IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: **D13829/2023**

In the matter between:

THE UNLIMITED GROUP (PTY) LTD **APPLICANT**

and

KGOTHATSO BARREL MAMOGALE **RESPONDENT**
IDENTITY NUMBER: 8[...]
UNMARRIED

Coram: Mossop J

Heard: 9 September 2024

Delivered: 16 September 2024

ORDER

The following order is granted:

The application is dismissed with costs, such to be taxed on scale B.

JUDGMENT

MOSSOP J:

[1] This is an opposed application in which the applicant seeks to sequestrate the estate of the respondent, who was previously employed by it as a senior business solutions analyst. The applicant alleges that the respondent has committed an act of insolvency as contemplated in s 8*(b)* of the Insolvency Act 24 of 1936 (the Act).

[2] The circumstances under which the respondent was employed by the applicant is the source of the obvious simmering discontent between the parties. The applicant apparently employed the respondent on the strength of his curriculum vitae and his performance at an interview. In that curriculum vitae, the respondent stated that he held a BSc degree in financial modelling, conferred upon him by the University of South Africa in 2006, was part way through studying towards a BSc degree in computer engineering at the same university, and was also part way through studying towards a BSc degree in mathematics statistics at the University of Pretoria. In addition, he also allegedly represented to the applicant that he was a qualified actuary.

[3] The applicant now holds the view that all these academic achievements are false. The respondent does not hold a BSc degree in financial modelling, and he is not a qualified actuary. In short, it is alleged by the applicant that the respondent is a fraud.

[4] Having been employed by the applicant for two and a half years, the respondent was dismissed by it for misconduct in March 2021. It appears that the misconduct relied upon by the applicant was the respondent's alleged misrepresentation of his academic achievements.

[5] Because of this alleged fraudulent conduct, the applicant in August 2021 brought an action against the respondent, seeking to recover damages from him arising out of his alleged misrepresentations. It appears that it seeks to recover the salary that it had paid him over the period of his employment. The respondent

defended the action and in due course delivered an exception to the applicant's particulars of claim.

[6] The exception was argued before Radebe J and was dismissed by her in a judgment delivered on 2 November 2023, and costs were awarded against the respondent (the first costs order).

[7] The applicant caused a bill of costs to be prepared consequent upon the first costs order and then had it taxed by the taxing master. An amount of R46 802.45 was allowed by the taxing master. This costs order is central to the applicant's attempt to sequestrate the respondent's estate.

[8] When the taxed costs were not settled by the respondent, the applicant caused a warrant of execution to be served upon him by the sheriff of this court. Service of the writ was effected by the sheriff on the respondent personally on 1 September 2023. Curiously, this was not done at the respondent's place of residence, of which the applicant had direct knowledge, having cited it in its founding affidavit in this application, but was effected at the offices of the Commission for Conciliation, Mediation and Arbitration (CCMA), where the respondent was on that day litigating against the applicant, challenging the termination of his employment.

[9] The sheriff's return of service reads, in part, as follows:
'PROCEEDED TO THE ADDRESS AND MET WITH MR J SCHABORT THE ATTORNEY. HE POINTED OUT THE DEBTOR. DEBTOR INFORMED ME THAT HE OWNS NO MOVABLE ASSETS, NOR VEHICLES TO SATISFY THE WARRANT. HE ALSO REFUSED TO PROVIDE HIS RESIDENTIAL ADDRESS. A RETURN OF NULLA NOBA (sic) RENDERED. NOTE: DEBTOR SERVED AT CCMA AS HE WAS APPEARING. Further, it is here by (sic) certified that at the above address, the amount of had been demanded from. (sic)

, however, informed me that had no money or attachable assets to satisfy the said warrant or a portion thereof. No movable goods/disposable assets were pointed out either, or could be found by me after a diligent search and enquiry at the given

address. Therefore my return is one of NULLA BONA, in respect of the given address, it is not known whether Defendant has any assets at any other address.

It is hereby further certified that has been requested in terms of section 66(8) to declare whether has any immovable property which is executable on which the following answer has been furnished:

(sic)'

[10] The return appears to be incomplete, with gaps existing where information presumably was to be inserted by the sheriff but was not. The applicant views this return as constituting evidence of an act of insolvency in terms of s 8*(b)* of the Act.

[11] Section 8*(b)* of the Act reads as follows:

'A debtor commits an act of insolvency-

. . .

(b) if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment.'

[12] It is settled law that there are two different and distinct acts of insolvency contemplated in s 8*(b)*:

'The first is committed when the debtor fails to satisfy the judgment or to indicate sufficient disposable property to satisfy it; and the second when the sheriff fails to find sufficient property to satisfy the judgment.'[1]

[1] *Absa Bank Ltd v Collier* 2015 (4) SA 364 (WCC) para 9.

Given the peculiar circumstances of this matter, and service of the writ of execution on the respondent at the CCMA, it is apparent that the second act must fall away and the applicant can only rely on the first act of insolvency.

[13] I shall assume, without deciding, that the sheriff's return constitutes an act of insolvency contemplated by s 8*(b)*, notwithstanding the blank spaces in the return.

[14] However, the applicant alleges that the respondent does own immovable property and owes money to a financial institution in respect of a mortgage bond registered over that immovable property, which is situated in Centurion, Gauteng. It is that immovable property that the applicant submits will form the core of the benefit to creditors that it is required to establish if the respondent's estate is to be sequestrated. The extent of the equity in the immovable property is not, however, mentioned by the applicant. No other assets of any significant financial value owned by the respondent are mentioned by the applicant.

[15] The applicant's case in its founding affidavit is succinctly stated and is shorn of any excess verbiage. It appears, however, that it is also shorn of certain essential facts that ought, in my view, to have been disclosed by it. Those facts have, however, been revealed by the respondent in opposition to the applicant's application. What the respondent states in that regard has not been seriously challenged by the applicant and has largely, if not totally, been admitted in reply.

[16] The respondent alleges that there is other litigation between the parties besides the litigation in this court. The applicant obliquely acknowledged this to be the case in its founding affidavit when it stated that the sheriff had served its warrant of execution on the respondent at the offices of the CCMA. There are, in fact, two matters between the parties before that body: one relating to an unfair labour practice and the other to the termination of the respondent's employment with the applicant.

[17] A significant omission from the applicant's founding affidavit, however, is the fact that before instituting its action in this court against the respondent, the applicant had sought relief against him in the labour court. That litigation appears to have been

an application relating to the validity of the respondent's contract of employment with the applicant. It was initially brought by the applicant on an urgent basis and was dismissed by Tlhotlhalemaje J on 10 October 2021.[2] A copy of the judgment in the labour court has been put up by the respondent. The order that was granted in that matter reads as follows:

'The applicant's application for interim relief as sought under paragraph 2.1 of its Notice of Motion is dismissed with costs, payable on the attorney and client scale, inclusive of wasted costs occasioned by the postponement on 1 October 2021.'

[18] In coming to that conclusion, Tlhotlhalemaje J made the following observation:[3]

'In every respects (sic), and given the manner with which the applicant has conducted itself in pursuing this matter, and further also taking into account its approach at the CCMA, there is clearly merit in Mamogale's contentions that the applicant was, and is intent on avoiding the arbitration proceedings, delaying the resolution of his dispute, and attempting to "litigate" him financially. Through its conduct under the circumstances, the applicant has taken the abuse of this Court to a different higher level, which clearly deserves censure on a punitive scale.'
The judgment was not appealed, and the costs order is accordingly extant.

[19] Thus, in asserting that the respondent was indebted to it in respect of the first costs order, the applicant failed to mention in its founding affidavit that it was liable to the respondent in respect of the costs ordered against it in the labour court on the attorney and client scale.

[20] On the strength of that order of the labour court, the respondent caused a bill of costs to be drawn up. It came to the amount of R72 144.40, which exceeds the first costs order in favour of the applicant. To be fair to the applicant, at the time when the respondent delivered his answering affidavit in this application, that bill of costs had not been taxed by the taxing master of the labour court. Despite this not

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[2] *The Unlimited Group (Pty) Ltd v Mamogale and others* [2021] ZALCJHB 354.
[3] Ibid para 27.

having occurred, in my view, the applicant ought to have disclosed in its founding affidavit that it, too, was indebted to the respondent in an as yet undetermined amount. But it did not do so. The respondent boldly claimed in his answering affidavit that the prospect of any significant amount being taxed off his bill of costs when it was finally taxed was remote, given that he was awarded costs on the attorney and client scale.

[21] In reply, the applicant admitted the fact of the costs order granted by the labour court in the respondent's favour and simply noted that the respondent's bill of costs had not, as yet, been taxed. It then went on to mention another costs order that had been granted in its favour, apparently in this court, and in respect of which a further bill of costs in the amount of R95 000 had been drawn up (the second costs order). Those costs relate to proceedings in this court but the basis for the order has not been disclosed. This bill of costs, like the respondent's bill of costs in the labour court, had, however, not been taxed by the time the applicant prepared its replying affidavit. The second costs order was not mentioned in the founding affidavit and thus comprised a new matter raised by the applicant in reply.

[22] To deal with this new disclosure, the respondent elected to deliver a supplementary affidavit (the supplementary affidavit).[4] In the supplementary affidavit, he indicated that, in the interim, the applicant's second costs order had been considered by the taxing master and an amount of R74 312.65 had been allowed on taxation. The respondent accepted that this amount was due to the applicant and revealed that he had already paid R50 000 of that amount to the applicant and that it had been agreed between himself and the applicant's attorneys that he would pay the balance by the end of August 2024. Before me, Ms Russo, who appears for the respondent, stated that the balance due to the applicant had, indeed, been fully paid at the end of August 2024, a fact confirmed by Mr Veerasamy, who appears for the applicant.

[23] The respondent introduced new facts of his own in the supplementary affidavit and went on to state that his bill of costs had also now been taxed in the labour court

[4] To the extent necessary, I grant leave for the filing of the respondent's supplementary affidavit and the applicant's supplementary affidavit delivered in reply to that affidavit.

and that an amount of R61 411.65 had been allowed by the taxing master. His earlier assertion that no significant amounts would be taxed off his bill of costs was thereby vindicated.

[24] The respondent accordingly submitted that the costs order granted in his favour in the labour court exceeded the first costs order granted in favour of the applicant by approximately R14 000. Through the operation of set-off, he was, thus, no longer indebted to the applicant and had informed the applicant of this fact. According to the respondent, the applicant had responded to this by stating that it:

'… does not consent to set-off'.

[25] A party does not have to consent to set-off for it to operate. Compensatio, or set-off, merely requires that there must be two liquidated debts, due and payable and mutually owed by the same pair of persons for it to operate.[5] The party claiming set-off bears the onus of proving it. As to how set-off operates, there are two competing theories.[6] The first theory holds that set-off operates automatically and *ipso iure*. The second theory holds that it does not occur automatically, but must first be invoked by one party but that, once invoked, it has retrospective effect. The weight of authority seems to favour the first theory. Indeed, in *Herrigel NO v Bon Roads Construction Co (Pty) Ltd*,[7] the court stated that 'it is trite law that set-off operates automatically'.

[26] Parties may, however, contractually agree that set-off will not apply to their relationship.[8] There is, however, no suggestion that this has been agreed upon in this matter and accordingly whether the applicant consented to set-off operating is of no importance.

[27] To counter the point of set-off, the applicant sought leave to, and did deliver, a further affidavit. In it, the applicant referenced a disclosure that the respondent had

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[5] *Ackermans Ltd v Commissioner, South African Revenue Service; Pep Stores (SA) Ltd v Commissioner, South African Revenue Service* [2010] ZASCA 131; 2011 (1) SA 1 (SCA) para 8.
[6] See generally 31 *Lawsa* 3 ed at 244.
[7] *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and another* 1980 (4) SA 669 (SWA); [1980] 4 All SA 704 (SWA) at 676F-G.
[8] *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* [2010] ZASCA 19; 2010 (4) SA 232 (SCA) para 15 (*Blakes Maphanga Inc*).

made in his answering affidavit. At paragraph 22 of the answering affidavit, deposed to on 27 February 2024, the respondent said the following:

‘In an effort to be transparent with the Honourable Court, and in the hopes that it may assuage the applicant in its current approach of trying to litigate me into submission, I advise that I hold a legal insurance policy with First National Bank Limited (“FNB”), in terms of which I am entitled to provision of legal assistance (“the FNB Policy”). I am up to date with all payments in terms of my FNB Policy and have been appointed legal practitioners to assist me by virtue of my ability to maintenance (sic) regular payments of premiums in terms of that policy as and when they become due.’

[28] The applicant latched onto this disclosure and submitted that the respondent had therefore not incurred any legal costs in the labour court. FNB did. Thus, so it was argued, the applicant is not indebted to the respondent arising out of the labour court order, but to FNB. There is accordingly no mutual indebtedness and set-off consequently does not arise.

[29] This is an argument of such brittle fragility that it does not withstand even the slightest scrutiny:

(a) As Ms Russo adroitly pointed out in argument, there is no suggestion whatsoever that the respondent had such a policy in place in 2021 when the proceedings were first commenced by the applicant against the respondent in the labour court. In the extract from the respondent’s answering affidavit already referred to, the respondent did not say that his insurance policy was in place in 2021: he said that it was in place in 2024. It is not possible therefrom to conclude that he had the policy in 2021;

(b) Who paid the respondent’s costs of litigation in the labour court is of no concern to the applicant. The applicant forgets that it was the applicant in the labour court, and it chose who the respondent was. It chose the respondent and not his insurers. Had it succeeded against the respondent, it would not have looked to FNB for its costs: it would have sought them from the respondent for there was simply no lis with FNB, only with the respondent;

(c) Whether the respondent had an insurance policy in place is of no concern to the applicant for the relationship between the respondent and FNB is a classic example of a *res inter alios acta*.[9] In *Zysset and others v Santam Limited*,[10] the court observed that the two classic examples of this, are:

'*(a)* benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums and *(b)* moneys and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy.'[11]

Scott J went on to state that:

'… the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff.'[12]

[30] The second example mentioned above, namely the benevolence of a third party, obviously does not arise in this matter. *In casu*, the respondent incurred the expense of the premiums in respect of his policy of insurance. That cannot be of benefit to the applicant nor can the existence of the insurance policy. The labour court ordered the respondent's costs to be paid and the respondent is thus entitled to enforce that order.

[31] It was argued by Mr Veerasamy that the respondent must have entered into an agreement of cession with FNB. There is no evidence of this being the case. There is, as already pointed out, no evidence that the policy even existed at the time that the applicant commenced litigation against the respondent in the labour court. Mr Veerasamy submitted that the applicant had requested a copy of the insurance policy from the respondent's attorneys but was advised that the respondent declined

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[9] The full maxim is 'res inter alios acta, aliis neque nocet, neque prodest', meaning 'a thing done, or a transaction entered into, between certain parties cannot advantage or injure those who are not parties to the act or transaction': see *Erasmus Ferreira & Ackermann and others v Francis* [2009] ZASCA 54; 2010 (2) SA 228 (SCA); [2009] 3 All SA 500 (SCA) para 15.
[10] *Zysset and others v Santam Ltd* 1996 (1) SA 273 (C).
[11] Ibid at 278B-C.
[12] Ibid at 278C-D.

to make it available. He had every right to refuse, for there is no obligation to discover in insolvency proceedings. I was asked by Mr Veerasamy to draw a negative inference from such refusal. I am not prepared to do so in the face of the facts of this application.

[32] There is accordingly no doubt that the two parties who have engaged in litigation in a variety of legal fora are the applicant and the respondent, as cited in this application. The amounts that have been awarded to each of them by way of costs orders have been taxed and are thus liquidated amounts,[13] which are now due. All the requirements for the operation of set-off are consequently present and I find that it has operated by operation of law. Consequently, the applicant is no longer a creditor of the respondent.

[33] As the applicant is not a creditor of the respondent, it has no basis to insist on the sequestration of his estate.[14] The respondent is therefore not presently indebted to the applicant and the application cannot be granted.

[34] Even if I should be incorrect in this conclusion, it is so that a court hearing a sequestration application has a discretion as to whether to grant such an application.[15] This is irrespective of the ground relied upon for the sequestration of the insolvent party.[16] As was said in *Kent v Transvaalsche Bank*:[17]

'And in determining how that discretion should be exercised it seems to me that the Court has a right to look at all the facts and circumstances bearing upon the case which it deems necessary to enable it to arrive at a right decision.'

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[13] It meets the requirement for being liquid as set out in *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at 469F-G. See also *Blakes Maphanga Inc* paras 17-18.
[14] Section 9(1) of Act reads as follows: '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.'
[15] Section 10 of the Act; *Epstein v Epstein* 1987 (4) SA 606 (C) at 612G.
[16] *F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (3) SA 841 (N) at 844.
[17] *Kent v Transvaalsche Bank* 1907 TS 765 at 783, per Bristowe J.

[35] A conspectus of all the facts in this matter makes it plain that there is ongoing litigation between the parties - even as this application is brought. The situation is a fluid one, with each of the parties having secured some success against the other in the form of costs orders. At present, it appears to me that the applicant is indebted to the respondent. That may change as the litigation progresses and further interlocutory applications, if any, are considered and are either granted or dismissed. It seems to me to be inappropriate at this stage to sequestrate the respondent's estate and that I should exercise my discretion against such a course of action. In the exercise of my discretion, I would therefore decline to grant the relief sought.

[36] As the facts have been revealed over the spread of the several affidavits delivered by the parties, there is, in any event, considerable doubt as to whether the applicant has established that the respondent is unable to pay his debts. He has, for example, paid the second costs order, a considerable sum, in full. He has provided his reasons for not paying the first costs order and, in my opinion, those reasons are sustainable in law and are bona fide and reasonable.

[37] Finally, it seems to me that the facts of this matter align with what was contemplated in *Badenhorst v Northern Construction Enterprises (Pty) Ltd*.[18] In *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and another v Honig*, the Supreme Court of Appeal confirmed that what was held in *Badenhorst* 'applies equally in both winding-up and sequestration proceedings'.[19]

[38] In my view, the respondent has opposed his sequestration on bona fide and reasonable grounds. In *Imobrite (Pty) Ltd v DTL Boerdery CC*,[20] the Supreme Court of Appeal observed that:

'A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company's liquidation. It would also constitute an abuse of

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[18] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 374-348 (*Badenhorst*).
[19] *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and another v Honig* [2011] ZASCA 182; 2012 (1) SA 247 (SCA) para 11.
[20] *Imobrite (Pty) Ltd v DTL Boerdery CC* [2022] ZASCA 67 para 40.

process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights.' (Footnotes omitted.)

The reference to a company in this extract may comfortably be interchanged with a reference to a natural person. I agree with these observations and consider that they apply with equal effect to the facts of this matter.

[39] The application consequently must fail. Again, a costs order will issue in the ongoing insidious dispute between the parties, this time in favour of the respondent. It is trite that costs are awarded in the discretion of the court. The matter was of considerable importance to the respondent who faced a potential loss of status if the application succeeded. The issues, however, were not particularly simple nor unbearably complex. In my view, it would accordingly be just to order costs against the applicant on scale B.

[40] In the result, I grant the following order:

The application is dismissed with costs, such to be taxed on scale B.

MOSSOP J

APPEARANCES

Counsel for the applicant:	Mr I Veerasamy
Instructed by:	MacGregor Erasmus Attorneys Incorporated First Floor, Bond Square 12 Browns Road

	The Point Durban
Counsel for the respondent:	Ms S Russo
Instructed by:	H L Legal Incorporated Unit 4, The Zenith 20 Solstice Road Umhlanga Ridge