

# REPORTABLE JUDGMENT



Republic of South Africa

## IN THE HIGH COURT OF SOUTH AFRICA (CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 2819/2012

In the matter between:

**BUSINESS PARTNERS LIMITED**

**Applicant**

and

**STEPHEN GIOVANNI SCHOLTZ**

**First Respondent**

**ADRIAANA PATRICIA SCHOLTZ**

**Second Respondent**

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<b>Counsel for the Plaintiff</b>	:	Adv. A M Smalberger
<b>Instructing Attorneys</b>	:	Cliffe Dekker Hofmeyr
<b>Counsel for Defendant</b>	:	Adv. A Lawrence
<b>Instructing Attorneys</b>	:	Shireen Ahmed Kagree
<b>Date of Hearing</b>	:	13 November 2012
<b>Date of Judgement</b>	:	28 November 2012

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

**Case No:7352/2012**

In the matter between:

**BUSINESS PARTNERS LIMITED**

**Applicant**

and

**STEPHEN GIOVANNI SCHOLTZ**

**First Respondent**

(Identity Number: 570719 5100 08 1)

Domicilium citandi et executandi:

2 Joostenberg Street, Durbanville, 7550

**ADRIAANA PATRICIA SCHOLTZ**

**Second Respondent**

(Identity Number: 590803 0218 08 4)

Domicilium citandi et executandi:

2 Joostenberg Street, Durbanville, 7550

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Date of Hearing & Order : 13 November 2012  
Reasons Delivered on : 27 November 2012

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**REASONS FOR ORDER DELIVERED ON 13 NOVEMBER 2012**

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**MANSINGH, AJ**

[1] On 13 November 2012, a final order for sequestration was handed down.

These are the reasons for that order.

[2] Section 12(1) of the Insolvency Act was satisfied.

[3] Respondents at the hearing placed in dispute the amount of indebtedness. Applicant was prepared to accept for these purposes that the amount of indebtedness is R3,9 million. The claim remains a liquidated claim.

[4] The respondents do not dispute their indebtedness to the applicant.

[5] The respondents have on the papers admitted that performance by them and their obligations under the loan is impossible. Their Answering Affidavit further indicates the speculative nature of their potential ability to pay what is due to the applicant. As paragraph 74.5 of the Answering Affidavit states:

*"Be that as it may, we wish to pause here, and deal with what we contemplate doing with this particular property. I submit that this is important to this court as should we be successful in our endeavour, then the proceeds of this transaction will be more than sufficient to satisfy whatever the applicant is owed."*

[6] The best proof of solvency is payment by the debtor of his debts. The failure to pay is itself an indicator of insolvency. **ABSA Bank v Rheboks Kloof (Pty) Ltd & Others 1993 (4) SA 436 at 446H – 447B.**

**A History of the Matter is Necessary:**

[7] A provisional order of sequestration in respect of the joint estate state was granted on an unopposed basis on 23 April 2012.

[8] The hearing for a final order of sequestration on an unopposed basis was set for 24 July 2012. Respondent sought a postponement to realise the property for purposes of effecting payment of the undisputed debt owed to the applicant.

[9] The matter came before this court on 27 August 2012 and an agreement between the parties was reached to postpone the matter until 25 September 2012 to enable the sale of the immovable property to be effected. Respondents agreed that in the event that the property was not sold by that date, the respondents would not oppose an order finally sequestrating their joint estate. A draft order was prepared, but Mr Acting Justice Stelzner was not prepared to make the full agreement an order of court, but postponed the matter to 25 September 2012.

[10] By their conduct, respondents have lost any entitlement to continue to oppose these proceedings. **Fedco Cape (Pty) Ltd v Meyer 1988 (4) SA 207 (ECD) 212 E – F.**

[1] On the return day 25 September 2012, filed opposing papers late and the matter was postponed to 13 November 2012.

[2] The matter came before me on 13 November 2012.

[3] The gist of respondents defences are as follows:

13.1 Impossibility of Performance: That delays at the Municipality prevented the timeous development of the immovable property. This is a red herring. The indebtedness to applicant remains.

13.2 Breach of Contract: That applicant breached the contract of loan. This allegation is supported neither by the facts nor the law.

13.3 Respondents are not Insolvent:

13.3.1 No cogent facts are provided in support of this allegation.

13.3.2 The valuation document "AS19" at page 306 is a draft document and has no probative value at all.

13.3.3 The sole basis for respondents' allegation of solvency is their assertion that the value of the property should the

development be completed and sold to a third party will exceed the indebtedness that is owed to the applicant and other parties.

13.3.4 There is no independent support for their valuation.

13.3.5 From the facts proved an inference of insolvency can be fairly and properly deduced.

**IT IS ORDERED THAT:**

The *rule nisi* is confirmed and a Final Order for sequestration of the joint estate is granted.

  
MANSINGH, AJ