REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO.4229/10

In the matter between

FIRSTRAND BANK LIMITED Applicant

and

KEVIN EVANS Respondent

J U D G M E N T

Del.18March 2011

WALLIS J.

[1] Mr Evans borrowed substantial amounts from FNB, a division of the applicant, First Rand Bank Limited. In April 2005 he acknowledged his indebtedness, in an amount of R1 200 000, in a mortgage bond registered over the property in which he and his family reside. On 13 September 2006 he acknowledged a further indebtedness of R1 000 000, in a subsequent mortgage bond over the same property. On 28 November 2007 he entered into a Commercial Property Finance Loan Agreement under which he borrowed a further amount of R724 500. That amount, together with an additional R2 000 000 in respect of his existing indebtedness, was secured by way of a sectional mortgage bond over a section in a development situated in Umhlanga Rocks. Overall by June 2009 he owed FNB some R2 800 000. It is that indebtedness that gives rise to this application for the provisional sequestration of his estate. The application was brought on two bases. First it was said that Mr

Evans had committed the act of insolvency described in s 8(g) of the Insolvency Act by giving written notice of his inability to pay his debts. Second it was said that he was factually insolvent.

[2] The grounds upon which Mr Evans resists the application for his sequestration flow from his invocation of the debt review provisions under the National Credit Act 34 of 2005 ("the NCA") and from certain events that have occurred subsequent to the commencement of these proceedings. To appreciate his contentions it is necessary to set out a history of the relevant events.

[3] The starting point is an application for debt review made by Mr Evans on 29 January 2009. FNB was advised that he was under debt review. On 17 April 2009 Mr Evans addressed the letter to FNB that is alleged to be a section 8(g) notice. I will revert to this in due course. Thereafter on 18 May 2009 FNB gave notice in terms of s 86(1) of the NCA that it was terminating the debt review in respect of the 'account/s in our books which are now in arrears'. It appears to be accepted that notwithstanding this rather vague description the notice applied to all the debts owed by Mr Evans to FNB. There is, however, a dispute as to its effectiveness in the light of its terms and the address to which it was sent.

[4] On 16 July 2009 FNB issued summons claiming a little over R2 000 000 under the two mortgage bonds. Service was effected on 22 July 2009 but at the wrong address and default judgment was taken on 18 August 2009. Mr Evans only learnt of this on 12 March 2010, when the Sheriff served a notice of attachment at his residence. In terms of the notice of attachment a sale in execution of the residential property was to take place on 28 May 2010.

[5] On 8 April 2010 FNB launched this application for the sequestration of Mr Evans' estate. It relied on both the judgment and on the then outstanding indebtedness of R841 940.99 in respect of the loan agreement. It contended that Mr Evans had committed an act of insolvency by sending the letter of 17 April 2009 and also that he was in any event factually insolvent. The sequestration application made no mention of the attachment order and the sale in execution of the residential property.

[6] On 6 May 2010 attorneys representing Mr Evans wrote to FNB's attorneys claiming that the judgment was void because it was obtained without proper service. The letter indicated that an application for the rearrangement of Mr Evans' debts had been issued in the Durban Magistrates' Court on 3 July 2009 and an order made on 24 July 2009. Contrary to the allegation in the founding affidavit that very few payments had been made, details were given of regular monthly payments in respect of both the two mortgage bonds and the loan agreement from 28 August 2009 to 29 April 2010 in terms of the debt rearrangement order. In those circumstances Mr Evans' attorneys said:

'We cannot understand your client's persistence in prosecuting its claim against our client. In this regard we also refer to the ill-conceived sequestration application …'

There being no response to that letter Mr Evans launched an urgent application to stay the sale in execution and seek the rescission of the judgment. An opposing affidavit was delivered in the sequestration application relying on these matters as grounds for resisting a sequestration order and contending both that there was a valid defence to the claims under the bonds and the loan agreement and that the NCA precluded resort to sequestration.

[7] FNB served a replying affidavit in which it contended that the NCA does not preclude an application for sequestration of a debtor's estate and that, insofar as the judgment debt was concerned the debt review process had been terminated. In effect therefore FNB contended that the debt rearrangement order had been improperly made, insofar as it purported to cover Mr Evans' indebtedness to it. The point was also made that the amounts payable to FNB in terms of that order – some R21 390 per month – were insufficient to service the loans, the aggregate monthly interest on which was approximately R25 270. In the result payments in terms of that order would not discharge the indebtedness to the bank. Some criticism was directed at Mr Evans on the basis that according to the documents attached to his affidavit he was making payment of R23 397 per month to his creditors on a net income of R22 408. In addition it was alleged that he had expenses over and above this amount of R58 791, but that is incorrect as this figure included the bond instalment of R22 638. Nonetheless, even if one allows for this, his claimed income and expenses were impossible to reconcile.

[8] Had matters rested there the outcome of this application would have revolved around Mr Evans' contentions in regard to the effect of the NCA. However they did not rest there. Shortly before the application was due to be argued in October 2010 Mr Evans delivered a further affidavit. In it he said that he had sold the sectional title unit in Umhlanga for an amount of R1 400 000, which was significantly more than the value of R600 000 attributed to it by FNB. His conveyancers were attending to the transfer but this required co-operation from FNB in view of its sectional mortgage bond over the property. Some issues had arisen in regard to FNB's guarantee requirements before they would consent to the

cancellation of the mortgage bond.

[9] This further affidavit brought forth a brief supplementary affidavit from FNB in which it contended that the issues raised therein were irrelevant to the application. However, when the application came before the court on 15 October 2010 it was adjourned for further hearing on 11 February 2011. That delay enabled Mr Evans to file a further supplementary opposing affidavit on 17 January 2011. That affidavit disclosed the following further information. Firstly the judgment granted against Mr Evans had been rescinded by consent. Secondly the amount owing to FNB under the loan agreement had been fully discharged on 3 December 2010 after Mr Evans had brought an urgent application against FNB to compel it to cancel its bond so as to enable the transfer to take place. A consent order had been granted in those proceedings on 19 November 2010. Thirdly the amount paid to FNB from the proceeds of the sale was R1 260 208.64, which was significantly more than was outstanding under the loan agreement. The difference was credited to the loan agreement secured by the two mortgage bonds. There is apparently some dispute between the parties as to the allocation of the surplus. Mr Evans says that an amount of R328 133.60 ought to have been credited to the two mortgage bonds and that only R122 529.62 has been credited. FNB has not responded to this.

[10] According to FNB Mr Evans' indebtedness to it on 6 January 2011 amounted to R1 922 914.06. According to Mr Evans, if he is given proper credit for the balance of the proceeds from the sale of the sectional title unit and certain debits to the account are reversed, his indebtedness on that date was slightly more than R1 600 000. On that basis he calculates the current interest accruing on the two bonds as a little less than R12 000

per month whilst the instalments provided for in the debt rearrangement plan were some R15 500 per month. On FNB's figures the monthly repayments should be around R16 500 per month. However, if Mr Evans were to take the full amount that he had been paying under the debt rearrangement plan in discharge of both this indebtedness and the indebtedness under the loan agreement he would have some R20 000 available to pay off the two bonds. This would cover the interest and repay the capital in less than the 16 years that would remain if the bonds were to run for the original terms of 20 years. The bank did not seek to challenge those figures.

[11] Against that background FNB continues to seek a provisional sequestration order, although counsel confined his argument to the contention that Mr Evans had committed the act of insolvency referred to in s 8(g) of the Insolvency Act. Mr Evans resisted the application on three grounds. First, he contended that the letter of 17 April 2009 is not a section 8(g) notice. Second, he contended that the provisions of the NCA bar this application. Third, he contended that the court should exercise its discretion to refuse a provisional sequestration order.

[12] The act of insolvency contained in s 8(g) of the Insolvency Act 24 of 1936 is committed if a debtor gives a notice in writing to any one of his creditors that he is unable to pay any of his debts. The letter relied on by FNB as constituting this act of insolvency is that of 17 April 2009 addressed to FNB Commercial Loans by Mr Evans and it reads as follows:

'Subject : Cancellation of Debit Order.

Account No.00 00 30 00 01 11 03 714.

To Whom it may Concern.

I have a commercial loan on the account number above. Your records should show that I am under Debt Review. Ref#F12437.
As a result, the bond repayment is being renegotiated and administered through the Courts. The repayments will be made via the Attorneys Trust Account shortly.
With this in mind, please cancel the Debit Order on the old arrangement against my Standard Bank account 25-254-694-6.
Please contact me if this cannot be done as I have requested.'

[14] The letter states that Mr Evans is under debt review. That means that he must have applied for debt review in terms of s 86(1) of the NCA. The purpose of his application was to obtain a declaration that he was over-indebted because that is always the purpose of applying for debt review. In terms of s 79(1) of the NCA:

'A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's

(a) financial means, prospects and obligations; and
(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.'

It follows from this statement of what constitutes over-indebtedness for the purposes of the NCA that a debtor who informs his creditor that he has applied for, or is under, debt review is necessarily informing the creditor that he is over-indebted and unable to pay his debts.

[15] The proper approach to adopt in determining whether a letter such as this constitutes a notice of inability to pay in terms of s 8(g) is to consider how it would be understood by a reasonable person in the person of the creditor receiving the letter. In construing it the knowledge that the creditor would have of the debtor's circumstances must be attributed to

the reasonable reader.[1] In view of the fact that nearly a year had elapsed between the receipt of the letter and the launch of the sequestration proceedings I asked counsel for submissions whether this exercise is to be undertaken at the date of receipt of the letter or at the date when the sequestration application is launched, when intervening circumstances could be taken into account. Their views diverged. Mr Harcourt SC, for FNB, submitted that it should be the date of instituting the application for sequestration, whilst Mr Kemp SC, for Mr Evans, submitted that it is at the date of giving the notice.

[16] In my view Mr Kemp is correct. The section is couched in the present tense and is invoked where the debtor gives notice to the creditor of an inability to pay debts. Clearly the notice must do that when the creditor receives it. The question is what it means to the recipient at the time of its receipt.[2] Otherwise it is conceivable that an otherwise innocuous letter could take on a fresh colour as a result of subsequent events, which could be highly prejudicial to the debtor. In my view the authors of *Insolvency Law*[3] are correct in saying that 'a notice of inability to pay debts does not cease to be an act of insolvency as a result of circumstances obtaining subsequently to the giving thereof …' This accords with the view of Horwitz J in *Chenille Industries v Vorster*[4], in rejecting a submission that subsequent events affected the meaning to be given to a notice alleged to fall under s 8(g), that 'if the act be unequivocal it cannot be explained away by circumstances arising subsequently'. The cases to which both counsel referred, dealing with the lapse of time from the date of receipt of the letter, do not I think qualify

1 *Standard Bank of SA Limited v Court* 1993 (3) SA 286 (C) at 292 H-J and on appeal *Court v Standard Bank of South Africa Ltd* 1995 (3) SA 123 (A) 134A-C..
2 *Optima Fertilisers (Pty) Ltd v Turner* 1968 (4) SA 29 (D) at C_D
3 *Insolvency Law* by the late Justice P M Meskin (looseleaf) currently edited by Justice P A M Magid, Prof A Boraine, Ms J Kunst and Prof D A Burnette, para 2.1.2.7, p 2-16 (Issue 35)
4 1953 (2) SA 691 (O) at 696D-E.

this approach but are pertinent at a different stage of the enquiry and I will revert to them in due course.

[17] The most pertinent fact known to FNB at the time it received this letter was that Mr Evans was significantly in default of his obligations under both the bonds and the loan agreement. The letter would have said to them that cumulatively Mr Evans debts were such that he could not, as situated at present, pay them in accordance with his commitments. FNB is clearly familiar with the terms of the NCA and the basis upon which a debtor is entitled to seek debt review. To be told by Mr Evans that he had done this would unequivocally have conveyed that he was unable to repay the amounts he had borrowed from the bank in accordance with his contractual undertakings.

[18] Mr Kemp argued that the letter conveyed an intention to have Mr Evans' debts rearranged in terms of s 87 of the NCA. He pointed out that the purpose of the NCA is that the debtor should discharge the debts lawfully owed by him or her. He stressed that once the debtor's debts have been rearranged by an order of court under s 87(1)(b)(ii) of the NCA the debtor is only obliged to make payments in terms of that order and such an order should only be made where the full indebtedness of the debtor will ultimately be discharged. That is all correct but it is not clear that it takes matters any further.

[19] However valid these points may be they do not alter the fact that when Mr Evans wrote this letter he was unequivocally conveying to FNB that he was at that time unable to pay his debts. It is true that he was hoping by way of the mechanisms of the NCA, to make arrangements for the payment of those debts on a basis different from his existing

contractual obligations. I assume in his favour that he genuinely believed that if his debts were rearranged they would ultimately be discharged. Nonetheless what he was conveying to FNB was that he was not in a position at that time to pay his debts on the terms on which they had been incurred. That understanding of his letter would be reinforced by two factors. The first is that he was already substantially in arrears in paying his debts to the bank. The second is that the purpose of the letter was to instruct the bank to cancel a debit order by means of which he was supposed to be paying the amounts due in terms of the loan agreement.

[20] The requirements of s 8(g) are satisfied when the notice given by the debtor to the creditor conveys that the debtor is at present unable to pay his or her debts. The debtor's willingness to attempt to pay the debts in the future is not relevant. As Scott J pointed out in *Standard Bank of SA Limited v Court, supra*,[5]

'… a debtor who gives notice that he will only be able to pay his debt in the future gives notice in effect that he "is unable" to pay. A request for time to pay a debt which is due and payable will, therefore, ordinarily give rise to an inference that the debtor is unable to pay a debt and such a request contained in writing will accordingly constitute an act of insolvency in terms of s 8(g). This is particularly so where the request is coupled with an undertaking to pay the amount due and payable by way of instalments … A distinction must, however, be drawn between an inability to pay and an unwillingness to pay. If a reasonable person in the position of the creditor to whom the notice is addressed would understand the notice to mean that while the debtor was unwilling to pay his debt forthwith he could nonetheless do so if pressed, then the notice will not constitute a act of insolvency … In each case where there is a request for time, the enquiry, therefore, is whether the content of the written statement, viewed together with the circumstances to which it may be permissible to have regard, is such as to negative the inference arising from the request for time to pay and to justify the conclusion that the debtor would be able to pay at once if pressed to do so.'

5 At 293 B-G.

[21] Mr Evans was asking for time to pay. He was also conveying that he wanted to pay his debts other than in accordance with his existing contractual obligations in consequence of their being rearranged by way of a court order in terms of s 87 of the NCA. That he was conveying unequivocally that, at the time of the letter, he was unable to pay his existing debts is in my view clear.

[22] Mr Kemp protested, albeit in muted fashion, that this places any debtor, who informs his or her creditors that they have applied for debt review or that he or she is in the process of debt review, in a situation where it can be contended that they have committed an act of insolvency. However, that is not a novel situation. As Caney AJ pointed out in *Madari v Cassim*[6] a debtor who gave notice to his creditors of an intention to apply for an administration order under the Magistrates' Courts Act, which is an earlier form of debt rearrangement, was in precisely that situation. It was suggested to me that s 8(g) must be interpreted differently in consequence of the enactment of the NCA. However, I fail to see how the well-established meaning of a provision in the Insolvency Act can be altered because of the terms of a wholly different statute that makes no reference to it. It is not as if Parliament was unaware of the existence of the Insolvency Act when the NCA was enacted. One can be certain of that because the NCA contains in Schedule 1 rules concerning conflicting legislation and it makes no mention of the Insolvency Act, whilst giving priority to the provisions of the NCA over sections 57 and 58 of the Magistrates' Courts Act dealing with the procedures by which a debtor can arrange to pay his or her debts in instalments. Then in Schedule 2 amendments are made to various

6 1950 (2) SA 35 (D)

statutes including s 84 of the Insolvency Act. If Parliament had intended to qualify s 8(g) in the manner suggested in argument it would surely have said so.

[23] The qualification contended for on behalf of Mr Evans would also have most peculiar results. It would favour the canny and informed debtor over the ignorant and unsophisticated. Thus a letter informing a creditor of the debtor's inability to pay debts, coupled with a request to pay the debt off over a period of time in smaller instalments, would constitute an act of insolvency under s 8(g). A similar letter, differently couched but suggesting that the debt be paid off over the same period of time and in the same instalments, by way of a proposal under s 86(7)(c) of the NCA available for acceptance by the credit provider under s 86(8)(a), would not constitute an act of insolvency. I can see no warrant for construing what is essentially the same statement in a different fashion depending on whether or not the debtor invokes the provisions of the NCA. That would favour the debtor who is aware of the NCA and its provisions and redound to the disadvantage of the debtor who did not. If the NCA has an impact on sequestration proceedings it must lie elsewhere. I hold that the letter of 17 April 2009 relied on by FNB constituted an act of insolvency by Mr Evans in terms of s 8(g) of the Insolvency Act.

[24] The broader contention advanced by Mr Kemp was that the effect of the NCA is to preclude a credit provider from bringing an application for the sequestration of the debtor's estate. In advancing this contention he relied principally upon the provisions of s 88(3) of the NCA. That section provides that:

'Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i)

may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until

(a) the consumer is in default under the credit agreement; and

(b) one of the following has occurred:

(i) an event contemplated in sub-section (1)(a) through (c);

(ii) the consumer defaults on any obligation in terms of a rearrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.'

The contention is that sequestration is the ultimate form of debt enforcement by way of the liquidation of all the debtor's assets and that, as FNB had received notice under s 86(4)(b)(i) prior to launching such proceedings, it is precluded by s 88(3) from doing so.

[25] The problem with this is that whilst a credit provider may bring sequestration proceedings with a view to obtaining payment of a debt that does not mean that the credit provider is thereby seeking to exercise or enforce by litigation or other judicial process any right or security under the credit agreement. The credit provider may hope to obtain payment in whole or in part of the debt but the proceedings are not proceedings to enforce the credit provider's rights under the credit agreement. Their purpose is to set the machinery of the law in motion to have the debtor declared insolvent.[7]

[26] Although it was suggested in argument that the point is novel that is not correct and it is therefore unnecessary for me to engage in a detailed analysis of the relevant provisions of the NCA. In *Naidoo v Absa Bank*[8] it was held that sequestration proceedings are not 'legal proceedings to enforce the agreement' within the meaning of s 129(1)(b) of the NCA. In

7 *Collett v Priest* 1931 AD 290 at 299.
8 2010 (4) SA 597 (SCA).

reaching that conclusion Cachalia JA expressly approved[9] the reasoning of Trengove AJ in *Investec Bank Limited v Mutemeri*[10] that had led to that same conclusion. That reasoning also led Trengove AJ to conclude that sequestration proceedings are not proceedings 'in respect of a credit agreement' within the meaning of s 130(3) of the Act or an endeavour to exercise or enforce by litigation or other judicial process any right or security under the credit agreement as referred to in s 88(3) of the NCA.[11] I agree with these conclusions and the reasoning by which they were arrived at. I would add only that it avoids what would otherwise be the very odd conclusion that the NCA operates to preclude credit providers from sequestrating the estates of their debtors, but does not prevent other creditors from doing so. If sequestration of a person's estate whilst they are under debt review was to be rendered impermissible there appears to be no sound reason why it should be available to creditors who are not credit providers under the NCA. Conversely there is no obvious reason why credit providers should be a class of creditor excluded from invoking the mechanisms of the Insolvency Act.

[27] That serves to dispose of the contention that it was impermissible for FNB to bring sequestration proceedings. To sum up at this stage FNB has satisfied the three requirements for a provisional sequestration order set out in s 9 of the Insolvency Act. It has established on a *prima facie* basis that it has a liquidated claim exceeding R100 against Mr Evans; that Mr Evans has committed the act of insolvency mentioned in s 8(g) of the Insolvency Act and that there is reason to believe that his sequestration will be to the advantage of creditors. The first and third of these were not challenged in argument. The indebtedness is that under the loans secured

9 In para [4]
10 2010 (1) SA 265 (GSJ) paras [27]-[31]
11 Paras [33} and [34].

by the mortgage. The realisation of Mr Evans' assets will result in a not negligible dividend being paid to creditors and there are also matters that may properly be the subject of investigation by a trustee, such as the source and amount of his income; the identity of his employer and the circumstances in which his 18 year old son came to be the sole member of a close corporation that may possibly be his employer. As already mentioned the figures given by him in his application for debt review in respect of his income and expenditure are irreconcilable. He claimed to be servicing all his other current liabilities but it is impossible to see how he was able to do this (much less live) on an after tax income of R22 408, when he was paying R21 362.42 to his debt counsellor for payment to his creditors. There is a mystery here that requires an explanation. The only apparent one is that he has not made a full disclosure of his income. It is unclear whether he was paying any other credit providers in terms of the provisional rearrangement order. Beyond saying that he encountered financial difficulties in 1998 'in respect of a failed business venture' he gives no indication of the precise cause, nature and extent of his financial woes. Nor does he give any proper account of his current business activities. All of this can properly be investigated by a trustee and may result in the discovery of assets or income that can be used to pay the creditors. That leaves only the question of the exercise of my discretion.

[28] Once the applicant for a provisional order of sequestration has established on a *prima facie* basis the requisites for such an order the court has a discretion whether to grant the order. There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking it seems to me that the discretion falls within that class of cases

generally described as involving a power combined with a duty.[12] In other words where the conditions prescribed for the grant of a provisional order of sequestration are satisfied then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.[13] Here Mr Evans relies upon two linked matters. Initially there is the period of time that elapsed between 17 April 2009 and the launch of these proceedings on 8 April 2010. Linked to that are the circumstances relating to his application for a debt rearrangement order in terms of the NCA. Under this latter head he places a strong reliance on his compliance with the interim debt rearrangement order between August 2009 and April 2010, which resulted in FNB receiving some R200 000 in respect of the different debts owed to it, and the sale of the sectional title unit in Umhlanga, with the resultant improvement in his overall financial position.

[29] Counsel did not refer me to any cases, nor did I find any, dealing with a significant delay in launching a sequestration application after the receipt of a section 8(g) notice. I was, however, referred to some cases dealing with a significant lapse of time between the launch of such proceedings and the date of the *nulla bona* return relied on by the applicant as an act of insolvency in terms of s 8(b) of the Insolvency Act. The first is *Abell v Strauss*,[14] where Irving Steyn J said:

'Quite apart from this, however, there is the additional factor that at this stage the purported *nulla bona* return is some seven months old and, as was indicated in *Bhyat v Khurishi* 1929 TPD 896;

12 *Schwartz v Schwartz* 1984 (4) SA 467 (A) 473I-474E.
13 c/f *Cargo Laden and Lately Laden on Board the mv'Thalassini Avgi v mv Dimitris* 1989 (3) SA 820 (A) 833C-F.
14 1973 (2) SA 611 (W) at 613 B-C

> "If a *nulla bona* return is not a recent one, there must be allegations supported by facts that the debtor's position is unchanged."

In the papers before me there is nothing to indicate, even remotely, that the respondent's position is unchanged from what it was in January 1970.'

Accordingly the application failed.[15]

[30] Like Goldstein J in *Wilken and Others NNO v Reichenberg*[16] I was unable to find the quotation from *Bhyat v Kurishi*, because it does not appear in that judgment, nor is the judgment authority for that proposition. It appears that in error Irving Steyn J took a sentence from Mars *The Law of Insolvency*[17] and wrongly attributed it as a quotation from *Bhyat v Kurishi*, which was the authority for that proposition cited in the footnote to the text.[18] A reading of that case provides no support for the proposition in question.

[31] There is nothing in the Insolvency Act that justifies this gloss on the provisions of either s 8(b) or s 8(g), at least at the level of what must be proved by an applicant for a provisional sequestration order. However, where there is a substantial lapse of time and nothing before the court to indicate that the debtor's circumstances have not improved in the interim that may, in a marginal case, be a significant factor in the exercise of the court's discretion. So will the explanation for the creditor not acting on the *nulla bona* return or s 8(g) notice with reasonable celerity. In the present case, however, the reason is readily apparent. FNB had obtained a judgment the usefulness of which had been thrown into doubt by the application for its rescission. It was confronted with the possibility of

15 That was also the fate of the application in *Rodrew (Pty) Limited v Roussouw* 1975 (3) SA 137 (O) at 139 C-D.
16 1999 (1) SA 852 (W) at 860 A-C.
17 The edition that was then current is not available to me but the sentence appears in precisely those terms in the 8th edition at page 65.
18 The error is cumulative as the same case is cited as authority for the same proposition in LAWSA in Vol 11 (2nd Ed) para 213 p 213.

protracted proceedings in both the High Court and the Magistrates' Court had it continued on its existing path. In those circumstances it is hardly surprising that it chose to have recourse to sequestration proceedings. At the time it did so, Mr Evans' indebtedness was mounting daily notwithstanding the payments he had been making, purportedly in terms of a debt rearrangement order. As FNB pointed out the payments were insufficient to cover the interest accumulating on his debts and the only prospect of his actually discharging his indebtedness was that an assumption that his financial circumstances would improve sufficiently so that he could escalate those payments at a rate of 8% per annum proved justified. At lowest that was then and remains a highly speculative assumption.

[32] As regards a change in circumstances the only change is that which has arisen from the sale of the sectional title unit in Umhlanga, the effect of which was to discharge the loan agreement and reduce to some extent Mr Evans' indebtedness in respect of the loans secured by mortgage bonds over his home. The statement in his initial founding affidavit that:

'I will in any event be in a position to settle all the debts on the sale of the office property',

has proved overly optimistic. Although for nine months until April 2010 he was making payments of slightly more than R21 000 per month to FNB in reduction of his indebtedness no further payments have been made since May 2010, with the result that the indebtedness will have increased. I have already referred to the unsatisfactory level of disclosure in regard to the sources and amount of his income and the manner in which he has been disposing of it, not only in regard to the discharge of the debts owed to FNB but also in discharging his other debts and paying his ordinary living expenses. Overall the papers leave me with the clear

impression that whilst his financial circumstances have improved they have not improved to the extent that he is in a position to discharge all his debts from current income. Certainly he has not placed any evidence before me to demonstrate that fact.

[33] In those circumstances I do not think that the lapse of time between the letter of 17 April 2009 and the commencement of sequestration proceedings is material to the proper exercise of my discretion. In supplementary heads of argument a passage was quoted to me where Caney J said:

'It may very well be the case that an act of insolvency may become stale or a creditor may abandon or waive his right to rely upon it.'[19]

However no argument was addressed to me that FNB had abandoned or waived its rights to rely upon the s 8(g) notice. As regards its becoming stale that is in my view only pertinent where it is shown that circumstances have so altered since the act of insolvency that it would be inappropriate for the court in the exercise of its discretion to grant a provisional order. On its own, however, the mere lapse of time since the act of insolvency, in circumstances where sequestration would clearly be in the interests of creditors, is unlikely to warrant the court exercising its discretion in favour of the debtor. The present is not a case where it affects matters.

[34] I did not understand Mr Kemp to argue that Mr Evans is in fact solvent, as opposed to submitting in his heads of argument that FNB had not proved that he is insolvent. In case I misunderstood him, however, it is appropriate for me to say that I am not satisfied on the information placed before me that Mr Evans is solvent. Uncertainty might have been

19 *Optima Fertilizers (Pty) Limited v Turner* 1968 (4) SA 29 (D) 34 A-B.

fatal to FNB's case were it based solely upon actual insolvency.[20] However, FNB confined its case to one based on the commission of an act of insolvency. In those circumstances, particularly at the level of a provisional order of sequestration, if the debtor is to persuade the court to exercise its discretion in his or her favour, they must place evidence before the court that clearly establishes that their debts will be paid if a sequestration order is not granted. If that contention is based on a claim that the debtor is in fact solvent then that should be shown by acceptable evidence. In this regard the oft-quoted words of Innes CJ in *De Waard v Andrew & Thienhaus Limited*[21] are pertinent:

'Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him … Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, "I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities". To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.'

In this case Mr Evans concedes that he fell upon hard times financially and, whilst he claims that his circumstances have improved somewhat in consequence of the sale of the sectional title unit in Umhlanga, he does not make out any strong case that he is financially sound and capable of discharging his debts in the ordinary course. A person who claims that they are solvent and for that reason should not be sequestrated should be able to establish this by way of acceptable evidence. Apart from reliance on the alleged debt rearrangement Mr Evans did not do so.

[35] That leaves the reliance upon the provisional debt rearrangement

20 *Ohlsson's Cape Breweries Limited v Totten* 1911 TPD 48 at
21 1907 TS 727 at 733.

order obtained in the Magistrates' Court. In essence, Mr Evans contends that as a result of that order he is only lawfully obliged to pay a diminished sum to FNB in discharge of his indebtedness under the bonds and for that reason it is inappropriate that his estate be sequestrated.

[36] I accept that in a clear case where the debtor's debts have been rearranged by way of an order in terms of s 87 of the NCA and it is apparent that this will result in the debts being discharged within a reasonable, albeit slightly longer than contracted, period, this will constitute a powerful reason for the court to exercise its discretion against the grant of a sequestration order. However, once it is accepted that debt review proceedings under the NCA do not constitute an automatic bar to the grant of a sequestration order, I am unable to see why the fact that a debt rearrangement order has been granted necessarily affects the situation. Contrary to the submissions by Mr Kemp that the effect of such an order is to alter the debtor's contractual obligation to the creditor, in my view it does nothing more than preclude the creditor from pursuing its contractual rights for so long as the debtor is complying with the debt rearrangement order. That is, after all, what the NCA says in s 88(3) thereof. If the debtor does not comply with the debt rearrangement order the creditor is not confined to claiming remedies on the basis of an amended contract. Instead the bar on proceeding against the debtor 'to exercise or enforce by litigation or other judicial process any right or security under that credit agreement' is removed and the creditor is entitled to pursue in full its contractual remedies. The effect of a debt rearrangement order is to place a moratorium on credit providers pursuing their contractual remedies for so long as the debtor complies with the terms of the debt rearrangement order. Once it is recognised that an application for sequestration is not the enforcement of the credit

agreement it must follow that any moratorium to claiming payment under the credit agreement that exists by virtue of a debt rearrangement order is not a bar to the grant of a sequestration order.

[37] None of this detracts from what I said earlier, namely that the existence of a debt rearrangement order that provides for the payment of the debtor's debts within a reasonable time and in an orderly fashion, in conjunction with proof that the debtor is complying with the terms of the order, is a powerful reason for the court to exercise its discretion in favour of the debtor when an application is brought for the sequestration of his or her estate. It is not, however, decisive. It is even less decisive when, as here, the existence and validity of any such order is debatable. FNB contends that it caused its credit agreements to be removed from the debt review process by way of a notice in terms of s 86(10) of the NCA. Mr Evans disputes that. It is not a question that can be resolved on these papers and when I asked counsel whether it needed to be resolved in order to determine the present application both, for different reasons, said that it did not.

[38] Assuming that the s 86(10) notice was ineffective I nonetheless have serious reservations about the validity of the provisional debt rearrangement order. First, it was sought in a court that does not appear to have any jurisdiction over Mr Evans, who both resides and carries on business outside its area of jurisdiction. Second, the rearrangement order was granted on a provisional basis by way of a rule *nisi*. As Mr Harcourt pointed out, in his supplementary written submissions, the NCA has no provision for the grant of rules *nisi* or any kind of interim or provisional debt rearrangement order. In s 87(1) it contemplates a hearing and a decision on the application before it and nothing more. In terms of the

Magistrates' Court Act 32 of 1944[22] the magistrates' courts have a limited jurisdiction in relation to the grant of rules *nisi* and none of the cases for which that Act provides contemplates an order such as this one. Then there is the impact of the order for a stay of operation of the debt rearrangement order. I can find nothing in the NCA or the Magistrates' Court Act that sanctions such a procedure. It is accordingly, at the lowest, extremely doubtful whether the magistrates' court ever validly granted a debt rearrangement order and whether any such order is still in place. The fact that the status of the debt rearrangement order obtained by Mr Evans is highly questionable is an important factor to consider in the exercise of my discretion.

[39] A further factor to bear in mind in considering the effect of a debt rearrangement order on the exercise of the court's discretion in relation to a sequestration application, is the period during which the order will, if implemented, result in the repayment of the debtor's indebtedness. Certainly, at the time when the present debt rearrangement order was proposed and put before the magistrate, it necessarily involved an extension of Mr Evans' indebtedness to FNB and others far beyond the term of the original credit agreements. That conclusion is drawn from the fact that the original basis for payment under the debt rearrangement order was one that did not discharge the monthly interest accruing on the indebtedness. According to the application for debt review Mr Evans' monthly commitments in respect of credit agreements amounted to R31 480. The debt rearrangement order provided for him to pay R23 397, less a distribution cost, per month, to be distributed pro rata to his creditors. The interest rate on his debts, bar one, ranged between 11% and 22.4%.

22 S 30 read with Rules 55(1) and 56.

[40] Manifestly on those figures the only basis upon which compliance with that debt rearrangement order would succeed in discharging his debts would be if he was able to increase his payments by 8% per annum every year for a number of years. That is a highly speculative assumption, although experience in these cases suggests that debt counsellors almost invariably make it, or a more generous assumption. It certainly means that the debts would only be discharged over a considerably greater period than the credit providers had anticipated when they concluded the credit agreements with Mr Evans. There is much to be said for the proposition that the proposal was very nearly as unrealistic as that which I considered in *Mudaly's* case.[23] Where a proposal for debt restructuring will significantly extend the period of the debtor's indebtedness and is dependent for its effectiveness upon a speculative assumption regarding increases in income and payments, that will diminish the weight to be attached to such an order in exercising the court's discretion whether to grant a sequestration order.

[41] There is one further relevant factor. Mr Kemp contends that, as a result of the discharge of the loan debt, Mr Evans is in possession of a sufficient income to pay his outstanding indebtedness to FNB in the ordinary course by way of monthly instalments on a loan on conventional terms. If that is so there seems to be no reason why he should not either negotiate for the reinstatement of his loan with FNB or obtain a loan in a corresponding amount from another financial institution and pay FNB. The fact that he has not done so suggests that his financial position may not be as rosy as Mr Kemp submits. That is a factor that weighs against the exercise of my discretion in his favour.

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23 *BMW Financial Services (South Africa) Ltd v Mudaly* 2010 (5) SA 618 (KZD) paras [37] to [42].

[42] Overall, I am not satisfied that this is a case where I should exercise my discretion to refuse to grant a provisional sequestration order. Mr Kemp submitted that the application should either be dismissed or a final order be granted because it would serve no purpose to argue the same issues again before this court if I were to decide in favour of FNB. He said that this accorded with the 'Transvaal' approach. I am not aware of any such approach. That it is impermissible as being contrary to the express provisions of the Insolvency Act I have no doubt. Section 9(5) of that Act provides that the court on consideration of an application may either act in terms of s 10 or may dismiss the application, postpone its hearing or make such other order as in the circumstances appears to be just. Section 10 provides only for the grant of a provisional order for sequestration. There are then requirements for the service of the rule *nisi* and s 12(1) provides that thereafter there shall be a hearing 'pursuant to the aforesaid rule *nisi*'. The authorities (which emanate from the former Transvaal) are clear in holding that the preliminary step of granting a provisional order is peremptory.[24] In those circumstances the proper order is a provisional order.

[43] I accordingly grant the following order:

1. That a rule *nisi* do issue calling upon the respondent and all other interested parties to show cause, if any, to this court on the 19th day of May 2011 at 09h30 or so soon thereafter as the matter may be heard why the estate of the respondent should not be placed into final sequestration.
2. That this order operate with immediate effect as an order for the provisional sequestration of the estate of the respondent.

24 *Provincial Building Society of SA v du Bois* 1966 (3) SA 76 (W) at 81 E-F.

3. That a copy of this order be served on:

3.1 The respondent;

3.2 The Master of the High Court;

3.3 The South African Revenue Services.

4. That a copy of this order be published on or before the 29th day of April 2011 once in the Government Gazette and once in a daily newspaper published and circulating in the Ballito and greater Durban areas.

DATE OF HEARING	11 FEBRUARY 2011
DATE OF JUDGMENT	18 MARCH 2011
APPLICANT'S COUNSEL	MR A W M HARCOURT SC with MR W N SHAPIRO
APPLICANT'S ATTORNEYS	MAHARAJ ATTORNEYS
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