REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 208/2013

In the matter between:

BANK WINDHOEK LIMITED **APPLICANT**

and

LOUW ANDREW JACOBS **RESPONDENT**

Bank Windhoek Limited v Jacobs (A 208/2013) [2014] NAHCMD 26 (29 January 2014)

Coram: Smuts, J
Heard: 22 January 2014
Delivered: 29 January 2014

Flynote: Return date in respect of a provisional order of sequestration. Respondent filing a supplementary affidavit making an offer to settle the applicant's outstanding debt. The applicant declining to accept that offer. The court cannot compel a party to accept a settlement offer in the circumstances. A creditor establishing its claim and an act of insolvency

has an unfettered right to choose its form of execution, one of which is sequestration of the debtor's estate. The respondent not raising any matter which would disentitle the applicant to a final order of sequestration. Order granted.

ORDER

The provisional order of sequestration granted on 13 November 2013 is hereby confirmed and the estate of the respondent is placed under a final order of sequestration.

JUDGMENT

Smuts, J

[1] On 13 November 2013, I delivered a judgment in an opposed sequestration application and placed the estate of the respondent under a provisional order of sequestration and called upon him and other interested parties to show cause on 22 January 2014 why he should not be placed under a final order of sequestration.

[2] Shortly before the return date and on 21 January 2014, the respondent filed a brief supplementary affidavit in which he contended that he should not be placed under a final order of sequestration and requested the opportunity to 'settle the debt with the applicant.' He referred to the hearing of the sequestration application which had taken place on 7 November 2013. On that occasion he had stated in court that he was willing to settle his debt with the applicant. He also referred to what is stated in his opposing affidavit to the provisional order with reference to the *nulla bona* return of service and with reference to his denial that he was insolvent. He also stated that he did not have any other creditors apart from the applicant.

[3] It is correct that the applicant relied upon s 8(b) of the Insolvency Act, 24 of 1936, for an act of insolvency on the basis of the nulla bona return provided by the deputy sheriff when a writ in respect of a judgment debt was personally served upon the respondent on 16 April 2013.

[4] The applicant also relied upon s8(c) and (d) for an act of insolvency. After hearing the respondent personally on 7 November 2013, and after weighing up the affidavits filed in the application and oral argument, it was clear to me that the applicant had prima facie established both of its claims against the respondent and an act of insolvency contemplated by s8(b) by virtue of the *nulla bona* return of service of the deputy sheriff. I accordingly did not consider whether an act of insolvency under s8(c) or s8(d) was established. I further concluded that the applicant also prima facie established that the respondent sequestration will be to the benefit of creditors and granted the provisional order of sequestration.

[5] The main issue raised in the supplementary affidavit of the respondent is the re-iteration of the his offer to settle the debt due to the applicant. He again offers to do so in monthly instalments, having done so in person in court on 7 November 2013. The respondent attaches to his supplementary affidavit a letter addressed by his lawyer to the applicant's instructing legal practitioners. The letter was dated 31 October 2013 and had preceded the hearing on 7 November 2013. That offer is reiterated – to pay off the debt by way of instalments. He further states in his affidavit that his lawyer made a further offer upon his instructions which was an improvement of that contained in the letter of 31 October 2013. It involved an initial payment of N$50 000 with the outstanding balance to be paid in instalments of N$5 000 per month. The respondent complains that the applicant has not reverted to him or his lawyer on these offers.

[6] The respondent further contends that it will be in the best interest for the applicant, being the main creditor, not to proceed with a final order of sequestration at this stage and afford him the opportunity to pay off the debt in

monthly instalments. This argument was taken further by Mr Karsten who appeared for the respondent on this return date. He stated that the costs of sequestration were considerable and that it would be in the applicant's best interest to accept the offer to settle the debt as made by the respondent. He submitted that I should in my discretion extend the return date to afford the respondent the opportunity to make good upon his settlement offer and requested that a final order should thus not be granted against the respondent.

[7] Mr Schickerling who appeared for the applicant, moved for a final order of sequestration. He submitted that the settlement offer set out in the further affidavit in any event amounted to a further act of insolvency in demonstrating that respondent could not pay his debts. He further submitted that refusing to grant a final order would amount to the court compelling the applicant to settle with the respondent which the applicant had clearly elected not to do to date.

[8] Mr Schickerling's latter submission would appear to be sound. It is open to the applicant to accept or reject the respondent's yet further settlement offer to pay off the debt by way of instalments. But I cannot compel it to do so. Prior to the hearing on 7 November 2013, the respondent had made the offer in his lawyer's letter of 31 October 2013. As I have said, he reiterated his willingness to pay off the debt by way of instalments when he addressed me in court on 7 November 2013. I had at the time reserved judgment and pointed out to the respondent that it would be open to the applicant to accept his offer whilst I prepared my judgment and that if the parties were able to settle the matter they would need to advise me accordingly. That did not occur and a provisional order of sequestration was granted.

[9] The reiteration and even improvement of the respondent's settlement offer, in the absence of its acceptance by the applicant, cannot stand in the way of a final order of sequestration if the requisites for such an order have been established. To do so would be tantamount to the court compelling a party to settle on terms which are plainly not acceptable to it. It is after all well settled that a creditor which establishes its claim and an act of insolvency has an unfettered right to choose its form of execution, one of which is sequestration of

the debtor's estate[1]. A court declined to refuse a final order of sequestration on the grounds that a creditor had not assented to a voluntary deed of assignment which was not in terms of the then Insolvency Act[2] (Act 32 of 1916).

[10] The respondent has not raised any matter in his supplementary affidavit which in my view would disentitle the applicant to a final order of sequestration. As I have pointed out in my earlier judgment, the requisites for a provisional order were established by the applicant and that order was granted. The further issues raised in the respondent's supplementary affidavit do not in my view address the requisites which the applicant had prima facie established for a provisional order. The respondent has not thus been able to show cause why a final order of sequestration should not be granted. I am satisfied that the applicant has on a balance of probabilities amply established its claims against the respondent, that the respondent has committed an act of insolvency and that there is reason to believe that it will be to the advantage of creditors if the respondent's estate were to be sequestrated.

[11] It follows that the provisional order granted on 13 November 2013 is to be confirmed.

[12] The order I accordingly make is:

> The provisional order of sequestration granted on 13 November 2013 is hereby confirmed and the estate of the respondent is placed under a final order of sequestration.

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D SMUTS

Judge

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[1] Bylo *v Rhodensian Barter and Export (Pty) Ltd* 1974 (1) 601 (R) at 602.

[2] *Effune v Hancock* 1923 TPD 355 (full bench) per Cerlewis, J as he then was. See generally Joubert at al (ed) *The Law of South Africa* (2d) Vol 11 at 235.

APPEARANCES

APPLICANT:	J Schickerling Instructed by Behrens & Pfeiffer
RESPONDENT:	L Karsten Instructed by MB De Klerk & Associates