REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No.55163/2019

REPORTABLE:YES/NO

OF INTEREST TO OTHER JUDGES:YES/NO

REVISED

DATE: 22/04/2021

In the matter between:

Medbond (PTY) Ltd — Appellant
(Registration No.: […])
And

Devan André de Meyer — Respondent
(ID No.: […])

JUDGMENT

Maumela J.

INTRODUCTION

1. In this case, the Applicant, Medbond (PTY) Ltd, applied for the sequestration of the Respondent's estate. It seeks a rule *nisi* for the provisional sequestration of the Respondent's estate, followed by a return date, (to be determined), for an order confirming the rule *nisi*.[1]
2. The Respondent is indebted to the Applicant. The debt is premised on a loan made by the Respondent to the Applicant. The amount of the loan is R 464 907.35. Applicant's application for the sequestration of the Respondent is premised on the contention that the latter has become factually insolvent. It is the contention of the Applicant that it shall be in the interests of creditors if the Respondent is declared to be insolvent.

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[1] pg1, notice of motion, prayer 1 and 2; pp8, par 6.1, FA

3. The Respondent delivered his notice of intention to oppose the sequestration application. He also filed his answering affidavit, whereupon the Applicant in return, filed a subsequent Replying Affidavit. In opposing the application for his sequestration, the Respondent raised the following defences:
    3.1. That he, (the Respondent), is not factually insolvent, and
    3.2. Although he, (the Respondent), admits that he received money from the Applicant, he denies that the money he received was in the form of a loan.
4. The Applicant contends the adjudication of this application has to involve a focus on the following issues:
    4.1. The undisputed facts relevant to the present application.
    4.2. The requirements for relief in terms of section 10 of the Insolvency Act.
    4.3. The defences raised by the Respondent and
    4.4. The relevant facts as appears from all affidavits filed by the Applicant and the Respondent.

    UNDISPUTED FACTS.
5. The following facts are admitted; not dealt with by the Respondent, or merely noted by him:
    5.1. The amounts as received by the Respondent which were paid over to the Applicant;
    5.2. Financial difficulties, which the Respondent experienced when he joined the Applicant;
    5.3. The relationship between the Applicant and the Respondent where Respondent worked for the Applicant an as an independent broker;
    5.4. That this relationship terminated during the course of January 2019;
    5.5. That the Respondent wants to pay back the money he received from the Applicant.
6. In the background of the above facts, the Court is required to consider granting the relief sought by the Applicant. An applicant who seeks an order for the provisional sequestration of a debtor's estate is required to *prima facie* establish the following:
    6.1. That he/she, it holds a claim against the debtor as intended in Section 9 (1) of the Insolvency Act;
    6.2. That the debtor has committed an Act of Insolvency or is factually insolvent;
    6.3. That there is reason to believe that it will be to the Advantage of Creditors of the debtor, if the Respondent's estate is sequestrated.
7. The Applicant submits that through the uncontested facts, it has been established that:
    7.1. The Respondent did receive, the amounts set out in paragraph 7.11 of the founding affidavit; from the Applicant.
    7.2. That the Respondent, indicated that he wants to pay back the money to the Applicant, (although he denies that the amount he received was in the form of a loan).7.3. The Respondent was indeed in a position of financial difficulty when he joined the brokerage firm of the Applicants; and this became the underlying

causa for the loan. (If the Respondent were not in a situation of financial difficulty, there would have been no underlying *causa* for the loan.

8. Applicant contends that the "defences" raised by the Respondent are no more than an attempt to delay payment which is in any event inevitable. There is no *bona fide*, genuine or real dispute of fact or defence disclosed by the Respondent.

9. "A *bona fide* dispute" on "reasonable grounds" is described as follows in LAWSA, Vol 4, part 3, par 69: *"A debt is not 'bona fide disputed' simply because the respondent company says that it is disputed. The dispute must not only be bona fide or genuine but must be on good reasonable and substantial grounds. The expression 'genuine dispute' connotes a plausible contention requiring the same sort of consideration as a serious question to be tried. It is not sufficient for the company to merely establish that there is a serious question to be tried as to whether the dispute over the debt is genuine in that the debt is disputed on the basis of an honestly held belief that it is not payable and is not disputed merely for the purposes of delay or obstruction. 'Genuine' in this context means not fabricated for purposes of the proceedings or not just thought up or brought forward without genuine belief: There can be no genuine dispute if there are no substantial grounds for disputing the debt." (Own emphasis added)*

10. In the case of *Wightman t/a JW Construction v Headfour (Pty) Ltd 2,* the following was stated, in respect of a *bona fide* dispute: *"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."*

11. The Applicant submits that the "disputes" or "defences" raised by the Respondent are not *bona fide* or genuine. It avers that such defences are not based on good, reasonable and substantial grounds. It advances the following substantiation of that assertion.
    11.1. The Respondent admits that he received money from the Applicant however, he denies that he received it as a loan.
    11.2. He does not advance any rebuttal, save for his contention to the effect that the money which he received was not a loan.
    11.3. He says that he wishes to pay back the money which he received.
    11.4. It begs the question why a reasonable person would tender to pay money of this magnitude if it is indeed not due owing and payable?
12. *In the case of Wightman t/a J W Construction v Headfour (Pty)*[2], the court stated the following concerning a real, genuine and *bona fide* dispute of fact: *"A real, genuine and a bona fide dispute of fact can exist only where the court is satisfied that parties who purports to raise the dispute have in their affidavits seriously and unambiguous addressed the disputed facts. A bare denial may meet the requirement if there is no other option. But it may not be*

[2]. 2008 (3) SA 371 (SCA) (10 March 2008).

sufficient if the averment is within the knowledge of the of the averring party and a basis is not set for disputing the veracity or accuracy of the averment."

13. The prevailing principles, in the assessment of a Respondent's defence, were summarised in the matter of *Ter Beeck v United Resources CC and Another*[3], where the court stated the following: "*In view of the aforementioned dispute between the applicant and the first respondent, this matter can be decided on a consideration of the probabilities only if I am satisfied that there is no real and genuine dispute of fact; that the first respondent's allegation is so far-fetched or untenable that their rejection merely on the papers is warranted; or that viva voce evidence will not disturb the probabilities appearing from the affidavits. Although it is undesirable to endeavour to resolve disputes of fact on affidavit without the hearing of evidence and seeing and hearing witnesses before coming to a conclusion it is equally undesirable to accept disputes of fact at their face value, because if that were done an applicant could be frustrated by the raising of fictitious issues of fact by a respondent. Accordingly, a court should in every case critically examine the alleged issues of fact in order to determine whether in truth there is a dispute of fact that cannot be satisfactorily determined without the aid of oral evidence."*

14. The aforementioned principles were more recently further enunciated in the anonymous judgment of the Supreme Court of Appeal in *PMG Motors Kyalami (Pty) Ltd and Another v First Rand Bank Ltd, Wesbank Division*[4]*.* when the Honourable Court stated that: *"This court has held that a real and genuine and bona fide dispute of fact can only exist where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact so to be disputed. It has also held that where a version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or … clearly untenable. The court is justified in rejecting it merely on the papers."*

15. The applicant submits that *in casu*, the court has to dismiss the Respondent's defences out of hand. If regard is had to the principles mentioned above, it becomes evident that the Respondent's defences simply do not pass muster and they fall to be rejected.

THE RESPONDENT'S FACTUAL INSOLVENCY.

16. The Applicant submits that actual insolvency denotes that a debtor's liabilities actually exceed the value of his assets. It contends that it is evident from the Respondent's own estimation of its debts that it is most likely that its liabilities indeed exceed his assets. Applicant submits that the Respondent did not properly quantify the liabilities in its answering affidavit and that this is an attempt to mislead the Court and to try and make his balance sheet or current financial outlook better than what it is in reality.

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[3]. 1997 (3) SA 315 C.

[4]. 1997 (3) SA 315 (C), at page 336A; 2015 (2) SA 634 (SCA) at

23.

17. In the case of *Ex parte Fouché,* it was held that it is only when it is established that it is improbable that the debtor's assets will realise sufficient proceeds to settle the amount of his debts in full that it can truly be said that the Court ought to be satisfied that the estate of the debtor is insolvent.

18. In his answering Affidavit, at paragraph 66.4, the Applicant submits that the value of the Respondent's household furniture is about R 500 000.00. It contends that this demonstrates that the Respondent does not have sufficient assets to satisfy his debts. It contends therefore that it cannot be disputed that the Respondent is in fact hopelessly insolvent.

19. The dicta of Innes CJ and in the case of De Waard v Andrew & Thienhaus Ltd[5] remains appropriate where he stated the following: *"The Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. 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."* 1956 (2) SA 116 (O) at 326 F-G. 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." The dicta of Innes CJ quoted supra were made in the context of liquidation proceedings, but Applicant submit that the Respondent's conduct and allegations are subject to similar suspicions.

ADVANTAGE TO CREDITORS.

20. Despite the Respondent's allegation that it would not be necessary for him to deal with the aspect of advantage for creditors, the Applicant submits that:
    20.1. The appointment of trustees who will invoke the machinery of the Insolvency Act will reasonably unearth or recover assets which will yield a possible pecuniary benefit to creditors.
    20.2. Applicant is the owner of immovable property, which if sold will hold some advantage to the creditors of the Respondent.

21. The Applicant argues that, should Respondent's estate be sequestrated, his appointed trustees will be in a position to properly investigate any disposal of his assets they shall be able to reclaim such assets and conduct a disposition as intended in the Insolvency Act. It also submits that in line with the quoted authorities, it is not open to the Respondent to deny the contents of the founding affidavit without meaningfully and unambiguously engaging with the evidence presented.

22. It is trite that there is a duty upon the Respondent to go beyond the mere formulation of disputes. The respondent has to disclose the grounds upon which he disputes the Applicant's claim. He has advance the material facts underlying the disputes he raises. Applicant charges that the Respondent only advanced a bare denial of the allegations and this does not suffice. The Applicant points out that the Respondent has not provided any factual

[5]. 1907 TS 727, at 733.

evidence that it would not be to the advantage of his creditors if his estate were to be sequestrated.

23. Applicant submits that the creditors whose advantage is envisaged are all the same collective body of creditors of the estate. In the case of *Meskin & Co v Friedman*[6], Roper J held that: *"In my opinion, 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 creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of inquiry under the [Insolvency] Act, some may be Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk*[7]*, 1948 (2) SA 555 (W) at 559 revealed or recovered for the benefit of creditors that is sufficient."*

24. In the case of *Stratford and Others v Investec Bank Ltd and Others*[8], the Constitutional Court held that: *"The correct approach in evaluating advantage to creditors is for a Court to exercise its discretion guided by the dicta outlined in Friedman. For example, it is up to a Court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment except through sequestration; or that some pecuniary benefit will be renowned to the creditors."*

ADVANTAGE TO CREDITORS.

25. The phrase "advantage to creditors" refers to means that there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole and that this requirement is considered to be fulfilled where it was established that there was reason to believe that there will be advantage to a "substantial portion" or the majority of the creditors reckoned by value. The Applicant submits that in the present circumstances it would be to the advantage of the majority of creditors, reckoned by value, if the Respondent's estate is sequestrated. 2015 (3) SA 1 (CC) at 19E-G. See: *Body Corporate of Empire Gardens v Sithole and Another*[9], and the authorities cited therein.
26. The applicant submits that the defences advanced by the Respondent notwithstanding; it has established a proper case for an order to be granted which provides for the provisional sequestration of the Respondent's estate.

STATUTORY REQUIREMENTS FOR AN ORDER TOWARD THE CORPORATION.

27. Section 9 of the Insolvency Act 24 of 1936, ("the Act"), provides the following: <u>*Section 9 Petition for sequestration of estate.*</u>

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6. 1948 (2) SA 555 (W) at 559.
7. *1997 (1) SA 244 (T) at 249F-G.*

8. CCT (62/14) [2014] ZACC 38; 2015 (3) BCLR 358 (CC), 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC) (19 December 2014).
9. 2017 (4) SA 161 (SCA) at paragraph 10.

(1). A creditor (or his agent) who has a liquidated claim for not less than (R100), or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than (R200) 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.

(2). A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition, shall be reckoned as a liquidated claim for the purposes of subsection (1).

(3).(a). Such a petition shall, subject to the provisions of paragraphs (c), contain the following information, namely –

(i). the full names and date of birth of the debtor and, if an identity number has been assigned to him, his identity number;

(ii). the marital status of the debtor and, if he is married, the full names and date of birth of his spouse and, if an identity number has been assigned to his spouse, the identity number of such spouse;

(iii). the amount, cause and nature of the claim in question;

(iv). whether the claim is or is not secured and, if it is, the nature and value of the security; and

(v). the debtor's act of insolvency upon which the petition is based or otherwise alleged that the debtor is in fact insolvent.

(b). The facts stated in the petition shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.

(c). The particulars contemplated in paragraph (a)(i) and (ii) shall be set out in the heading to the petition, and if the creditor is unable to set out all such particulars he shall state the reason why he is unable to do so.

(d). In issuing a sequestration order the registrar shall reflect any of the said particulars that appear in the heading to the petition on such order.

(4). …

(4A).(a). When a petition is presented to the court, the petitioner must furnish a copy of the petition-

(i). to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and

(ii). To the employees themselves-

(aa). by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or

(bb). if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;

(iii). to the South African Revenue Service; and

(iv). to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it.

(b). The petitioner must, before or during the hearing, file an affidavit by the person who furnished a copy of the petition which sets out the manner in which paragraph (a) was complied with.

(5). The court, on consideration of the petition, the Master's or the said officer's report thereon and of any further affidavit which the petitioning creditor may have submitted in answer to that report, <u>may</u> act in terms of section ten or <u>may</u> dismiss the petition, or postpone its hearing or make such other order in the matter as in the circumstances appears to be just.

28. The respondent avers that Applicant failed to comply with the requirements of section 9(3)(a) of the Act. It states that the application does not contain his date of birth or his marital status; neither does it reflect his full names and date of birth of his spouse, much as it does not reflect the full names and date of birth and identity number of his spouse. He states that the Applicant also failed to comply with the requirements of section 9(3)(c) in that it failed to state the reason why it is unable to set out all such particulars required in terms of section 9(3)(a)(i) and (ii).
29. Respondent argues therefore that this application falls to be dismissed with costs for this reason alone. The onus is upon the Applicant to satisfy the court at the hearing of the application that the requirements of section 9(4A) (a) and (b) of the Act have been met.

ABUSE OF SEQUESTRATION PROCEEDINGS.

30. It is common cause that the Act does not define 'liquidated claim'. In the case of *Kleynhans v Van Der Westhuizen NO*[10] it was held that a claim is the amount which has been determined by agreement, order of court or otherwise. The Respondent disputes that the applicant has a liquidated claim against him in the form of a verbal loan agreement.

31. The Respondent points out that sequestration proceedings are not designed for resolution of disputes regarding the existence of the debt or otherwise. If the claim is disputed on *bona fide* and reasonable grounds, an order ought not to be granted. Such an application may amount to an abuse of the

[10]. 1970 (2) SA 742 (A) at 749F.

process of court.[11] It is an abuse of process to use sequestration proceedings to enforce payment of a debt, the existence of which is disputed *bona fide* by the debtor on reasonable grounds, (the onus being on the debtor to establish such a dispute),[12] where the sole or predominant notable purpose of the application is something other than the *bona fide* bringing about of the sequestration of the debtor's estate for its own sake, but for some ulterior motive.[13]

32. Where there is a genuine and *bona fide* dispute regarding the respondent's indebtedness to the applicant the court should as a general rule dismiss the application. The Constitutional Court recently reaffirmed this principle in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*[14]*,* at paragraph [27], [86] and [145] which state as follows (footnotes omitted):

> "*[27]. As regards liquidation, there is a general principle that, where there is a genuine and bona fide dispute concerning the respondent's indebtedness to the applicant, the application for liquidation should be dismissed (Badenhorst principle). This principle acknowledges that liquidation proceedings are not the proper realm to determine debts, and that the proceedings should not be abused in an attempt To enforce repayment.*
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> *[86]. …I also agree that the Badenhorst principle does not obstruct a determination of the pointed issue here. That principle is less of a principle than a sensible rule of practice. It says that if you want to claim a debt you know is disputed, you should not bring liquidated proceedings to do it. You should claim the debt by way of action – and only once your claim has been established may you, if necessary, seek to liquidate or sequestrate.*
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> *[145]. Liquidation proceedings are designed to bring about a concurrence of creditors to ensure an equal distribution of the insolvent estate between them, and are inappropriate to resolve a dispute as to the existence of a debt. In order to prevent the possible abuse of the liquidation process, the rule was developed to the effect that where there is a genuine and good faith factual dispute concerning an alleged insolvent debtor's indebtedness to a creditor, the application for provisional liquidation should normally be dismissed.*
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> APPLICANT'S ALLEGED LIQUIDATED CLAIM – VERBAL LOAN AGREEMENT.

33. The applicant's alleged liquidated claim is premised upon an express verbal loan agreement[15] entered into between the applicant, duly represented thereto by the deponent to the applicant's founding affidavit Mr. Charl Steenkamp and Mr Jaco Van Heerden, and the Respondent acting in

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[11]. Laeveldse Koöperasie Bpk v Joubert 1980 (3) SA 1117 (T) at 1120H; Investec Bank Limited v Lewis 2002 (2) SA 111 (C) at 119C; Sonnenberg McLoughlin Inc v Spiro 2004 (1) SA 90 (C) at 96C.

[12]. Badenhorst v Northern Construction Enterprises Limited 1956 (2) SA 346 (T) at 347-348; Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) at 980

[13]. Wackrill v Sandton International Removals (Pty) Ltd 1984 (1) SA 282 (W) at 293E-F

[14]. 2018 (1) SA 94 (CC).

[15]. pp83, par 3.1, RA; pp85, par 6.5, RA; pp87, par 6.17, RA.

person.[16]

34. The date and place of the verbal loan agreement are not stated by the applicant.[17] A party relying on a claim based on a loan agreement must allege and prove:
(a). the loan agreement;
(b). that money was advanced under the agreement; and
(c). the loan is repayable.

35. The applicant asserts that the terms of the verbal loan agreement were *inter alia* as follows:
    35.1. The applicant would borrow to the respondent, who in turn would lend from the applicant, such amounts as were necessary to keep the applicant operational for a period of six months.
    35.2. The respondent was to pay all amounts back once he broke even, alternatively within a reasonable time.
36. These terms are in stark contrast and inconsistent with the following preceding assertion by Steenkamp in his founding affidavit[18]:
    36.1. *Realising that the respondent has taken a financial hit due to the fact that he lost the majority of his client base, the applicant offered to loan amounts to the respondent, until the respondent once again established a client base, which loan offer the respondent accepted ("the loan").*
37. It is apparent from the foregoing that the applicant seeks to rely on an express verbal loan agreement as the basis for its liquidated claim against the Respondent. It is further apparent from the foregoing that the express terms in regard to repayment of the loan relied upon by the applicant are contradictory in that the Applicant asserts that it offered to loan money to the Respondent "*until the respondent once again established a client base*" – without any explanation as to what this entails – which the Respondent would repay "*once he broke even, alternatively within a reasonable time*".
38. In his There is no allegation by the applicant in the founding affidavit that the respondent 'has broken even' (whatever 'broke even' is intended to mean) or that a reasonable time has lapsed (whatever a reasonable time would be under the circumstances)[19] which render the loan amount due and payable.
39. The applicant avoids dealing with this issue in its replying affidavit by raising a bold denial coupled with a nebulous assertion that:[20]
    39.1. The time periods for the repayment of the loan, should be seen within the context within which the loan was advanced to the respondent, and that it the sole purpose of the loan was to enable to respondent to set up his business infrastructure in order to be in a position whereby he can be self-sufficient and generates income (sic).
    39.2. Having regard to the fact that the repayment of the loan need be seen in the broader context of the loan, it is denied that as the

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[16]. pp9, par 7.8 and 7.9, FA.
[17]. *Ibid.*
[18]. pp9, par 7.7, FA.
[19] pp49-50, par 32 to 36, AA
[20] pp89, par 6.37 and 6.38, RA

respondent claims in paragraph 36 that there are mutually constructive versions in respect of a repayment of the loan (sic).

40. The applicant's failure (and inability) to deal with the ambiguity in its founding affidavit with regard to the terms for repayment of the loan, and its admission that the word 'loan' was never mentioned on any of the four occasions on which money was advanced to the respondent, belies the fallacy of its alleged liquidated claim, i.e. an express verbal loan agreement.[21] A creditor wishing to rely on the lapse of a reasonable time must establish what that period was.[22] The applicant does not address this issue either in its founding affidavit or in its replying affidavit despite a challenge in regard thereto by the respondent.

41. It behoves repeating that the Applicant relies on an express verbal loan agreement in support of its alleged liquidated claim against the respondent. The Respondent denies that the word 'loan' was ever mentioned on either occasion when money was paid to him. It is telling to note that the applicant admits that "*the word 'loan' was never mentioned by any party on each occasion that the applicant paid money to (the respondent)*".[23] The applicant does not rely on a tacit loan agreement.[24] The applicant avoids dealing with this aspect by raising a bare denial in its replying affidavit.[25] The applicant's reliance on an express verbal loan agreement with the respondent is accordingly untenable.

IS THE RESPONDENT IN *MORA*? (IE. DOES THE APPLICANT HAVE A LIQUIDATED CLAIM AGAINST THE RESPONDENT)?

42. A debtor is in *mora ex re* if the contract stipulates a time for performance but the debtor fails to perform within the time limit.[26] The Supreme Court of Appeal in *Scoin Trading (Pty) Ltd v Bernstein NO*[27] held at paragraph [11] and [12] as follows[28] (footnotes omitted):

> *[11]. The starting point is therefore an examination of the meaning of mora. The term mora simply means delay or default. This concept is employed when the consequences of a failure to perform a contractual obligation within the agreed time are determined. The date may be stipulated either expressly or tacitly and there must be certainty as to when it will arrive. Thus, when the contract fixes the time for performance, mora (mora ex re) arises from the contract itself and no demand (interpallatio) is necessary to place the debtor in mora. The fixed time, figuratively, makes the demand that would otherwise have had to be made by the creditor.*
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> *[12]. In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (interpallatio) becomes necessary to put the debtor in mora. This is referred to as mora ex persona. The debtor does not*

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21 pp49, par 32, 33 and 34, AA

22. Rustenburg Platinum Mines Limited v Breedt 1997 (2) SA 337 (SCA) at 352-353.

23. pp49, par 30, AA; pp88, par 6.32, RA.

24. pp50, par 37, AA.

25. pp90, par 6.39, RA.

26. Laws v Rutherford 1942 AD 261.

27. 2011 (2) SA 118 (SCA).

28. MV Snow Crystal Transnet Limited t/a National Ports Authority v Owner of MV Snow Crystal 2008 (4) SA 111 (SCA) at par [27]

necessarily fall into mora if he or she does not perform immediately or within a reasonable time. In this situation mora arises only upon failure by the debtor to comply with a valid demand by the creditor. Mora ex persona is so referred to since it requires an act of a person (the creditor) to bring it into existence.

43. The terms of the loan agreement relied upon by the applicant expressly state that all amounts loaned to the Respondent would be repayable "*once the respondent broke even, alternatively within a reasonable time*", thereby stipulating the time for repayment of the full loan amount by the respondent. When the contract fixes the time for performance *mora* is said to arise from the contract itself (*mora ex re*) and no demand (*interpellatio*) is necessary to place the debtor in *mora* because:

    43.1. Figuratively, the fixed time makes the demand that would otherwise have to be made by the creditor.[29]

44. This principle also applies when the contract fixes the time for performance by reference to the fulfilment of a suspensive condition or suspensive time clause.[30] The Applicant places much score on the Respondent's acknowledgement that he was paid an amount of R235 000.00 on 31 August 2018 and a further amount of R200 000.00 on 21 September 2018, (without any mention of a loan), "*despite which he (the respondent) intended to repay to the applicant*".[31]

45. This assertion by the Respondent does not avail the Applicant who relies on an express verbal agreement between the parties together with contradictory terms regarding the repayment of the loan. The fallaciousness of the verbal loan agreement relied upon by the applicant is further borne out by the applicant's admission that pursuant to the deterioration of the relationship between the parties it barred the respondent from returning to his office and that the applicant retained possession of all the office furniture and equipment and fittings.[32] The applicant's bare denial that the payment of the amounts of R12 636.10 and R17 271.25 to the respondent were reimbursements for the purchase of the foresaid office furniture and equipment and fittings is telling.[33]

FACTUAL INSOLVENCY / ACT OF INSOLVENCY.

46. The applicant relies on the bold assertion that the Respondent is factually insolvent.[34] The evidence presented by the Respondent in regard to the approximate market value of his residential dwelling at R2 800 000.00 with an outstanding balance of R1 521 441.54[35] with equity in an amount of R1 278 558.46 is admitted by the Respondent.[36] It is not ascertainable from the contents of the Applicant's founding affidavit on what basis it is contended that the Respondent has committed an act of insolvency.

BONA FIDE DISPUTE OF DEBT ON REASONABLE GROUNDS – *BADENHORST* RULE.

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[29]. Laws *supra* at 262.
[30]. Reping v Dacombe 1994 (3) SA 756E.
[31]. pp51, par 43, AA.
[32]. pp52, par 48 to 51, AA; pp91, par 6.48.
[33]. pp51, par 44, AA; pp52, par 47, AA; pp90, par 6.43, RA; pp90, par 6.46, RA.
[34]. pp8, par 6.4, FA; pp11, par 8.5, FA.
[35]. pp56, par 65, AA.
[36]. pp92, par 6.55, RA.

47. The Respondent disputes that he entered into an express verbal loan agreement with the applicant or that he is liable for the repayment of the alleged loan amount in terms thereof. The Respondent has dealt fully with the circumstances giving rise to the payment of various amounts to him by the applicant – none of which were described as a loan. The ambiguity regarding the terms of repayment belies the fallaciousness regarding the existence of an express verbal loan agreement.

48. The principle regarding *bona fide* disputed debts on reasonable grounds was succinctly captured in the recent judgment of GAP Merchant Recycling CC v Goal Reach Trading 55 CC[37] by Rogers J at paragraph [20] and [21] as follows:
"*Claim bona fide disputed on reasonable grounds? The legal test — disputed claims*
[20]. The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds, is part of the broader principle that the court's processes should not be abused. Liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. The rule is generally known as the 'Badenhorst rule', after one of the leading cases on the subject, subject, Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347H – 348C. A distinction is thus drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the respondent's liability, on the other hand, the question is whether the applicant's claim is disputed on reasonable and bona fide grounds; a court may reach this conclusion, even though on a balance of probabilities (based on the papers) the applicant's claim has been made out (Payslip Investment Holdings CC v Y2K Tec Ltd[38]). However, where the applicant at the provisional stage shows that the debt prima facie exists, the onus is on the company to show that it is bona fide disputed on reasonable grounds (Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)[39] [21] There was some debate before me as to how far a respondent need go in order to discharge the burden of proving that a debt which is prima facie due and payable is bona fide disputed on reasonable grounds. Both parties referred me to statements made by Thring J in Hülse-Reutter supra. It is desirable that I quote fully what the learned judge said at 219F – 220C*: "'I think that it is important to bear in mind exactly what it is that the trustees have to establish in order to resist this application with success. Apart from the fact that they dispute the applicants' claims, and do so bona fide, which is now common cause, what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do*

[37]. 2016 (1) SA 261 (WCC).
[38]. 2001 (4) SA 781 (C) at 783G – I.
[39]. 1998 (2) SA 208 (C) at 218D – 219C).

not, in this matter, have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their and their company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such a trial. This is not an application for summary judgment in which, in terms of Supreme Court Rule 32(3), a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the Court that he has a bona fide defence to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits the material facts relied upon therefor. . . . It seems to me to be sufficient for the trustees in the present application, as long as they do so bona fide, and I must emphasise again that their bona fides are not here disputed, to allege facts which, if approved at a trial, would constitute a good defence to the claims made against the company. Where such facts are not within their personal knowledge, it is enough, in my view, for them to set out in the affidavit the basis on which they make such allegations of fact, provided that they do so not baldly, but with adequate particularity. This being the case, they may, in my judgment, refer to documents and to statements made by other persons without annexing to their affidavits such documents or affidavits deposed to by such persons, subject of course to the qualifications which I have mentioned and, in particular, to the Court being satisfied, as it is in this case, of their bona fides."

49. It bears mentioning that the authorities relied upon by the applicant in its heads of argument pertain to the existence of 'factual disputes' in application proceedings which is quite distinct from the test as to whether a liquidated claim in insolvency proceedings is *bona fide* disputed.

CONCLUSION.

50. The onus is on the applicant to establish the requisites for the grant of a provisional sequestration order and the respondent is not required to disprove any element. The court is not bound to grant an order for the sequestration of the respondent's estate even if the requirements therefore have been met. Thus the court in *Chenille Industries v Vorster*[40] exercised its discretion against sequestration, notwithstanding proof of an act of insolvency (and the existence of a liquidated claim), where the debtor furnished independent evidence that his estate was solvent.

51. The applicant has failed to demonstrate that it has a liquidated claim against the respondent in the form of an express verbal loan agreement and that the full loan amount is due and payable, i.e. that the respondent is in *mora* in that the agreed time period/s for repayment of the loan (albeit contradictory) have lapsed and that the amount of R464 907.35 is payable to the applicant. The applicant has furthermore failed to demonstrate that the respondent is indeed factually insolvent or that the respondent has committed an act of insolvency.

52. The applicant constitutes an abuse of the court process in regard to the nature of the respondent's employment and is instigated by an ulterior and

[40]. 1953 (2) SA 691 (O).

improper motive which is premised upon a fictitious debt in the circumstances where the respondent's estate is not insolvent.[41] The respondent will accordingly seek the dismissal of the application with costs on an attorney and client scale as a mark of this Honourable Court's disapproval of the applicant's conduct.

53. In the result, the following order is made:
ORDER.

The application for the provisional sequestration of the Respondent's estate is dismissed with costs.

_____
T.A. Maumela.
Judge of the High Court of South Africa.

[41]. pp44, par 9, 10 and 11, AA.