THE REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 30/3/2017

CASE NO: A324-16

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

In the matter between:

NEDBANK LIMITED **Appellant**

and

SELLO MABENA **Respondent**

Heard: **26 October 2016**

Delivered: **March 2017**

JUDGMENT

Molahlehi J

Introduction

[1] The appellant, having successfully obtained a provisional sequestration order of the

respondent, approached the Court below for its confirmation. The Court, per Molefe J discharged that interim order and accordingly dismissed the appellant's application for a final sequestration order.

[2] The appellant was also unsuccessful in his application for leave to appeal the order of the Court below. Its leave to appeal having been refused, it then petitioned the Supreme Court of Appeal (the SCA) for leave to appeal. The leave to appeal was granted and thus this appeal serves before this Court with leave from the SCA.

[3] The issue in this appeal is limited to whether or not the appellant is a creditor of the respondent as envisaged in section 9(1) of the Insolvency Act (the Act), [1] and if so whether it is entitled to have the provisional liquidation confirmed. In the context of the facts of this case section 9 (1) of the Act has to be read with section 35 of the Administration of Estate Act (the AEA).[2]

The parties

[4] The appellant, Nedbank Limited, is a registered bank, financial services and credit provider, duly registered as such, in terms of the laws of South Africa.

[5] The respondent, is a former attorney whose name has been struck off the roll of practicing attorneys. He was appointed as an agent by a certain Mr Lepley, (Lepley) the executor who had been appointed as such in the estate late Ms Phyllis Debie Tepper (the deceased) by the Master of the High Court, Pretoria. It turned out later that that appointment was fraudulently obtained. He is also the sole director of Banchivis Property Holdings (Pty) Ltd trading as Morua Trust and Estate Planning (Morua).

The background facts

[6] It is common cause that the appellant was, during October 2014, defrauded of the amount

of R1 361 454 44. The amount was part of the administration of the estate of the deceased, under Master's reference T29233/2014.

[7] The deceased passed away during 2014. At the time of her death she had the amount of R1 361 454 44 in her account with the appellant.

[8] The Master's office in Pretoria appointed Mr Lepley as the executor of the deceased estate. As indicated earlier it turned out later that the letter of executorship, appointing Mr Lepley as executor was fraudulently obtained.

[9] The respondent was appointed by Mr Lepley as his agent to administer the late estate of the deceased and this was done in terms of the powers of attorney issued on 15 September 2014.

[10] Thereafter the respondent approached the appellant and provided it with the relevant documents relating to the administration of the estate including proof that an account had been opened in the name of the late estate with First National Bank. The respondent provided the appellant with the documents certified as true copies by him in his capacity as a Commissioner of Oaths, *ex officio* attorney.

[11] The respondent certified the copies of the documents provided to the appellant purportedly in his capacity as a practicing attorney. This was a misrepresentation of his status as he was at that stage already struck off the roll of attorneys. He was stuck off the roll of attorneys on 11 June 2007.

[12] After confirming the death of the deceased the appellant made payments to the account nominated by the respondent on 1 October 2014. It turned out after the payment of the amount of R1 361 454. 44 to the deceased's late estate account that the appointment of Mr Lepley was fraudulent and that Mr Tupper was the lawfully appointed executor with the

letter of executorship by the Master.

[13] As the agent of Mr Lepley the respondent attended to the affairs of the late estate under the auspices of Moruo which is a legal entity separate from its directors.

[14] The appellant stated in its papers that despite the demand it made neither the respondent nor Moruo repaid the funds in question to it.

[15] On 9 June 2015, the appellant obtained an order on an urgent basis directing the respondent and Moruo to produce proof that the funds in question have been paid into the First National Bank account and whether those funds were still available.

[16] The respondent and Moruo were further ordered to provide a liquidation and distribution account (the L & D account) in the event the funds were no longer available in the bank. In compliance with the order the respondent furnished the appellant with the bank statement confirming that the estate account was opened and that the funds were deposited into the business account of Morua. The respondent further indicated in the e-mail that he had not prepared an L & D account.

[17] The bank statement which the respondent had provided to the appellant reflected that several payments were made out of the fund during the period of 1 to 16 October 2014. The balance in the account as at 17 October 2014, was R 29 777.25.

The decision of the Court below

[18] In its judgment the Court bellow emphasized that in acting as he did, the respondent did so in his capacity as a representative of Morua. It was for this reason that it found that the respondent was not liable for what happened to the funds.

[19] In dismissing the appellant's application to have the respondent sequestrated the Court below held that it did not agree with the contention of the appellant that the respondent was

severally liable in the same way as Morua. The Court further found that the respondent was not a surety of Morua and also that he never accepted liability for the funds in question. It was for this reason that the Court found that the claim of the appellant was with Morua and not the respondent.

[20] The Court further reasoned that the amount claimed by the appellant was unassessed and that the appellant failed to satisfy the requirements of section 9(1) of the Insolvency Act, to justify the sequestration of the respondent.

[21] Before this Court, counsel for the respondent contended that the appellant's claim lies against Morua and not the respondent. It was submitted in this respect that the respondent never acted in his personal capacity. It was further argued that:

a. The appellant's claim is not liquidated.

b. The appellant never set out in its founding affidavit that the particularity of the amount it is claiming.

c. The liability of the respondent was not established.

d. The payment made by Morua does not create a claim against the respondent.

Evaluation/Analysis

[22] The two key findings made by the Court below and which are central to this appeal are the following:

a. The respondent in dealing with the late estate of the deceased did not do so in his personal capacity but in his capacity as the director of Morua.

b. The claim of the appellant was not assessed and accordingly unliquidated.

[23] The respondent in opposing this application raised the above as his defence and further contended that payments made by Morua did not create a personal claim against him and that those payments could not support the sequestration claim against him.

[24] In relation to the amount of R14 000 which was paid from the account of Morua on 31 October 2014 into his bond account, it was argued that there was no proof of what monies were utilized by Morua and that at that stage Morua had in its bank account the amount of R35 580.80 which means that it had sufficient funds of its own to pay the appellant.

[25] In terms of section 9(1) of the Act a creditor who has a liquidated claim of not less R100 may institute sequestration proceedings against the debtor's estate. A liquidated claim may exist by virtue of a judgment of the court, an agreement or otherwise.[3]

[26] The court will refuse to grant a sequestration order in a case where the creditor merely claims unassessed damages. In the present instance it is common cause that the funds were taken from the appellant fraudulently which means that it was in a sense stolen and/or misappropriated.

[27] The authorities seem to be in agreement that a cause of action based on theft of money can constitute a liquidated claim. In this respect Grosskopf JA in *The Attorneys Notary and Conveyancers and Another Fidelity Guarantee Fund v Tony Allem (Proprietary) Limited and Another,* ***[4]*** in dealing with this issue had the following to say:

> "The first respondent's claim in the present case was not an unliquidated claim. The claim was for a specific sum of money which was reflected in the consolidated account, and the fact that the claim was based on a theft did not, in my judgment, change the position."[5]

[28] The SCA further said:

"In *Kleynhans v Van der Westhuizen,* N.O, 1970 (2) SA 742 (A), where it was said that a claim based on the theft of a specific sum of money was/a "liquidated claim" for the purposes of section 9(1) of Act 24 of 1936. In the course of his judgment Wessels JA held as follows at 750 A-B:

"Dit kom my as vanselfsprekend voor dat waar die skuldenaar vaste som geld van 'n applikant gesteel het, die bedrag van laasgenoemde se vordering, wat op die pleging van die diefstal gegrond is, uiteraard met sekerheid bepaal is. Die bedrag behoef geen bepaling deur h hof of ooreenkoms met die dief nie, aangesien dit met sekerheid 58 'andersins' bepaal is. Waar bewys is dat die diefstal geleeg is, is die bedrag van skadevergoeding eweneens bewys, en daardie bepaalde bedrag is onmiddellik na die diefstal opeisbaar. Die dief is vanaf die datum van die diefstal in mora (Wessels, Law of Contract in S.A., 2de. uitg., para 2864)." [6]

[29] Similarly, in *Hassan and Another v Berrage* N.O.[7] , the Court held that a claim based on misappropriation of the value of shares by the respondent in a company constituted a liquidated claim in that the shares were traded on the stock exchange and therefore the market value was easily determinable.

[30] The funds in question in the present matter were paid by the appellant, as per the advice of the respondent into the late estate account of the deceased. It was thereafter paid to various third parties by the respondent. This, the respondent did fully aware of the requirements of section 35 of the AEA.

[31] The involvement of the respondent in the process which resulted in the misappropriation of the funds of the late estate is not in dispute. It was, however contended, as alluded to earlier in this judgment, that the involvement of the respondent was not in his personal capacity but, as reflected in the powers of attorney, in his

capacity as a representative of Morua.

[32] It was also contended on behalf of the respondent that he never acknowledged any indebtedness to the appellant in his personal capacity.

[33] In my view, the respondent's defence bears no merit when regard is had to the totality of the evidence which served before the court below. It is for this reason, as elaborated in more detail hereafter, that I find that the Court below misdirected itself in the approach it adopted in dealing with the issue of whether the appellant had a liquidated claim against the respondent.

[34] It is common cause, as already mentioned above, that the amount of R1 361 454.44 was paid into the estate late account of the deceased consequent to the fraudulent misrepresentation which resulted in the appointment of Mr Lephey as executor in terms of the letter of executorship issued by the Master's office.

[35] I do not agree with the respondent that the appellant's claim is unliquidated. It is important to note in this regard that the appellant avers at paragraph 5.1 of its founding affidavit that the respondent is indebted to it jointly and severally with Moruo for the total amount which is the subject of the claim. It is not in dispute that no portion of this amount has been recovered by the appellant.

[36] It was also not disputed that the respondent was appointed as the agent of Mr Lephey, who as alluded to earlier was appointed executor in the late estate of the deceased. This is confirmed by the Court below at paragraph 5 of its judgment. At paragraph 7 of the judgment the Court below recorded, amongst others, as true facts that:

> "7.4 The payments were made without compliance with the peremptory steps prescribed by the Administration of Estate Act and more specifically section 35

thereof of which includes inter alia the filing of a liquidation and distribution account open for inspection and supporting vouchers for all payments made from the estate late account."

[37] Having recorded the above as the true facts the Court below proceeded to find that (at paragraph 15) the respondent did not act in his personal capacity in dealing with the funds received from the appellant, but rather in his capacity - as stated above - as the representative of Moruo.

[38] In its founding affidavit, the appellant made the following allegations which are significant in the resolution of this dispute:

"5.5 The fund[s] were paid into the estate's bank account by the applicant on 1 October 2014.

5.6 The bulk of the fund[s] ,in the sum of R800,000-00 were transferred by Mabena into the business account of Moruo Trust on 16 October 2014.

5.7 In the period between 01 October 2014 and 17 October 2014, Mabena made payments from the estate's banking account to the effect that as at 17 October 2014, only the sum of R29,777.25 (of the original R 1,000,361 454. 44) was left in the account.

5.8 As at 18 December 2014, the business account of Moruo Trust reflected the balance of R42, 189. 60.

5.9 Mabena paid out the fund received from the applicant, to various third parties, as salaries and one account in his personal name, without any liquidation and distribution account ever having been prepared or approved by the Master."

[39] The respondent did not dispute the above allegations in his answering affidavit. It

follows therefore that the allegations stand uncontested and thus serve as a proven facts.

[40] I have already alluded to the fact that the respondent's defense bears no merit. In my view the fact that the powers of attorneys appointed the respondent in his representative capacity as a director of Morua does not detract from the liability imputed on him by the law. In this respect section 1 of the Act defines an "executor" as a person who is authorized to act under the letters of executorship issued by the Master. And "letters of executorship" includes:

> "any document issued or a copy of any such document duly certified by any competent public authority in any State by which any person named or designated therein is authorized to act as the personal representative of any deceased person or as executor of the estate of any deceased person."

[41] Section 16 of the AEA deals with the letters of executors hip and endorsements to or in favour of corporations and provides as follows:

> "If any person referred to in subsection (1) of section fourteen in subsection (1) of section fifteen is a corporation, relevant letters of executorship or endorsement, as the case may be, shall be granted or made-
>
> (a) in favour of person who is an officer or director of the corporation and has been nominated by the testator or, if the testator has not nominated any person, by the cooperation"

[42] In *Metequity Ltd Another v NWN Properties Ltd and Others,* **[8]** the Court held that an official of a company or corporation who in that capacity has been appointed executor cannot in the exercise of his duties be dictated to by the company. It was further held that the executor being the nominee of the bank was the right person to sue which means he

was not shielded by the fact that he was a representative of the bank. The court further held that:

> "It follows that the nominated official or the director is in fact the executor by virtue of the issue of the letters of executorship." [9]

[43] In the context of the circumstances of this case the provisions of the Act are, as mentioned above, to be read with the provisions of the AEA. In this respect the provisions section 35 of the AEA, which are peremptory, provides more importantly at subsection (1) thereof that:

> "An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29 (1), but within-
>
> (a) six months after letters of executorship have been granted to him; or
>
> (b) such further period as the Master may in any case allow, submit to the Master an account in the prescribed form of the liquidation and distribution of the estate."

[44] The issue of whether the respondent can be exonerated from liability because he was acting in his capacity as director of Morua is addressed by section 50 of the AEA which provides as follows:

> "Any executor who makes a distribution otherwise than in accordance with the provisions of section thirty-four or thirty-five, as the case may be, shall-
>
> (a) be personally liable to make good to any heir and to any claimant whose claim was lodged within the period specified in the notice referred to in section twenty-nine, any loss sustained by such heir in respect of the benefit to which he is entitled or by such claimant in respect of his claim, as a result of his failure to make a distribution in accordance with the said provisions; and

(b) be entitled to recover from any person any amount paid or any property delivered or transferred to him in the course of the distribution which would not have been paid, delivered or transferred to him if a distribution in accordance with the said provisions had been made: Provided that no costs incurred under this paragraph shall be paid out of the estate."

[45] In *Kruger Van Rensburg (Pty) Ltd t/a Bureau Trust Insolvensie Praktisyns and Another v Grand Palace Trading 47 (Pty) Ltd)**[10]*** the Court held that:

"[2] The first and second defendants are companies which do business as insolvency practitioners and they administer insolvent estates. In terms of the provisions of the Administration of Estates Act, No. 65 of 1966, read with the Insolvency Act, No. 24 of 1936, and section 339 of the Companies Act, No. 61 van 1973, only natural persons can be appointed by the Master of the High Court to administer estates and a legal entity is precluded from being appointed as such. A practice therefore, inevitably, evolved *(Grove v Marica Board of Executors* Ltd. 1908 T.S. 11; *Bekker v Republiek Trustees (Edms) Bpk. en In Ander 1988(2)* SA 250 (T)), in terms whereof companies, such as the defendants, make use of "fronts" i.e. natural persons who are employed by them to be formally appointed by the Master in compliance with the various legal provisions. The companies then administer the estates on behalf of their employees whom the Master appointed and later benefit from the estates through the payment of the fees allowed by the regulations out of the estates to the persons appointed to administer the estates."

[46] In *Boland Bank Ltd v Rop, Wacks, Kaminer and Kriger,**[11]*** the plaintiff, Boland Bank Ltd, purporting to act in its capacity as executor in a deceased estate, instituted action for payment by defendant of an amount allegedly due to the deceased estate. Boland Bank then

sought to amend its summons by substituting, for the description of plaintiff, one Jordaan as the nominee of Boland Bank in his capacity as executor of the deceased estate. The application for an amendment was dismissed by the magistrate and it was argued on appeal that the magistrate's judgment was correct inasmuch as Boland Bank and Jordaan were two separate and distinct *personae;* that this was not merely a case of misdescription; and that the amendment sought to introduce a new plaintiff. In dealing with this argument the Court held that:

> "I do not agree that the amendment involves the substitution of one *persona* for another as plaintiff. From the beginning the action was one by the executor in the estate of the late Anne Tobias. Boland Bank did not purport to sue in its personal capacity: it sued in its capacity as executor in the deceased estate. This was a misdescription of the plaintiff; the correct plaintiff was Jordaan who had been nominated by the bank in terms of s 16 of the Administration of Estates Act 66 of 1965, and to whom the Master had, pursuant to such nomination, issued letters of administration. The amendment sought to rectify the misdescription by substituting the name of Jordaan for that of the bank as executor. In this respect the application for amendment is similar to those in *Yu Kwam v President Insurance* Co *Ltd* 1963 (1) SA 66 (T); *Schnellen v Randalia Assurance Corporation of SA Ltd 1969 (1) SA 517 (NV) and Samente v Minister of Police and Another* 1978 (4) SA 632 (E)."[12]

[47] I am in agreement with the proposition by the appellant that personal liability, envisaged in section 35 of the AEA, extends to an agent appointed by the executor to administer an estate.

[48] Turning to the issue of admission of liability, there is overwhelming evidence of admission of liability by the respondent. The respondent has, except for the denial of

perpetrating the fraud against the appellant, acknowledged liability for the amount in question and also acknowledged contravention of section 35 of the AEA. He further conceded having made payments to various parties from the funds.

[49] The issue of whether the respondent played any role in the fraudulent conduct of his staff, is in my view irrelevant. What is relevant and significant is the fact that he acknowledged personal liability for the amount paid into the late estate account and how it was misappropriated by being paid out in contravention of the provisions of the AEA.

[50] The evidence supporting the proposition that the respondent personally acknowledged liability can be found in both his affidavits and the correspondence between the parties. In this respect he stated at paragraph 6 of his second answering affidavit that:

"6.1 I offered to repay the monies if given time and again offer to do so, but not admitting that I was the party to the fraud and transgressions as set out in the Affidavit of Appellant."

[51] In the email he addressed to the appellant on July 2015 he stated the following:

> "Dear Mr Mohamed
>
> I refer to the above matter and to our consultation on the 2nd July 2015 at your offices.
>
> I am once again asking you and your client to afford me an opportunity to have this matter resolved without going to Court, at least on urgent basis.
>
> I have sold the property in Winchester for R1 750 000.00.
>
> I am willing to pay the proceeds of the purchase price of the property situated at [...] W. as soon as it is registered. I therefore request that you consider removing the matter on the urgent Court Roll while we explore the ways and means of paying off your client's claim.

I am willing to sign an acknowledgement of debt for the balance of your client's claim, which would be liquidated with be sure (sic) a period of time . .

[52] In the supplementary answering affidavit he stated that although his "Opposing Affidavit" was late he honestly believed that the offer he had made would have been accepted by the appellant. This is the offer in which the respondent undertook to utilize the proceeds of the sale of his immovable property at W. H. Extension […] to settle the appellant's debt.

[53] A further confirmation of acceptance of liability by the respondent can be construed from the letter dated 7 July 2015 wherein the conveyancing attorneys who were involved in the sale of the property at W. H. extension 3 stated the following:

"4. We note the cession of equity to you by the Seller (on an out -and-out session basis), entered into between and by the Seller and your good self. Accordingly we irrevocable undertake and bind ourselves to pay your client the equity surplus, an amount of R 630 486.22 excluding any bridging deductions, deriving from the aforesaid transaction on the date of registration of same. We further confirm that we hold such equity in trust on behalf of SI & NL MABENA.

We undertake to pay the ceded equity surplus into the banking furnished to us by yourselves as soon as reasonably possible after registration."

[54] As alluded to earlier, the amount claimed by the appellant is R1 361 454.44. The sale amount in the above property was indicated as R1 750 000. On a simple calculation taking into account, the commission on the purchase price, the outstanding debt on the property, the proceeds of the sale could be estimated at R377 375. This is the amount that would have been available to distribute to the appellant which would have obviously been insufficient to settle the indebtedness of the respondent to the appellant.

[55] There can be no dispute in light of the above that the respondent unlawfully distributed and misappropriated the funds from the late estate account of the deceased. In this respect he stated the following in his answering affidavit that:

> "The respondent complied with the instructions (referring to payments made) without obtaining the Master's consent to do so. I therefore conceded that the respondent did not comply with the provisions of section 35 of the Administration of Estate Act."

[56] There is thus no doubt that the respondent acted with the full knowledge that his conduct was unlawful and did so wilfully. He did this, even on his own version, in his personal capacity and not as the director of Morua.

[57] In light of the above the Court below erred and incorrectly concluded, as it did, that the respondent was not personally liable for the distribution and misappropriation of the funds because he acted in his representative capacity. The Court also erroneously concluded that the claim of the appellant was not liquidated as envisaged in section 9(1) of the Act.

[58] In my view, based on the above analysis, the appellant has successfully made out a case for the confirmation of the provisional sequestration order. I see no reason in the circumstances of this case why costs should not follow the results.

Order

[59] In the premises the following order is made:

1. The appeal is upheld with costs.
2. The order of the court below is replaced with the following order:

    2.1 The provisional sequestration of the respondent is confirmed and accordingly the respondent is finally sequestrated.

_____

E Molahlehi

Judge of the High Court

of South Africa, Pretoria

I agree

_____

SP Mathie

Judge of the High Court

of South Africa, Pretoria

I agree

_____

N Davis

Acting Judge of the

High Court of South

Africa, Pretoria

[1] Act 24 of 1936 (the Act). Section 9(1) provides:

> "(1) A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds 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] 66 of 1965 (AEA).

[3] See *Stephane v Khan* 1917 CPD 24 and *Kleynhans v Van der Westhuizen* NO 1970 (2) SA 742 (AD) at 750 A-B.

[4] [1990] ZASCA 5; 1990 (2) SA 665 (AD).

[5] Id at para 57.

[6] Google translation:

> "It seems to me as obvious that where the debtor stole fixed sum of money from an applicant, the amount of the latter's progress, based on the commission of the theft, of course, is determined with certainty. The amount situation requires of nothing by h court or deal with the thief, since it determines otherwise safely 58. Where evidence that the theft geleeg, the amount of damages is also evidence, and that certain amount immediately after the theft due. The thief is from the date of the theft in mora (Wessels, Law of Contract in SA, 2nd. Ed.. Para 2864) "

[7] 2012 (6) SA 329 at para 35.

[8] 1998 (2) SA 554 (T) at 557.

[9] Id.

[10] [2007] ZAGPHC 97.

[11] 1989 (3) SA 912 (C).

[12] Id at 914.