IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NUMBER: 06/10064

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

21.12.06
DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED **Applicant**

and

McCRAE, GORDON ANDREW **Respondent**

JUDGMENT

SCHWARTZMAN J:

1. This is the extended return day of a provisional sequestration order that is opposed by the Respondent principally on the ground that the Applicant has failed to prove that he is factually insolvent. In addition to the ordinary three sets of affidavits, the Respondent has filed five supplementary affidavits to which the Applicant has responded with two supplementary affidavits, all of which add up to a 633 page record.

2. The Respondent was the Managing Director of two companies; Metallurgical Design and MDM Ferroman that formed part of a group of companies. As at 10 December 2005 these two companies had a facility with the Applicant in terms of which the Group could borrow up to R17 million.

3. As at 18 April 2006 Metallurgical Design had overdrawn on the facility and owed the Applicant R21 093 357.81, being the debit balances on two current accounts together with interest at 10.5% per annum calculated monthly from 5 April 2006 to date of payment.

4. As at 18 April 2006 Friedshelf 374 (Pty) Ltd (Friedshelf), a company within the group, was indebted to the Applicant in an amount of R6 889 437.06 plus interest. This debt was secured by a mortgage bond over the immovable property owned by Friedshelf.

5.1 On 11 November 2002 the Respondent bound himself as a surety and co-principal debtor, jointly and severally, with Metallurgical Design for the payment of any sum of money owed by Metallurgical Design to the Applicant.

5.2 On 5 February 2004 the Respondent bound himself as surety and co-principal debtor, jointly and severally, with Friedshelf for the payment of any sum of money owed by Friedshelf to the Applicant.

5.3 On 24 April 2005 the Respondent bound himself as surety and co-principal debtor, jointly and severally, with MDM Ferroman for the payment of any sum of money owed by MDM Ferroman to the Applicant.

5.4 On 1 December 2005 cross deeds of suretyship were signed in terms of which Friedshelf, MDM Ferroman and Metallurgical Design and Metallurgical Project Developments bound themselves to the Applicant jointly and severally as sureties and co-principal debtors for the repayment of any sums any of them may owe to the Applicant.

6. Metallurgical Design, Metallurgical Project Developments and Friedshelf were wound up by order of this Court. MDM Ferroman was wound up by order of the Transvaal Provincial Division of the High Court. From what is set out above, the debts owed by these companies that total R27 982 914.17 became due and payable by the Respondent. In addition to these debts, the Respondent is jointly and severally liable with Robert Moosmann and David Dodd to Flexicon Piping Specialists (Pty) Ltd in an amount of R4 million, interest and costs. This debt is based on a judgment handed down by this Court on 30 June 2006 – two days after the provisional order was granted. On 18 August 2006 the Respondent divorced his wife. The Court Order incorporated an agreement in terms of which the Respondent undertook to pay his wife R2 million. On these uncontested facts, the Respondent has debts in excess of R33.9 million.

7. For purposes of its argument, the Applicant was prepared to accept that the Respondent owned immovable property worth R14.9 million. It is common cause that the immovable property owned by Friedshelf was sold for R9.5 million excluding VAT. On the Respondent's version, this leaves a free residue of approximately R2.4 million that can be applied in reduction of his debt. Accepting both of these figures, the Respondent has debts of some R16.6 million.

8. Moosmann's and Dodd's, who are co-principal debtors for Metallurgical Designs, debt to the Applicant have both been sequestrated at the instance of the Applicant. The only asset Moosmann is said to have is a home on which a value of R1 million is placed. In the case of Dodd, he is said to have a holiday home worth R1.2 million. No proper valuations of these properties have been furnished. Dodd's and Moosmann's other liabilities are not known. The Respondent only interest in Dodd and Moosman is that in the event of his paying the Applicant, he would have a right to a *pro rata* contribution from them. None of this really assists the Respondent to show that he is not factually insolvent. In addition to these suretyships, the Applicant holds a joint and several suretyship for R5 million signed by Mrs Dodd for Metallurgical Designs' debt to the Applicant. Mrs Dodd is said to own a house said to be worth R5 million. There is no evidence of its value. The Applicant has brought an action against Mrs Dodd that she is defending. What the Applicant may in due course recover from Mrs Dodd is unknown. However, and

whatever amount it may recover would not change the Respondent's position – he would on the figures I have referred to still be factually insolvent.

9.1 Mr Peter, who appeared for the Respondent, referred to the Respondent's assertion that Metallurgical Project Developments, a co-surety for Metallurgical Designs, has a 40% interest in Tan Mining. Shortly before Metallurgical Project Developments was wound up, its mine was valued at R31.5 million. 40% of this figure is R12.6 million. On these figures the Respondent values his shareholding in the company at R4.2 million. The fact of the matter is that there is no evidence to support the Respondent's assertions. The document attached to his affidavit, which purports to verify the value of the mine, is nothing more than an unsigned extract from part of a report from an unidentified person.

9.2 There is then the Respondent's 20% shareholding in MDM Technical. Here he asserts that two days before his provisional sequestration a Mr Bennett, a co-director, offered him R1.2 million for his shareholding. Bennett has not deposed to an affidavit. Even if it could be said that the shares are worth R1.2 million and that Bennett is a willing and able buyer, the Respondent would still be factually insolvent.

9.3 For the rest, the Respondent has referred to unliquidated claims that the companies in liquidation have, which could, if the claims succeeds, result in his shareholding in the companies having a value. These speculative assertions similarly do not assist the Respondent.

10. On a consideration of all the facts, I conclude that the Applicant has, on the probabilities, proved that the Respondent is in fact insolvent. There is a clear benefit to creditors in sequestrating the Respondent. The only ground on which it was submitted that the Court should, in exercise of its discretion and not grant a final sequestration order is that by discharging the rule the Respondent would be able to take up a directorship and acquire share options in a merged company to be listed on the Australian Stock Exchange. This would, it is said, be to the advantage of the Respondent's creditors. The advantage to the Respondent is obvious. How and when creditors would benefit is not explained. The submission is rejected.

11. In the result the *rule nisi* is confirmed and a final sequestration order is granted.

I W SCHWARTZMAN

JUDGE OF THE HIGH COURT