



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 19791/2020

- (1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

08/05/23

Date

ML TWALA

In the matter between:

**MERCANTILE BANK LIMITED
A DIVISION OF CAPITEC BANK LIMITED**

APPLICANT

And

MICHAEL MAURICE ROSS

FIRST RESPONDENT

MICHELLE BEVERLEY ROSS

SECOND RESPONDENT

Neutral Citation: *MERCANTILE BANK LIMITED v MICHAEL MAURICE ROSS & MICHELLE BEVERLEY ROSS* (Case No: 19791/2020) [2023] ZAGPJHC `435 (08 May 2023)

JUDGMENT

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 8th May 2023.

Summary: *Insolvency Act 24 of 1935 – section 12(1) and (2) of the Act – act of insolvency – advantage to creditors – prospect that some pecuniary benefit will result – consideration of protection of innocent public from the insolvent - estate of insolvent sequestrated.*

TWALA J

- [1] On the 13th of August 2021 the applicant was granted and obtained a provisional order sequestrating the estate of the first respondent with a return day for the first respondent to show cause why a final order sequestrating his estate should not be granted. The first and second respondents are before this

Court to show cause why the estate of the first respondent should not finally be sequestrated, the second respondent, who was married out of community of property to the first respondent, having been successful in her application to be joined in these proceedings.

- [2] Initially the applicant contended that the first respondent has committed an act of insolvency after he failed to pay the debt on demand in terms of section 8(g) of the Insolvency Act, 34 of 1936 (*"The Act"*). Secondly, the applicant relied on the provisions of section 8(c) in that the first respondent disposed of his immovable property to the prejudice of his creditors at the time when he was insolvent and that he was factually insolvent. However, at the hearing when the provisional order was granted, the applicant abandoned the basis of its claim under the provisions of s 8(c) of the Act. I propose to refer to the first respondent as the respondent and where I am referring to the second respondent I will do so by mentioning the number of the respondent.
- [3] The genesis of this case is that the applicant lent and advanced monies to a company known as QD Cellular (Pty) Ltd (*"The Company"*) during the period 2007 to 2017. The loan was secured by the cession of the company's debtors book, the various notarial bonds that were registered and suretyship undertakings which were signed by three third parties and one of whom is the respondent. The respondent bound himself as surety and co-principal debtor unto and in favour of the applicant in terms of various suretyships concluded over a period of time.
- [4] It is undisputed that in July 2019 the management of the company advised the applicant that, due to the financial strain, the business of the company was no longer sustainable and that it could no longer service its loan with the applicant and that attempts to procure the sale of the company were unsuccessful.

Furthermore, in August 2019, as a result of the repudiation of the loan agreements by the company and the acceptance thereof by the applicant, it was agreed between the applicant and the company that the applicant would proceed to perfect the notarial bonds registered in its favour over the moveable property of the company. The company is as a result no longer a trading entity.

- [5] The proceeds received from the sale of the movable property were credited to the total debt owed by the company to the applicant and this left an outstanding balance in the sum of R32 807 774. 41 owing to the applicant as at 1st February 2020. In breach of the suretyship agreements, the respondent has failed to make payment to the applicant in the reduction of the total debt. As a result of the non - payment of the debt, on the 10th of March 2020 the applicant dispatched a notice to the respondent in terms of which the suretyship obligations and indebtedness were recorded. Furthermore, the notice granted the respondent an opportunity to repay the debt due to the applicant and that if he failed to do so, the notice will constitute a notice in terms of s 8(g) of the Act.
- [6] In response to the notice of the 10th of March 2020, the respondent contended that it is not indebted to the applicant in the amount claimed and or at all. It was contended that on the 15th of August 2019 the parties concluded an agreement whereby the respondent was appointed to act as an agent for the applicant. Its mandate was to dispose the movable assets of and to collect the trade debtors of the company. The agreement was that, should the disposal of the movables and the collection of the trade debtors of the company realise an amount of R12 million, the applicant would be released from his indebtedness in favour of the applicant.

- [7] The respondent testified in his answering affidavit that the applicant made it impossible for him to perform his obligations in terms of his mandate as it interfered and prevented him in the execution of his duties. The applicant immediately after the signing of the agreement took over and issued the letters of demand to the book debtors. Such conduct by the applicant amounted to a breach of the agreement between the parties which breach resulted in the respondent being unable to realise the R12 million for the stock and book debt of the company in order for him to be released from the liability towards the applicant. As a result, in December 2019 the movable assets and stock to the value of R28 million were sold to a single purchaser known as KNR Flatrock for the sum of R2.1 million.
- [8] The applicant testified that it appointed the respondent as its agent with a mandate to dispose of the movable assets and stock of the company and to be involved in its operation at a salary of R100 000 per month. However, as the respondent seemed to be inactive, in October 2019, the applicant issued letters of demand to the debtors of the company for payment of outstanding debts owed to the company. Again, at a meeting in October 2019, the respondent informed the applicant that the book debt was standing at R4.2 million but only a sum of R1 179 843.98 was recovered. In light of the diminished value in the stock, it was decided that auctioneers be engaged. The respondent was part of the decision and part of the preparation and organisation of the auction process and his approval was sought and obtained with regard to certain lot of the stock. The stock in the auction yielded only R510 500.
- [9] The applicant revisited engagements of KNR Flatrock since there was low interest shown in the stock and KNR Flatrock offered to take the stock at the sum of R2.1 million which the applicant accepted. The respondent was at all the relevant times aware of the negotiations with KNR Flatrock since he was

part of the negotiations with KNR Flatrock in July 2019 when it was suggested that the respondent be employed by KNR Flatrock.

[10] It is trite that for a creditor to succeed in an application for the sequestration of the estate of a debtor, it needs to establish that it has a claim which is not less than the sum of R100 which the debtor is unable to contest on reasonable and bona fide grounds, that the debtor has committed an act of insolvency and that there is reason to believe that it will be to the advantage of the creditors of the debtor that his estate is sequestrated.

[11] Section 12 of the Insolvency Act, 24 of 1936 (as amended) (*"the Act"*) provides as follows:

"Final sequestration or Dismissal of Petition for Sequestration

(1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that –

(a) The petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and

(b) The debtor has committed an act of insolvency or is insolvent; and

(c) There is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated;

It may sequester the estate of the debtor.

(2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die."

- [12] I do not understand the respondent to be disputing that there is a sum of money he is owing to the applicant which is not less than R100. But that he is not liable to pay the amount of R32 million to the applicant as alleged for the applicant breached the terms of the agreement by interfering and preventing him from executing his mandate (in terms of the agreement) in order for him to be released from his indebtedness to the applicant. I do not agree with this contention of the respondent. Firstly, the applicant appointed the respondent as its agent and reserved its rights to revoke the authority of the agent in terms of the agreement. The applicant did not furnish the respondent with the sole an exclusive mandate to dispose of the assets of the company and did not waive any of its rights in any manner whatsoever in terms of the agreement.
- [13] It is therefore not open to the respondent to say that the applicant interfered and prevented him from executing his mandate in terms of the agreement. The applicant legitimately exercised its rights in revoking and cancelling the agent's authority in terms of the agreement. The uncontroverted testimony of the applicant is that the respondent was part of the negotiations from the beginning to end in the disposal of the assets and stocks of the company. He was even involved and participated in the process in auctioning the assets as lots with the auctioneers. It cannot now be said that the applicant repudiated the agreement of mandate which was concluded between the parties.
- [14] It should be recalled that it is the respondent who provided the applicant with a valuation schedule of the book debts and the stock in August 2019 which recorded an amount of R7.7 million. However, in October 2019 the value of the book debts and stock had diminished to the tune of R4.2 million and due to the poor interest shown by the industry players, only an amount of R1.179 843.98 was recovered by the applicant. There was nothing untoward

in the conduct of the applicant when it exercised its rights in terms of the agreement and took charge of the process of realising the assets and stock of the company. The respondent gladly received the salary it was agreed upon and never raised an issue with the applicant that it was interfering with his duties.

- [15] It is therefore not correct that the target amount of R12 million which was to be achieved before the respondent could be released from his indebtedness in favour of the applicant could not be reached because the applicant interfered and or prevented the respondent in the execution of his duties. The undisputed facts are that the respondent participated in all the negotiations and dealings including the auction process which culminated in December 2019 and raised only an amount of R510 500. The respondent's approval was sought and obtained regarding the sale of the stocks to KNR Flatrock for the amount of R2.1 million. Therefore, if these figures are added together they amount to a sum of money which is a far cry from the sum of R12 million.
- [16] Once the R12 million threshold was not reached, the respondent could not be released from its indebtedness to the applicant. The company remains indebted to the applicant in the total sum of R32 807 774.41 as at the 1st of February 2020 after all the amounts realised from the stock and book debts were credited to the account of the company. The respondent therefore remains indebted to the applicant in terms of the suretyships agreement he has concluded in favour of the applicant. I am therefore satisfied that the applicant has complied with the provisions of section 12(1)(a) and (b) by demonstrating that the company is indebted to the applicant in the sum which is not less than R100 and that the respondent in fact insolvent.

- [17] The respondent contend that the applicant has failed to demonstrate that it is to the advantage of his creditors that his estate be sequestrated finally. He does not have any realisable assets, except for the BMW motor vehicle, which when sold could yield a “not negligible” dividend in favour of his creditors. He has only three creditors being, a liability towards Nedbank and Discovery arising from credit cards and the debt owing to the applicant. Furthermore, the applicant has failed to demonstrate what dividend, in rand and cents, would be realised by the creditors if the estate of the respondent is finally sequestrated. Therefore, so the argument went, it would not be to the benefit of the creditors if his estate is sequestrated.
- [18] In *Meskin & Co v Friedman 1948 (2) SA 555 (WLD)* at 559 the court held that the right to an investigation by a trustee which follows upon a sequestration is not sufficient in itself to constitute the ‘advantage’ contemplated in insolvency legislation. The court stated the following:
- “The right of investigation is given, as it seems to me, not as an advantage in itself, but as a possible means of securing ultimate material benefit for the creditors in the form, for example, of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collusive claims. 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 thee creditors. It is not necessary to prove that the respondent has any assets. Even if there are none at all, but there are reasons to believe that as a result of an enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient”*

- [19] In *Dunlop Tyres (Pty) Ltd v Brewit* 1999 (2) SA 580 (WLD) the Court referring to the Meskin decision quoted supra stated the following:

“It will be sufficient if the creditor in an overall view of the papers can show, for example, that there is reasonable ground for coming to the conclusion that upon a proper investigation by way of an enquiry under section 65 of the Act a trustee may be able to unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors.”

- [20] More recently, in *Stratford and Others v Investec Bank Limited and Others* [2015] (3) SA (CC) the Constitutional Court stated as follows:

“Paragraph 44: The meaning of the terms ‘advantage’ is broad and should not be rigidified. This includes the nebulous ‘not negligible’ pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or ‘not-negligible’ benefit in the context of a hostile sequestration where there could be many creditors is unhelpful.”

- [21] I find myself in disagreement with the contentions of the respondent in this regard. There is no onus on the applicant to prove that it is to the advantage or benefit of the creditors and what dividend, in rand and cents, would be paid to the creditors of the applicant if the estate of the respondent is sequestrated. I understand the authorities quoted above to be saying that it is sufficient for the applicant to reasonably believe that it will be to the advantage or benefit of the creditors that the estate of the respondent be sequestrated. In this regard, each case must be considered on its own merits. Although there is no onus upon the respondents to show that the order is resisted on bona fide and reasonable grounds, he bears the evidentiary burden to do so. It is for the respondent to demonstrate that it is not insolvent and that his assets far exceed the amount he is owing to his creditors.

- [22] It is on record that the respondent disposed of his only immovable asset in favour of his ex-wife on the basis of a divorce settlement agreement which was made an order of court. It is also undisputed that the applicant in its meeting with the respondent in August 2019 suggested to the respondent that its immovable property, being the Gallor Manor property (*"The property"*), be mortgaged in favour of the applicant considering the amount of the debt owed by the company to the applicant. However, the respondent refused to bond his property for the debt of the company. According to the deed office search at the time, the property was registered in the name of the respondent only and had a bond in favour of a financial institution in the sum of around R300 000.
- [23] It should further be recalled that between the period of July 2019 and December 2019 there were several meetings between the respondent and the applicant, but at no stage during that period did the respondent mention that he was going through a divorce and that he has paid off his bond over the property nor that, as part of the divorce settlement, he had concluded a settlement agreement whereby the property has been given to his ex-wife. Until early March 2020, according to the deeds office searches conducted by the applicant, the property was still registered in the name of the respondent. However, later in March 2020, through a deed office search, the applicant discovered that the property was transferred and registered in the name of the respondent's ex-wife.
- [24] Considering that the applicant does not have the capacity to investigate the affairs and or the assets of the respondent and that he does not have to specify the rand and cents by which the creditors would benefit if the estate of the respondent is sequestrated, it is my respectful view that the appointment of the

trustee is necessary in order to investigate the suspicious circumstances under which the property, said to be worth approximately R2.4 million, was transferred. The sudden settlement of the bond on the property and its immediate transfer into the name of the respondent's ex-wife is suspicious since the respondent was aware of the debt owing to the applicant by the company of which he had signed suretyships at that time. Put in another way, there are, in my view, reasonable prospects that the trustee may unearth some other assets of the respondent which may have some pecuniary benefit to the creditors including the transfer of the property. The trustee is the only person who is empowered to investigate the affairs of the respondent.

[25] Even if I am wrong in finding that the respondent's estate should be sequestrated on the basis of the reasons stated above, it should also be borne in mind that the purpose of the Insolvency Act is not only for securing the pecuniary benefit to the creditors, but to protect the general body of the public from people who behave in this manner. It would be an absurdity to interpret s 12(2) of the act in a way that, even if the creditor has established and met the requirements of s 12 (a) and (b), but the debtor does not have any assets which when realised may yield a dividend to the benefit of the body of creditors, an order sequestrating the estate of the debtor should not be granted because the sequestration of the estate will not be to the advantage of the creditors. I say so because that would be a narrow and rigid interpretation of s 12(2) of the act.

[26] It is now settled that, in the interpretation of a statute, Courts must consider the words used in the statute, the context and the purpose for which the legislation was promulgated and other related legislation. Section 39 (2) of the Constitution of the Republic of South Africa provides that, when interpreting any legislation, and when developing the common law or customary law,

every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

- [27] In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10 BCLR 1027 (CC); (6 June 2007) the Constitutional Court dealt with the interpretation of the provisions of a statute and stated the following:

“Paragraph 53: It is by now trite that not only the empowering provisions of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing ‘as a result of past racially discriminatory laws or practices’ in its setting of section 2 (1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This so even when the ordinary meaning of the provision to be construed is clear and unambiguous.”

- [28] More recently, in *Independent Institution of Education (Pty) Limited v KwaZulu Natal Law Society and Others* [2019] ZACC 47 the Constitutional

Court again had an opportunity of addressing the issue of interpretation of a statute and stated the following:

“Paragraph 1: It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution.

Paragraph 2: The interpretive exercise is no exception. For, section 39(2) of the Constitution dictates that ‘when interpreting any legislation ... every court, tribunal, or forum must promote the spirit, purpose and objects of the Bill of Rights’. Meaning, every opportunity courts have to interpret legislation, must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself.”

[29] The Court continued and stated the following:

“Paragraph 18: To concretise this approach, the following must never be lost sight of. First, a special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could

be given to a word or expression in a statute, without straining the language, 'promotes the spirit, purport and objects of the Bill of Rights', then that is the meaning to be adopted even if it is at odds with any other meaning in other statutes."

"Paragraph 38: It is a well-established canon of statutory construction that 'every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature'. Statutes dealing with the same subject matter, or which are in pari material, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.

Paragraph 41: The canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to the words used therein. While maintaining that word should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where the words to be construed are clear and unambiguous.

Paragraph 42: This Court has taken a broad approach to contextualising legislative provisions having regard to both the internal and external context in statutory interpretation. A contextual approach requires that legislative provisions are interpreted in of the text of the legislation as a whole (internal context). This Court has also recognised that context included, amongst others, the mischief which the legislation aims to address, the social and historical background of the legislation, and, most pertinently for the purposes of this, other legislation (external context). That a contextual approach mandates consideration of other legislation is clearly demonstrated in Shaik. In Shaik, this Court considered context to be 'all-important' in the interpretative exercise. The context to which the Court had regard included the 'well-established' rules of criminal procedure and evidence' and, in particular, the provisions of the Criminal Procedure Act."

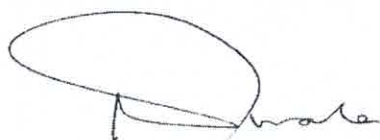
- [30] The purposive interpretation of the act is that the intention of the legislature is to protect the unsuspecting and innocent public from dealing with persons who are unable to pay their debts and whose liabilities exceed their assets and are actually insolvent. It is my considered view therefore that where a creditor has demonstrated and proved compliance with the s 12 (1) (a) and (b) but failed to satisfy the Court that sequestration of the estate of a debtor will bring some pecuniary benefit to the creditors in terms of s 12 (1) (c), in that the debtor does not have any realisable assets capable of affording a pecuniary benefit to his or her creditors, his or her estate should nonetheless be sequestrated. It would be an absurdity not to sequester an estate of a person who is unable to pay his debts because that would be allowing him or her to continue to enter into contracts with unsuspecting and innocent members of the public who will have no recourse against him since he or she does not have assets which when realised would not be to the benefit of the creditors.

- [31] It should be recalled that, once an insolvent has been so declared and his estate sequestrated, his rights are to a certain extent curtailed and therefore will be unable to contract without the consent of his or her trustee. That is the protection being afforded the innocent public against mischievous conduct of insolvent persons. It therefore does not lie in the mouth of the respondent that he does not have any assets to his name that may yield a pecuniary benefit to his creditors when are sold and therefore his estate should not be sequestrated. The unavoidable conclusion is therefore that the applicant has made out a case which is unassailable by the respondent and is therefore entitled to the relief that it seeks in terms of the notice of motion.
- [32] The second respondent applied and was granted leave to be joined in these proceedings. It is not in dispute that the applicant initially placed reliance of its case upon the provisions of s 8(c) of the act that the first respondent committed an act of insolvency by disposing of its immovable property in favour of the second respondent in terms of a divorce settlement agreement which was made an order of court. Such disposition had the effect of preferring one creditor above others. However, on the day of hearing of the matter when the provisional order was granted, the applicant abandoned and did not persist with its claim under the provisions of s 8(c). Instead the applicant proceeded with its claim under s 8 (g) and the order was granted on the 13th August 2021.
- [33] It is surprising that the on the 7th of October 2021, almost two months after the judgment and provisional order was granted, the second respondent decided to launch the application to join these proceeding. The second respondent did not partake in those proceedings when the provisional order was granted. It is clear from the judgment of the Court a quo that the issue of disposing the Gallo

Manor was abandoned by the applicant and the Court a quo was called upon to determine it as pertinently stated in the judgment. It is not clear to me why the second respondent has find it necessary to involve itself in these proceedings when in fact the sequestration of the first respondent has no bearing on her since they are divorced. Furthermore, I have doubts in my mind that the judgment of the Court a quo was made available to the Court hearing the joinder application otherwise in my view, the Court would not have granted an order for the second respondent to join these proceedings. I am therefore unable to disagree with the applicant that the second respondent has created unnecessary costs for the applicant by causing unnecessary filing of affidavits and this cannot be countenanced.

[34] In the circumstances, I make the following order:

1. The estate of the first respondent is sequestrated and placed in the hand of the Master of the High Court, Johannesburg.
2. Costs of the application to be borne by the insolvent estate.
3. The second respondent is liable for the costs of the intervening application.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 17th April 2023

Date of Judgment: 8th May 2023

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