and prior to the taxed costs being paid.
- [19] In response to the sheriff's attempt at execution of the debt of R59,824.27 the respondents' attorneys of record addressed correspondence to the applicant's attorneys on 30 May 2022. The respondent proposed settling the outstanding amount of taxed costs in three monthly instalments.
- [20] This the applicant submits is a further act of insolvency as the letter constituted a notice in writing of the respondent's inability to pay his debt as contemplated by s 8(g) of the Act.
- [21] The applicant not only relies on the acts of insolvency to show that the respondent is insolvent it also relies on the fact that the respondent is factually insolvent. The applicant submits that even if only the applicant's claim is taken into account the respondent is insolvent. This is further demonstrated by the fact that Check One had creditors of over

R400 million and one of Check One's creditors Shield is owed over R100 million. The respondent had signed surety for this debt and it is likely that the respondent has signed suretyships for other creditors of Check One. Consequently, it submits that the respondent is de facto insolvent.

Advantage to creditors

[22] The leading authority on what constitutes advantage to creditors is the decision in *Meskin & Co v Friedman*.^[1] The applicant is required to satisfy the court that there is reason to believe that sequestration would be to the financial advantage of creditors or stated differently that there is a reasonable prospect, not too remote, that some not negligible pecuniary benefit will be obtained by creditors. This would include a prospect of a pecuniary benefit and also would be to the advantage if an enquiry were conducted into the respondent's financial affairs where there is a prospect of undisclosed assets being brought to light.

[23] In support of its contentions that it would be the advantage of creditors of the respondent for his estate to be sequestrated, the applicant relies on the following:

23.1 the fact that the respondent's spouse although he is made out of community of property to her, owns an unencumbered immovable property which vests in the trustees in terms of s 21 of the Act;

23.2 the respondent has admitted he is a director of LENZO Investments Pty Ltd and LESCOT Investments Pty Ltd. Although he does not disclose the extent of his interests, he confirms that he is conducting the affairs of these two companies. The respondent contends that this fact is irrelevant as he is not insolvent, the trustees will have the powers of investigation and can fully investigate the respondent's affairs. In addition to these powers, the trustees will be able to fully investigate what has become of the respondent's entitlement to the benefits of the business which in 2017 turned over R2.1 billion. In addition, it is evident, having regard to the respondent's various affidavits that despite not owning any assets he has been a director of several entities, among them Check One and Wishing Stone and has signed surety for these entities, but also that of Shield One.

[24] At the initial hearing of the matter Mr Harpur SC indicated that the allegations of procedural non-compliance with the Insolvency Act were no longer in dispute and were a not being pursued. He submitted that there were a number of aspects on which the respondent challenged the sequestration application. The first related to the fact that the appeal process was still pending before the Constitutional Court. It emanated during the course of argument that the petition to the Supreme Court of Appeal had been lodged on the 14 September 2022 and was finalized in March 2023.

- [25] The sequestration application had been set down for hearing by the applicant on 5 December 2022. Subsequent, to the refusal of the petition to the Supreme Court of Appeal. The respondent then lodged the application for leave to appeal with the Constitutional Court in May 2023. Mr Van Rooyen confirmed that the applicant's answering affidavit in the application for leave to appeal which was due on 24 May 2023 had been lodged. As at the date of the hearing in May 2023 the appeal before the Constitutional Court was still pending.
- [26] The crux of the appeal relates to the failure by Hadebe J to allow an interlocutory application to serve before her at the hearing of the application in which the applicant obtained the default judgment against the respondent for R20 million based on the suretyship agreement. When I asked Mr Harpur SC whether or not the documents that the appeal related to were before me and whether or not I could decide the sequestration application on the papers before me, his response was 'yes and no My Lady'.
- [27] At the initial hearing before me, the respondent challenged his indebtedness which formed the basis of the judgment. The first related to the fact that the respondent's accountant had done a recalculation of the interest and found an over-calculation of interest of approximately R6 million. He indicated that one could not simply combine the debts of the two entities being Wishing Stone and Check One and simply subtract the over-calculated amount from the money due as this was a joint facility extended to two entities.
- [28] In addition, he indicated that the judgment was granted based on the suretyship agreement. He raised vague allegations of duress and also indicated the suretyship agreement was null and void as the debt did not exist. The suretyship is challenged on the basis that the amount reflected therein is incorrect and secondly, as the suretyship agreement is against public policy. He indicated that the suretyship agreement subsists even after payment of the debt and consequently exceeds the bounds of public policy. It is thus unenforceable and falls to be set aside. That then takes one back to the facility agreement and if the calculation of the interest is not correct then the debt which formed the basis for the suretyship agreement is challenged on bona fide and reasonable grounds.
- [29] Much of Mr Harpur SC's argument centered around the appeal process and the difficulty which this court faced in deciding the matter at that stage. The dilemma faced by the court at that juncture, was in the event of the respondent being successful in the appeal to the Constitutional Court, this court would have sequestered the estate of the respondent and it would be difficult to return the status quo ante.
- [30] The applicant, however indicated that if it is found that the court applied the incorrect interest rate what the respondent failed to consider in doing the re-calculation was that the applicant was entitled to charge penalty interest and in doing the calculation the respondent's accountant used the incorrect interest rate. Secondly, the respondent failed to have regard to the fact that there is joint and several liability for the indebtedness of the respondent with the two entities. Although the respondent avers that the incorrect calculation of the interest taints the indebtedness there is no authority which has been

referred to for this submission.

[31] Given the circumstances which prevailed at the time of the initial hearing, the application was adjourned pending the outcome of the appeal to the Constitutional Court. Such appeal was subsequently dismissed in August 2023 and the opposed application was re-enrolled for further hearing in October 2023.

[32] At the reconvened hearing, Mr Van Rooyen submitted that the requirements of the Insolvency Act had been met in that:

32.1 the applicant has a claim in excess of R100.00;

32.2 the acts of insolvency are admitted; alternatively the respondent is de facto insolvent;

32.3 the applicant has demonstrated an advantage to creditors as the solvent spouse's assets vests in the trustees and it is evident that there will be a not negligible dividend to creditors;

32.4 the respondent has indicated in his affidavit that the family business which has been in operation for a number of years generated an income of approximately R2.1 billion which a trustee can investigate; and

32.5 lastly the respondent is a director of two entities being Lenzo and Lescot which the trustee can investigate.

[33] Consequently, the applicant has established a prima facie case for sequestration in compliance with s 9 of the Insolvency Act.

[35] Once an applicant for a provisional sequestration order establishes the three requirements for such order the court has a discretion whether or not to grant the order. This much is evident from the decision of Wallis J in *Firststrand Bank Ltd v Evans*[2] in which the court said the following:

“Once the applicant for a provisional order of sequestration has established on a prima facie basis the requisites for such an order, the court has a discretion whether to grant the order. There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within that class of cases generally described as involving a power combined with a duty. In other words, where the conditions prescribed for the grant of a provisional order of sequestration is satisfied then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.

- [36] Having regard to the application papers, the respondent has no basis to oppose the granting of the order. In the main, the basis for his opposition related to the failure by Hadebe J to allow the further the admission of the recalculation presented by his accountants in an attempt to dispute his indebtedness. Regrettably, this formed the subject matter of the various applications for leave to appeal which have been dismissed the last being before the apex court.
- [37] At the reconvened hearing, Mr Voormolen who now appeared for the respondent, submitted that this was still a live issue as no court had pronounced on this and consequently the debt was disputed on bona fide and reasonable grounds. Regrettably, I cannot agree. The effect of the dismissal of the application for leave to appeal to the Constitutional Court is that the applicant has a judgment in excess of R100.
- [38] The respondent filed a supplementary affidavit which raised only one issue, at the reconvened hearing, namely that he was unaware of the payments which the applicant had received from the business rescue proceedings of Check One. In addition, he submits that there was a possibility that as a consequence thereof the principal debt has been settled. In its supplementary replying affidavit the respondent deals with this aspect and in my view the response renders the issue raised
- by the respondent in the supplementary affidavit as a non-issue. The applicant confirmed that the principal debt is some R47 million. The respondent's liability is limited to R20 million. He bears the onus to show that the balance of the R27 million has been paid and he has not put up any evidence in support of this.
- [39] More importantly the applicant indicates that the respondent is being disingenuous in indicating that he does not know what payments were made as he raised this pertinently in the related winding up application of Wishing Stone. The business rescue practitioner in that application had delivered an affidavit indicating that it received R9 million of the R47 million debt. In addition, the applicant annexed payments received in terms of the conclusion of the settlement agreement which indicates a total overall payment of R14 414 940.42. Consequently, there is monies owing in terms of the principal debt of the entities in respect of which the respondent signed surety.
- [40] Mr Voormolen also focused his argument on the acts of insolvency and his submissions in relation to the acts of insolvency relied on by the applicant in the original papers. I have considered his submissions but my difficulty is that the de facto position is that the respondent on his own version is insolvent. Apart from the acts of insolvency the main thrust of the respondent's initial

challenge to the sequestration application related to the judgment in the sum of R20 million, and that the debt was being challenged on bona fide and reasonable grounds. Once the last appeal was dismissed the factual position is the judgment stands and the applicant is a creditor as it has a judgment of R20 million. Consequently, these further submissions were without merit.

[41] The respondent has reached the end of the road in my view and the applicant has an interest in the finality of the matter and the satisfaction of the judgment debt. The respondent has not advanced any reasons as to why this court ought not to grant the orders sought. He has not demonstrated special or unusual circumstances that warrant the exercise of the court's discretion in his favour.

[42] Considering the three requirements that the applicant has to establish for a sequestration order the applicant has in my view successfully done so. Regrettably the respondent has reached the end of the line in that:

42.1 the applicant is a judgment creditor with a claim in excess of R100, namely a judgment of R20 million;

42.2 the respondent on his own version is factually insolvent;

42.3 the applicant has in my view demonstrated advantage to creditors.

Conclusion

[43] In the result the following orders will issue:

5.1 service on the Respondent at 5[...] S[...], 1[...] A[...] Road, Greyville, Durban;

HENRIQUES ADJP

CASE INFORMATION

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Street Pietermaritzburg 033 345 2304 Dates of Argument: 24 May 2023 26 October 2023 Date of
Judgment: 14 June 2024

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 13h00 on 14 June 2024.

[1] Meskin & Co v Friedman 1948 (2) SA 555 W at 558

[2] Firststrand Bank Ltd v Evans 2011 (4) SA 597 (KZD) at para 27

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