

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Diab (2019/37448) [2021] ZAGPJHC 631 (29 July 2021) [2021] ZAGPJHC 631

COURT

South Gauteng High Court, Johannesburg

BEFORE

S M Katzew

CASE / FILE NUMBER

2019/37448

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2019/37448

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

In

the matter between:

FIRSTRAND

BANK

LIMITED

Applicant

and

PATRICIA

LILY

DIAB

Respondent

JUDGMENT

KATZEW, AJ:

- [1] This is the return date (19th April 2021) of a provisional sequestration order granted by the Honourable Vally, J on 4th February 2021.
- [2] The application for the provisional sequestration order was opposed by the Respondent. She delivered an opposing affidavit and Respondent's Heads Of Argument and argued the matter in person before the Honourable Vally, J.
- [3] Although the Respondent contested the validity of the Applicant's claim in argument before the Honourable Vally, J, the opposition to the validity of the claim was not pursued on the return date.
- [4] The act of insolvency by the Respondent relied upon by the Applicant in the application for provisional sequestration is contained in a settlement agreement that was concluded between the parties. The Respondent challenged the validity of this settlement agreement in the application for provisional sequestration on the basis that it is contra bonis mores. This defence was also not pursued by the Respondent on the return date.
- [5] For the purpose of the application for a final sequestration order, this Court therefore accepts that the Applicant has proved its claim and that the Respondent committed an act of insolvency.
- [6] It follows that the only issue left for determination by the Court in the application for a final sequestration order is whether the Applicant has satisfied the requirement of showing that there is reason to believe that it will be to the advantage of creditors of the Respondent if her estate is finally sequestrated.
- [7] The Respondent did not deliver an affidavit for the return date to show cause why the provisional order should not be confirmed. She did however appoint Attorney Gary Segal with right of appearance in the High Court to appear on her behalf at the hearing to oppose the confirmation of the provisional sequestration order.
- [8] Mr. Segal confined his submission to the Court to whether the Applicant had demonstrated that there is reason to believe that it will be to the advantage of creditors of the Respondent if her estate is finally sequestrated.
- [9] The only issue that I raised with Mr. Choate for the Applicant was whether the Applicant, without expert evidence on the valuations of the Respondent's two immovable properties, had adequately demonstrated that there is reason to believe that it will be to the advantage of the Respondent's creditors if the Respondent's estate is finally sequestrated.

- [10] In particular, I pointed out to Mr Choate that the evidence in the application by both parties on the valuations of the Respondent's properties gave no indication to the Court of what the properties were likely to fetch on forced sales in prevailing market conditions.
- [11] I invited Mr Choate to present supplementary affidavits on behalf of the Applicant on the valuations of the properties for purposes of forced sales. I also afforded Mr Segal an opportunity to deliver heads of argument, which neither party had done for the return date.
- [12] Mr. Choate undertook to arrange for delivery by the Applicant of supplementary affidavits containing valuations of the properties by close of business on Wednesday the 21st of April 2021. I gave Mr Segal until 11h00 on Thursday 22nd April 2021 to submit heads of argument.
- [13] I stood the matter down until 14h00 on Thursday the 22nd of April 2021 for final submissions.
- [14] On Wednesday the 21st of April 2021 the Applicant delivered a Confirmatory Affidavit by Lisa Kerrin Silberman, a Director of the Applicant's attorney

of record, whereto were attached the following documents:

14.1 Advanced Valuation Valuers Report prepared by Cornell Strydom of residential property Portion 8 of Erf 576 Bassonia Extension 1 with a market value of R2 800 000,00 and a Forced Sale Value of R1 820 000,00.

14.2 JNS property appraisers Valuation Report on Section 8 of SS Bronze Beach SS 179/1981 62 Lagoon Drive, Umhlanga Rocks, Province of KwaZulu-Natal prepared by Jean N. Swart with an Open Market Value of R3 700 000,00 and a Forced Sale Value of R2 200 000,00.

- [15] The valuation reports were not accompanied by confirmatory affidavits by either of the valuers. It needs to be emphasized that proper valuations in Court proceedings are required to be under oath.

- [16] In ABSA Bank Ltd v Mokebe And Related Cases 2018

- (6) SA 492 (GJ) the court (Tsoka, J, Pretorius, J and Wepener, J) stated the following at 519C-522A in relation to the presentation of evidence of a valuation of immovable property where a bank or bondholder seeks to have an immovable property declared specially executable:

"... It is thus incumbent upon the bank or bondholder to place 'all relevant circumstances' before the court when it seeks an order for execution. This, in our view, includes a proper valuation of the property (under oath), the outstanding arrears, municipal accounts and the like information. ..."

- [17] The insistence by the Court in ABSA Bank Ltd v Mokebe And Related Cases (supra) on valuations under oath was in the context of a consideration of the rights of a homeowner at risk in legal proceedings of being evicted from his or her home.

- [18] When proof of valuations is required in sequestration applications, it is no less critical to the rights of interested parties that the highest degree of proof by way of evidence under oath be maintained (see *Nel v Lubbe* 1999 (3) SA 109 (W) at 111F-G especially the use of the word “Testimony” which normally indicates evidence under oath).
- [19] Fortuitously for the Applicant, the presentation in unsworn statements (as opposed to under oath) of the evidence that this Court required of the valuations of the immovable properties of the Respondent is not an issue between the parties. On the contrary, Mr. Segal relied on the evidence of the anomalously described sworn valuations in the unsworn statements for all of his

submissions

in the Respondent’s Submissions Regarding Advantage To Creditors dated 22nd April 2021.

- [20] Mr Choate also handed up Applicant’s Supplementary Heads Of Argument dated 21st April 2021 to accompany Ms. Silberman’s Confirmatory Affidavit and the two sworn valuations.
- [21] Mr. Choate points out in Applicant’s Supplementary Heads Of Argument that on the Respondent’s own version her property in Umhlanga is valued at R6 million and that the Windeed valuation of the same property relied on by the Applicant puts the value of the property at R2 772 000.00, or at best for the Applicant, R3 120 000.00.
- [22] This is in stark contrast to the forced sale valuation of R2 200 000.00 for the same property by the expert sworn valuator appointed by the Applicant.
- [23] Mr. Choate points out further in Applicant’s Supplementary Heads Of Argument that on the undisputed evidence of the Applicant, in 2018 the Respondent’s property in Bassonia had a municipal valuation of R2 679 000.00 with an expected high of R3 150 000.00.
- [24] These figures must also be contrasted with the forced sale valuation of R1 820 000.00 for the Respondent’s Bassonia property by the expert sworn valuator appointed by the Applicant.
- [25] In paragraph 5 of his supplementary heads, Mr. Choate points to a difference of judicial opinion on whether where there has been an act of insolvency, there is still an onus to establish that there is reason to believe that it will be to the advantage of creditors of the debtor if the debtor’s estate is sequestrated.
- [26] Mr. Choate continues in paragraph 6 of his supplementary heads that this Court had inclined towards the view that despite the act of insolvency committed by the Respondent, it was still required of the Applicant to prove that there is reason to believe that it will be to the advantage of the Respondent’s creditors if her estate is sequestrated.

[27] Although this Court agrees with the accuracy of Mr. Choate's rendition of the extract relied on by him for this statement from paragraph 2.1.4 of Insolvency Law and its operation in winding-up edited by A. Boraine, J.A. Kunst and D.A. Burdette (updated to November 2020) and of his statement that this Court inclines to

requiring proof of advantage to creditors, the Court is nonetheless of the view that, properly analysed, the difference of judicial

opinion alluded to relates not so much to whether proof of advantage to creditors can be dispensed with in cases where there has been an act of insolvency, but rather to how far the net can be cast in determining suitable criteria for proof of advantage to creditors where there has been an act of insolvency.

[28] For example, where there is an absence of tangible evidence of a potential for a pecuniary benefit to creditors but the Court is nevertheless of the view that investigation by a trustee of the affairs of the debtor (who has committed an act of insolvency) could unearth hidden assets, the Court may have regard to this potential for the unearthing of hidden assets in an inquiry as reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated (see *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) at 583B-G).

[29] This is different from laying down a rule that proof of advantage to creditors is dispensed with in cases where there is an act of insolvency.

[30] To return to the facts before this Court, no sooner had I received the Confirmatory Affidavit of Ms. Silberman with the sworn valuations, when I received the following letter addressed directly to me by Ms. Silberman on the letterhead of the Applicant's Attorney on 23rd April 2021.

[31] There was no affidavit by Ms. Silberman or anyone else covering the facts in the letter, and neither was there any application by the Applicant to supplement its papers in the application with the letter.

[32] The gravity of the disclosures in the letter may have been the cause for the departure from required procedural formality. However, it needs to be said, especially in *casu* where this is the second departure from the requirement of presenting evidence under oath on vital aspects in the application, that any matter that parties want a Court to take into account in a Judgment needs as far as practically possible to be confirmed under oath.

[33] This Court intends, however, to take cognizance of the contents of letter given that at the time of the disclosure of the facts therein to the Court, there was no indication by the Respondent that she disagreed with the contents in any way.

[34] Quite to the contrary, Mr. Segal on her behalf communicated his views to the Court on the contents of the letter in a letter that will be quoted in full later on herein. There is no hint in this letter by Mr. Segal that the truth of the contents of Ms. Silberman's letter is impinged in any way. Neither does Mr. Segal's letter contain a reservation of the Respondent's rights to

impinge the truthfulness of the contents of the letter once he had taken proper instructions, which Mr. Segal expressed as a reason for the need for time to deal with the matters raised in Ms. Silberman's letter.

[35] Ms. Silberman's letter is not brief, but I deem it necessary to quote it in full hereunder as follows:

"23 April 2021

Dear Judge

FIRSTRAND BANK LIMITED / P L DIAB

CASE NO: 2019/37448

DATE OF HEARING: 19 APRIL 2021

MATTER NUMBER 1 ON THE ROLL

1. We refer to the above matter which was argued before you on 19 and 22 April 2021.

2. This correspondence is being addressed to you as since 22 April 2021 and –

2.1 the submission of the applicant's confirmatory affidavit and valuations; and

2.2 the submission of the applicant's supplementary heads of argument

and at 09h00 on 23 April 2021, we received a new Windeed report from the valuers who attended to the valuations of the two immovable properties of the respondent reflecting that on 22 February 2021 (subsequent to the granting of the provisional sequestration order by Vally J), that the respondent sold the Bassonia property for R1 750,000.00 (bellow the forced sale value) and the transfer thereof was registered on April 2021.

3. Accepting that when the respondent's attorney filed his submissions to the Court yesterday, he was unaware of the above, we addressed the attached correspondence to him providing him with an opportunity to address this issue particularly as the matter was expressly addressed to the Court in submissions made.

4. Moreover, the Court will recall that the respondent was provided as the contact individual to provide access to the property for the valuations to be conducted.

5. The above said, the respondent's attorney has not drawn the above to the Court's attention by 14h00 today, as demanded, and in circumstances where this is material to the matters argued before the Court.

6. The materiality of the above is not in that the sale of the Bassonia property resulted in payment to certain secured and preferrent creditors, notwithstanding the existence of the concursus creditorum, but that the remaining balance of any proceeds received ought to have been paid to the respondent's provisional trustees for the benefit of her creditors. The respondent did not disclose this to the Court, which is a fact which was peculiarly within her

knowledge and would have demonstrated that a not, not negligible dividend would have been available to remaining creditors and would have assisted the Court in determining the issue of the benefit to her creditors.

7. The material non-disclosure of this fact is a matter which needed to be drawn to the Court's attention in light of the arguments presented to the Court by both parties.

Yours faithfully

Werksmans Inc"

[36] This letter was sent by Ms. Silberman to Mr Segal under cover of the following note:

"Dear Gary

I'm addressing this e-mail to you in light of a serious matter which has arisen.

I have attached to this correspondence a Windeed Search which I have received and which reflects inter alia that your client, despite having been provisionally sequestered, nevertheless sold her property in Bassonia on 22 February 2021, the transfer of which was registered on 8 April 2021.

Accepting that you were completely unaware of what is contained in the attached document, in light of your written submissions to Judge Katzew yesterday, which submissions must have premised on your client's instructions, I hereby provide you with an opportunity to address the above by no later than 14:00 today and to:

1. Draw the above to the judge's attention; and
2. Revert to me with the details of the attorney who attended to the transfer of the property.

The significance of your client's conduct will not be lost on you in that the proceeds of the sale of the Bassonia property are an asset which fall into her insolvent estate and are to be distributed to her creditors. Whilst it is appreciated that the bondholder ABSA Bank would have been paid, failing which the bond registered over the property would not have been cancelled, the remaining proceeds are to be paid to her provisional trustee for the benefit of her creditors.

As stated above, I await your urgent response by 14:00 today.

Regards

Lisa Silberman"

[37] Mr Segal replied hereto at 13:56 on 23rd April 2021 as follows:

"Dear Lisa

I am endeavouring to get instructions which I don't have yet. You requested a reply by 14h00 which I won't manage.

Can I suggest that we approach the Judge this afternoon advising him that we are looking into something which we believe will be relevant and would be pleased if he will not finalise until this is clarified

Gary”

[38] Literally minutes later, Mr Segal followed up with another e-mail to Ms. Silberman at 14h04 as follows:

Thanks. Please let me know if you would like me to address a letter as well. You can advise the judge that you have kept me apprised and I also suggested contacting him

I meant to thank you for mentioning that you accepted that I was not aware of this, which I confirm is of course true

[39] On 23rd April 2021 Mr Segal wrote to me as follows:

“Dear The Honourable Katzew AJ

The applicants attorneys have forwarded me a copy of the correspondence forwarded to yourself in this matter.

I responded to them before 14h00 which is the time they requested stating that I was endeavouring to take instructions but would not be able to respond properly by then. I suggested that we advise your Lordship not to attend to the matter further until this further information was clarified.

They forwarded me a further letter addressed to your Lordship which stated that I had not responded to them in the time period they demanded. In this regard I enclose my response to them prior to 14h00.

I submit that there are issues both in regard to the conduct of the respondent and the effect this will have on the application which need to be properly addressed. Thus my suggestion that your Lordship be requested to take no further action in the matter until this has been clarified.

I will attempt to co-ordinate this with the applicant’s attorneys.

I wrote to applicants attorneys expressing my appreciation for accepting that I was not aware of this step by the respondent, which I confirm is correct

Gary Segal”

[40] Both the Applicant’s Supplementary Heads Of Argument dated 21st April 2021 and Respondent’s Submissions Regarding Advantage To Creditors dated 22nd April 2021 primarily traverse the question of advantage to creditors based on the valuations of the Respondent’s two immovable

properties prior to the disclosure of the sale of the Bassonia property by the Respondent after the date of the provisional sequestration order.

- [41] Mr. Choate in his supplementary heads relied on the judgment of Trengove, AJ in *Investec Bank Limited and Another v Mutemeri and Another* 2021 (1) SA 265 (GSJ) at para 16 for the submission that this Court is entitled to place reliance on the Respondent's valuation in her opposing affidavit of R6 million for her Umhlanga property and on the undisputed WinDeed valuations for both the Respondent's Umhlanga property and Bassonia property in the Applicant's affidavits in the application, which are considerably higher than the forced sale valuations of both properties in the sworn valuations supplied to the Court under cover of Ms. Silberman's Confirmatory Affidavit.
- [42] This submission is premised on the principle, enunciated by Trengove, AJ in *Investec Bank Limited and Another v Mutemeri* (supra), that where there is no dispute on the papers in a sequestration application on valuations averred by the parties, a Court is entitled to dispense with evidence of valuations by an expert.
- [43] A fortiori in casu this principle is applicable where it is the Respondent herself who tenders evidence of the value of R6 million for her Umhlanga property.
- [44] Although it seems at first blight to be artificial to accept the evidence of either the Applicant or the Respondent in the competing affidavits in the application on the valuation of the Umhlanga property in the face of the considerably lower sworn forced sale valuation that the Court now has before it, the rule that binds litigants to what they say in their affidavits, provided it is not self-serving, must hold sway even in the face of what may appear to be more realistically conservative estimates. This is how I understand the ratio of the judgment of the learned Trengove, AJ in *Investec Bank Limited and Another v Mutemeri* (supra), which accords with rigid application procedure.
- [45] Therefore, applying this principle in casu, this Court is of the view that Mr. Choate is correct in saying that one need look no further than the Respondent's own valuation of R6 million for her Umhlanga property to find more than adequate sufficient potential for pecuniary benefit to creditors.
- [46] Conceivably the application of the principle could even go so far as to take precedence over disclosures to the Court outside of the competing papers in the application which conflict with what is said in the papers, as is the case in casu with the disclosure in the Applicant's Attorney's letter of the unlawful sale of the Bassonia property by the Respondent at lower than forced sale value. Applying the extent to which this principle can apply, this disclosure could be disregarded by this Court for the purpose of including the admitted value of the Bassonia property in the application in the assessment of advantage to creditors.
- [47] This puts paid to any possible argument by the Respondent that adequate advantage to creditors has not been proved by the Applicant.

- [48] It also completely neutralizes Mr. Segal's calculations in his written submissions based on the forced sale values of both properties in the sworn valuations that showed that there would be no residue available for distribution amongst creditors of the Respondent after the sale of the two properties.
- [49] Without in any way sacrificing the application of this principle through the holding of the Respondent to what is common cause in the competing affidavits, the Court is also entitled to have regard to the conduct of the Respondent now revealed to the Court by the information of her alienation of the Bassonia property after her provisional sequestration at R70 000.00 below forced sale value as per the sworn valuation of R1 820 000.00, which she has not sought to explain to the Court despite an indication given by Mr. Segal in his letter to the Court that this needs to be done (and despite the lapse of ample time and opportunity for doing so), which adds an extra dimension to the consideration of advantage to creditors in this application.
- [50] In view of the objective of sequestration as the orderly dissolution of an insolvent estate to ensure minimal attrition and maximum retrieval of salvageable assets and the fairest possible distribution of the residual value of the estate to creditors in accordance with legal rules of preference and priority not readily recognizable to a layperson, the Court must obviously lean towards even the remotest potential for benefit that supervised dissolution under sequestration holds for creditors, especially where wasteful and disobedient conduct of the debtor is evident (see *Dunlop Tyres (Pty) Ltd v Brewitt* (supra) at 583A-G).
- [51] Going back to the letter addressed to me by Mr Segal on 23rd April 2021, and particularly to his submission in the fourth paragraph thereof

“that there are issues both in regard to the conduct of the respondent and the effect this will have on the application which need to be properly addressed.”

I hereby confirm that despite this statement by Mr. Segal, the Court received no further address from Mr. Segal or the Respondent

explaining the conduct of the Respondent in alienating the Bassonia property after she was provisionally sequestered without the consent of her provisional trustee and of the effect thereof on this application. The only communication I received from Mr. Segal after 23rd April 2021 was an unsolicited remark regarding the relevance of Ms. Silberman's letter to me of 23rd April 2021 “unless application is made to reopen the matter”, which remark was made by Mr. Segal in an E-mail he sent to my registrar on 26th July 2021 (more than three months after the application was heard) in response to my request to him via my registrar for the re-sending of Respondent's Submissions Regarding Advantage To Creditors, which I was unable to find.

- [52] The Court infers from the silence of the Respondent and her legal representative that the Respondent has no comment to make on her conduct and on the impact thereof on this application.

[53] The Court in determining this application will accordingly, in addition to the proof of potential for not negligible pecuniary benefit to creditors on the papers, have regard to the conduct of the Respondent in selling the Bassonia property after her provisional sequestration by the Court without the consent of her provisional trustee.

[54] Indeed, the Court regards the sale of the Bassonia property as constituting a further act of insolvency by the Respondent as contemplated by section 8(c) of the Insolvency Act 24 of 1936 which reads as follows:

“8. Acts of insolvency. A debtor commits an act of insolvency –

(a) ...

(b) ...

(c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;”

[55] At the very least for the Respondent’s creditors, the final sequestration of the Respondent’s estate will empower a duly appointed trustee to recover for their benefit the not insubstantial difference of R350 000.00 between the claim of R1.4 million of the mortgagor over the Bassonia property, ABSA Bank Limited, and the selling price of R1.75 million.

[56] This of course is in addition to the limits that final sequestration will impose on potential for losses in distributable value due to the already exposed wasteful and irregular conduct of the Respondent.

[57] The Court accordingly rules that the Applicant has satisfied all the requirements of a final sequestration order as contemplated by section 12 of the Insolvency Act 24 of 1936.

The following is ordered:

1. The rule nisi granted by Vally, J on 4th February 2021 is hereby confirmed.
2. The estate of the Respondent is placed under final sequestration in the hands of the Master of the High Court of South Africa, Gauteng Local Division, Johannesburg.
3. The costs of the application are costs in the sequestration of the Respondent’s estate.

S M KATZEW

Acting Judge of the High Court of South Africa

DATE OF JUDGMENT: 29 July 2021

DATE OF HEARING: 19 April 2021

APPEARANCES:

For Applicant: Mr. L. Choate instructed by Werksmans Inc.

For Respondent: Mr G. Segal (attorney with right of appearance)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2021/631.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/firststrand-bank-limited-v-diab-unknown-topic-agpjhc-2021>

Prepared on 10 October 2026 · Esheria