IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN CASE NO. 4187/2015

In the matter between:

ABSA BANK LIMITED **Applicant**

and

THOMAS JAMES COOMBS **Respondent**

JUDGMENT

Bloem J.

[1] On 26 August 2015 the applicant instituted an application for the sequestration of the respondent's estate. Despite the respondent's opposition a provisional order of sequestration of the respondent's estate was granted on 11 February 2016. The applicant now seeks an order that the respondent's estate be placed under final sequestration. The respondent still opposes the application.

[2] The applicant seeks the sequestration of the respondent's estate on the basis that the respondent allegedly committed an act of insolvency, as envisaged in section 8 (g) of the Insolvency Act.[1] Section 8 (g) provides that a debtor commits an act of insolvency "*if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts*".

[3] The history of the matter is that during June 2008 the applicant lent to Ash Brook Investments 55 (Pty) Ltd (Ash Brook) and DYU Trading CC who borrowed from the

[1] Insolvency Act, 1936 (Act No. 24 of 1936).

applicant money in terms of a loan facility limited to the sum of R115m. The purpose of the loan was to finance, in whole or in part, the acquisition and development of the Rosehill Mall, just outside Port Alfred. The parties agreed that the amount loaned, inclusive of interest, should be repaid by Ash Brook and DYU Trading CC to the applicant after the completion of the construction of the Rosehill Mall over a period of 10 years. The repayments were staggered over that period.

[4] On 5 June 2008 the respondent signed a suretyship in favour of the applicant and bound himself as surety and co-principal debtor jointly and severally with Ash Brook and DYU Trading CC for their indebtedness towards the applicant. Ash Brook thereafter changed its name to Rosehill Mall (Pty) Ltd.

[5] The applicant claims that it demanded payment from the respondent after which the parties entered into negotiations. During those negotiations the respondent did not disclose sufficient assets which could be liquidated to settle his indebtedness to the applicant. From what the respondent informed the applicant's officials his liabilities exceeded the fair value of his assets. His estate was accordingly *de facto* insolvent, the applicant claims. As the parties could not reach agreement the applicant handed the matter to its attorneys for the recovery of the debt.

[6] The applicant's attorney, Leon Sandenbergh of Sandenbergh Nel Haggard Attorneys, addressed a letter to the respondent inviting him to make submissions regarding payment of the debt. By letter dated 12 December 2014 the respondent's attorney, Michael White, informed Mr Sandenbergh that the respondent was prepared to cede a life insurance of R3m in the applicant's favour as security for his obligations. He was furthermore informed that, in addition to the sum of R150 000.00 that was appropriated

from a related account without the respondent's authority, the respondent was in a position to make a further payment of R350 000.00 at the end of April 2015 and a further R500 000.00 by the end of April 2016, that all of the respondent's tangible assets which could have been sold or provided security for his obligations, were mortgaged to Standard Bank or Investec and that none of them was prepared to release any properties or securities. By email dated 19 December 2014 Mr Sandenbergh requested Mr White to advise how the respondent intended settling the balance of the outstanding debt. Mr White informed him by letter dated 5 January 2015 that the above proposal was made in full and final settlement of any obligations that might exist between the applicant and the respondent. By email dated 29 January 2015 Mr Sandenbergh informed Mr White that the applicant was not prepared to accept the respondent's proposal in full and final settlement.

[7] Reference was also made to an email dated 28 May 2014 that Nicolene Butler addressed to the applicant wherein she informed Colin Botha, one of the applicant's managers, that the respondent's auditor had advised that "*it would not be possible for [the respondent] to increase his offer of a cast settlement of :*

R500 000 payable by the end of 2014

R500 000 payable by the end of 2107

Cession of the interest/deferred payment due to Tom Coombs and Associates Trust in respect of the Grand Hotel".

[8] In her confirmatory affidavit Ms Butler described herself simply as an adult female personal assistant. In an email that she addressed to Mr Sandenbergh on 15 October 2014 she described herself as the respondent's personal assistant. The reasons that

she gave for the impossibility to increase the offer was that the respondent turned 69 during 2014, was unemployed and his assets had been mortgaged to Standard Bank and Investec. She concluded the email by expressing regret "*that we are not in a position to make further offers*".

[9] The applicant's case is that in the email from Ms Butler and the letters from Mr White the respondent gave notice to the applicant, being one of his creditors, that he was unable to pay his debt to the applicant and thereby committed an act of insolvency as envisaged in section 8 (g) of the Insolvency Act.

[10] The respondent opposes the confirmation of the *rule nisi* on various bases. Firstly, he contends that the person who deposed to the applicant's founding and replying affidavits, Claudia Correia, failed to show not only that she had authority from the applicant to bring the application and to depose to the affidavits but also that she failed to show that she is in a position to state and verify the material facts upon which the application for the grant of final relief is based. Secondly, the respondent contends that the certificate upon which the applicant relies to show the respondent's indebtedness to it is unreliable and provides no particularity of the circumstances taken into account in producing it. Thirdly, the respondent contends that the applicant was required to make demand before the alleged debt could be said to be due and payable and failed to do so. Fourthly, it contends that the principal debt was novated with the result that the respondent was discharged as surety. Fifthly, the respondent contends that the applicant failed to establish that there is reason to believe that it will be to the advantage of creditors if his estate is sequestrated. Sixthly, the respondent contends that the applicant failed to show that the respondent gave written notice to the applicant that he is unable to pay any of his debts.

[11] In her founding affidavit Ms Correia described herself as a legal counsel employed in the applicant's litigation department. She stated that she was duly authorised to make the founding affidavit and to represent the applicant in the present application. She also stated that all the applicant's data and records relating to the claims against the respondent are under her control and that she acquainted herself therewith.

[12] The present proceedings were instituted and prosecuted[2] by Mr Sandenbergh whose firm purports to act on behalf of the applicant. If an attorney is authorised to bring an application on behalf of the applicant, the application necessarily is that of the applicant. If the attorney's authority to act on behalf of the applicant is disputed, the person disputing the authority must follow the procedure provided in Rule 7 of the Uniform Rules of Court.[3] The respondent did not call upon Mr Sandenbergh or Sandenbergh Nel Haggard Attorneys to deliver a power of attorney to satisfy the court that the firm was authorised to act on behalf of the applicant.

[13] In any event, the probabilities are against Ms Correia, who is employed in the applicant's legal department, instituting an application of this nature involving millions of rands allegedly due to the applicant on behalf of the latter without the knowledge of the applicant's head of legal services[4]. In that regard it is pointed out that Mr Botha, in his capacity as the applicant's portfolio manager in its Business Support, Commercial Property Finance and Agriculture Department, deposed to an affidavit wherein he stated that, when it became evident that legal action was required, he transferred the applicant's action to Ms Correia and her team. In the circumstances, the submission that Ms Correia did not have authority to act on behalf of the applicant cannot be upheld.

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[2] *Ganes and another v Telecom Namibia Limited* 2004 (3) SA 615 (SCA) at 624H-J.
[3] *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C-H to which reference was made with approval in *Ganes* (supra) at 624F-625A.
[4] *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 207H.

[14] Regarding Ms Correia's alleged lack of personal knowledge of the applicant's claim, the respondent's case is that, prior to the involvement of the parties' attorneys, he dealt primarily with Mr Botha. In his aforesaid affidavit Mr Botha confirmed the correctness of the contents of Ms Correia's founding and replying affidavits – particularly insofar as the contents related to his "*involvement in the business transaction and in particular the mandate that was provided and the eventual sale of the immovable property by private treaty*". It is accordingly common cause that Mr Botha, on behalf of the applicant, was involved in settlement negotiations with the respondent before the parties engaged attorneys. In my view Mr Botha would not have been involved in settlement negotiations with the respondent unless he knew the facts material to the applicant's claim. Those facts are set out in Ms Correia's affidavits which facts were confirmed by Mr Botha. In the circumstances, the submission that Ms Correia is not in a position to state and verify material facts upon which the application is based, can also not be sustained.

[15] In the suretyship agreement wherein the respondent bound himself as surety and co-principal debtor with Ash Brook and DYU Trading CC he agreed in clause 14 thereof that a certificate signed by any of the applicant's managers shall be sufficient proof of any applicable rate of interest and of the amount owing in terms of the suretyship or of any other fact relating to the suretyship for the purposes of judgment, including provisional sentence and summary judgment, proof of claims against insolvent and deceased estates or otherwise and if a party disputed the correctness of such certificate, he or it shall bear the onus of proving the contrary. It shall not be necessary to prove in such a certificate the appointment or capacity of the person signing such certificate.

[16] In this case the certificate upon which the applicant relies was signed by Maria Eugenia Camacho, described as the applicant's manager of Legal Recoveries: Business Support

and Recoveries. The certificate correctly reflects the principal debtors. It reflects not only the respondent as surety but three other alleged sureties. Ms Camacho certified:

> "*that the abovementioned Principal Debtor and Sureties are indebted to Absa Bank Limited, jointly and severally, as follows in respect of the abovementioned SHORTFALL ON MORTGAGE LOAN:*
>
> *The total amount due and payable on 22 August 2014 is R84 540 507.24 (Eighty four million five hundred and forty thousand five hundred and seven rand and twenty four cents) plus interest at 8.22%, per annum, capitalised monthly from 23 August 2014 to date of payment, both days included*."

[17] In that certificate Ms Camacho certified that as at 22 August 2014 the sum due and payable by the principal debtors was R84 540 507.24 plus interest at 8.22% per annum capitalised monthly from 23 August 2014 to date of payment. What is set out in the certificate informs the reader of the "*applicable rate of interest and … the amount owing in terms of the suretyship*." With respect, what is contained in the certificate is sufficient to comply with clause 14 of the suretyship. No further fact was required to be stated in the certificate for purposes of this application. Since the principal debtors were as at 22 August 2014 indebted to the applicant to the extent set out in that certificate, the effect of the suretyship is that the respondent was indebtedness to the applicant to the same extent on that date. The respondent's contention that the certificate is unreliable cannot be sustained.

[18] The applicant's claim that the respondent is insolvent is based on the respondent's alleged inability to pay his indebtedness to the applicant arising from the suretyship. The respondent contends that the agreement (mandate agreement) between Rosehill Mall (Pty) Ltd and the applicant novated the principal debt. In terms of the mandate agreement Rosehill Mall (Pty) Ltd, as the owner of the immovable property, gave the

applicant a mandate to sell the immovable property and settle or cover some of its indebtedness towards the applicant from the proceeds of the sale. In terms of the mandate agreement "Owner" is the Rosehill Mall (Pty) Ltd.

[19] Clause 3.8 of the mandate agreement provides as follows:

> "*This Power of Attorney and Agreement shall not create any novation of the cause or causes of action in terms whereof the Owner owe its indebtedness to Absa, and Absa shall be entitled in his sole discretion at any time to institute action against the Owner for the recovery of any or all of the amounts owing by the Owner to Absa*".

[20] Furthermore, clause 4.5 of the mandate agreement provides as follows:

> "*Unless all the indebtedness of the Owner on the Banking Facilities has been settled in full from the Realisation Proceeds, notwithstanding anything to the contrary contained or implied in this Agreement, Absa shall be entitled forthwith to institute legal proceedings for the recovery of any amount that remains owing to it thereafter*".

[21] Clause 5.9.3 of the mandate agreement provides that the applicant's "*right to act in accordance with this Agreement does not constitute a novation of either the Owner's indebtedness in terms of the Banking Facilities*".

[22] Mr Buchannan SC, counsel for the respondent, submitted that, notwithstanding its purported attempt not to novate the principal debt, the fundamental restructuring of the principal debt and the sale of the immovable property resulted in a novation of such debt. The submission was that it is irrelevant that the mandate agreement purported not to novate the principal debt.

[23] A contract of novation is one that extinguishes an existing obligation and at the same time replaces it with a fresh obligation. In other words the existing obligation is replaced

with a new one, the existing obligation being discharged.[5] A party alleging novation must allege and prove it.[6] Although an express declaration from the parties to novate is not a requirement, the party alleging novation must place sufficient evidence before the court from which a necessary inference of novation could be drawn.[7] There is a presumption against novation. In determining whether novation has occurred, the intention to novate is not presumed. Novation is essentially a question of intention. In the absence of an express declaration of the parties to novate, the intention to effect novation cannot be held to exist except by way of necessary inference from all the circumstances of the case.[8]

[24] In this case the existing obligation that was placed on the respondent by the suretyship was to pay on demand any sum or sums of money which the principal debtors owe to the applicant. In my view that obligation is not replaced by the mandate agreement, as appears from the clauses quoted above. The respondent relies on alleged restructuring of the principal debt and the sale of the immovable property as resulting in the novation of the debt. With respect, the parties agreed in the mandate agreement that the proceeds of the sale of the immovable property will be used to settle the respondent's indebtedness to the applicant and where the proceeds do not cover this entire indebtedness, the applicant was entitled to institute legal proceedings against the respondent for the recovery of any amount that remains owning to the applicant after the settlement of part of the respondent's indebtedness. That clause in the suretyship makes it clear that the principal debt would either be settled by the proceeds of the sale of the immovable property and where the proceeds are insufficient to cover the principal debt,

[5] *Rodel Financial Services (Pty) Ltd v Naidoo and Another* 2013 (3) SA 151 (KZP) at 155G-H and Christie's *The law of contract in South Africa*, Sixth Edition at 466.
[6] *Botes NO and another v Shamley* [2007] 4 All SA 731 (SE) at 735e.
[7] *French v Sterling Finance Corporation (Pty) Ltd* 1961 (4) SA 732 (A) at 736F-H.
[8] *Darling v Registrar of Deeds, Cape Town* 1912 AD 28 at 35 and *National Health Laboratory Service v Lloyd-Jansen van Vuuren* 2015 (5) SA 426 (SCA) at 430H-431D.

the applicant could institute legal action against the respondent for the recovery of the outstanding amount. In my view that clause discounts the notion of a novated principal debt.

[25] The fact that the Rosehill Mall (Pty) Ltd sold the immovable property to 328 Wynberg Property CC does not, without evidence to prove it, mean that the respondent's obligation to pay the debt to the applicant was novated. It is not enough to allege that the principal debt was restructured simply because the applicant and Rosehill Mall (Pty) Ltd concluded the mandate agreement, to the exclusion of DYU Trading CC, the co-debtor of Rosehill Mall (Pty) Ltd. That is, with respect, irrelevant because in clause 2.1 of the mandate agreement Rosehill Mall (Pty) Ltd acknowledged its indebtedness to the applicant in the sum of R144 000 000.00. The respondent gave suretyship to the applicant in respect of liabilities incurred by the principal debtors and whether such debts already exist or may exist in future.

[26] Nowhere in his affidavit did the respondent, on whom the onus rested to prove novation, state how the respondent's obligation to pay the applicant under the suretyship agreement (the existing agreement) was allegedly extinguished under the mandate agreement or how the mandate agreement replaced the respondent's existing obligation with a fresh obligation. The respondent did not place facts before the court from which a necessary inference could be drawn that the principal debt was novated. To the contrary, it is clear from the mandate agreement that the respondent was not discharged from his obligation to pay the money which the principal debtors owe the applicant. In the circumstances, the respondent failed to prove the novation of the principal debt.

[27] One of the consequences of novation is the release or discharge of a surety from his

liability under the principal obligation, unless the parties expressly agree to the contrary.[9] However, it is unnecessary to discuss the consequences of novation because the respondent failed to establish the novation of the principal debt.

[28] The respondent contends that the application to have his estate finally sequestrated should be refused because the applicant failed to establish that there is reason to believe that it will be to the advantage of the respondent's creditors if his estate is sequestrated.[10] The applicant relies on the common cause facts that the respondent is the owner of 36 immovable properties over which mortgage bonds are registered and that he is the director of two companies and a member of a close corporation. It also relies on the fact that the respondent has resigned as director and member of companies and close corporations.

[29] The onus of establishing that there is reason to believe that sequestration of a debtor's estate will be to the advantage of creditors is on the sequestrating creditor.[11] The creditor is required to place facts before the court to 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*."[12]

[30] Against the above background I need to determine whether the applicant placed facts before the Court to satisfy it (not that the sequestration of the respondent's estate will be to the advantage of creditors, but) that there is reason to believe that such sequestration will be to the advantage of creditors. The applicant placed before the court facts to show that the respondent owns 36 immovable properties, all of which are bonded. It also

[9] Caney's *The law of suretyship*, Sixth Edition at 194.
[10] Section 12 (1) (c) of the Insolvency Act.
[11] *Stock Owners Co-operative Co Ltd v Rautenbach* 1960 (2) SA 123 (E) at 127C-D.
[12] *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559 to which reference was made with approval in *Stratford and others v Investec Bank Ltd and others* 2015 (3) SA 1 (CC) at 18D-19B.

showed the purchase prices of three of those properties, namely R200 000.00, R1 650 000.00 and R1 250 000.00 respectively as at the dates of registration, namely 16 January 1989, 11 June 2003 and 18 August 2003.

[31] Except for its reliance on the respondent's ownership of the immovable properties, the applicant also relies on the respondent's past and present directorship and membership of companies and close corporations as well as the advantage of investigation of the respondent's financial affairs after the sequestration of his estate. Roper J in *Meskin & Co v Friedman* stated at 559 that, because the advantage of investigation follows automatically upon sequestration, the Legislature must have had some other kind of advantage in mind when it required that the Court should have "reason to believe" that there would be advantage to the creditors. The learned Judge was of the view that the right of investigation is given not as an advantage in itself, but as a possible means of securing ultimate material benefit for the creditors. It is not enough to make out a case for an investigation without showing that any material benefit to the creditors is likely to result from the investigation. There would be an advantage to creditors only if an applicant establishes that there are reasons to believe that an investigation following sequestration is likely to result in some pecuniary benefit to creditors.

[32] The respondent admitted ownership of the 36 immovable properties and his directorship and membership of companies and a close corporation. He did not set out his assets and liabilities, save to state that his estate is complex "*and it is premature to comment, in detail, upon the details of the assets and liabilities forming part of that estate. Suffice it to say that the estate consists, inter alia, of immovable property, loan accounts in various entities and financial instruments. A process of the identification of various assets and liabilities, and the valuation thereof, is being undertaken.*" No valuation of his estate was

subsequently placed before the Court. I take into account that the respondent bound himself as surety to the applicant in an amount of R115m. It does not make commercial sense for a bank, like the applicant, to expose itself to that extent without the respondent having provided sufficient security to the applicant. It seems that the respondent must have been a man of financial substance when he concluded the suretyship with the applicant. I am sure that an investigation is likely to reveal what happened to his financial muscle and his interest in the companies and close corporation in which he holds directorship and membership. An investigation into the respondent's estate is likely to unearth assets, for instance the nature and value of the assets ceded to Standard Bank and Investec, which would benefit creditors.

[33] In the circumstances, I am satisfied that the applicant placed enough facts before the Court to conclude that there are reasonable prospects that an investigation of the respondent's estate will result in some pecuniary benefit to the creditors. The applicant has accordingly established that it will be to the advantage of creditors if the respondent's estate is sequestrated.

[34] The respondent's contention that the applicant should have given him notice before the institution of these proceedings is based on the provisions of the mandate agreement. It was submitted on the respondent's behalf that, because the mandate agreement requires notice, the applicant's failure to give notice has the result that the principal debt, if any, is not yet due and payable. That is so because the mandate agreement makes the giving of notice part of the applicant's cause of action.[13] It was furthermore submitted on behalf of the respondent that if the applicant relied on the original principal debt, clause 24 of the loan agreement provides that in the event of default, the applicant may *inter alia*

[13] *Henriques and another v Lopes* 1978 (3) SA 356 (W) at 358B-C.

require the two principal debtors to discharge the whole of their indebtedness to it under the loan agreement and clause 29 thereof provides how and where notices and documents in legal or other proceedings in connection with the loan agreement should be served by the applicant on the principal debtors. Neither clause makes the giving of notice a prerequisite for the institution of legal proceedings against the principal debtors.

[35] But more importantly, the applicant's cause of action is based on the suretyship. There is no requirement in the suretyship that the institution of sequestration proceedings be preceded by the giving of notice. In the circumstances, there is no merit in the respondent's submission that, because the applicant did not give notice to the respondent prior to the institution of the present proceedings, the principal debt is not yet due and payable.

[36] I now deal with whether or not the applicant established that the respondent committed an act of insolvency as envisaged in section 8 (g) of the Insolvency Act. The applicant's case is that the correspondence that was addressed to it and its attorneys by Ms Butler and Mr White, on behalf of the respondent, amounts to an acknowledgement by the respondent that he was unable to pay his debt to the applicant. The respondent's response thereto is twofold. Firstly, the applicant did not identify the email or letter upon which it relies for the contention that the respondent admitted his inability to pay the principal debt. Secondly, whatever email or letter the applicant relied upon cannot be used against the respondent because it was addressed to the applicant in the course of settlement negotiations and it was the applicant who invited the respondent to make proposals in writing. It was submitted on behalf of the respondent that it is unconscionable for the applicant to demand a proposal in writing and then to rely on that proposal as constituting an act of insolvency.

[37] In my view the applicant could only have referred to the email dated 28 May 2014 that Ms Butler sent to Mr Botha and the letter dated 12 December 2014 that Mr White addressed to Mr Sandenbergh for the contention that the respondent admitted his inability to pay the debt. In her email Ms Butler informed Mr Botha that the respondent would be unable to increase an offer to settle his indebtedness to the applicant because of his age, being unemployed and his assets having been ceded to Standard Bank and Investec. The offer was not accepted by the applicant. In his letter Mr White informed Mr Sandenbergh that he received advice "*that any submissions that [the respondent] might have should be submitted in writing.*" He then proceeded to make a settlement proposal in that letter and requested Mr Sandenbergh to take instructions thereon and revert. That settlement proposal is set out in paragraph 6 above. It was made in full and final settlement of any obligations that the respondent might have had towards the applicant.

[38] Mr Buchanan submitted that if it is found that the applicant relies on the above correspondence it falls short of what is required to constitute an act of insolvency in terms of section 8 (g) of the Insolvency Act because a reasonable person of business would not have concluded that the respondent was unable to meet his financial obligations towards the applicant, based on the above correspondence.

[39] I am of the view that in the above correspondence, particularly the letter from Mr White, the respondent, through his personal assistant and attorney respectively, acknowledged that he was unable to pay his indebtedness to the applicant. If he was able to pay the debt he would not have made the settlement proposals. It is also not an answer to state that neither Ms Butler nor Mr White had a mandate from the respondent to make settlement proposals to the applicant on behalf of the respondent. In his above letter Mr White repeatedly referred to his instructions. He could only have been instructed by the

respondent to address that letter to Mr Sandenbergh. Similarly, Ms Butler's email was addressed to, not only Mr Botha but, also to the respondent. At no stage prior to the delivery of the answering affidavits did the respondent deny that Ms Butler had a mandate from him to make settlement proposals on his behalf. His denial in that regard in his answering affidavit is accordingly unconvincing.

[40] The issue whether or not correspondence written with a view to settle a dispute is inadmissible was recently discussed by the Supreme Court of Appeal in *Absa Bank Ltd v Hammerle Group.*[14] In that case the Court admitted a letter that was written with a view to settle a dispute on the ground that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest and that public policy dictates that an admission of insolvency should not be precluded from sequestration or winding-up proceedings, even made on a privileged occasion. In this regard Mbha JA, with reference to *Absa Bank Ltd v Chopdat*[15] and *Lynn & Main Inc v Naidoo and another*[16] had the following to say at 219B-H:

> "[13] It is true that, as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest. A *concursus creditorum* is created and the trading public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged. This is explained in the words of van Schalkwyk J in *Absa Bank Ltd v Chopdat*, when he said:

[14] *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA).
[15] *Absa Bank Ltd v Chopdat* 2000 (2) SA 1088 (W) at 1092H-1094F.
[16] *Lynn & Main Inc v Naidoo and another* 2006 (1) SA 59 (N) at 65B-66A.

> '(A)s a matter of public policy, an act of insolvency should not always be afforded the same protection which the common law privilege accords to settlement negotiations.
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> A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. I would therefore be inclined to draw an analogy between the individual who seeks to protect from disclosure a criminal threat upon the basis of privilege and the debtor who objects to the disclosure of an act of insolvency on the same basis.'

In the final analysis, the learned judge said at 1094F:

> 'In this case the respondent has admitted his insolvency. Public policy would require that such admission should not be precluded from these proceedings, even if made on a privileged occasion.'"

[41] Mr Buchanan sought to distinguish *Hammerle* from the present application on the basis that the former was concerned with an application for liquidation in terms of the Companies Act[17] and not an act of insolvency as envisaged in the Insolvency Act, as is the case in the present matter. While it is correct that the Court in *Hammerle* dealt with an application for liquidation in terms of the Companies Act, the principle enunciated therein applies to both liquidation and sequestration proceedings. The exception to the general rule (that negotiations between parties which are undertaken with a view to settlement of their dispute are privileged from disclosure) applies to liquidation and sequestration proceedings because both are juridical processes which can have extensive and profound consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent and after he had admitted an act of insolvency. That much is said by Mbha JA in the above quote. In my view the respondent acknowledged his indebtedness to the applicant in the above correspondence.

[42] I am satisfied that the applicant established a liquidated claim against the respondent, that the respondent committed an act of insolvency in terms of section 8 (g) of the

[17] Companies Act, 1973 (Act No. 61 of 1973).

Insolvency Act and that there is reason to believe that it will be to the advantage of the respondent's creditors if his estate is sequestrated. In the circumstances, the *rule nisi* issued on 11 February 2016 should be confirmed.

[43] In the result, it is ordered that the respondent's estate be and his hereby placed under final sequestration.

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G H BLOEM
Judge of the High Court

For the applicant:	Adv L M Olivier SC, instructed by Sandenbergh Nel Haggard Attorneys, Cape Town and Huxtable Attorneys, Grahamstown.
For the respondent:	Adv R G Buchanan SC, instructed by Lexicon Attorneys, Port Elizabeth and Netteltons Attorneys, Grahamstown
Date heard:	28 July 2016
Date of delivery of the judgment:	27 September 2016