Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 23 February 2022
Date of judgment: 22 March 2022

Case No. 8225/2021

In the matter between:

ULLMAN SAILS (PTY) LTD	Plaintiff

and

JANNIE REUVERS SAILS (PTY) LTD	First Defendant
LEADING EDGE SAILMAKERS (PTY) LTD	Second Defendant
JAN BASIL REUVERS	Third Defendant
BELINDA HELEN REUVERS	Fourth Defendant

Case No. 8231/2021

And in the matter between:

ULLMAN SAILS INTERNATIONAL INCORPORATED	First Applicant
ULLMAN SAILS EAST (PTY) LTD	Second Applicant
BETTER SAILS MANUFACTURING (PTY) LTD	Third Applicant

and

JAN BASIL REUVERS First Respondent

ID No: [….]

BELINDA HELEN REUVERS Second Respondent

Case No. 8232/2021

And in the matter between:

ULLMAN SAILS INTERNATIONAL INCORPORATED First Applicant

ULLMAN SAILS EAST (PTY) LTD Second Applicant

BETTER SAILS MANUFACTURING (PTY) LTD Third Applicant

and

BELINDA HELEN REUVERS First Respondent

ID No: [….]

JAN BASIL REUVERS Second Respondent

JUDGMENT
(Transmitted by email to the parties' legal representatives and posted on SAFLII. The judgment shall be deemed to have been handed down at 10h00 on Tuesday, 22 March 2022)

BINNS-WARD J:

[1] On 15 October 2018, Quantum Sail Design Group LLC ('Quantum') obtained judgment in a US district court in Michigan against Jannie Reuvers Sails Ltd ('JRS') and Leading Edge Sailmakers (Pty) Ltd ('LES') in the net amount of US$2 521 754.88 ('the principal judgment debt').[1] The award included a monetary sanction of US$312 439 granted by way of a special order against Mr Jannie Reuvers and his wife, Mrs Belinda Reuvers, in respect of 'discovery violations' by them in the action against JRS and LES. The result was that Mr and Mrs Reuvers were each jointly and severally liable together with JRS and LES (and each other) for payment of US$312 439 of the principal judgment debt. The district

[1] The figure was arrived at after the court set off the amount of US$580 228 that it had awarded against Quantum in JRS's counterclaim in the action.

court's judgment was upheld on appeal by the US Court of Appeals for the Sixth Circuit in an opinion by a panel of that court filed on 10 September 2020.

[2] The action in the United States arose out of a contractual dispute between Quantum and JRS. At the relevant time JRS, which is a manufacturer of sails, had operated under a licence agreement with Quantum. LES was described in the Sixth Circuit's opinion as an 'affiliate of JRS', which had been involved in certain 'unauthorised sales' in breach of JRS's obligations under the licence agreement. The litigation ensued in the aftermath of the termination of the licence agreement in 2013 and concerned a dispute between the parties about the implementation of various aspects of the agreement during its currency. JRS subsequently, until sometime in 2018, operated under a licence from a different company, Ullman Sails International Incorporated (California), which is part of a group of companies. The indications are that the Reuvers' business mentor, one Geoff Grylls (since deceased), was a moving force in the Ullman group.[2]

[3] Grylls was instrumental in introducing a Cape Town attorney, Michael England, then in practice under the name and style Davidson England Attorneys, to the Reuvers to assist JRS in its dispute with Quantum. It is apparent from the documentary evidence that England was closely involved on behalf of JRS and the Reuvers in their conduct, through the offices of locally appointed American legal representatives, of the litigation in the United States. England was also involved in furnishing advice on, and arranging expert assistance to be obtained in respect of, the restructuring of the Reuvers' business affairs in South Africa in a manner designed best to protect them and the entities in which they traded against the consequences of any adverse judgments in the litigation being conducted in America.

[2] Ullman Sails International (California) was founded in 1967 by David Ullman.

[4] England, however, disputes that he was engaged as the Reuvers' attorney or as that of JRS. He maintains that he acted throughout at the instance of Grylls, not the Reuvers. England alleges that any appearance that he acted for JRS and the Reuvers was because Grylls' interests were closely aligned with those of JRS until the sale of the latter's business to Better Sails Manufacturing (Pty) Ltd ('BSM') in or about September 2018. (BSM, which is part of the Ullman group of companies, currently trades as 'Ullman Sails South Africa'.) England's evidence derives some support from the undisputed fact that Grylls paid for most of the legal expenses incurred by JRS in the conduct of the litigation in the US. It is fortunately unnecessary for the purposes of this judgment to determine the issue because Mr *Manca* SC, who (together with Mr *Landman*) appeared for Ullman Sails (Pty) Ltd and related parties in the matters before me, allowed that the cases currently before this court might properly be decided assuming that England, notwithstanding the latter's protestations to the contrary, had indeed been the attorney, as maintained by the Reuvers.

[5] I consider that it may also fairly be inferred, despite a lack of detailed evidence on the point, that in the course of the aforementioned restructuring exercise, in which he had a demonstrable involvement, England would have become privy to information concerning their proprietary affairs that the Reuvers would justifiably have considered to be private or confidential. During the restructuring exercise, in which it is apparent from the documented exchanges included in the papers that England considered that a desirable objective would be to end JRS's existence as a trading entity and house its business operations elsewhere, England was appointed, evidently at the instance of Grylls, as president and chief executive officer of Ullman Sails International Incorporated (California) and as a co-director of Ullman Sails East (Pty) Ltd and BSM. He also acquired a 40% shareholding in a foreign registered company that is the ultimate holding company of the Ullman group of companies. England, at that stage (in 2018 or 2019), ceased to be a practising attorney and handed over his

functions as such to his then practice partner, Nikki Slabbert. In an email to the Reuvers at the time, England nevertheless reassured them that he would remain involved in looking after their interests behind the scenes as it were.

[6] The business relationship between the Ullman companies and JRS came to an end when the business and personal relations between Grylls and England, on the one hand, and the Reuvers, on the other, soured. That happened after the primary litigation in the US had concluded. The breakdown in relations does not appear to have been related to the American litigation. JRS had by that stage sold its manufacturing business to BSM,[3] which carried on trading from the premises that had been occupied by JRS. The premises were owned by other companies held in a trust of which Mr and Mrs Reuvers were two of the trustees and beneficiaries. The fallout between the interests represented by the Ullman companies and the Reuvers gave rise to further litigation in this court, including proceedings for interim interdictory relief that were determined against the Reuvers and JRS and various other parties by Le Grange J in case no. 17279/2019 on 18 May 2020.

[7] The judgment in the last-mentioned proceedings included an award of costs against the unsuccessful parties. Although there was some disputation on the papers as to whether the liability of the losing parties in terms of the costs order was joint and several or just joint, Mr *Manca* accepted for the purposes of his argument, advisedly in my view, that the order gave rise to only joint liability. The taxation of the costs was settled on the basis of an acceptance by those of the respondents before Le Grange J from whom the Ullman companies sought to recover costs of the quantification of the applicant's recoverable costs in the total amount of R500 000.

[3] The sale was described by the Reuvers as the sale by JRS of its 'manufacturing capacity'.

[8] In terms of a deed of cession executed on 20 January 2021, Quantum (therein called 'the Assignor') ceded its rights under the US judgment in favour of Ullman Sales East (Pty) Ltd (named in the deed simply as 'Ullman Sales (Pty) Ltd' and referred to as 'the Assignee'). As cessionary, Ullman Sales East (Pty) Ltd (cited as 'Ullman Sails (Pty) Ltd') has commenced action by way of provisional sentence summons, in case no. 8225/2021, for the recovery of the principal judgment debt from JRS and LES (cited as first and second defendants, respectively) and, to the limited extent of their joint and several liability for payment thereof in the amount of US$312 439, also against Mr and Mrs Reuvers (cited as third and fourth defendants, respectively).

[9] In separate proceedings, under case no.s 8231/2021 and 8232/2021, respectively, Ullman Sails International Incorporated (as first applicant), Ullman Sails East (Pty) Ltd (second applicant) and BSM (third applicant) have also applied for the provisional sequestration of the estates of Mr Reuvers and Mrs Reuvers (who are married out of community of property). The applicants' standing in the sequestration applications is founded on the second applicant's status as a creditor of the respondents by virtue of it having taken cession of the judgment creditor's rights under the American judgment against the respondents and also all three applicants' claim for the payment of costs awarded against the respondents in the litigation before Le Grange J.

[10] There was some dispute between the parties whether the individual liability of Mr Reuvers and Mrs Reuvers in terms of the costs settlement fell to be quantified at R83 333 (as contended by the applicants) or R62 250 (as argued on behalf of the Reuvers), but the difference and the reason for it are of no moment for the determination of the sequestration applications. I am prepared, without making any decision on the point, to assume in favour of the respondents that the amount involved is the lower one.

[11] The provisional sentence matter and the two sequestration applications were heard together. This was convenient because of a pertinent commonality of parties and issues. The grounds for the defendants' opposition to provisional sentence were the same as those upon which the respondents in the sequestration proceedings contested the second applicant's standing as an alleged creditor in respect of the American judgment debt. In all three matters the opposition was predicated on (i) the alleged non-enforceability of the ceded claim in the hands of the cessionary by reason of the cession having been *contra bonos mores* or offensive to public policy and (ii) the alleged bar to Ullman Sails East (Pty) Ltd's ability to recover the judgment debt by virtue of it not being registered as a 'debt collector' in terms of the Debt Collectors' Act 114 of 1998. The court will only reach the stage of having to decide whether it had been established that the Reuvers were factually insolvent or had committed an act of insolvency if neither of those grounds of defence is upheld.

The non-enforceability in the hands of the cessionary of the ceded claim

[12] There were some indications in the opposing papers that could be construed as directed to support a contention that the cession was not a true cession and that it constituted no more than a disguised appointment by Quantum of Ullman Sails East (Pty) Ltd as its collecting agent, as distinct from the out and out transfer of its title to the judgment claim.[4] However, Mr *Ferreira*, who appeared for the defendants in the provisional sentence action and for the respondents in the sequestration proceedings, made a helpful interpolation during Mr *Manca*'s address to clarify that the character of the transaction as a cession was not contested. Consistently with that intimation, Mr *Ferreira* did not advance any argument that

[4] As remarked in LAWSA 3ed, vol 3, s.v. '*Cession*' at para 145, '*It is often a question of some nicety whether a mandate (or power of attorney) given by a creditor to a third party to receive or collect money from the debtor amounts to a cession to the third party of the right to the money or whether it is merely a mandate granted to the third [arty to receive or collect payment and to account to the creditor for the proceeds. This is a factual question of intention. Mandate and cession are distinct legal concepts ...*'.

the cession agreement was a simulation to disguise what was only a mandate to collect the money for the judgment creditor.

[13] The argument that was advanced on behalf of the defendants and the respondents was that the cession should not be enforced in the peculiar circumstances. The basis for the contention was articulated as follows in the opposing affidavit in the provisional sentence proceedings: '*but for* [the] *attorney-client relationship ... between Michael England (the CEO of the plaintiff ...) and the Defendants herein, the Plaintiff would not have been able to secure the cession that is the basis for the relief sought, and that it improperly benefits from same*'. Later in the affidavit it was added that England himself benefitted from the cession because of his proprietary interest, albeit indirect, in the plaintiff company.

[14] The Reuvers averred that in the course of restructuring their affairs in the circumstances described above, England became privy to confidential information relating to their personal and business affairs. They alleged that the current litigation '*is a piece of the puzzle in a greater scheme in which England has taken information obtained in privileged circumstances to benefit his own estate and that of the companies over which he is the guiding mind. But for his involvement as our attorney of record, England would not have become the CEO of Ullman Sails International, he would not have been in a position to negotiate the purchase of JRS and most importantly, he would bear no knowledge of the very judgment that he now seeks to enforce under the guise of the Plaintiff.*' Attention was directed to para 158 of the title on cession in LAWSA (3ed, vol. 3), where it is stated that '*An act of cession will generally speaking be inoperative if its conclusion, implementation, or purpose is prohibited by a statute or by the common law or is contra bonos mores or against public policy; or if it is tainted by fraud, duress or undue influence. So too if the prospective cessionary is disqualified from taking cession of the right in question*'.

[15] Mr *Ferreira* did not rely on any specific statutory provision or incident of the common law to contend that the cession in the current matter was prohibited. He did, however, refer to various provisions in the Code of Conduct published in terms of the Legal Practice Act 28 of 2014,[5] which he submitted had been contravened by England in relation to the cession. In this regard, he highlighted clauses 3.3, 3.5 and 3.6 of Part II of the Code, which provide as follows:

> 'Legal practitioners, candidate legal practitioners and juristic entities shall –
>
> 3.3 treat the interests of their clients as paramount, provided that their conduct shall be subject always to:
>
> 3.3.1 their duty to the court;
>
> 3.3.2 the interests of justice;
>
> 3.3.3 observance of the law; and
>
> 3.3.4 the maintenance of the ethical standards prescribed by this code, and any ethical standards generally recognised by the profession
>
> 3.4 ...
>
> 3.5 refrain from doing anything in a manner prohibited by law or by the code of conduct which places or could place them in a position in which a client's interests conflict with their own or those of other clients;
>
> 3.6 maintain legal professional privilege and confidentiality regarding the affairs of present or former clients or employers, according to law;'

(The term 'juristic entity' is defined in the Code as meaning 'a commercial juristic entity established to conduct a legal practice as an attorney, as contemplated in section 34(7) of the [Legal Practice] Act and a limited liability legal practice as contemplated in section 34(9) of the Act'.)

[5] In terms of s 36(1).

[16] One of the difficulties with the defendants' and respondents' reliance on England's alleged breach of the Code of Conduct is that England was not a party to the cession. The fact that England is a co-director of and indirect interest-holder in the cessionary and the CEO of its holding company does not afford a proper legal basis to conflate his legal personality with that of the cessionary company. The question is therefore whether England's role as the cessionary's representative in the conclusion of the cession, when he had previously acted as the judgment debtors' attorney in the relevant litigation, was a consideration that should justify a refusal by the court to recognise or give effect to the agreement.

[17] If one were to think England out of the equation, there would simply be no basis whatsoever to impugn the probity of the cession. That focusses the enquiry on the question what difference, if any, it should make that England, for present purposes assumed to have been the erstwhile attorney of JRS and the Reuvers, represented the cessionary company in concluding the cession agreement.

[18] It has not been established that England improperly divulged any privileged or confidential information to induce the cession. It is true that England, who terminated his registration as a practising attorney when he took up his positions in the Ullman group, may have become involved in the sail manufacturing industry and acquainted with Quantum, the cedent, by virtue of his engagement on behalf of JRS and the Reuvers in the American litigation. But there is no reasoned suggestion that he was in any way in breach of his professional mandate in the conduct of that litigation. As noted, the outcome of that litigation was that JRS, LES and Mr and Mrs Reuvers incurred a judgment debt. It is not suggested that England was in any way legally or morally blameworthy in that result.

[19] There was also nothing secret or confidential about the existence of the judgment debt. Judgments are ordinarily published and freely made available to anyone who wishes to access them. The practice is a manifestation of the values of openness and accountability on which our constitutional state is founded. The evidence establishes that the practice also applies in respect of the judgments of the US District Court for Western Michigan and the Sixth Circuit of the US Court of Appeals. Both the judgments in favour of Quantum, that at first instance and that on appeal, are readily accessible on the internet. The fact that England might have had direct knowledge of the judgments by virtue of his involvement in the litigation does not entail that Ullman's Sails' acquisition of knowledge of them through him involved a breach of privilege or confidentiality. Telling anyone about something that is public knowledge or freely accessible to any member of the public cannot be a breach of privilege or confidence. The information is not privileged or confidential.

[20] It has not been shown, nor am I able to conceive how it could have been shown, that anything about England's involvement on behalf of the JRS interests in the US litigation makes the resultant judgment debt any more onerous by virtue of the right to exact payment of it having been ceded to a company of which he happens to be a director. It has not been demonstrated that the judgment debtors' burden in having to redeem the judgment debt has, in a legally cognisable way, been increased or their situation prejudiced by the fact that it is now exigible by Ullman Sails East (Pty) Ltd rather than by Quantum.

[21] If I am correct in understanding the opposing papers to assert that the cessionary has obtained an improper advantage through England's involvement because it might be better placed to execute the judgment by virtue of the knowledge obtained by England in the restructuring of JRS and the Reuvers' affairs, there is nothing in the point. It is not contended that the judgment was invalid or tainted in any way that might justify the judgment debtors resisting an obligation to discharge the resultant debt. There is no suggestion that the

judgment was not granted by a court with jurisdiction to entertain the case according to the applicable jurisdictional principles in respect of foreign judgments under our law. Accordingly, if they are in a financial state to settle the debt, the judgment debtors should simply pay it; any question of a search for assets against which to execute should not arise. If, however, they are insufficiently liquid to settle the debt out of available funds and execution against their assets consequently becomes necessary, they are dutybound to point out to the sheriff such assets as might be available. They cannot lawfully conceal them. So where is the cognisable prejudice in the knowledge that England might have of their proprietary arrangements? I do not see any.

[22] I can readily appreciate the anger and insult a client might feel to discover that its erstwhile attorney in some litigation now acts for a third party in taking cession of the judgment given against it in that litigation with a view to enforcing the judgment. The situation is undeniably one to which many people would intuitively react disapprovingly as unbecoming and indecorous. It may even be one that might entail a breach by the attorney of his professional ethics. It is neither necessary nor desirable for me in this case to venture a finding in that regard, however; for even assuming that England's involvement as the cessionary's representative was unethical, it would not necessarily follow that the cession should be invalid or unenforceable. The question would remain whether England's postulated breach of professional ethics had a tainting effect on the agreement sufficient to justify a court on principled grounds to refuse to enforce it.

[23] The reported cases reflect multiple instances of the observation that personal sensitivities, particularly those of the judge, as to the propriety of an agreement cannot be the touchstone for its enforceability. In *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9 (SALR) Smalberger JA noted –

'No court should ... shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* (1938) AC 1 at 12, "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (see also *Olsen v Standaloft* 1983 (2) SA 13 668 (ZSC) at 673 G). *Williston on Contracts* : 3rd Edition, para 1630, expresses the position thus:

> "Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power".

In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.

> "(P)ublic policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject matters" (per Innes, CJ, in *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* (supra) at p 598) - and see the much quoted aphorism of Sir George Jessel MR in *Printing and Numerical ReRistration Co v Sampson* (1875) LR 19 Eq 462 at 465 referred to in, inter alia, *Wells v South African Alumenite Company* 1927 AD 69 at 73.[6] A further relevant, and not unimportant, consideration is that "public policy should properly take into account the doing of simple justice between man and man" - per Strafford, CJ, in *Jajbhay v Cassim* 1939 AD 537 at 544. It is in the light of these principles that the validity of the deed of cession must be considered.'

---

[6] "*If there is one thing which, more than another, public policy requires, it is that men of faull age and competent understanding shall have the utmost liberty of contracting, and that theior contracts, when entered into freely and voluntarily, shall be held sacred and and shall be enforced by courts of justice.*"

See also, amongst others, *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73 (31 May 2002); 2002 (6) SA 21 (SCA); [2002] 4 All SA 125 (SCA) at para 8, *South African Forestry Co Ltd v York Timbers Ltd* [2004] ZASCA 72; 2005 (3) SA 323 (SCA) at para 27 and the fifth of the 'important principles' listed in *A B and Another v Pridwin Preparatory School and Others* [2018] ZASCA 150 (1 November 2018); [2019] 1 All SA 1 (SCA); 2019 (1) SA 327 (SCA); 2019 (8) BCLR 1006 (SCA), in para 27.[7] The identification of those important principles as the salient considerations was endorsed in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 (17 June 2020); 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) in para 82.

[24] Harms DP observed in *Bredenkamp and Others v Standard Bank of SA Ltd* [2010] ZASCA 75 (27 May 2010); 2010 (4) SA 468 (SCA); 2010 (9) BCLR 892 (SCA) ; [2010] 4 All SA 113 (SCA), at para 38, that '(d)*etermining whether or not an agreement was contrary to public policy requires a balancing of competing values*'. Whilst the principle of *pacta sunt servanda* enjoys no inherent precedence as a relevant consideration, it is generally in the interest of public policy that contracts should be enforced. The acknowledgment was endorsed by the majority in the Constitutional Court's judgment in *Beadica 231 CC* supra, in para 87. The peculiar factual and legal context of a given case will provide the framework within which the required balancing act occurs.

---

[7] The 'important principles' identified in *Pridwin* supra, were listed by Cachalia JA as follows:

'(i) Public policy demands that contracts freely and consciously entered into must be honoured;
(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;
(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.'

[25] Drawing on the Constitutional Court's judgment in *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC), at para 56 in which Ngcobo J, writing for the majority, posited a double inquiry viz. firstly, whether the terms of the impugned agreement are such as to establish that its implementation would be contrary to public policy, and secondly, if the agreement passes muster on the first question, whether in all the circumstances of the particular case, it would be contrary to public policy to enforce the facially unobjectionable agreement,[8] I am not persuaded that it has been established - the onus in this regard being on the defendants in the provisional sentence proceedings and the respondents in the sequestration applications - that the cession was facially '*inimical to a constitutional value or principle, or otherwise contrary to public policy*', or is likely to be held to be such by any court seized of the duty to make a final determination of the question. For the reasons discussed earlier in this judgment, I am also not persuaded that the enforcement of the cession in the peculiar circumstances of the case would be *contra bonos mores* or contrary to public policy.

[26] If England's involvement in the conclusion of the cession agreement was in breach of his residual professional obligations to his former client, that is something that should, in terms of the applicable statutory framework, be able to be dealt with adequately through the disciplinary authority of his professional body. The fact that the terms of the cession are facially unobjectionable, and no demonstrable prejudice of a cognisable nature will be occasioned to the judgment debtors by the enforcement of the judgment by the cessionary rather than the cedent, impels the conclusion that this is not a case in which a court would be justified in declining to recognize or enforce the agreement for any of the reasons advanced by the defendants and respondents.

---

[8] See also *Beadica 231 CC* (CC) supra, at para 36-37.

The applicability of the Debt Collectors' Act

[27] It is relevant in considering this aspect of the matters to have particular regard to clauses 4 and 5 of the cession agreement and to the definition of '*debt collector*' in the statute.

[28] Clauses 4 and 5 of the deed of cession provide as follows:

> '4. Judgment Amounts Collected. No Judgment Amounts collected shall be used to reimburse Assignee for any funds that Assignee expends during Collection Activities, which Assignee shall be solely responsible for. Any and all collected Judgment Amounts shall be distributed forty percent (40%) to Assignee and sixty percent (60%) to Assignor, the payment of the latter amount by the Assignee to the Assignor constituting the determination of the purchase price and the payment thereof.
>
> 5. Relationship to Parties. This Agreement does not create a relationship between the parties. Even though the Assignor is entitled to a portion of the Judgment Amount collected hereunder, Assignee shall pursue Collection Activities on behalf of Assignee only. Nothing contained in this Agreement shall authorize or empower Assignee to act in the name of, on behalf of, or as an agent for Assignor, and the Assignee shall by virtue of the cession and assignment in terms of this agreement be entitled to claim the Judgment Amounts for its own account and in its own name'.

[29] The term '*debt collector*' is defined as follows in s 1 of the Act:

> '"debt collector" means-
>
> (a) a person, other than an attorney or his or her employee or a party to a factoring arrangement, who for reward collects debts owed to another on the latter's behalf;
>
> (b) a person who, other than a party to a factoring arrangement, in the course of his or her regular business, for reward takes over debts referred to in paragraph (a) in order to collect them for his or her own benefit;
>
> (c) a person who, as an agent or employee of a person referred to in paragraph (a) or (b) or as an agent of an attorney, collects the debts on behalf of such person

> or attorney, excluding an employee whose duties are purely administrative, clerical or otherwise subservient to the actual occupation of debt collector'.

[30] Section 8(1) of the Act prohibits anyone from acting as a debt collector unless they have been registered as such under the statute. Any agreement between a debt collector and his client that is inconsistent with the prohibition in s 8(1) is invalid to the extent of such inconsistency (see s 8(3)).

[31] In my judgment, the forementioned concession by Mr *Ferreira* that the cession agreement was genuine[9] carried with it an acknowledgment on behalf of the defendants and respondents that there was an effective out and out transfer of Quantum's rights in terms of the American judgment to Ullman Sails East (Pty) Ltd. It follows, incontrovertibly, that when, pursuant to the cession, Ullman Sails instituted the proceedings currently under consideration it did so in its own cause, and *not* on behalf of some other titleholder. It was therefore not acting as a 'debt collector' within the meaning of the Act.

[32] Ullman Sails clearly falls outside the ambit of paragraph (a) of the statutory definition of the term because the collection of the judgment debt is not occurring on behalf of some other party to which it is owed, and the company is not acting on anyone else's behalf. There can also be no suggestion that Ullman Sails qualified in terms of paragraph (b) of the definition because, quite apart from any other consideration, there is no indication that its taking over and recovery of the judgment debt is an exercise of a sort undertaken in the course of its regular business. Ullman Sails is, moreover, not acting as the agent or employee of a debt collector as defined in paragraphs (a) or (b), and accordingly paragraph (c) of the defined meaning of the term also finds no application.

---

[9] See paragraph [12] above.

[33] The fact that Ullman Sails has undertaken to pay 60% of the amount it recovers under the judgment debt to Quantum does not detract from the effectiveness of the cession by Quantum of the entire judgment claim; cf. *Marsh v Van Vliet's Collection Agency* 1945 TPD 24 referred to in *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* [1991] ZASCA 174 (28 November 1991); 1992 (1) SA 867 (A); [1992] 1 All SA 398 (A), at 875 (SALR). Ullman Sail's liability to Quantum in terms of clause 4 of the deed of cession arises in terms of what might be labelled a separate obligationary agreement that exists alongside the cession in the manner illustrated in the late Appellate Division's judgment in *Hippo Quarries* supra, at pp. 877G-878A (SALR). It imposes an obligation that Ullman Sails incurred consequent upon the cession. Insofar as the deed characterises the consideration as 'the price' of the cession, the consideration is one that was stipulated in respect of Quantum's agreement to make the cession. That agreement is separate from, and stands alongside, the cession itself.[10]

[34] For all the forementioned reasons, there is no merit in the defence predicated on the applicability of the Debt Collectors Act.

Provisional Sentence

[35] It is well established that provisional sentence proceedings are competent to enforce a foreign judgment. There is no attack by the defendants on the legitimacy and local enforceability of the US district court's judgment. The only grounds of opposition to the provisional sentence claims were those discussed above. Save in the special circumstances identified by the Constitutional Court in *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another* [2011] ZACC 2 (22 February 2011); 2011 (5) BCLR 505 (CC) ; 2011 (3) SA 1 (CC) (i.e. where the

[10] See LAWSA, 3ed. Vol.3 s.v. *Cession* at para 135.

nature of the defence raised does not allow the defendant to show a balance of success in his or her favour without the benefit of oral evidence and, in addition, the defendant is unable to satisfy the judgment debt) and those in *Fichardt's Estates v Mitchell and Others* 1921 OPD 152, the court is bound to grant provisional sentence unless the defendants are able to show a probability of success if the matter goes to trial. Mr *Ferreira* rightly conceded that a case for the exercise of the court's discretion in the circumstances in the first mentioned case had not been established. The facts also do not afford a basis for the application of the approach in *Fichardt's Estates* (i.e where the balance of probabilities is equal and the provisional sentence claim is part of a larger dispute between the parties, which in fairness and justice should not be decided piecemeal).

[36] In the circumstances provisional sentence will be granted against the defendants in case no. 8225/2021, as prayed.

Has the insolvency of the respondents in the sequestration applications been established?

[37] It is necessary, by virtue of the rejection of the forementioned bases of opposition, to determine whether the applicants have established that the respondents in the sequestration applications are insolvent. I am not persuaded that the disputes raised by the respondents concerning the applicants standing to rely on the US judgment debt are of a nature to make it inappropriate to entertain the sequestration applications. The disputes turned on questions of law that fell to be determined on essentially uncontested facts; cf. *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another* [2015] ZAWCHC 71 (28 May 2015); 2015 (4) SA 449 (WCC) at para 12.

[38] The applicants allege that each of the respondents has committed an act of insolvency of the sort provided for in s 8(c) of the Insolvency Act; viz. made or attempted to make any

disposition of his or her property which has or would have the effect of prejudicing his or her creditors or preferring one creditor above another. They also allege that in any event the evidence establishes on a balance of probabilities that the respondents are factually insolvent.

[39] The applicants are currently engaged in litigation against the Reuvers and others in respect of matters arising out of the sale of JRS's business to BSM and related matters. Part of that litigation concerns a claim by Ullman Sails International and Ullman Sails East (Pty) Ltd for 'pre-estimated damages' in the sum of US$150 000 against Mr and Mrs Reuvers individually, as provided for in confidentiality agreements concluded with each of them as 'employees' during the subsistence of the licence agreement between Ullman Sails International and JRS. It is not necessary for present purposes to describe the disputes between the parties in that litigation in any detail. Suffice it to mention that a material aspect of it concerns alleged conduct by the Reuvers interests of business in competition with BSM, which the Ullman Sails parties contend is in breach of the agreement in terms of which JRS's manufacturing business was acquired by BSM.

[40] The allegedly competing business is, or was, conducted from premises at Airport Industria in Cape Town that were purchased and developed by a company known as Four Rivers Trading 363 (Pty) Ltd ('FRT'), the shares in which are owned by the aforementioned trust of which Mr and Mrs Reuvers are trustees and beneficiaries. Mr Reuvers is surety to the extent of R5 million in respect of the R42 million loan taken out by FRT from Nedbank Ltd for the purposes of the acquisition of the property. Further security for the loan was provided, amongst other things, by way of a suretyship from Mrs Reuvers to the extent of R8 million and the mortgage of various properties including the residential property in Plattekloof (Erf 21005, Parow) registered in Mrs Reuvers' name and the properties registered in the names of the two companies (which are currently in business rescue) from

which BSM currently rents the premises at which JRS formerly traded. Those companies also ceded their present and future rights under any lease agreements in respect of the properties, with the result that BSM currently pays the rental for the properties to Nedbank. The companies also each stood surety for the loan to the extent of R42 million. The term of the loan agreement is five years, and, with interest, represents a total liability by FRT to the bank of over R62 million. FRT is in business rescue too.

[41] The purchase agreement in respect of the property was framed as the purchase of a 'rental enterprise' consisting of the property and the seller's 'right, right, title and interest in and to the leases'. The leases were identified in the agreement as (i) the lease between the seller (Hill End Properties (Pty) Ltd) and Stretchtents International (Pty) Ltd and (ii) the 'lease in respect of Exterior Billboard'. The first mentioned lease was a lease at a monthly rental of R262 000 escalating at 7% per annum. Schedule 1 to the lease agreement contemplated that Mr and Mrs Reuvers would each stand surety in favour of the landlord for an amount limited to the equivalent of two months' rental, but it is not apparent whether deeds of suretyship were ever executed.

[42] On his own account, Mr Reuvers was unable himself to finance the undertaking for which the Airport Industria property was acquired after what he regarded as an attractive business proposition had been made to him by an Italian company that was looking to have a certain type of sail fabric manufactured. He said this necessitated him involving a third party in the person of Mrs Marion Cole, a friend of the Reuvers, who ostensibly became involved in the enterprise through Stretchtents International (Pty) Ltd. The apparent intention was that Stretchtents would rent the Airport Industria property at a commencement rental of R262 000 per month exclusive of VAT. The applicants' attorney established from Mrs Cole, however, that Stretchtents had never taken occupation of the property and that a

banking account opened at Nedbank in the name of Stretchtents was controlled by Mr Reuvers and that she did not have access to it.

[43] The resultant factual picture is far from clear on the papers, but the applicants said enough to call for a clarificatory response from the Reuvers. Without an explanation, which Mr Reuvers should have been in a position to give (cf. *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6 (10 March 2008); [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) in para 13), the ability of FRT to satisfy its obligations to Nedbank in terms of the loan for which Reuvers has stood surety is called into question. That is a relevant consideration. Mr Reuvers, however, chose not to deal with the issue at all, dismissing the evidence as 'irrelevant for the purposes of the application'.

[44] The alleged act of insolvency by Mr Reuvers upon which the applicants rely is the disposition of him of his member's interest in a close corporation, Offshore Promotions CC, to one Craig Middleton in October 2018. The interest was, according to the applicants, thereafter transferred to the abovementioned trust of which Mr and Mrs Reuvers are trustees and beneficiaries. Offshore Promotions reportedly trades as DYNA Sails from the abovementioned Airport Industria Property. Middleton, it would appear, is a business associate of the Reuvers. He was cited with them as one of the respondents in the proceedings before Le Grange J and was ordered to be jointly liable for the applicants' costs of suit in that matter. The applicants also rely on the disposition by Reuvers to the trust of his shares in Sail Design Company (Pty) Ltd (SDC), one of the entities that owns the properties from which JRS used to operate and from BSM currently does. As mentioned, SDC is currently (since 18 November 2020) in business rescue.

[45] Mr Reuvers' answer to these allegations is somewhat enigmatic. He does not deny the transactions and appears to imply that they were part of the restructuring of his affairs by

English. The evident purpose of that exercise was, as discussed above, to afford protection against the consequences of an adverse determination of the forementioned litigation in the United States; in other words, to move exigible assets beyond the reach of a potential judgment creditor. Mr Reuvers gives no indication that he received any consideration for the dispositions.

[46] The difficulty with an application for the sequestration of a person's estate based on act of insolvency in terms of s 8(c) of the Insolvency Act is that it will often be impossible to determine whether the disposition in issue has or would have the effect of prejudicing his creditors or preferring one creditor above another without an adequate overall insight into the respondent's proprietary affairs. Thus, if the respondent is factually solvent it would generally be difficult to establish that the disposition of any property that would not put his balance sheet into the red would prejudice his creditors. It would, however, defeat the object of s 8(c) if it could find a basis to operate only if an applicant established that the disposition in question had or would have the effect of rendering the respondent factually insolvent; cf. *Nahrungsmittel GmbH v Otto* 1991(4) SA 414 (C) at 426E-F. Therefore, having regard to the object of the establishment of 'acts of insolvency' in terms of s 8, which is to relieve applicants of the often daunting evidential burden of establishing factual insolvency, it seems to me that the sort of disposition that the legislature must have primarily had in mind when it enacted s 8(c) must have been the sort that by its very character, seen in isolation, was likely to have the postulated effect. An example that comes to mind is the disposition by a debtor, outside the ordinary course of business, of moveable property that is subject to a general notarial bond. Irrespective of the mortgagor's actual state of solvency, that is conduct, that would be liable to prejudice the bondholding creditor.

[47] In the current matter I would prefer to determine the application on the basis of the applicants' allegation that Mr Reuvers is factually insolvent. There is very little, if anything, in the evidence, independent of that issue, to demonstrate that the dispositions had the requisite prejudicial effect.

[48] It is not incumbent on an applicant relying on factual insolvency to adduce evidence that would enable the respondent's assets and liabilities to be finitely determined in rands and cents. It would be a rare case, other than in the context of so-called friendly sequestrations, for an applicant to be able to do that. It is well established that an applicant can discharge the onus of establishing a prima facie case on the basis of factual insolvency by adducing sufficient evidence to justify the inference as a matter of probability that the respondent is insolvent. Once an applicant does that, the respondent attracts an evidential onus to rebut the inference by showing that he does possess sufficient assets to be able to settle his liabilities, see *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 443D-G and *Mackay v Cahi* 1962 (4) SA 193 (O) at 204F-G. A strong and persuasive indicator of insolvency is the failure by a respondent to pay his debts; cf the oft cited observation by Innes CJ in *De Waard v Andrews & Thienhans Ltd* 1907 TS 727 at 733: '*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*'.

[49] In the current matter it is uncontested that Mr Reuvers is a judgment debtor in the amount of US$312 439, which, using a conversion rate of R15 to the dollar, constitutes a liability in local currency of just under R4,7 million and for R62 500 in respect of costs in case no. 17279/2019. He is also contingently liable in the sum of R5 million in respect of the suretyship given to Nedbank for FRT's liability for the five-year term loan described above. On the available evidence, the possibility that the suretyship could be called upon by Nedbank is not fanciful. Against that, the only identified asset of Mr Reuvers against which

creditors might levy execution is an old model Porsche motor vehicle, which he himself says is valued at R100 000. He is also listed in an attachment to FRT's business rescue plan as a creditor of FRT. His claim is stated in the attachment to be in the amount of R66 913,17, but no substantiating particularity is provided. In the context of FRT's business rescue, the real value of any such claim is moot.

[50] Mr Reuvers has not demonstrated that he would be able to settle his costs liability in case no. 17269/2019, nor explained why he has not done so. He has not demonstrated that he has the assets to settle his liability under the US judgment or explained his failure thus far to have redeemed that debt. His allegation that the cession to the second applicant was invalid does not afford a reason for his failure to have paid the debt. If the problem was that he considered the cession invalid, one would have expected an explanation as to why the money due had not been tendered to Quantum. There is nothing in the evidence to suggest that Mr Reuvers could derive any advantage from his delay in settling the judgment debt; it bears interest.

[51] Assessing the position in accordance with the authorities cited in paragraph [48] above, I am of the opinion that the applicants have established prima facie that Mr Reuvers is insolvent.

[52] I shall treat presently with the question whether there is reason to believe that it would be to the advantage of creditors if Mr Reuvers' estate were to be sequestrated. It is convenient to deal with that issue after determining, in case no. 8232/2021, whether the requirements of s 10(a) and (b) of the Insolvency Act have also been satisfied in respect of the application for the provisional sequestration of Mrs Reuvers' estate.

[53] Turning then to the application for the provisional sequestration of Mrs Reuvers' estate.

[54] Mrs Reuvers' defence on the US judgment debt was the same as that of her husband. I have already disposed of that.

[55] With regard to her liability under the costs order made by Le Grange J, she points out that she has paid R62 500 into trust with her attorneys. As the applicants' counsel point out, whilst that might go some way towards suggesting that she is able to pay that debt, it is not to be equated with the actual payment by a debtor of an acknowledged indebtedness. It affords no right to the applicants to enforce payment against the attorneys (cf. *Norman Kennedy v Norman Kennedy Ltd; Judicial Managers Norman Kennedy Ltd NO v Reinforcing Steel Co Ltd and Others* 1947 (1) SA 790 (C) at 802-3).

[56] Mrs Reuvers' established liabilities comprise at least the following: (i) the US judgment debt of approximately R4,7 million, excluding interest, (ii) the costs order liability in case no. 17279/2019 in the sum of R62 500 and (iii) R8 million in respect of the suretyship she gave in favour of Nedbank in respect of the loan advanced to FRT. The suretyship obligation was secured by the mortgage of the immovable property at Erf 21005 Parow registered in her name. The loan agreement was dated 4 October 2019 and the mortgage bond was registered on 21 November 2019, ie several months after the US district court handed down its judgment.[11]

[57] Mrs Reuvers maintains that she is well able to settle the claims of her creditors, but she has refrained from providing any substantiating particularity. Her only identified assets are the aforementioned immovable property with a market value of R8,4 million, mortgaged in favour of Nedbank as mentioned, and a motor vehicle valued at R150 000.

[11] There is also an indication in an email that Mrs Reuvers sent to one André Julius on 4 February 2020 that she, and possibly also Mr Reuvers, signed a personal suretyship in respect of a R3,5 million loan from Rodel in favour of The Sailmakers (Pty) Ltd. Reference to this was made for the first time in the applicants' replying papers and I therefore leave it out of consideration for the purposes of determining the sequestration applications.

[58] Applying the approach discussed above with reference to the authorities cited in paragraph [48] above, I consider that the applicants have established prima facie that Mrs Reuvers is insolvent. I also consider in any event that her mortgaging of the immovable property in favour of Nedbank at a time when her indebtedness in terms of the US District Court judgment was unredeemed (albeit subject of an as then undecided appeal) had the effect of prejudicing her creditors because it put a readily identifiable and exigible asset beyond their reach, and that she thereby committed an act of insolvency in terms of s 8(c) of the Insolvency Act.

[59] The issue that remains to be addressed is whether it has been established prima facie that the sequestration of Mr and Mrs Reuvers' estates would be to the advantage of creditors.

[60] The prospect of a significant dividend to unsecured creditors does not look promising on the papers, but, as explained in *Stratford and Others v Investec Bank Limited and Others* [2014] ZACC 38 (19 December 2014); 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC) at para 43-45, that is not necessary to establish that there would be an advantage to creditors if the respondents' estates were sequestrated. The Constitutional Court there endorsed the approach stated in *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559, where Roper J held that if the facts before the court satisfied it that there was 'a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit would result to creditors' that would be sufficient. The learned judge elaborated: 'It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors that is sufficient'.

[61] In *Stratford* supra, at para 44, the Constitutional Court stated –

> 'The meaning of the term "advantage" is broad and should not be rigidified. This includes the nebulous "not-negligible" pecuniary benefit on which the appellants rely. ... specifying the cents in the rand or "not-negligible" benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin et al [*Insolvency Law* Service Issue 42 (2014)] state that—
>
> > "the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order."'

[62] It is evident that the arrangement of the respondents' proprietary affairs is complex. They have made use of a number of corporate entities to conduct their affairs. Their dealings with the J&B Trust, which takes its name from the initials of their respective first names, Jan and Belinda, also bear investigation. The applicants aver that it is an 'alter ego trust'. Quite what they mean by that – whether it is said to be sham trust or one used for purely personal purposes by the respondents by abusing their authority as trustees - has not been clearly explained on the papers. But there are sufficient indications in the evidence that an investigation of various transactions involving the trust may bear fruit for the respondents' creditors. In the circumstances I am satisfied, in both case no. 8231 and 8232/2021, that the applicants have satisfied the requirement in s 10(c) of the Insolvency Act.

[63] The following orders are made:

A **In case no. 8225/2021**:

1. Provisional sentence is granted in favour of the plaintiff against the first and second defendants jointly and severally in the sum of $US2 521 754.88, together with interest thereon from 14 August 2013 at the Michigan statutory rate.

2. Provisional sentence is granted in favour of the plaintiff against the third and fourth defendants in the sum of $US312 439, being a constituent part of the amount of $US2 521 754.88 in paragraph 1 above, together with interest thereon from 14 August 2013 at the Michigan statutory rate. The third and fourth defendants' liability in terms of this paragraph shall be joint and several as between the two of them and also as between each of them individually and the first and second defendants.

3. The defendants shall be jointly and severally liable for the plaintiff's costs of suit, including the costs of two counsel.

B **In case no. 8231/2021:**

1. The estate of the first respondent (JAN BASIL REUVERS, ID No: 5912275153105, resident at 14 Melkhout Crescent, Plattekloof, Cape Town, Western Cape) is hereby placed in provisional sequestration in the hands of the Master.

2. A rule nisi does hereby issue calling upon the first respondent to appear before this Honourable Court on **Tuesday, 19 April 2022** at 10h00 or as soon thereafter as the matter may be called to show cause why his estate should not be sequestrated finally, provided that he may apply to the Court on not less than 24 hours' notice to the applicants to anticipate the return day for the purpose of discharging the order of provisional sequestration.

3. The rule must be served personally on the first and second respondents and copies thereof must also be served as provided in terms of section 11(2A) read with section 11(4) of the Insolvency Act 24 of 1936.

4. The Sheriff shall attach all moveable property in the insolvent estate and shall, immediately after effecting the attachment, report to the Master in writing that the attachment has been effected and shall submit with such report a copy of the inventory in terms of section 19 of the Insolvency Act.

C **In case no. 8232/2021:**

1. The estate of the first respondent (BELINDA HELEN REUVERS, ID No: 6505070008083, resident at 14 Melkhout Crescent, Plattekloof, Cape Town, Western Cape) is hereby placed in provisional sequestration in the hands of the Master.

2. A rule nisi does hereby issue calling upon the first respondent to appear before this Honourable Court on **Tuesday, 19 April 2022** at 10h00 or as soon thereafter as the matter may be called to show cause why her estate should not be sequestrated finally, provided that she may apply to the Court on not less than 24 hours' notice to the applicants to anticipate the return day for the purpose of discharging the order of provisional sequestration.

3. The rule must be served personally on the first and second respondents and copies thereof must also be served as provided in terms of section 11(2A) read with section 11(4) of the Insolvency Act 24 of 1936.

4. The Sheriff shall attach all moveable property in the insolvent estate and shall, immediately after effecting the attachment, report to the Master in writing that

the attachment has been effected and shall submit with such report a copy of the inventory in terms of section 19 of the Insolvency Act.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Plaintiff's / Applicants' counsel:	**B. Manca SC** **F.W. Landman**
Plaintiff / Applicants' attorneys:	**PR Nabal** **Durbanville** **England Slabbert Attorneys** **Cape Town**
Defendants' / Respondents' counsel:	**André Ferreira**
Defendants' / Respondents' attorneys:	**Deon Perold & Associates Inc** **Kenilworth, Cape Town**