Reportable:	YES / **NO**
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	**YES** / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

Case No: 1353/2010
Heard: 24/06/2013
Delivered: 30/08/2013

In the matter between:

MARTHINUS DAVID DE KLERK Appellant

V

GRIQUALAND WEST CORPORATIVE CC Respondent

Coram: Kgomo JP; Pakati J et Mamosebo AJ

FULL BENCH APPEAL - JUDGMENT

KGOMO JP

[1] The appellant, Mr Marthinus De Klerk, was finally sequestrated by order of Madame Justice Williams of this Court on 28 November 2011. She had previously provisionally sequestrated him on 28 March 2011. The appellant's opposing affidavit was perfunctory and consisted of only a single non-descript document, "MDK1". He added no flesh to this document. Having studied the provisional sequestration judgment he did his best to bolster and even embellish his so-called Supplementary Affidavit, which was anything but. In it he dealt with just about all matters afresh and encumbered the record which escalated from a single volume to four volumes. This is totally unacceptable.

[2] The sequestration order was triggered by the appellant having approached a debt counsellor, Debt Wise Kimberley, to apply for a debt review in terms of s86(1) of the National Credit Act, 34 of 2005 (NCA). Ms Leana Van Wyk compiled a Debt Restructuring Proposal consisting of a schedule on which 17 credit providers are reflected who are owed an aggregate amount of R2, 363, 238-78. The debt thereon owed to the respondent, Griqualand West Corporative CC, is the most prominent and amounts to R800 000-00.

[3] This appeal is with the leave of Williams J. Two issues therefrom falls for determination. First, whether the debt restructuring proposal in terms of 86(1) of the NCA nevertheless constitutes an act of insolvency as contemplated in s8(g) of the Insolvency Act, 24 of 1936. The second aspect which was opened up for debate on appeal is whether the appellant was in any event also factually insolvent.

[4] In his written submission Mr Snellenburg, who was not available for oral argument, which argument was piloted by Mr Rheiders, urged that Griqualand West Corporative CC must stand or fall by its postulate that the appellant committed an act of insolvency in terms of s 8(g) of the Insolvency Act. In other words the Corporative has not made out any case that the appellant is factually insolvent and that the appeal must for that reason be upheld. Section 8(g) therefore provides:

"8 Acts of insolvency: a debtor commits an act of insolvency:

(g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts."

[5] Counsel for the appellant argued that Williams J erred in not having followed the judgment of Bhikha AJ in **Nedbank Limited v Heather Ann Maxwell**: Case No. 18027/2010 (SGJ), Delivered 28/08/2010, Unreported. At para 11 and part of para 14 the following is stated:

5.1 *"[11] Clearly, in taking advantage of a debt review process, and further the intention encapsulated in the application to a court for the debt restructuring should not prejudice or in my mind impute an inability or unwillingness to pay. In fact the contrary intention is evidenced by this process – the debtor indicated her clear and unequivocal intention to pay in accordance with the manner and over the period as ordered. This order is a result of a judicial process wherein all relevant parties had an opportunity to participate. The applicant refused to participate, which is its right and has appealed against the judgment, as it obviously is unhappy with the outcome. Again this is its entitlement."*

5.2 *"[14] If this submission [adverse to the debt restructuring proposal] is accepted the very purpose of the NCA is defeated. The consequences of the debt restructuring order is to rearrange the existing rights and obligations after due process, and accordingly as long as the respondent meets her obligations and pays her debt, in instalments, the restructured debt is not due nor is it payable. Even the accrued future instalments are not due; hence the claim is not liquidated."*

[6] Disposing of this argument is relatively straightforward. However, this has to be done with reference to precedent. Bhikha AJ referred to the judgment by Trengove AJ in **Investec Bank Ltd and Another v Mutemeri and Another** 2010 (1) SA 265 (GSJ). It is not altogether very clear on what basis Bhikha AJ distinguished this case. It is even more difficult to comprehend because the learned Acting Judge (Bhikha) referred to **Naido v Absa Bank Ltd** 2010 (4) SA 597 (SCA) which approved the dictum by Trengove AJ in the **Mutemeri** case. In the **Naidoo-case** in para 4 Cachalia JA states:

"[4] Mr Reddy's submission, as I understand it, implicitly contains a concession that sequestration proceedings are not in and of themselves 'legal proceedings to enforce the agreement' within the meaning of s129(1)(b). That his concession is correct is clear from the recent judgment in Investec Bank Ltd and Another v Mutemeri and Another, where Trengove AJ concluded that an order for the sequestration of a debtor's estate is not an order for the enforcement of the sequestrating creditor's claim, and sequestration is thus not a legal proceeding to enforce an agreement. He did so after carefully considering the authorities which have held that - 'sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent' - they are not proceedings 'for the recovery of a debt'. The learned judge's reasoning accords with this court's description of a sequestration order as a species of execution, affecting not only the rights of the two litigants, but also of third parties, and involves the distribution of the insolvent's property to various creditors,

while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent - it is not an ordinary judgment entitling a creditor to execute against a debtor."

At para 7 the Learned Judge of Appeal continued:

"[7] It is clear from the language employed in s 130(3)(a) that the proceedings referred to there do not extend the remit of s 129, as the appellant contends, but as Trengove AJ has correctly pointed out, it simply provides that where a credit provider decides to institute proceedings to enforce the agreement, he may do so only after having complied with the procedure in s 129(1)(a). Similarly the reference in s 130(3)(a) to s 127 and to s 131 refers specifically to procedures which are applicable to those proceedings involving the surrender and attachment of goods respectively, under a credit agreement - not to 'any proceedings' concerning a credit agreement. It follows that the appellant's insistence that the respondent had to comply with the procedure provided for in s 129(1)(a) before commencing sequestration proceedings against him has no merit."

[7] Whereas Wallis J in **Firstrand Bank Ltd v Evans** 2011(4) SA 597 (KZD) did not specifically refer to **Nedbank Ltd v Heather Ann Maxwell** (above) by Bhikha AJ it is nevertheless implicit in the following excerpts of his judgment that he would have found that the **Maxwell judgment** was wrongly decided:

7.1 *"[13] The letter states that Mr Evans is under debt review. That means that he must have applied for debt review in terms of s 86(1) of the NCA. The purpose of his application was to obtain a declaration that he was overindebted, because that is always the purpose of*

applying for debt review. In terms of s 79(1) of the NCA:

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

(a) financial means, prospects and obligations; and

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

It follows from this statement, of what constitutes overindebtedness for the purposes of the NCA, that a debtor who informs his creditor that he has applied for, or is under, debt review is necessarily informing the creditor that he is overindebted and unable to pay his debts.*"* (My emphasis).

7.2 *"[19] The requirements of s 8(g) are satisfied when the notice given by the debtor to the creditor conveys that the debtor is at present unable to pay his or her debts. The debtor's willingness to attempt to pay the debts in the future is not relevant. As Scott J pointed out in* ***Standard Bank of SA Ltd v Court*** *supra:*

'(A) debtor who gives notice that he will only be able to pay his debt in the future gives notice in effect that he is unable to pay. A request for time to pay a debt which is due and payable will, therefore, ordinarily give rise to an inference that the debtor is unable to pay a debt and such a request contained in writing will accordingly

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

7.3 *"[35] --- (O)nce it is accepted that debt-review proceedings under the NCA do not constitute an automatic bar to the grant of a sequestration order, I am unable to see why the fact, that a debt-rearrangement order has been granted, necessarily affects the situation. --- (I)n my view it does nothing more than preclude the creditor from pursuing its contractual rights, for so long as the debtor is complying with the debt-rearrangement order. That is, after all, what the NCA says in s 88(3) thereof. If the debtor does not comply with the debt-rearrangement order the creditor is not confined to claiming remedies on the basis of an amended contract. Instead, the bar on*

proceeding against the debtor, 'to exercise or enforce by litigation or other judicial process any right or security under that credit agreement', is removed, and the creditor is entitled to pursue in full its contractual remedies. The effect of a debt-rearrangement order is to place a moratorium on credit providers pursuing their contractual remedies, for so long as the debtor complies with the terms of the debt-rearrangement order. Once it is recognised that an application for sequestration is not the enforcement of the credit agreement, it must follow that any moratorium to claiming payment, under the credit agreement that exists by virtue of a debt-rearrangement order, is not a bar to the grant of a sequestration order."

[8] In **Collet v Firstrand Bank Ltd** 2011 (4) SA 508 (SCA) the consumer was in default with her repayments under a bond. By reason thereof all her arrear instalments and the whole outstanding balance became due and payable. The consumer subsequently successfully applied for a debt review in terms of s86(1) of the NCA. The debt counsellor circulated the debt restructuring proposal to **Firstrand Bank** (the respondent) and all other credit providers. None of them accepted the proposal. The debt counsellor resultantly referred the matter to the magistrates court in terms of s 86(8) for an order that the consumer be declared over-indebted; that her debt commitments be rearranged; that the credit agreements of those credit providers who terminated their reviews under s86(1) be resumed. At paras 10 and 14 of the judgment Malan JA writing for the unanimous court (five judges) stated:

"[10] The purpose of the debt review is not to relieve the consumer of his obligations, but to achieve either a voluntary debt rearrangement or a debt rearrangement by the magistrates' court. The purposes of the NCA include the promotion of responsibility in the credit market by 'encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers'. Its approach to overindebtedness is 'based on the principle of satisfaction of all responsible consumer obligations'. By providing for a consistent and harmonised system of debt-restructuring the NCA 'places priority on the eventual satisfaction of all responsible consumer obligations'. It follows that the NCA serves not only the interests of consumers: its construction calls for a careful balancing of all relevant interests."

"[14] The conclusion, that the right of the credit provider to terminate the debt review under s 86(10) can be exercised even after a referral to the magistrates' court, does not lead to the anomalous result contended for on behalf of the amicus curiae. While it is correct to say that s 87(1) requires that the magistrates' court 'must conduct a hearing', it is not correct to argue that termination of a debt review terminates the hearing. Section 86(10) entitles a credit provider to terminate the debt review relating to a specific credit agreement ('(i)f a consumer is in default under a credit agreement that is being reviewed'), not the 'hearing'. The hearing continues and, if several credit agreements are being reviewed, continues in respect of the others."

[9] It will be noted in the **Collet-case** (supra) at footnote 4 thereof the SCA specifically approved the decision by Wallis J in **FirstRand Bank v Evans** 2011 (4) SA 597 (KZD). It is interesting to note, however, that Malan JA in the Collet case has not referred to **Naidoo v ABSA Bank Ltd** 2010 (4) SA 597 (SCA) that had been decided in the same Court precisely a year earlier (21/05/2010 and 27 May 2011, respectively). Nothing revolves on this issue for purposes of this judgment as there is no dichotomy. What should be added though is that Malan JA found in the Collet (2011) judgment that an act of insolvency had been committed within the contemplation of the provisions of s8(g) of the Insolvency Act, notwithstanding that the case involved Summary Judgment, which is a court process unlike a sequestration which is not.

[10] To put matters beyond doubt the Supreme Court of Appeal has in **O'Shea NO v Van Zyl & Others NNO** 2012 (1) SA 90 (SCA) in para 26 referred with approval to paras 14 and 15 of the **Investec-judgment** (supra) when it remarked:

"(26) --- The letter was unambiguous and must stand or fall as an act of insolvency on its own terms. It cannot be subjected to interpretation by reference to events which occurred or knowledge which was obtained subsequent to its writing. The proper approach to determining whether a letter contains a notice of inability to pay in terms of s8(g) is to consider how it would be understood by a reasonable person in the position of the creditor at the time he receives it, taking into account that creditor's knowledge of the debtor's circumstances: ***FirstRand Bank Ltd v Evans*** *2011 (4) SA 597 (KZD) at paras 14 and 15."*

[11] In **Ex Parte Minister of Safety and Security**: In Re **S v Walters** 2002 (4) SA 613 (CC) the Constitutional Court expressed itself in these terms on the precedent system at para 57 (pp 644D – 645A) which principle Bhikha AJ seems to have overlooked:

"[57] What is at issue here is not the doctrine of stare decisis as such, but its applicability in the circumstances of this particular case. A brief comment on the doctrine will therefore suffice. The words are an abbreviation of a Latin maxim, stare decisis et non quieta movere, which means that one stands by decisions and does not disturb settled points. It is widely recognised in developed legal systems. Hahlo and Kahn describe this deference of the law for precedent as a manifestation of the general human tendency to have respect for experience. They explain why the doctrine of stare decisis is so important, saying:

'In the legal system the calls of justice are paramount. The maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of Judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.

It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps

the weaker Judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike. . . . Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.'"

[12] At para 60 (p 646D-H) (of **S v Walters** (supra)) the Court decided that according to the hierarchy of courts in Chapter 8 of the Constitution, the Supreme Court of Appeal "clearly ranks above the High Courts" and that "courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals." In the circumstances Mr Rheiders with the invocation of the **Nedbank Limited v Heather Ann Maxwell**, North Gauteng High Court Division case, attempted to close the stable gate long after the horse had bolted.

[13] It is perhaps not unkind to dismiss the appellant's argument, dealt with next, as a red herring. The argument is to the effect that Debt Wise Kimberley was not the appellant's agent and therefore the Debt Restructuring Proposal scheme prepared by it should not be construed to mean that the appellant committed an act of insolvency in terms of s 8(g) of the Insolvency Act. The distinction that is sought to be drawn is that whereas in the **Evans-case** the consumer personally disseminated the letter of indebtedness, however, in the instant case the distribution was made by the debt counsellor who was not even an attorney.

[14] The distinction sought to be drawn escapes me. The appellant personally instructed the debt counsellor as regards his indebtedness to each and every one of the 17 creditors who appears on the Debt Restructuring Proposal Schedule. What is more he confirmed the correctness of the schedule, Annexure "JAB4", in an affidavit in an application that served in the magistrates court. Short schrift.

[15] I am satisfied that a reasonable person in the position of the creditor (the directing mind of Griqualand West Corporative CC) receiving the Debt Restructuring Proposal relating to Mr De Klerk would understand it to convey and constitute a notice of inability to pay in terms of s 8(g) of the Insolvency Act. The courts have held that this is the proper approach to adopt to make such a determination. See the **Evans-case** (supra) at para 14 and **O'Shea NO** (supra) para 26 and **Chenille Industries v Vorster** 1953 (2) SA 69(O).

[16] In the premises the decision by the court *a quo* that the appellant, Mr De Klerk, had committed an act of insolvency with the dissemination of the Debt Restructuring Proposal cannot be faulted.

[17] The only issue that remains for determination is whether the appellant was factually insolvent. The debt counsellor, as stated, determined that the appellant was over-indebted. That finding was justified. The appellant has not queried the correctness of the schedule of creditors drawn up on his instructions. The total debt is reflected as R2, 363 238-78. According to the schedule the instalments currently payable stand at R40 292.04 per month. The proposed restructured instalment is given as R14 365.98 per month.

[18] As far as the position with Griqualand West Corporative, the creditor, is concerned the R800 000-00 shown in the schedule is a reference to the original amount advanced to the appellant. However, as at 01 February 2011 the amount had already escalated to R1,052 992.12. The agreed interest rate is 16.5% per annum. The proposal shows that the appellant was required to pay an instalment of R3000-000 per month to Griqualand West Corporation. The rescheduled proposal was that the instalment be scaled down to R1066.01 per month. Adv De Bruin SC for the credit provider makes a valid point that the payment offered is even insufficient to take care of the interest charged, let alone the capital amount.

[19] The reason for the escalation of the amount owed is not only due to the accrued interest charged but also because appellant had not made any payment to Griqualand West Corporative since January 2009 to the date of hearing of the provisional sequestration application by the court *a quo* on 25 February 2011.

[20] The appellant made the averment that the value of the bonded farm by far exceeds the money owed to the Corporative, even on a forced sale in execution. He contends that three years prior to February 2011 First National Bank (FNB) did an appraisal of the farm and placed a R5 million value thereon. This statement was not supported by any documentary evidence. Besides, three years was a long time ago. For the proper determination of the value of land see **Nel v Lubbe** 1999 (3) SA 109 (W) at 111D-G where Leveson J stated:

"The purpose of furnishing a sworn valuation is therefore to establish the price that is likely to be realised from the sale of the property on what is called a forced sale so that it can be determined that there will be a free residue available for creditors and advantage to creditors is thereby established. A practice has therefore grown up in this Division (I cannot speak for others) whereby a sworn valuation is furnished by an expert witness, usually, as in the present case, an estate agent. He expresses an opinion with respect to the price that the property will fetch. Normally the opinion of a witness is not receivable in evidence. But the opinion of an expert witness is admissible whenever, by virtue of the special skill and knowledge he possesses in his particular sphere of activity, he is better qualified to draw inferences from the proved facts than the Judge himself. A Court will look to the guidance of an expert when it is satisfied that it is incapable of forming an opinion without it. But the Court is not a rubber stamp for acceptance of the expert's opinion. Testimony must be placed before the Court of the facts relied upon by the expert for his opinion as well as the reasons upon which it is based. S v Gouws 1967 (4) SA 527 (E); S v Govender and Another 1968 (3) SA 14 (N). The Court will not blindly accept the assertion of the expert without full explanation. If it does so its function will have been usurped."

[21] This dictum has been approved on innumerable occasions in this Division and indeed in others. The bland statement by De Klerk concerning the speculative value of his land said to have been carried out a long time ago is vague and unhelpful and is therefore rejected. His claim was reminiscent of what is stated in **De Waard v Andrew Thienhaus Ltd** 1907 TS at

733 where the Court, per Innes CJ (Solomon J and Bristowe J concurring):

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

[22] Having regard to all the issues raised I am satisfied that the court *a quo* did not misdirect itself. The appeal on the merits must fail.

ON THE ISSUE OF COSTS

[23] Apparently *per in curiam* the court *a quo* when granting leave to appeal ordered that the respondent (Griqualand West Corp) pay the costs of the application for leave to appeal. Counsel were agreed that it was an error. I agree. The conventional order is that such costs are costs in the appeal. The correction follows.

[24] **ORDER**

1. The appeal is dismissed with costs.

2. The court *a quo's* order (granting leave to appeal on 25 April 2012) to the effect that "die Respondent [Griqualand West Corporative CC] word gelas om die kostes van hierdie aansoek te betaal" is set aside and replaced with the following:

   "The costs of the leave to appeal heard on 25 April 2012 are costs in the appeal."

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F DIALE KGOMO

JUDGE PRESIDENT

Northern Cape High Court, Kimberley

I concur

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B M PAKATI

JUDGE

Northern Cape High Court, Kimberley

I concur

M C MAMOSEBO

ACTING JUDGE

Northern Cape High Court, Kimberley

On behalf of the Appellant:	**Adv Rheiders** (Haarhoffs)
On behalf of the Respondent:	**Adv J P De Bruin SC** (Van De Wall & Vennote)