

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 21/6064

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
14/02/2022

In the matter between:

COURIER-IT S.A. (PTY) LTD
(Registration Number 1998/010351/07)

Applicant

And
TREVOR VAN STADEN
(Identification number: [...])

First Respondent

BELINDA JANE VAN STADEN
(Identification number: [...])

Second Respondent

JUDGMENT

NGCONGO AJ:

Introduction

1 The applicant, Courier-It SA (Pty) Ltd, seeks an order for the provisional sequestration of the first respondent's estate. The applicant bases its claim on section 8(b), (c) and, belatedly, (g) of the Insolvency Act, 24 of 1936 ("**the Insolvency Act**").¹ In argument, it abandoned the section 8(c) grounds but sought to further rely on the fact that, based on the evidence advanced by the first respondent in his papers, the first respondent is also *de facto* insolvent.

2 The first respondent in this case is Trevor van Staden and the second respondent in this matter is his wife. The respondents are married out of community of property and no claim is sought against the second respondent.

3 The central issue for determination in this matter is, quite simply, whether the applicant has established that an order of provisional sequestration should be made in relation to the first respondent's estate. The parties have, however, raised a number of preliminary disputes that need to be addressed before this central issue can be determined.

Background facts

4 On 8 October 2020, this Court granted an order under case number 17414/2020 for payment by the first respondent and another, Optimum Express

¹ The relevant subsections in section 8 of the Insolvency Act read as follows:

"8. Acts of insolvency – A debtor commits an act of insolvency—

- (a) ...
- (b) If a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to exercise that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;
- (c) If he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;
- (d) ...
- (e) ...
- (f) ...
- (g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts".

Courier Services CC, to the applicant in the sum of R543 000.00. The payment obligation was joint and several, the one paying the other to be absolved.

5 The 8 October 2020 order followed the institution of a liquidation application brought by the current applicant against Optimum Express Courier Services CC. The order was granted by agreement between the parties and the liquidation application of Optimum Express Courier Services CC was postponed. In the order, the first respondent and Optimum Express Courier Services CC undertook to settle the indebtedness to the applicant. The payment was to be made into the trust account of the applicant's lawyers.

6 The order stated that should there be a failure to pay on the dates that payment was due, the full amount outstanding would become immediately due and payable, with interest. In the event of default, the order stated that the application would be heard unopposed and, additionally, the applicant may apply for a warrant of execution against the respondent.

7 Payment was not made in accordance with that order.

8 A warrant was therefore issued in November 2020 and served on the first respondent in January 2021. The sheriff was directed to moveable goods in the home of the respondents, but it later transpired that the vast majority of these goods did not belong to the first respondent, but were owned by his wife or children.

9 This application was subsequently brought by the applicant.

Preliminary issues

10 The respondents have raised a number of objections to the applicant's application that need to be considered before the main dispute can be determined.

11 These, broadly, fall into the categories of (a) a defective founding affidavit and (b) non-compliance with the requirements for bringing an action for provisional sequestration.

Defective founding affidavit

12 The respondent contends, on three bases, that the founding papers by the applicant were defective and that the matter ought to be struck out without any further consideration:

12.1 Firstly, that the deponent to the founding affidavit did not have the requisite authority to institute an application on behalf of the applicant;

12.2 Secondly, that the deponent did not have personal knowledge of the matters contained in the founding affidavit and that this therefore constituted inadmissible hearsay evidence; and

12.3 Thirdly, that the use of the female pronoun in the commissioner of oaths' in the affidavit, when the deponent was in fact male, meant that the deponent failed to appear before a commissioner of oaths and the affidavit was therefore not signed under oath and cannot be said to be an "affidavit".

13 I deal with each of these bases for the alleged defective nature of the applicant's founding papers separately.

Lack of authority on the part of the deponent of the founding affidavit

14 The respondents submit that the deponent to the founding affidavit is not authorised by the applicant to institute proceedings on its behalf.

15 The deponent of the applicant's papers was Mr van der Meer, the applicant's attorney. The respondents' objection is that Mr van der Meer is not a director of the applicant company, nor is there any resolution by the applicant's board attached to the papers that authorises the deponent to depose to the affidavit on behalf of the applicant.

16 In response, the applicant relies on the case of *Eskom v Soweto Council*² where the Court held that:

“Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, *proof is dispensed with except only if the other party challenges the authority*. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications.”³

17 The applicant states in response to the allegations of lack of authority in his replying affidavit that confirmatory affidavits from the applicant’s representatives have been filed in support of the deponent’s authority. This would dispense with the requirement to bring proof where the other party challenges the authority. However, no such confirmatory affidavits were found in the papers.

18 In both the written submissions and in his oral address, the applicant further relies on *Ganes v Telecom Namibia Ltd*,⁴ where the Supreme Court of Appeal, per Streicher JA, stated the following at page 624 (I quote this in full because of its relevance to the current matter):

“In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. *In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised*. In the

² 1992 (2) SA 703 (W).

³ Id at 705G – H.

⁴ 2004 (3) SA 615 (SCA).

present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided.”

19 The *Ganes* case similarly concerned a lawyer representing a creditor in a sequestration application.

20 In my view, The *Ganes* approach is the correct approach to adopt in the current case. It follows that this preliminary objection raised by the respondents must fail.

Lack of personal knowledge and hearsay evidence

21 The second preliminary issue is of a similar ilk to the first. The respondents allege that the deponent, Mr van der Meer, does not have personal knowledge of the matter and that his founding affidavit therefore amounts to hearsay evidence.

22 The respondents submit that, since the deponent would not have been involved in the daily operations of the applicant, including the business dealings between the applicant and Optimum Express Courier Services CC that led to the order granted under case number 17414/2020, the deponent has no personal knowledge relating to the judgment debt on which the applicant attempts to rely.

23 The applicant’s response is that it was the attorney of record in that matter and that the payment that was due following that order was to be paid into the deponent’s trust account. The deponent’s signature is on the writ of execution to the

Sherriff in November 2020 and the deponent attended to the issuing of security to the Master.

24 I am satisfied that the deponent had personal knowledge of the relevant facts alleged in the founding papers, namely: the Court order of 8 October 2020; the non-payment by the first respondent in accordance with that order; and the fact that a writ of execution was issued and that security was granted.

25 This objection is therefore also dismissed.

Incorrect pronoun used in certificate for Commissioner of Oaths

26 The deponent, Mr van Der Meer, is male. He states this in paragraph 1 of the applicant's founding affidavit. Despite this, the respondents complain that the certificate of the commissioner of oaths appearing at the end of the founding papers records that "*the deponent having acknowledged that she knows and understands. .*".

27 The respondents seek to rely on the case of *Absa Bank Ltd v Botha NO*⁵ in support of their assertions that this error vitiates the affidavit. In that case, the Court held that a document purporting to be an affidavit supporting an application for summary judgment was not an affidavit as it was not clear that the document had been signed in front of a commissioner of oaths. This uncertainty arose from the fact that the commissioner of oaths' certificate used the pronoun "he" when the deponent attested that she was female.

28 The applicant *in casu*, on the other hand, contends that this was a typographical error, which was simply a formal mistake. It is submitted that there had nevertheless been *substantive* compliance with the Regulations promulgated in terms of the *Justices of the Peace and Commissioner of Oaths Act*, 16 of 1963.

⁵ 2013 (5) SA 563.

29 In *Ex parte Du Toit*,⁶ the usual phrase that “the deponent knows and understands the contents of the affidavit” was missing from the certificate. The Court followed the finding in *Ex parte Vaughan*⁷ that the requirement in the Regulations in place at that time (it is important to note that for all intents and purposes these were the same as those currently under consideration) to record or note the words “[t]he deponent has acknowledged that he knows and understands the contents of this affidavit” were *directory* rather than peremptory. It was therefore concluded that the missing words in that matter were a formal defect that could be overlooked as the papers were otherwise in order.

30 The applicant relies on the case of *Standard Bank of South Africa Ltd v Malefane: In Re Malefane v Standard Bank of South Africa*,⁸ where reference was made to the incorrect government notice in the commissioner’s certificate. In a similar vein to the two cases referred to in the paragraph above, the Court held that this was simply a formal defect and that there had been substantial compliance with the Regulations. No substantive application was required, and the non-compliance was condoned.

31 Plainly, what is important to ascertain is whether there has been substantive compliance with the Regulations.

32 In my view, the *Absa* case relied on by the respondents must be considered in light of the circumstances surrounding that case – particularly that it was an application for summary judgment, where the affidavit is essential to satisfy the court that the plaintiff’s course of action is unimpeachable.

33 In the current matter, the deponent, who is himself a legal practitioner, has deposed to the founding affidavit, replying affidavit and supplementary replying affidavit in this application ostensibly in front of the same commissioner of oaths. Whilst the recordal in the first certificate refers to “she”, the second refers to “he” and the last refers to “he/she”. Although I wish to caution deponents, especially those

⁶ 1962 (1) SA 445 (E).

⁷ 1937 (2) PH E12.

⁸ 2007 (4) SA 461 (Tk).

who are legal practitioners, to exercise due care when drafting papers, including certificates for commissioning, I am of the view that in the current matter the reference to “she” is merely a formal defect and that there has been substantial compliance with the Regulations. I therefore do not accept the respondents’ assertion that the founding affidavit is not an affidavit.

34 I am accordingly not persuaded by the respondents’ arguments that the applicant’s founding papers are defective for any of the reasons advanced above. However, this is not the end of the matter, as the respondents also raise what I refer to as non-compliance objections to the application.

Non-compliance objections raised by the respondents

The security for costs is defective

35 It is contended by the respondents that the applicant’s security for costs, or bond of security, is stale or defective because it did not accompany the notice of motion when the latter was served on the respondents. The respondents’ case is that this is fatal to the proceedings because it renders the applicant’s case defective.

36 Section 9(3)(b) of the Insolvency Act states as follows:

“The facts stated in the petition shall be confirmed by affidavit and the petition shall be *accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given* for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings. . .” (emphasis added).

37 The issue in dispute is whether the Master’s certificate evidencing the giving of security must be attached to the application when it is originally issued and served, or whether it is sufficient that the certificate of security is obtained before the hearing of the matter. This matter can be dealt with succinctly with reference to the

(then) Appellate Division case of *Court v Standard Bank of SA Ltd; Court v Bester NO*,⁹ which pronounces on the law in this regard.

38 In the *Court* case, the appellant submitted that the application for sequestration was fatally defective for want of compliance with section 9(3) of the Insolvency Act in that when the application was issued by the Registrar and served on her, it was not accompanied by a certificate of the Master confirming that security had been given. Vivier JA held that there is no implied requirement to be found in section 9(3)(b) of the Insolvency Act that the security certificate must be served on the respondent.¹⁰ All that is required by the subsection is that security must have been given before the matter is heard and that the security certificate shall then accompany the application.¹¹

39 The cases relied on by the respondents in support of their contention that the security has to be attached to the Notice of Motion all pre-date the decision by the Appellate Division in *Court*. I am satisfied that the law in this regard has been settled by the Supreme Court of Appeal and that the applicant's application is therefore not defective by virtue of its filing of the Master's certificate for security after the issuing and serving of the notice of motion.

The application fails to include a calculation of the expected dividend in the first respondent's estate

40 The next opposition raised by the respondents was that the applicant was required by a practice directive of this Court to accompany its application for compulsory sequestration with a calculation of the expected dividend. This was said to have not been complied with.

41 The applicant disputed this; stating that the practice directives do not require a calculation of this nature where the proceedings relate to compulsory sequestration proceedings as opposed to friendly sequestration.

⁹ 1995 (3) SA 123 (A).

¹⁰ *Id* at 130H.

¹¹ *Id* at 131B.

42 The applicant is correct. The directives are prefaced by the words:

“[i]f the applicant fails to establish that the application is not a so-called ‘friendly’ sequestration. . .”

43 It is only where there is a friendly sequestration that the court has a number of requirements in place in order to ensure that the parties are not attempting to use the avenue of friendly sequestration as a way of achieving other aims or acting in a manner where it would be contrary to what is most advantageous for all creditors. The applicant further submits that it would be unduly burdensome on a creditor who does not have knowledge of all of the debtor’s assets and liabilities to have to provide such a calculation. Regardless of the reason underlying the position, the position in the directions is that only those applications for “friendly” sequestrations need to establish the various grounds referred therein. That is not applicable to the current case.

44 Finally, there is one last preliminary issue raised by the respondents. This was that the applicant filed a supplementary replying affidavit without applying for leave to file such supplementary affidavit. I do not intend to deal with this in detail, save to state that it is trite that the Court has a discretion in this regard. The respondents themselves detail certain the factors that a court will consider in exercising this discretion. Applying the respondents’ own factors, I am of the view that the supplementary replying affidavit will not prejudice the respondents, especially as they had the opportunity to reply. In addition, the information shared was only discovered by the applicant after the application was launched. I therefore do not see any prejudice in allowing both supplementary affidavits into the papers to be considered.

Application for provisional sequestration

45 Having disposed of the preliminary objections raised by the respondents, I turn to the core of the current matter. In an application for provisional sequestration, the Court is called to answer the crisp question of whether the applicant has made a *prima facie* case that the first respondent is insolvent. Because the first respondent

has introduced evidence on rebuttal, however, consideration must be had to *all* the evidence adduced by both parties and in light of that, decide whether a case for sequestration has been made out.

46 For provisional sequestration to be granted, three questions must be answered in the affirmative:¹²

46.1 Does the applicant have a liquidated claim?

46.2 Has the first respondent committed an act of insolvency or is the respondent insolvent?

46.3 Is there reason to believe that sequestration of the first respondent's estate will be to the advantage of creditors?

47 The standard of proof was aptly best by Stegmann J in *Renyolds NO v Mecklenberg (Pty) Ltd*¹³ as follows:

"It is based on the fact that [section] 10 authorises the Court, if it is of the opinion that the requirements of the section have been satisfied *prima facie*, in its discretion to grant a *provisional* sequestration order. Where the allegations of fact relied upon by the petitioning or applicant creditor are disputed by the respondent it has been held that the dispute should not ordinarily be referred to evidence, although it may be so referred where circumstances of an exceptional nature show such a step to be appropriate. The Court is required to adopt an approach which is not permissible in

¹² Section 10 of the Act provides for provisional sequestration as follows:

"10. Provisional sequestration – If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie*—

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection 1 of section 9; and
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may make an order sequestrating the estate of the debtor provisionally."

¹³ 1996 (1) SA 75 (W) at 80G – 81A.

motion proceedings generally, viz contrary to the general rule that any *bona fide* dispute of fact arising on affidavit evidence can only be resolved by referring the dispute to oral evidence or to trial, in proceedings for a provisional sequestration order the Court is required to take the unusual step of considering whether, so far as can be determined from the affidavits, there is a balance of probabilities which favours the conclusion that the requirements of [section] 10 of [the] Act have been satisfied. If so, the requirements of [section] 10 will have been satisfied '*prima facie*', and a provisional sequestration order may be issued."

48 I turn now to consider each of the three requirements that need to be present before this Court will grant the provisional sequestration order sought by the applicant.

A liquidated claim

49 Section 9 of the Insolvency Act provides that a creditor who has a liquidated claim against the debtor for not less than R100 may apply to the court for the sequestration, or provisional sequestration, of the debtor's estate.¹⁴ A liquidated claim is one that is sounding in money and which amount is fixed by agreement, judgment or otherwise.

50 The respondents here seek to assert that there is no liquidated claim because the order that was granted by this Court on 8 October 2020 was not a "judgment" and therefore did not amount to a judgment debt as envisaged by the Insolvency Act. However, at the same time, the respondents do not dispute in their answering affidavit that the applicant has judgment in excess of R543 000 against the first respondent and that this Court granted an order for payment against the first respondent under case number 17414/2020 in this amount. The respondents'

¹⁴ Section 9 of the Act reads as follows:

"9. Petition for sequestration of estate—

(1) A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor."

contention appears to be that the order of 8 October 2020 required the applicant to first institute a further application if there was a default in payment by the judgment debtors before it could apply for a warrant of execution against the first respondent.

51 I am in agreement with the applicant that this is not the correct interpretation of the order. The disputed paragraph of the order reads as follows:

“In the event of default, the application will be heard unopposed and in addition, the applicant may apply for a warrant of execution against the respondents.”

52 In my view, this paragraph of the order, on its plain reading and read in light of the rest of the order as a whole, empowers the applicant, upon an event of default or non-payment to both re-institute the sequestration application against Optimum Express Courier Services CC and simultaneously apply for a warrant of execution against the respondents in order to recover what it is owed.

53 I therefore do not doubt that there is a liquidated claim that founds the applicant’s *locus standi* in this matter.

Acts of insolvency or debtor insolvent

54 The next question is whether this Court is convinced, on a balance of probabilities, that the first respondent is insolvent or has committed an act of insolvency.

55 The Insolvency Act has designated certain acts of insolvency on which an applicant can rely in support of an application for sequestration. These are found in section 8. The applicant in this case initially relied on sections 8(b) and (c) as the acts of insolvency allegedly committed by the first respondent. However, the applicant all but abandoned reliance on section 8(c) in the hearing and proceeded to rely on only section 8(b) and section 8(g), the latter following the filing of the respondents’ answering affidavit.

56 I repeat sections 8(b) and (g) here for ease of reference. In light of the applicant's decision to not pursue this ground during the hearing, it is not necessary to deal with section 8(c).

57 The relevant sections read as follows:

“(b) If a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to exercise that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;

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

58 The applicant further submits that the fact that the first respondent admitted his factual insolvency in the respondents' answering affidavit makes redundant the exercise of considering whether there are grounds indicating acts of insolvency. This may well be so. I nevertheless wish to briefly touch on the act of insolvency raised by the applicant in its founding papers.

Non-satisfaction of warrant of execution

59 Section 8(b) covers the situation where a Court has given judgment against a debtor and he fails to satisfy that judgment or to indicate sufficient disposable property to satisfy it, or if it appears from the return made by the officer whose duty it was to execute it, that he has not found sufficient disposable property to satisfy the judgment.

60 There are two different and distinct acts of insolvency contemplated in section 8(b). The first occurs when, upon the demand of the sheriff, the debtor fails to satisfy judgment debt and thereafter fails to indicate sufficient disposable property to satisfy the warrant. In *casu*, there is no dispute about the fact that the first respondent failed to satisfy the judgment debt on demand of the sheriff.

61 The question whether or not the first respondent indicated sufficient disposable property to satisfy the warrant is also, in my opinion, clear on the facts. Quite simply, the items that the first respondent indicated to the sheriff were not, in fact, his. I do not understand the section to mean, nor could it logically be said to be so, that there would be no act of insolvency is a debtor points out various goods but that these, in fact, do not belong to him. The goods pointed out by the debtor must be goods that are owned by him that could be used to satisfy the debt. In my view, by pointing out goods in the family home that belonged (almost entirely) to the second respondent, I am of the view that the first respondent did *not* indicate to the sheriff sufficient unencumbered disposable assets (that he owned) that would satisfy the warrant. An act of insolvency was therefore committed.

62 I am therefore in agreement with the applicant that this first act of insolvency has been established.

63 Much is made by the respondents that the return of service does not *ex facie* constitute a *nulla bona* execution. In light of my finding above, it is not necessary to focus on this issue, as I am satisfied that the applicant has shown an act of insolvency on the part of the first respondent.

Written notice of an inability to repay debts

64 For the same reasons, I do not deem it necessary to fully consider the applicant's further act of insolvency under section 8(g), though that was relied on during the hearing. This act of insolvency was not relied upon in the founding papers, although I understand that to be due to the fact that such written notice of an inability to repay his debts only arose when the first respondent admitted as such under oath in his answering affidavit.

65 The first respondent informed the applicant that his mortgage bond payments are in arrears and that, as a result, Nedbank has taken judgment and attached the property.¹⁵ This, in my view, is a clear notice to a creditor that he is unable to pay any one of his debts. I do not think that it could be taken to mean anything other than

¹⁵ Para 48.7 of the respondents' answering affidavit.

that the debtor cannot pay his debts. That is especially so in light of the answering affidavit as a whole. In the premise, the first respondent has committed an act of insolvency on this ground too.

66 I turn now to consider the third and final requirement – whether the applicant has established that there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated.

Advantage to creditors

67 It is not necessary under this requirement for the applicant to convince this Court either *prima facie* or on a balance of probabilities that there will be some advantage to creditors. All that is required is that it is established that there is *reason to believe* that there will be an advantage to creditors.¹⁶

68 The respondents seek to rely on the statement of assets and liabilities they attached to their answering affidavit¹⁷ to show that their liabilities exceed their assets and there would be no pecuniary benefit to the creditors. However, the supplementary replying affidavit filed by the applicant raises the suspicion that at least one of the liabilities on that list, the debt of R1 883 744.57 that has been reflected by the respondents to be owed by the first respondent to Balanced Solutions (Pty) Ltd, is not actually a debt owed by the first respondent. The applicant further notes that the largest liability on that schedule – what appears to be a judgment debt in the amount of R4 581 930 in favour of Gelveno Consolidated Fabrics (Pty) Ltd – may not be accurately reflected as the applicant's research indicated that Gelvenor may itself have been liquidated. These doubts together are sufficient reason for why I cannot place much reliance on this schedule in support of the respondents' allegations that there would, as a matter of fact, be no benefit to creditors.

¹⁶ In *Meskin & Co v Friedman* 1948 (2) SA 555 (W), the Court described it thus at 559: "In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospects – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to the creditors."

¹⁷ Annexure AA16 attached to the respondents' answering affidavit.

69 The applicant's calculations place the first respondent's assets at R4 449 000 and liabilities at R2 211 988.60. On these values, there would be some pecuniary value for the creditors upon sequestration, although the first respondent has preferent creditors that would be satisfied first. The applicant supports its allegation that sequestration will be to the advantage of creditors by referring to the non-financial advantages that sequestration would bring, namely, that the trustee will be able to investigate the true state of affairs regarding the first respondent's dealings. The applicant assumes in this regard that the fact that the first respondent owns almost none of the movable property in their home and has been involved in a number of entities which have since been deregistered, in inherently suspicious and that there is reason to believe that an investigation may reveal other suspicious activity. At the start of the application, the applicant also contended that investigations would reveal that dispositions made by the first respondent may be set aside. If true, further assets may become available for distribution amongst creditors and in such an instance an advantage to creditors would be shown to exist.

70 In the overall factual circumstances of this case, and upon the proper legal standard – whether there is *reason to believe* that there will be an advantage to creditors – I consider it appropriate to exercise my discretion in favour of the applicant's case. Having regard to the facts, it appears to me that there are indeed grounds to believe that the relevant enquiry could be to the benefit of creditors.

Conclusion

71 For the reasons set out above, I find that the applicant has established on a balance of probabilities that there was a liquid claim, the first respondent has committed acts of insolvency, and it would be to the advantage to the creditors for an order of provisional sequestration to be granted.

72 The applicant sought an adverse cost order on a punitive scale against the respondents in light of what it terms "unsubstantiated defences" that were raised in this matter. I am not inclined to grant costs on a punitive scale in light of my finding for provisional sequestration. The costs of this matter will be costs in the insolvent estate and a punitive cost order will only work to disadvantage the creditors.

73 I therefore make the following order:

73.1 the estate of the first respondent is provisionally sequestrated and the assets thereof placed in the hands of the Master of the High Court, Johannesburg;

73.2 the first respondent and any other interested party is called to show cause to this Court, on the date indicated by this Court, why the first respondent should not be finally sequestrated;

73.3 that a *rule nisi* be and is hereby issued calling upon the first respondent and any other interested party to show cause, if any, before this Court on 14 March 2022 at 10h00 or so soon thereafter as Counsel may be heard as to why the first respondent's estate should not be finally sequestrated.

73.4 a copy of this Order is to be served on:

73.4.1 the first and second respondents personally'

73.4.2 employees of the respondents;

73.4.3 trade unions of the employees of the respondents, if any;

73.4.4 the Master of the High Court, Gauteng Local Division, Johannesburg;

73.4.5 the South African Revenue Service;

73.5 this Order is to be published once in the Government Gazette and The Star newspaper;

73.6 The costs of this application on a party and party scale shall be costs in the insolvent estate.

**Acting Judge of the High Court,
Gauteng Local Division, Johannesburg**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 February 2022

Date of hearing: 07 September 2021

Date of judgment: 14 February 2022

Appearances:

For the applicant: F W Landman
Instructed by: Van der Meer Attorneys

For the respondent: F Bezuidenhout
Instructed by: Jay Mothobi Inc