

SOUTH AFRICA / JUDGMENT

Wellington Retreading (Pty) Ltd and
Another v Swart and Another (14567/2024)
[2024] ZAWCHC 292 (8 October 2024)
[2024] ZAWCHC 292

COURT
Western Cape High Court, Cape Town

BEFORE
R K Parker

CASE / FILE NUMBER
14567/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
CASE
NO.: 14567/2024

In the matter between:

WELLINGTON RETREADING
(PTY) LTD
First Applicant
(Registration number:
2021/569843/07)
TOPTRACK THREE (PTY)
LTD T/A COMMERCIAL
Second Applicant
RETREADERS
(Registration number:
2020/623850/07)
and
ANNEMARIE
SWART
First Respondent

(Identity number: 8[...])
DIEDERICK CHARLES
SWART
Second Respondent
Married out of community
of property, with the accrual system and
residential
address at: 1[...] D[...] Crescent, Milnerton Ridge, Cape Town
First
Respondent's domicilium citandi et
executandi: 2[...] B[...] Street,
Triangle Farm Stikland, 7530.
(Application for
Sequestration of the First Respondent's estate only)
Coram: Parker, AJ
Matter heard on: Tuesday
03rd September 2024
Judgment delivered
electronically on: Tuesday 08th October
2024

JUDGMENT

PARKER, AJ:

Introduction

- [1] The Applicants launched an application for the sequestration of the First Respondent's estate in terms Section 9 of the Insolvency Act 24 of 1936 as amended, herein referred to as ("the Act") as amended.
- [2] The Applicants, namely two petition creditors, rely on separate agreements concluded with the First Respondent, who is the sole director of Concorde (Pty) Ltd, herein referred to as ("the Company"). The First Respondent and the Second Respondent are married out of community of property under the accrual system.

THE APPLICANTS

FIRST APPLICANT

- [3] The Company represented by the First Respondent, concluded agreements with the First Applicant on or about 23rd August 2023 for a written 30 days credit facility in the amount of R2 000 000.00 (two million rand). Additionally, the First Applicant concluded a written suretyship agreement in terms of which she bound herself as surety and co-principal debtor for all amounts due by the Company to the First Applicant.

[4] The relevant, salient express, alternatively tacit, alternatively implied material terms of Suretyship are, inter alia, the following:

4.1 First Respondent binds herself as surety for and co-principal debtor in solidum for the Company, being in favour of the First Applicant, for the due payment of all amounts due and payable by the Company to the First Applicant [clause 1];

4.2 The First Respondent renounces the benefits of *ordinus seu excussionis*, *duobus vel pluribus reis debendi*, *cause debiti*, revision of account, errors of calculation and *cedendarum actionum*; and

4.3 In the event of the First Applicant instituting action in respect of the Suretyship A, the First Respondent shall be liable for all legal fees incurred by the First Applicant as between attorney and own client as contained [clause 3] thereto.

[5] Business operations commenced and during the period 5th September 2023 to 20th November 2023 a credit totaling R433 735.22 was raised and after applying credits in favour of the Company the total amount due and owing by the Company was in the amount of R351 992.72. The Company had consistently defaulted in its obligation to settle invoices presented to it promptly for payment to the First Applicant, resultantly, First Applicant ceased attendances until such time as the Company settled the outstanding invoices. Consequently, First Applicant issued a letter of demand to the Company on the 26th April 2024 for the amount of R 351 992.72, however no payment was forthcoming.

SECOND APPLICANT

[6] In so far as the Second Applicant is concerned, a similar pattern of engagement ensued as for First Applicant and I will not repeat the content, save where necessary as the pleadings speaks to it in detail. A written 30 days credit facility was concluded in the amount of R300 000.00 with the Company on 27th October 2022 and 29th October 2023 (these dates appear from the annexures to the Founding affidavit) This was followed by a further increased credit facility to the amount of R700 000.00 made available to the Company, and a suretyship agreement concluded on 7th July 2023 resulting in an amount of R477 347.47 being due by First Respondent to Second Applicant. According to the Second

Applicant it would grant the increased facility, however it would not advance any further services until such time as the outstanding debt is settled.

[7] The Company provided Second Applicant with a settlement offer on or about 28th September 2023, whereby the Company admitted the indebtedness in the amount of R477 347.47. The offer which was made by the Company. It intended to repay the debt over a period of 6 months. The Second Applicant accepted this offer in a letter dated November 3,

2023. The Second Applicant accepted the terms proposed by the Company, with the exception of the commencement and end dates, which were in favour of the Company. Second Applicant's commencement of repayment suggested a commencement date of a month later than the date offered by the Company. This offer was open for acceptance until close of business on 6th November 2023 and it was extended to 17th November 2023, failing which, Second Applicant indicated it will pursue legal action. No payment was received.

THE PROCEEDINGS

- [8] The First Respondent opposed the provisional application for sequestration and had to eventually be placed under a notice to compel to file its answering affidavit, despite numerous requests and receiving notice of the chamber book application issued by the First Applicant. It is the view of Applicants that the Company opposed the liquidation application with the sole intention of delaying proceedings.
- [9] Furthermore, at no point in time, did the Company or its attorneys of record inform the Applicants of the pre-existing liquidation application, when on or about 24th May 2024, the Company, of which First Respondent is a director, was provisionally wound up by this Honorable Court under case number 19203/2023. The Company was subsequently placed in final liquidation on July 16, 2024, by the Honourable Justice Slingers.

COMMON CAUSE

[10] The following facts are common cause:

10.1 The First Respondent is the director of Concorde (Pty) Ltd (in liquidation) ("Concorde"), which was placed in final liquidation on 16th July 2024 by the Honorable Justice Slingers;

10.2 The Applicants have the necessary locus standi to bring this application as creditors of the First Respondent;

10.3 The First Applicant's claim for R351 992.72, which amount is due and payable for services rendered at the Company's special instance and request. The First Respondent bound herself as surety and co-principal debtor in respect of the Company indebtedness towards the First Applicant. Despite demand, the First Respondent has failed to make payment of the First Applicant's claim;

10.4 The Second Applicant's claim amounts to R477 347.47, which amount is due and payable for services rendered at the Company special instance and request. The First Respondent bound herself as surety and co-principal debtor in respect of the Company's indebtedness towards the Second Applicant. Despite demand, the First Respondent has failed to make payment of the Second Applicant's claim;

10.5 The Applicants do not hold any security for their claims.

FIRST RESPONDENT'S DEFENCE

- [11] The First Respondent is of the view that no case is made out as envisaged in Section 9 of the Act, and maintains that it would not be to the advantage of the First Respondent's creditors if her estate is sequestrated. She admits that Applicants are creditors in her estate, however, denies that Applicants has made out a case that she is insolvent. Her affidavit was relatively brief contained 10 pages and no annexures.
- [11] Furthermore, First Respondent's defence to the application is that Applicants are essentially seeking for the recovery of a monetary debt. They relied on *Direro v Van Bruggen and Another*[1], which posits that an application for sequestration is not a procedure for the recovery of a debt, rather it is aimed at bringing a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion.
- [12] The First Respondent contends that the Applicant is under obligation to establish insolvency on a balance of probabilities, as outlined in the aforementioned *Direro* decision. According to the First Respondent, this obligation was not met.

DISCUSSION

- [13] The Applicants maintain that the claims against the First Respondent are not in dispute and that the First Respondent is de facto insolvent. The First Respondent has failed to meet the evidential burden of proof in opposing this application by failing to provide any evidence to substantiate her assertion that she is solvent or that her sequestration will not benefit her creditors.
- [14] The Applicant places reliance on *Kalil v Decotex (Pty) Ltd and Another*[2] that the First Respondent's insolvency meets section 9(1) of the Act and the First Respondent's point in limine – that she did not commit an act of insolvency, therefore, must fail.
- [15] It is submitted that since this application is clearly unfriendly, the approach confirmed in *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others*[3], as well as in *Ullman Sails (Pty) Ltd v Jannie Reuvers Sails (Pty) Ltd & Others*[4], ought to be followed when considering whether the Applicants have established the First Respondent's insolvency on the requisite

balance of probabilities.

FINANCIAL POSITION OF THE RESPONDENT

- [16] The First and Second Applicant are unaware of the comprehensive position of the First Respondent's estate however, a deed search was undertaken by the Applicants' attorney of record. However, according to the Applicants, the First Respondent is likely to be held liable for further sureties signed on behalf of the Company, in addition to those specified in this Application, due to the fact that she is the sole director of the Company which is now under liquidation.
- [17] The financial position on the available information found by the applicants to be:

17.1 First Respondent owns immovable property. The Applicants have provided prima facie proof that the First Respondent owns an immovable property situated in Milnerton, Western Cape. The Applicants were able to establish that the property has a reasonable estimated market value of R3 595 000.00

Assets: Erf 2[...], Milnerton, Western Cape R3 595 000.00 Liabilities: First Applicant 351 992.72 Second Applicant R 477 347.47 FirstRand Bank bond over Erf 2[...] R2 876 000.00 Total Liabilities R3 705 340.19 SHORTFALL: R 110 340.19 Advantage to Creditors Total Assets R3 595 000.00 Free Residue available for distribution for Concurrent creditors R 719 000.00 The Free Residue divided by the concurrent Creditors R 829 340.19 Estimated concurrent Dividend 87c/R1

- [18] Although the Applicants make a general allegation that the Applicant is factually and commercially insolvent, it is conceded that the First and Second Applicant has no detailed knowledge of the estate of the First Respondent. This is the privy of First Respondent who when opposing the provisional order, is required to set out in detail her financial situation, which she was rather sparse on.
- [19] The asset liability calculation depicted above shows that Applicant's claims a combined value of R829 340.19, together with the bond registered over the First Respondent's immovable property in favour of First Rand Bank in the amount of R2 876 000.00 shows that the First Respondent is insolvent as her liabilities exceed her assets in the amount of R110 340.19.
- [20] A case for the sequestration of a debtor's estate may be made out from the commission of one or more specified acts of insolvency or on the grounds of actual insolvency, i.e. that the total liabilities (fairly valued) exceed the total assets (fairly valued). In alleviating this difficulty, statutory provision was made for recognising certain conduct on the part of a debtor as warranting an application to sequester an estate. This introduced the concept of an act of insolvency.
- [21] The Applicant also relied on *ABSA Bank Ltd v Rhebokslouf (Pty) Ltd and Others*[5]:

“Even, however, where a debtor has not committed an act of insolvency and it is incumbent on his unpaid creditor seeking to sequester the former's estate to establish actual insolvency on the requisite balance of probabilities, it is not essential that in order to discharge the onus resting on the creditor if the is to achieve this purpose that he set out chapter and verse (and indeed figures) listing the assets (and their value) and the liabilities (and their value) for he may establish the debtor's insolvency inferentially. There is no exhaustive list of facts from which an inference of insolvency may be drawn, as for example an oral admission of a debt and failure to discharge it may, in appropriate circumstances which are sufficiently set out, be enough to establish insolvency for the purpose of the prima facie case which the creditor is required to initially make out.”

INSOLVENCY

[22] The First Respondent's answering affidavit appears to suggest that the Applicants' valuation of her property is inaccurate, however, she did not dispute it, save for denying it. The opposing affidavit was lean on detail and failed provide any evidence or collateral to the contrary.

[23] In the circumstances, the First Respondent has failed to discharge the evidential onus in this application. Her efforts at listing unspecified movables and sources of income without providing any substantiation for any of her averments does little to assist her.

ADVANTAGE TO CREDITORS

[24] First Respondent's approach in respect of the allegations pertaining to her insolvency, she elected to simply deny that the application would be to the advantage of her creditors, without substantiating this contention at all.

24.1 Given the undisputed nature of the Applicants' claims and the reasonable inference of the First Respondent's insolvency, it would be to the advantage of her creditors if her estate is sequestrated as further claims by the various creditors of Concorde may undoubtedly be imminent.

24.2 The First Respondent may likely be liable for additional sureties signed on behalf of the Company (under liquidation), in addition to the liabilities already mentioned in this application.

24.3 It is highly likely that the shortfall will substantially increase;

24.4 A trustee may be appointed to assume responsibility for the estate and ensure that its status is accurately established.

24.5 A trustee may be appointed to dispose of the estate and to make a fair and equitable distribution of the proceeds so as to ensure that no creditors are given preference over another/others;

24.6 In the interest of the general body of creditors, legal proceedings that certain creditors are either about to initiate or have already initiated against the First Respondent will be suspended.

24.7 The Applicants' reasonable valuation of the First Respondent's immovable property constitutes prima facie proof that there exists sufficient evidence that it would be to the advantage of the First Respondent's creditors if her estate is sequestrated.

[25] The Court therefore need only be satisfied that there was reason to believe, not even a likelihood but a prospect not too remote, that will benefit creditors.

LEGAL PRINCIPLES

[26] It is trite that insolvency' for purposes of sequestration proceedings refers to de facto (factual) insolvency. In terms of section 9(1) of the Act, a creditor who has a liquidated claim for a minimum of R100.00, or two or more creditors who in the aggregate have liquidated claims for a minimum R200.00 against a debtor who has committed an act of insolvency, or is insolvent, may petition the

court for the sequestration of the estate of the debtor.

[27] If reliance is not placed on an act of insolvency, the creditor must allege that the debtor is insolvent.

[28] Section 10 of the Act provides that if the Court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie –

- a) the petitioning creditor has established against the debtor a claim such as is mentioned in Section 9(1); and
- b) the debtor has committed an act of insolvency or is insolvent; and
- c) there is reason to believe that it will be to the advantage of creditors of the debtor's estate if her estate is sequestrated,

it may make an order sequestrating the estate of the debtor provisionally.

[29] It is trite that even if the papers disclose disputes of fact, the Applicants will nevertheless succeed in establishing a prima facie case where it can show that on a consideration of all the affidavits filed, that a case for sequestration has been established on a balance of probabilities, though some doubt may remain.

[30] The Honorable Justice Binns-Ward in *Ullman Sails (Pty) Ltd v Jannie Reuvers Sails (Pty) Ltd & Others*[6], stated the following:

*"It is not incumbent on an applicant relying on factual insolvency to adduce evidence that would enable the respondent's assets and liabilities to be finitely determined in rands and cents. It would be a rare case, other than in the context of so-called friendly sequestrations, for an applicant to be able to do that. It is well established that an applicant can discharge the onus of establishing a prima facie case on the basis of factual insolvency by adducing sufficient evidence to justify the inference as a matter of probability that the respondent is insolvent. Once an applicant does that, the respondent attracts an evidential onus to rebut the inference by showing that he does possess sufficient assets to be able to settle his liabilities, see *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 443 D-G and *Mackay v Cahi* 1962 (4) SA 193 (O) at 204 F – G"; and*

*"A strong and persuasive indicator of insolvency is the failure by a respondent to pay his debts; see the often cited observation by Innes CJ in *De Waard v Andrews & Thienhaus Ltd* 1907 TS 727 at 733: 'To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes'."*

- [31] The Constitutional Court in *Stratford & Others v Investec Bank Ltd and Others*[7] made it clear that the meaning of the term “advantage to creditors” has a broad definition and should not be approached rigidly. The facts put before the court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to the creditors.

THE MERITS OF THE SEQUESTRATION APPLICATION

- [32] Consequently, I am satisfied that the Applicants have satisfactorily demonstrated to this court on a *prima facie* basis, that the First Respondent is factually insolvent and or has committed an act of insolvency, and that there is reason to believe that sequestration will be to the advantage of the First Respondent’s creditors.

- [33] The common cause facts support the Applicants.

- [34] The Respondents does not dispute in the answering affidavit that they are indebted to Applicants.

- [35] It is clear from the offer to liquidate the debt on about 28th September 2023, that the First Respondent accepted that it was indebted to Second Applicant in an amount of at least R 477 347.47;

that it was unable to pay the full amount at the time; and that it offered to make payment in instalments. Having regard to all the relevant and admissible facts and circumstances, the letter clearly demonstrates that the First Respondent was unable to pay its debt to Second Applicant at the time. Consequently, there is no rationale for rejecting the inference arising from the request for time to pay and or to justify a conclusion that the First Respondent would be able to pay at once if pressed to do so.

- [36] Furthermore, the First Respondent has failed to disclose her current financial position. It has not placed any valuations, financial or income statements before the court, save for vague unsubstantiated allegations. The opposing affidavit does not assist the First Respondent as she simply criticizes the valuation.

- [37] On a conspectus of the evidence, I am satisfied that Applicants has demonstrated that the First Respondent has committed an act of insolvency.

- [38] Once the Applicant for a provisional order of sequestration has established on a *prima facie* basis the requisites for such an order, the court retains a discretion whether to grant the order or not. Where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then, in the absence of some special circumstances, the court should ordinarily grant the order, and it is for the First Respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.

- [39] Given that Applicants' case is predicated on factual insolvency, at the stage of a provisional order of sequestration, it was incumbent on the First Respondent to place evidence before the court that clearly establishes that its debts will be paid in the event that a sequestration order is not granted. Further if that contention is based on a claim that it is in fact solvent, the evidence then should have been acceptable.
- [40] There is no evidence before the court that demonstrates that the First Respondent's debts would be paid within a reasonable time, for the reasons previously mentioned. On the contrary, the evidence indicates that the First Respondent is unable to do so, and that the First Respondent did not complete or pay according to the terms that it proposed. There is no evidence before the court that the First Respondent has attempted to sell the property on the open market or what the proceeds of a sale on the open market would be and consequently there is no evidence before the court that a sale at auction will yield a lower sale price than a sale on the open market.
- [41] I am not satisfied with the information placed before me, that the First Respondent is commercially solvent. I am further satisfied that Applicants have established a prima facie case, as there is a reasonable prospect that it will be to the advantage of creditors if the estate is sequestrated.
- [42] The First Respondent has attempted to needlessly muddy the waters of this matter by making averments pertaining to the phrase "just and equitable" and its applicability to a sequestration. The Applicant, while cognizant that the phrasing is often used in liquidation applications, submits that the phrase "just and equitable" refers to an outcome which is objectively just and fair taking into account the circumstances of a matter.
- [43] The First Respondent herself has not considered the repercussions of her indebtedness to the Applicants and her various other creditors. Given the fact that the Applicants' claims are undisputed, along with the reasonable inference of the First Respondent's insolvency, it would be just and equitable that her estate be placed under sequestration as additional claims by the various creditors of the Company are undoubtedly imminent.
- [44] It is submitted that the Applicants have sufficiently addressed the advantage to creditors with substantiating reasons.
- [45] The Applicants' reasonable valuation of the immovable property owned by the First Respondent inter alia, constitutes prima facie proof that there exists Creditors. Further, it is recommended that a trustee should be appointed to take control of the First Respondent's estate, to conduct an investigation into the financial position of the First Respondent and to ensure the just and equitable distribution of proceeds in order to avoid the undue preference of certain creditors,
- [46] For these reasons I am satisfied that a proper case has been made out for the granting of a provisional sequestration order.

[47] In the result I make the following order:

1. The First Respondent's estate is placed under provisional sequestration.
2. A rule nisi is issued calling upon the respondents and all other interested parties to show cause to this Court on Tuesday 19th November 2024 why:
 - 2.1 The First Respondent's estate should not be placed under final sequestration; and
 - 2.2 The costs of this application should not be costs in the sequestration of the First Respondent's estate.
3. Service of this Order shall be effected:
 - 3.1 By one publication in each of the Cape Times and Die Burger newspapers.
4. By the Sheriff delivering a copy of the application be effected on:
 - 4.1 The First Respondent at 2[...] B[...] Street, Triangle Farm, Stikland;
 - 4.2 The Master of the High Court;
 - 4.3 The South African Revenue Services;
 - 4.4 All known creditors with claims in excess of R 25 000.00 by registered mail.
 - 4.5 Any employees that the respondents may have, as prescribed in Section 11(2A)(b) of the Insolvency Act 24 of 1936; and
 - 4.6 Any trade unions representing the respondents' employees.

R K PARKER

ACTING JUDGE OF THE HIGH COURT

Appearances: Counsel for Applicant : Adv. MJ Kapp Instructing Attorney : Lucas Dysel Crouse Inc
– Ms N Lubbe Counsel for Respondents : Adv. H Van Zyl (Pretoria Bar) Instructing Attorney : Attie Schlechter Inc – Mr A Schlechter

- [1] Direro v Van Bruggen and Another 2023 JDR 4508 (GP) at paragraphs [37] – [41].
- [2] Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A).
- [3] Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others 1993 (4) SA 436 (C).
- [4] Ullman Sails (Pty) Ltd v Jannie Reuvers Sails (Pty) Ltd and Others 2022 JDR 1920 (WCC).
- [5] Ibid, p443 C – H.
- [6] supra at para [48].

[7] Stratford & Others v Investec Bank Ltd and Others 2015

(3) SA 1 (CC) at para [44].

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