IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: **1864/2020**

In the matter between:

FIRSTRAND BANK LIMITED Applicant

and

GERT DAWID OOSTHUIZEN Respondent

CORAM: JP DAFFUE, ADJP

HEARD ON: 12 NOVEMBER 2020

JUDGMENT BY: JP DAFFUE, ADJP

DELIVERED ON: 12 NOVEMBER 2020

I INTRODUCTION

[1] There is a well-known saying in the Afrikaner community that "*'n boer maak 'n plan*" directly translated into English as "*a farmer makes a plan.*" This saying has a positive connotation insofar as it has always been accepted that farmers will rise above difficult circumstances by making use of innovative and skilful measures. For example, if a combine harvester breaks down at a crucial time during the harvesting season, the farmer will instead of waiting two or three weeks for a new part to arrive, modify the old defective part to get the machine running again. Many more examples can be quoted from personal experience.

[2] In this application for the provisional sequestration of a Bultfontein farmer, a devious plan has been devised by the farmer, perhaps with the advice of his attorney, in terms whereof promissory notes were presented to a bank teller of the farmer's financial institution in terms whereof the outstanding amounts due to the bank were offered to be paid in monthly instalments. These promissory notes were issued on 31 July 2020 at Bultfontein, signed on 3 August 2020 by the farmer as well as his attorney who affixed his official stamp to the notes. Although the application for sequestration was issued about two months earlier, the promissory notes were delivered at the financial institution's College Square branch in Bloemfontein where a bank teller signed for the receipt thereof. I shall later deal with the farmer's submissions in this regard.

II THE PARTIES

[3] Applicant is Firstrand Bank Ltd, a financial institution duly registered in terms of the applicable legislation of this country. It is also registered as a credit provider in terms of the National Credit Act ("the NCA").[1] I shall hereinafter refer to applicant as FNB.

[4] Respondent is Gert Dawid Oosthuizen, a major male farmer of profession residing on the farm, ES-Genade in the Bultfontein district. He is married out of community of property in accordance with the accrual system.

III THE RELIEF CLAIMED

[5] Applicant seeks a provisional sequestration order in the customary form usually granted by this court, save insofar as costs are also claimed. In the alternative to the claim for provisional sequestration, a monetary judgment is sought in the amount of R16 760 557.00 together with interest as more fully set out in the notice of motion and costs on an attorney and client scale, including the costs consequent upon the employment of two counsel.

[1] Act. 34 of 2005

IV THE REQUIREMENTS FOR A PROVISIONAL SEQUESTRATION ORDER

[6] In order to obtain a provisional sequestration order FNB has to establish *prima facie* that:

6.1 it has a liquidated claim of not less than R100.00 against respondent as contemplated in s 9(1) of the Insolvency Act[2];

6.2 respondent has committed an act of insolvency or is insolvent; and

6.3 there is reason to believe that it will be to the advantage of creditors if the estate of the respondent is sequestrated.[3]

[7] It is important to note that if the court forms an opinion that *prima facie* the three requisites set out in s 10 have been met, a provisional sequestration order may – not must - be issued. The threshold is much lower than at the stage when a final order is sought in terms of s 12.

[8] In *Naidoo v Absa Bank Ltd*[4] Cachalia JA stated that:

> "… a sequestration order is a species of execution, affecting not only the rights of the two litigants, but also of third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditors' ordinary remedies imposing disabilities on the insolvent – it is not an ordinary judgment entitling a creditor to execute against a debtor."

[2] 24 of 1936
[3] Section 10 of the Insolvency Act
[4] 2010 (4) SA 597 (SCA) at par 4

V ACTS OF INSOLVENCY

[9] In the alternative to factual insolvency a creditor may rely upon the fact that a debtor has committed one or more of the various acts of insolvency stipulated in s 8 of the Insolvency Act. *In casu*, FNB relies on ss 8 (c), (d) and (g) which read as follows:

> "(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;
> (d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;
> (e) …….
> (f) …….
> (g) If he gives notice in writing to any of his creditors that he is unable to pay any of his debts;"

[10] For purposes of this judgment I shall concentrate on ss 8(g), but this shall not be construed as if I am of the view that FNB has not made out a case in respect of any one of the other two subsections. Far from it.

VI FACTUAL INSOLVENCY

[11] The million-dollar question is whether respondent's assets, fairly valued, exceed his liabilities. This will be discussed in the following paragraphs, but before I do that, I shall firstly consider whether it is possible to find insolvency on the basis of inference.

[12] Over a century ago Innes CJ made the following remark in dealing with the defence of solvency in the well-known case of *De Waard v Andrews and Thienhaus Ltd* 1907 TS 727 at p 733*:*

> "Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says:
>
> "*I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.*"
>
> 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."

[13] Factual insolvency may be established indirectly as stated in *Mars.*[5] *Absa Bank Ltd v Rhebokskloof*[6] is also a typical case in point in order to rely on insolvency by way of inference. Much weight should be attached to a respondent's unexplained failure to pay his debts. In conclusion on this topic, respondent had sufficient time to settle his admitted debt, but failed to do so. The best proof of solvency is to settle one's debts.

[14] In order to prove his solvency respondent went as far to rely on the valuation of immovable property owned by Calandria 114 CC as well as a schedule of movable properties belonging to that close corporation. The evidence relied upon in order to prove the value of his and the CC's assets is inadmissible insofar as, in respect of the immovable properties, the sworn valuator failed to confirm his

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[5] Bertelsmann et al, Mars: The Law of Insolvency in South Africa, 9ed at p 136, relying on inter alia Louw v W P Koöperatief (Bpk) 1998 (2) SA 418 (SCA); also: *Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd intervening)* [1998] 2 All SA 433 (W) at par [51]

[6] 1993 (4) SA 436 (C) at pp 446H – 447J

valuations under oath and in respect of the movable properties, the author of the documents relied upon is not only unidentified, but who ever drafted the documents failed to confirm the valuations under oath. In any event, it is apparent from the schedules supplied that the movable properties are valueless due to depreciation. Respondent also failed to be frank and candid about his liabilities as he was supposed to do, bearing in mind that this is a hostile sequestration application. Respondent was deliberately evasive and did not avail himself of the opportunity to set out comprehensively his financial status. I am satisfied that FNB has *prima facie*, if not conclusively, shown that respondent is factually insolvent and at best for respondent his insolvency has been proven by inference.

VII ACTS OF INSOLVENCY

[15] I indicated above that I shall concentrate on the allegation that respondent has committed an act or acts of insolvency in accordance with ss 8(g). There is clear proof of this in respect of the claim of Monsanto. I refer to the letter of his attorneys, M J Lombard Inc dated 23 April 2019.[7] Furthermore, although FNB could not and did not rely on the promissory notes referred to above, as these were allegedly tendered two months after the notice of motion was issued, FNB is now entitled to rely on this as a further act of insolvency. In terms hereof respondent unconditionally admitted liability in respect of the full capital amounts due by him to FNB in respect of the three relevant credit agreements relied upon. He also offered to pay the debt,

[7] Annexure "FA 13.5" to the founding affidavit, pp 445 - 447

excluding interest, in monthly instalments over a period of time which, as FNB calculated, would take 38 years to settle. This is a case book example of a notice in writing indicating that the debtor is unable to pay his debt and constitutes proof of an act of insolvency as provided for in ss 8(g). It is apparent that respondent required an extension of 38 years to settle his FNB debt. Such undertaking does not make commercial sense. Over and above this, respondent consented to perfection of the notarial bond in favour of FNB.[8] In terms thereof he admitted liability in respect of the amounts due at that stage together with interest thereon and conceded in writing that these amounts were already due and payable in the following words:

"Die bedrae genoem in paragrawe 1.1 tot 1.4 hierbo is reeds opeisbaar, betaalbaar en oorverskuldig."

Furthermore, FNB was granted leave, not only to perfect the notarial bond, but to further act in accordance with the powers and authorities granted to it, *inter alia* to sell his assets in accordance with clause 10 of the notarial bond.[9]

[16] Mr Bekker, appearing for respondent, could not offer any meaningful reasons why the aforesaid three acts should not be accepted as three distinct acts of insolvency in terms of ss 8(g).

[8] Annexure "FA13.3" to the founding affidavit, pp 441 – 443
[9] Annexure "FA 2.4" p 130

VIII RESPONDENT'S DEFENCES

[17] Respondent relies on three distinct defences, to wit:

17.1 reckless credit was provided by FNB to him as stipulated in s 81(2) of the NCA;

17.2 the promissory notes served on FNB had the effect of discharging respondent's liability towards FNB in accordance with the provisions of the Bills of Exchange Act ("BEA");[10]

17.3 factual solvency.

These defences will be dealt with in the next paragraphs.

IX THE 1ST DEFENCE: GRANTING OF RECKLESS CREDIT

[18] This defence was never raised at any time by respondent personally or during communication between the parties' legal representatives. It surfaced for the first time in the answering affidavit. A respondent cannot avail himself in his answering affidavit with bare and unsubstantiated denials. Evidence should be produced in response to the version of the applicant and he is expected to deal with all allegations contained in the founding affidavit, obviously unless there is no other way open to the respondent and nothing more can be expected of him. The

[10] Section 87 of Act 34 of 1964

warning sounded in *Wightman t/a JW Construction v Headfour (Pty) Ltd*[11] should be heeded by respondents:

"[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

(emphasis added)

[19] Contrary to the warning sounded in *Wightman*, respondent failed to deal exhaustively with the facts relied upon in order to successfully prove the defence of over-indebtedness. His version is inherently and seriously unconvincing and in line with the tendency by so

[11] 2008 (3) SA 371 (SCA) at par 13, referred to with approval in Grancy Property Ltd v Manala & others 2015 (3) SA 321 (SCA) at pp 320 C – 321 A

many consumers that they were over-indebted and that reckless credit was granted.[12] In response to respondent's vague and sketchy allegations, FNB's deponent explained in detail in reply, relying on the evidence of a number of its senior employees supported by documentary proof, that proper credit evaluations were undertaken[13] and convincingly proved that the NCA was duly considered and applied. Insofar as hearsay evidence was tendered in some instances, FNB asked me to accept the hearsay. Bearing in mind the fact that respondent did not seriously grapple with the correctness of the documentary evidence, I am prepared to accept it as part of the evidential material before me.[14] Respondent was so satisfied with the "lifeline" granted to him that he thanked FNB in a Whats App message and undertook not to disappoint it.[15]

[20] Mr Bekker submitted with reference to a judgment of the National Consumer Tribunal that a credit consumer's prospects may not be taken into account for purposes of s 81(2).[16] This judgment is totally distinguishable on the facts and I refer specifically to paragraph 80 thereof. It is perhaps necessary to quote s 81(2) fully. It reads as follows:

"A credit provider must not enter into a credit agreement without first taking reasonable steps to assess –

(a) the proposed consumer's -

[12] Standard Bank of SA Ltd v Panayiotts 2009 (3) SA 363 (WLD) paras 8 - 10 and SA Taxi Securitisation v Mbatha & similar cases 2011 (1) SA 310 (GSJ) paras 69 & 70; this tendency has been witnessed by me in many matters recently

[13] Annexure "RA1" at p 687 and all further annexures up and until p 1044 and especially p 943

[14] Trustees for the time being of the Delsheray Trust and others v ABSA Bank Ltd [2014] 4 All SA 748 (WCC) at par 34 and further

[15] Annexure "RA3" at p 717

[16] National Credit Regulator v Shoprite Investment Ltd case no: NCT/32946/2015/140(1)

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
(ii) debt re-payment history as a consumer under credit agreements;
(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."

[21] I have no doubt that FNB fully appreciated respondent's commercial purpose for applying for credit and that proper assessments were made in accordance with ss 81(2) and the NCA in general. I agree with Mr Van der Walt that respondent failed to deal with and/or rely on s 124 of the NCA and/or s 90 (2)(n) thereof in the answering affidavit and that Mr Bekker's reliance on non-compliance with s 124 is inappropriate.

[22] In any event, it is clear that insofar as s 81(1) of the NCA imposes an obligation on a prospective consumer to fully and truthfully answer any request for information as part of the assessment required, respondent misled FNB by failing to inform it that Monsanto had obtained judgment against him. It is FNB's case that the respondent's failure in this regard materially affected its ability to make a proper assessment. This untruthfulness is a complete defence to the allegation that credit was granted recklessly.[17]

[17] See s 82(4) of the NCA

X THE 2ND DEFENCE: NEW AGREEMENT & THE PROMISSORY NOTES

[23] A promissory note is defined as follows in s 87 of the BEA:

> "(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to bearer.
> (2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.
> (3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell it or dispose thereof."

[24] Section 88 of the BEA requires delivery for coming into existence of a promissory note insofar as the note is inchoate and incomplete until delivery thereof to the payee or bearer.

[25] The signing of the promissory notes serves as proof of a promise to pay the admitted debts. Notwithstanding respondent's criticism of the manner in which FNB's founding papers and annexures thereto were presented - which criticism is totally unfounded - he confirmed through his signature on the three notes the capital amounts claimed to be due and payable to FNB.[18]

[18] Answering affidavit, annexure "D", pp 626 - 629

[26] I do not understand on what basis could it ever be argued that the delivery of these notes to a teller of one of FNB's branches served to discharge respondent's liability towards FNB. It is one thing to say that the fundamental purpose of a negotiable instrument is to be freely negotiable and to serve in effect as money as Conradie J correctly held in *Allied Credit Trust (Pty) Ltd v Cupido and Another,*[19] but totally wrong to submit that, in the present factual matrix, FNB as the "payee" has forfeited the right to proceed with either an application for sequestration or a monetary claim for the amount due and payable in that the debt has been discharged. Clearly, the promissory notes were never accepted as so-called payment. The teller who allegedly received them had no authority to accept settlement in the manner set out in the documents. No financial institution or any other at arms' length creditor will be prepared to wait for payment over a period of 38 years. It is really unnecessary to waste any more time and effort in order to show the respondent's devious plan, but I need to mention that it is the second time within a period of four months that I have come across such a scheme. In the first case a farmer of the Theunissen district, adjacent to Bultfontein, and his trusts faced Landbank's claim for a monetary judgment. Respondent's attorney eventually featured in the other matter as well. The promissory notes were clearly prepared by the same author as they and the accompany letter read virtually the same as *in casu*. In that matter the promissory notes were presented to the local branch of Landbank, well-knowing that application procedure had been instituted and that Pretoria and Bloemfontein attorneys were acting for the bank.

[19] 1996 (2) SA 843 (CPD) at p 847 E

[27] Mr Bekker's submissions that if FNB did not wish to be bound by the promissory notes, they had to "be returned before Maturity to avoid the Respondent being discharged from the payment thereof" and insofar as FNB "exercise a decision of non-acceptance, but fail to return the note" a reasonable presumption exists that FNB "has sold the Promissory Notes as Negotiable Instrument" are far-fetched and so speculative that it must be rejected as non-sensical. Neither FNB's attorneys, nor its deponent, to either of whom one would have expected the documents to be delivered, knew about them. FNB and its attorneys for the first time became aware of the respondent's devious scheme on receipt of the answering affidavit. It was made clear in the replying affidavit that these documents could not be found notwithstanding a diligent search.

[28] The BEA consists of three chapters dealing separately with bills of exchange, cheques and promissory notes. Chapter 3 deals with promissory notes. Mr Bekker's references to Malan *et al*[20] and chapter 1 of the BEA, dealing with bills of exchange, are misplaced and inappropriate. His submissions are not worth repeating and do not take the matter any further. I may however mention that Mr Bekker probably had in mind that the acceptance of a promissory note may prevent the creditor from enforcing the original obligation which is suspended until maturity of the promissory note. The facts in this matter are clearly not in line with the legal position set out in *Adams v SA Motor Industry Employers Association.*[21]

XI THE 3RD DEFENCE: FACTUAL SOLVENCY

[20] Malan on Bills of Exchange Cheques and Promissory Notes, 5th ed
[21] 1981 (3) SA 1189 (AD) at pp 1199 G – 1200 B

[29] I referred to and quoted extensively from the *Wightman* judgment *supra*. The same thoroughness was expected of respondent in this regard, but he again failed to live up to expectation. Mr Bekker's submission that FNB was prepared to accept the assets of Calandria 114 CC ("the CC") when it considered respondent's applications for credit, but now refuses to take those same assets in consideration in an attempt to show factual insolvency, is so misplaced that it can be rejected without further ado. No doubt, FNB was not prepared to grant credit facilities to respondent without security in several forms, including mortgage bonds to be registered by the CC in its favour. Respondent's membership interest in the CC may have a value, but he has failed to provide any proof pertaining to the CC's members and/or the financial position thereof in order to establish the value of his membership interest. In any event, as indicated *supra*, none of the valuations relied upon by respondent have been confirmed under oath and the evidence in this regard is inadmissible. It is unnecessary to elaborate any further in respect of this defence in light of the conclusions to which I have arrived *supra.*[22]

XII ADVANTAGE TO CREDITORS

[22] Under the heading, Chapter VI: Factual Insolvency

[30] I have not said anything about this requirement *supra*. I agree wholeheartedly with the evidence pleaded in both the founding and replying affidavit as well as the submissions of FNB's counsel. I may also add that a court will more often than not be persuaded by the views of a majority creditor as to whether sequestration would be in the interest of creditors as a group. Respondent failed to inform the court of any other creditors than FNB and Monsanto. This requirement has been met for purposes of s 10.

XIII CONCLUSION

[31] I am satisfied that FNB has made out a proper case for the customary provisional sequestration order. The return date should be four weeks from now, to wit 10 December 2020. Mr Van der Walt sought costs of the application, including the costs consequent upon employment of two counsel to be costs in the administration of the insolvent estate of respondent. It is not for the court not make such orders as statutory provisions apply. Sub-sections 97(2) and (3) of the Insolvency Act are clear.[23] Logic dictates that once the respondent's estate is finally sequestrated, the trustee of his estate will upon receipt of the applicant's bill of costs consent in writing to taxation in his absence in line with an establish practice and it will be the duty of the Registrar of the court to tax the bill. She will decide whether the costs of two counsel should be allowed.

[32] In light of the conclusion arrived at pertaining to a provisional sequestration order, it is obviously not necessary to consider the

[23] For further explanation, refer to Mars, *loc cit*, pp 146 & 479 - 481

monetary claim, save to say that a proper case has been made out by FNB, confirmed in writing by respondent as discussed *supra*.

XIV ORDERS

IT IS ORDERED THAT:

1. The estate of the respondent is hereby placed under PROVISIONAL SEQUESTRATION in the hands of the Master of the High Court.

2. A provisional sequestration order is hereby issued calling upon the respondent to show cause if any, to the court on the **10th** day of **DECEMBER 2020** at **09:30** why a FINAL ORDER of SEQUESTRATION should not be granted against his estate.

3. This order shall be served on the respondent personally.

4. The sheriff must ascertain whether there are employees in the employ of the respondent, and if so, whether they are represented by a trade union and whether there is a notice board on the premises to which the employees have access.

5. A copy of this order must be served on:

    5.1 Any registered trade union that as far as the Sheriff can reasonably ascertain, represents any of the employees of the respondent.

5.2 the respondent's employees, if any, by affixing a copy of the order and application to any notice board to which the employees have access inside the respondent's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the respondent conducts any business at the time of the presentation of the application papers, and

5.3 the South African Revenue Services.

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J P DAFFUE, ADJP

On behalf of Applicant	:	Advv DJ van der Walt SC and S Tsangarakis
Instructed by	:	Symington & De Kok BLOEMFONTEIN
On behalf of Respondent	:	Mr JJ Bekker
Instructed by	:	Bekker Attorneys BLOEMFONTEIN