

REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE:

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

10 January 2024
DATE:

— [REDACTED]
SIGNATURE:

CASE NR: 35958/2022

In the matter between:

MARIA CHARLOTTA STEYN

APPLICANT

and

MARIA CHARLOTTA STEYN N.O

FIRST RESPONDENT

LAETITIA GERBER N.O

SECOND RESPONDENT

MAARTEN JOHANNES SLABBERT POTGIETER

THIRD RESPONDENT

Delivered: This judgment was prepared and authored by the Acting 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 of the judgment is deemed to be 10 January 2024.

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

- [1] This application calls for a careful reflection on the purpose of sequestration as an insolvency law procedure in the context of family feuds. There is a need to evaluate whether sequestration can be used as one of the tools to resolve family disputes. This necessitates the examination of the parameters within which sequestration should be applied and can be granted by the court when a family member is using it as one of the arrows in her bow against another family member. Failure to do so will open the floodgates of sequestration being abused and used for purposes other than those it was originally intended.
- [2] In this application, the applicant seeks an order *‘that the estate of the Respondent [be] sequestered and placed in the hands of the Master of the High Court’*. While it is not immediately clear which of the three respondents’ estates should be sequestration from the applicant’s notice of motion, it is clear from all the affidavits filed as well as oral and written arguments made on behalf of the parties that the applicant seeks to sequester the Maarten Potgieter Familie Trust (hereafter “Trust”). A provisional sequestration order was granted on 21 August 2023 with a return date of 9 October 2023. The matter was heard on 13 October 2023.
- [3] The applicant and the second respondent are trustees of the Trust. The third respondent is one of the beneficiaries of the Trust and he opposes this application. The applicant and the third respondent are siblings. The second

respondent is their sister-in-law. Apart from determining whether sequestration procedure can be used to 'resolve' family disputes, the court is called upon to determine whether the applicant proved that the liabilities of the Trust exceed its assets to the extent that the Trust is unable to pay its debts when they become due, thereby justifying its sequestration.

[4] The third respondent applied for condonation for the late filing of his answering affidavit. Initially, this application was opposed. However, the court was informed from the bar that the applicant did not persist with her opposition to the third respondent's application for condonation.

[5] At the onset, it is important to highlight that most of the allegations made and the documentation attached to the parties' respective affidavits are not relevant to the applicant's quest to demonstrate the trust's insolvency. Rather, they clearly demonstrate the family dispute with which the court is confronted. For this reason, there is no need to extensively deal with the allegations made by the parties against each other in this judgment. I will only highlight the facts that demonstrate the family dispute to the extent to which they may be relevant to the question of insolvency. I found the points *in limine* raised by the applicant in her replying affidavit and the hearsay nature of some of the evidence tendered by both parties irrelevant and without merit.

B FACTS AND CONTENTIONS

i) Background

[6] The applicant and the second respondent are the trustees of the Trust. The applicant, the third respondent, and his wife are the identified beneficiaries of the Trust. On the one hand, the third respondent alleges that the Trust was created to honour the applicant, and the third respondent's father. To also provide both their parents with *fideicommissium* over the property owned by the Trust (hereafter 'trust property'). On the other hand, the applicant contends that despite being recorded in the trust deed that a *fideicommissium* was to be registered in favour of the parties' parents, such a right was not registered in their favour.

- [7] The Trust owns two properties, Farm 79 and Farm 80 which are adjacent to each other in Haakdoornboom, Gauteng. Farm 80 was initially occupied by the parties' father who was conducting a struggling brick business thereon. In 1998, the third respondent and his wife moved into the property to assist his father in saving the business. However, the business could not be saved, and his father's estate was sequestrated. The parties' father did not own this property.
- [8] It is not clear who initially owned the trust property. Nonetheless, the trust property was sold to Mr de Villiers in 1999. The Trust purchased the trust property after it was placed on auction in 2006. The bank was willing to sell this property to a willing buyer even if such a buyer would utilise a surety and co-principal debtor. The third respondent was interested in purchasing the trust property but did not have the financial means to do so.
- [9] To purchase the trust property, the third respondent sought assistance from the applicant, his sister, who agreed to stand as surety and co-principal debtor. The third respondent suggested that the property be registered in a trust to which the applicant agreed and insisted that she should be appointed as one of the trustees. The third respondent and his wife agreed to this arrangement provided they could be appointed as beneficiaries.
- [10] Farm 79 and Farm 80 were purchased through mortgaged bonds in favour of Standard Bank for R 216 000.00 and R 350 000.00 respectively. The current values of these properties are estimated at R 1 000 000.00 and R 1 300 000.00 respectively. The parties agreed that the third respondent would be responsible for the payment of the transfer costs. They also agreed that the third respondent would occupy the property and be responsible for the payment of all the costs associated with the trust property such as municipal rates and taxes.
- [11] The parties also agreed that the third respondent would be responsible for the payment of the monthly bond instalments. This money was to be provided to the applicant who would then pay it to the bank. The applicant alleges that there was a lease agreement signed between the third respondent and the trustees that the third respondent would pay rent in exchange for his accommodation at Farm B.

- [12] This allegation is disputed by the third respondent who contends that the purported lease agreement was a simulated transaction aimed at assisting the applicant to demonstrate to the bank when she bound herself as surety that there will be income generated by the Trust that will sustain the bond payments. However, the applicant denied that she bound herself as surety with the sole aim of assisting the third respondent to purchase the trust property.
- [13] The third respondent saw the trust property as his property and the applicant merely assisting him in acquiring this property with a view that he would be responsible for all its expenses, including municipal rates and taxes, when his financial position improved. To achieve this, the third respondent bargained to be 'included' as one of the trustees. The third respondent alleges that the applicant failed to take steps to have him appointed as one of the trustees. Without directly addressing this allegation, the applicant merely alleges that the trustees have on multiple occasions unsuccessfully attempted to appoint an additional independent trustee.
- [14] The third respondent alleges that the applicant took steps to have him removed as one of the beneficiaries, which the Master of the High Court frowned upon owing to the applicant's failure to follow the appropriate procedure. The applicant denies this without providing her account of this event. Over time, the relationship between the applicant and the third respondent deteriorated to such an extent that there was no meaningful communication between them.
- [15] According to the applicant, the third respondent refused the trustees' entry into the trust property. The third respondent contends that the trustees never contacted him to arrange a visit to the trust property. The applicant alleges further that her appointed valuator indicated that there are alternations made on the trust property that does not appear from the approved building plans registered with the municipality. The third respondent contends further that the applicant refused to submit the building plans to the municipality.
- [16] The applicant alleges further that the third respondent operates an illegal shebeen, brothel, illegal mining, and unlawful farming on the trust property. According to the third respondent, he received written authorisation from the

trustees permitting him to operate recreational and accommodation facilities at the trust property.

- [17] The applicant contends further that in 2016, without consulting with the trustees, the third respondent allowed their other sibling, Hermanus, to occupy the trust property in exchange for monthly rentals that were paid directly into the third respondent's personal bank account. Further, the third respondent did not pay the collected rentals to the trustees. The third respondent denies this allegation and alleges that Hermanus lost his employment and needed a place to stay, hence he provided him with accommodation. This contention was confirmed in writing by Hermanus.
- [18] The third respondent further contended that since 2013, he made payments of R 4 079.00 and R 4 080.00 respectively directly into the bond accounts. Further, he paid surplus amounts in these accounts and does not understand how, despite the payments of surpluses the property still owes more than half of the loan amount after 17 years. The third respondent contends that his top priority as the 'true principal financier' of the Trust is to ensure that the Trust has no unpaid debts. The applicant maintains that the third respondent failed to make rental payments thereby placing the Trust in a precarious financial position to the extent that it is now insolvent.
- [19] The third respondent alleges that the applicant's motivation behind this application is to force him to 'buy her out as a beneficiary'. The applicant alleges that the trustees attempted to resolve the dispute with the third respondent. They proposed that they would resign as trustees in exchange for a settlement amount. The applicant informed the third respondent through her attorneys that the money she spent on the Trust must first be repaid to her. Among others, she also indicated that both trustees must be released in writing from any liability for the sums that may currently or in the future be owed to the bank.

ii) *Alleged Insolvency of the Trust*

- [20] The applicant claims that she is the creditor of the Trust with a liquidated claim against the Trust in the amount of R 479 608.00. The Trust also owes the municipality an amount of at least R 19 215.81 and Hermanus an unknown amount for the improvements he made to the trust property. The outstanding amount due to the bank is R 172 802.91 for Farm 79 and R 189 765.71 for Farm 80.
- [21] According to the applicant, the third respondent is also owed an amount of R 53 831.00 for the transfer duty costs paid when the properties were purchased by the Trust. Further, the Trust is unable to pay its debts. It was submitted on behalf of the applicant that this application constitutes a friendly sequestration of the Trust by the applicant in her capacity as the creator and trustee of the trust.
- [22] In 2010, the third respondent started paying rent inconsistently and ultimately stopped paying in 2018. This led to the applicant, as the surety and co-principal debtor, to take over the payments of the bond instalments. The applicant is of the view that the Trust cannot pay its debts when they become due, and it would be to the advantage of creditors for the Trust to be sequestrated. This will allow an investigation into the Trust's affairs to establish the value of its assets and the extent of its liabilities.
- [23] According to the third respondent, the applicant's application is self-serving and does not consider the interests of other people such as other beneficiaries in the Trust and the people who reside and work at the premises of the trust property. It was also submitted on behalf of the third respondent that the applicant failed to provide audited financial statements as required by the trust deed. As such, the third respondent cannot verify the applicant's claim because of the outstanding statements of the bank account of the trust. The third respondent contends that he recently made a payment to the municipality in the amount of R 25 100.00.

C APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

i) A Trust

- [24] A trust can be understood as a legal instrument of its own kind that empowers the owner of the property through a written formal arrangement to allow another person to administer or control such property for the benefit of the identified person or persons.¹ A trust is recognised as a legal institution *sui generis*.² Despite being a legal entity, a trust does not possess legal personality and cannot sue or be sued in its own name.³ A trust litigates through its trustees.
- [25] The Supreme Court of Appeal in *Land and Agricultural Development Bank of SA v Parker and Others*, held that the trust estate ‘vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act.’⁴ It was correctly held in *T. T v D. T N.O and Others*, that ‘[i]t is trite that it is the duty of a trustee(s) to administer a trust for the benefit of the beneficiaries’.⁵
- [26] It seems to me that while the Trust in this matter may be regarded as a genuine trust, it was not created for reasons for which trusts are ordinarily created. The evidence demonstrates that the third respondent got wind of the fact that the trust property was to be sold on auction. At that time, the third respondent did not have the financial means to purchase the property for himself and his wife. He approached the applicant for assistance. The applicant agreed to assist provided that she would be provided some form of benefit.
- [27] I am convinced that the parties agreed that the most viable option for what they wanted to achieve was through the establishment of a trust wherein the applicant would be a trustee and also a beneficiary together with the third respondent, and his wife. This is made evident by the fact that the third respondent and his wife were not only to reside on but also to manage and care for the trust property. The responsibility for the bond payments and all the

¹ See section 1 of Trust Property Control Act 57 of 1988.

² *Braun v Blann & Botha NNO and Another* 1984 (2) SA 850 (A); [1984] 2 All SA 197 (A) 859.

³ *Standard Bank of South Africa Limited v Swanepoel N.O.* 2015 (5) SA 77 (SCA) para 8.

⁴ [2004] 4 All SA 261 (SCA); 2005 (2) SA 77 (SCA) para 10.

⁵ (1916/2023) [2023] ZAFSHC 238 (2 June 2023) para 58

expenses arising from the trust property also fell on the third respondent, and not the trustees as is usually the case.

[28] Why would a beneficiary be responsible for the payment of the trust property expenses when there are appointed trustees who are tasked with the management of the trust? It is highly unlikely that the alleged landlord, the trustees in this case, will defer the duty to maintain and care for the property, to the alleged tenant, the third respondent in this case. The third respondent has always been allowed by the trustees to manage the trust property. Now that he stopped making payments to the applicant because the trustees failed to get him appointed as a trustee, the applicant wants to sequester the Trust.

[29] The applicant brought this application in her personal capacity as the person who is allegedly owed money by the Trust. She represents herself as a creditor of the Trust. However, the challenge is that she is the trustee of the Trust who instituted this application based on her intimate knowledge of the affairs of the Trust. This appears to be contrary to what is required by section 9(1) of the Trust Property Control⁶ which states that:

'[a] trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another'.⁷

[30] It cannot be denied that trustees can also be beneficiaries. But this does not mean that they can use their position as trustees to benefit only themselves as beneficiaries to the disadvantage of other beneficiaries. The required duty of care obliges trustees in their representative capacities to deal with trust assets to further the interest of all the beneficiaries. Trustees are not allowed to use their position to further their personal interests.⁸ It seems to me that because the third respondent failed to make an offer to pay the applicant what she claims to have spent on the Trust, she has decided that the Trust should be sequestered.

⁶ 57 of 1988.

⁷ See *P.M.M N.O and Another v D.M N.O and Another* (26855/2021) [2022] ZAGPPHC 313 (4 May 2022) para 7.

⁸ See *Commissioner For Inland Revenue v Macneillie's Estate* [1961] 4 All SA 27 (A) 32.

[31] In my view, while the applicant approached the court in her personal capacity, what she alleged to have spent on the Trust was done in her capacity as both the trustee and beneficiary. This demonstrates that this application was brought to advance the personal interest of the applicant. This conduct is contrary to her position as the trustee. In *Law Society of the Cape of Good Hope v Randell*, it was convincingly held that:

'[a]lthough a trustee may also be a beneficiary, it must always be subject to the principle that he may not put his personal interests in conflict with his duty as trustee which is to deal with trust assets to further the interests of the beneficiaries, and not to further his own interests'.⁹

[32] Launching sequestration proceedings when there is a viable remedy available to her as the trustee, demonstrates that the applicant's personal interests conflict with her official duties as a trustee. Trustees can make an application in terms of section 13 of the Trust Property Control Act to terminate the trust when there are justifiable grounds to do so.¹⁰ It is not clear why the applicant decided that sequestration of the Trust was the most appropriate route to follow.

[33] It is also strange that the applicant as a trustee would want to enter into an arrangement with the beneficiary to be 'bought out'. Surely, trustees must manage the trust property and not the beneficiaries. The fact that the applicant was willing to negotiate an exit plan with the third respondent demonstrates that the trust was created as alleged by the third respondent. The applicant appears to be confusing her roles as the trustee and beneficiary.

ii) Compulsory Sequestration

[34] Despite not being a legal person, a trust falls within the definition of a debtor in section 2 of the Insolvency Act.¹¹ This is because a trust is a special kind of entity that is empowered through its appointed trustees to acquire assets and credit as well as to incur debts.¹² In other words, a trust through its trustees can

⁹ [2015] JOL 33627 (ECG) para 50.

¹⁰ See *Gowar and another v Gowar and others* [2016] JOL 36056 (SCA) para 33.

¹¹ *Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly and Another NNO* 1984 (1) SA 160 (W) 162.

¹² 36 of 1924, a "debtor", in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies'.

owe creditors and be held accountable to pay incurred debts, failing which be vulnerable to being sequestrated when its liabilities exceed its assets.¹³ To be sequestrated, the trust must be factually insolvent or have committed an act of insolvency.¹⁴

- [35] Sequestration proceedings can indeed be instituted against a trust even though it cannot be cited as a respondent. All the trustees can sue or be sued in their representative capacity on behalf of the trust jointly unless one of the trustees has the authority to act for the others through a resolution.¹⁵ Usually, sequestration proceedings are brought by creditors against the trust through its trustees and not trustees disguised as creditors against the trust and citing themselves in their representative capacities as respondents.
- [36] This does not mean that trustees in their personal capacity cannot be creditors of their trusts. Where they claim to be trust creditors, trustees must clearly indicate how they became creditors. I doubt that any of the trustees are empowered to create financial liabilities for their trust, for their own benefit without the resolution of all the trustees. Even worse, to make the trust indebted to them in their personal capacity without proper authorisation from the trustees acting jointly. In my view, that is a textbook example of a conflict of interest.
- [37] The trustees should collectively decide whether to oppose sequestration proceedings against the trust. In this case, the Trust is sought to be sequestrated by one of the trustees who claims to be a creditor of the Trust supported by the other trustee. None of them has considered whether there is a need to 'defend' the Trust. Both of these trustees are cited as respondents but none of them is opposing this sequestration application. The application is opposed by one of the beneficiaries and not the trustees as is usually the case.
- [38] To be successful with this application, there are substantive requirements that the applicant should satisfy as provided for in section 12(1) of the Insolvency

¹³ *Melville v Busane and another* [2012] 1 All SA 675 (ECP) para 10

¹⁴ *Standard Bank of South Africa Limited vs Mothuloe* (20/21345) [2022] ZAGPJHC 1028 (19 December 2022) para 2.

¹⁵ *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) 127 and *Glen Elgin Trust v Titus and another* [2001] 2 All SA 86 (LCC) para 14.

Act. Before dealing with section 12(1), it is important to note that section 9 of the Insolvency Act provides that:

‘[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’.

- [39] It is disappointing that despite a Rand being adopted as the South African currency in 1961 and thirty (30) years into democracy this section still refers to Pounds as opposed to Rands. The danger with this is that the value of the Rand is much less than that of the British pound which was the South African currency before it was replaced by the Rand. Without any justification and serious consideration of the differences in the value of the Rand and the British Pound, South African courts have generally interpreted this provision as requiring that the creditor must demonstrate that he, she, or it has a liquidated claim of not less than R 100.¹⁶ It is not clear why the Legislature has not ‘modernised’ the Insolvency Act to reflect the applicable South African currency.
- [40] In any event, the applicant claims that the Trust owes her an amount of R 479 608.00. It is not clear how the Trust incurred this debt to regard the applicant as a genuine creditor of the Trust. It is also not clear whether the trustees in their official capacity entered into any agreement with the applicant in her personal capacity to pay for any of the obligations of the Trust with an understanding that the Trust would be liable to pay the applicant back what she spent on the Trust. Did the applicant unilaterally decide to pay what she claims to have paid for and that the trust should pay her back? The extent to which the applicant paid for anything, is the recovery of what was spent sanctioned by the trust deed?
- [41] This matter demonstrates the complexity that arises when one person is a creator, trustee, and beneficiary of a trust. There are no audited financial

¹⁶ See among others *Mogapi v Mogapi* [2023] JOL 61915 (NWM) para 41; *Anglowealth Shariah (Pty) Ltd v Adam and another* [2022] JOL 54141 (GJ) para 24; *Firststrand Bank Limited v Oosthuizen* [2020] JOL 49694 (FB) para 6; *Premier Western Cape and others v Parker & Mohammed and others* [1999] 1 All SA 176 (C) 190.

statements placed before the court to assess how this debt arose and whether indeed the Trust is indebted to the applicant in her personal capacity. In any event, section 12(1) of the Insolvency Act provides that:

'[i]f at the hearing pursuant to the aforesaid rule nisi the court is satisfied that—

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; 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 sequester the estate of the debtor'.

[42] The applicant claims to have satisfied the first requirement because the Trust allegedly owes her money. I am not convinced that the applicant is a genuine creditor of the Trust, and that the first requirement is satisfied. It is not entirely clear whether the applicant's case is based on factual insolvency or an act of insolvency. It is alleged that the trust property has a combined estimated value of R 2 300 000.00. The alleged debts, including the amount that the applicant claims the Trust owes her, are way below this amount. It does not seem like the Trust is factually insolvent.

[43] This means that the applicant, at the very least, should rely on one or more of the acts of insolvency listed in section 8 of the Insolvency Act. However, the applicant's case does not centre around any of these acts of insolvency. It was submitted on behalf of the applicant that the Trust is commercially insolvent and must be sequestrated. It is not clear whether the concept of commercial insolvency can be relied upon when debtors are sequestrated. This concept usually arises in the context of the liquidation of companies.

[44] Generally, commercial insolvency denotes '*a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities*'.¹⁷ The Supreme Court of Appeal in *Murray and Others*

¹⁷ *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* [2014] 1 All SA 507 (SCA); 2014 (2) SA 518 (SCA) para 16. The court further held that '[i]n view of the long established and well-settled practice in our courts that commercial insolvency justifies the liquidation of a company' (para 18).

NNO v African Global Holdings (Pty) Ltd and Others, held that the test for commercial insolvency:

*‘...is whether the company “has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant?” Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading’.*¹⁸

[45] I am of the view that the concept of commercial insolvency ‘cannot strictly’ be relied on as a ground for the sequestration of trusts. Nonetheless, there are different trusts and some of them conduct business. Some of these trusts are referred to as business trusts. I am open to accepting that perhaps concerning business trusts, the concept of commercial insolvency can be relied upon. I doubt, however, whether the same can be said with family discretionary trusts. In most instances, family discretionary trusts acquire assets for the benefit of beneficiaries. They do not necessarily conduct business in the true sense of the word.

[46] In this matter, we are dealing with a family discretionary trust that was created to purchase property for the third respondent and not necessarily for the benefit of beneficiaries. If I am wrong and the applicant can rely on the concept of commercial insolvency, based on the direction provided by the Supreme Court of Appeal, there is no merit in the argument that the Trust is commercially insolvent. This is simply based on the alleged value of the trust property. Over and above this, I accept the third respondent’s argument that initially this trust was created to assist him and his wife to purchase the trust property.

[47] It will be to the benefit of all the beneficiaries if the parties can revisit their initial agreement when the Trust was created to explore the substitution of debtors under the bonds. The parties can also explore the replacement of trustees and the appointment of an independent trustee as per the applicant’s initial suggestion. This will allow the applicant to sue the Trust to the extent to which

¹⁸ [2020] 1 All SA 64 (SCA); 2020 (2) SA 93 para 31 (footnote omitted)

she has a claim for the recovery of the amounts she claims are owed to her without compromising other beneficiaries. This application is contrary to what is required by the applicant's office as a trustee and fundamentally prejudices other beneficiaries. I am of the view that the applicant failed to demonstrate that the Trust is either insolvent or has committed an act of insolvency.

- [48] The third requirement that the trustee must satisfy is that there is reason to believe that this application will be to the advantage of creditors. In *Du Randt Richards Inc Attorneys v Scheepers NO and another (ABSA Bank Limited intervening)*, the court correctly accepted the submission on behalf of the intervening creditor that:

*'... when evaluating whether or not there is an "advantage to creditors", no distinction should be drawn between creditors who should be viewed as a single entity. All assets, secured or otherwise, should therefore be placed in one imaginary pot. After deducting the costs of sequestration, the remainder available for the benefit of the "general body", ie all creditors, should then be determined. No creditor should be excluded from this arithmetical calculation which should include all assets, secured or otherwise'.*¹⁹

- [49] The test is not what is advantageous to the beneficiaries, but the creditors as a collective. No creditor of the Trust should be prioritised over others. Even though the phrase 'advantage to creditors' is not defined in the Insolvency Act, it is generally accepted that creditors will be advantaged when there is a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole.²⁰ The disclosed value of the trust property demonstrates that creditors will derive financial value from the sequestration. In fact, should the trust property be sold in line with its estimated market value, all the creditors will be paid in full should this application succeed. However, sequestration is not a procedure available to debtors who can pay their debts in full.

- [50] Sequestration is not the same as liquidation where a solvent company can be liquidated.²¹ With sequestration, the liabilities of the person sought to be sequestrated must exceed that person's assets. The disclosed value of the trust property suggests that the assets of the Trust exceed its liabilities. The fact that

¹⁹ [2013] JOL 30519 (GSJ) para 5.

²⁰ *Ex Parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP) para 13

²¹ See sections 79 and 80 of the Companies Act 71 of 2008.

the third respondent stopped making payments to the bank is because of poor communication and family disputes that can be resolved through various means, including dedicated family mediation. There is no reason why the third respondent who is in a better financial position than he was when the Trust was created should not make the payments to the bank as initially agreed.

- [51] Surely, the applicant is aware that the sequestration order will automatically lead to the sale of the trust property. She is equally aware that the value of the trust property is such that she and other creditors will be paid in full. The applicant is using sequestration proceedings to secure payment for herself. This is not the purpose for which the sequestration procedure is intended. This procedure is not intended to benefit a single creditor only but all the creditors jointly. The Supreme Court of Appeal in *Body Corporate of Empire Gardens v Sithole and Another*, held that:

'[t]he purpose and effect of the sequestration process is "to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that the creditors are treated equally". It cannot fittingly be described as a mechanism to be utilized by a creditor to claim a debt due by the debtor to one single creditor. Once a sequestration order is made, a concursus creditorum comes into being. This means that the rights of the creditors as a group are preferred to the rights of the individual creditor'.²²

- [52] In my view, this application is self-serving and amounts to an abuse of the sequestration procedure. I am convinced that the applicant chose the sequestration procedure as a convenient mechanism to resolve the dispute between herself and the third respondent as siblings. I doubt that insolvency proceedings generally and the sequestration procedure, in particular, were intended to be used to resolve family disputes. Thus, it is not sufficient in the context of this case to stereotypically accept that all the creditors will benefit by being paid in full. The facts of this case necessitate a serious assessment of the position of all the beneficiaries and the way the trust was created.

²² 2017 (4) SA 161 (SCA)

- [53] Apart from the animosity between the applicant and the third respondent as siblings, there is no justifiable reason for the Trust to be sequestrated. Sequestration of the Trust will be detrimental to the third respondent and his wife as two of the three beneficiaries. In this case, the sequestration procedure is used as punishment that the sister, the applicant, wishes to administer to the third respondent and his wife. In my view, the sequestration procedure is not a whip at the hands of some family members with which to beat other family members. To allow this would be to allow the abuse of the sequestration procedure.
- [54] The applicant and the third respondent cannot find it in themselves to sit down and sensibly resolve their dispute. The third respondent stopped paying as agreed and now the applicant responds with a sequestration application. To allow sequestration proceedings to be used in this way will be to open the floodgates of the abuse of this important economic tool. I am of the view that this is something that should never be allowed.
- [55] The third respondent is in a financial position to make the necessary payments to the creditors as initially agreed when the Trust was established. He is merely despondent by the fact that he has not yet taken over the obligations from the bank and that he is not one of the trustees. By stopping payments, particularly to the bank, he wanted to 'force' the applicant to abide by the initial agreement. Without encouraging his conduct, it is clear that he is financially capable of fulfilling the terms of the parties' initial agreement. In my view, he should be allowed to do so.
- [56] The bank as the creditor of the Trust can also receive payment from the third respondent as was initially agreed. Similarly, the third respondent is also in a financial position to make payments to other creditors such as the municipality. The applicant can also sue the Trust directly for the payment of what she alleges she is owed. If there is no readily available cash or movable properties to satisfy her claim, the trust property can be attached. This demonstrates that sequestration is not the only means for the creditors' claims to be satisfied. The Constitutional Court in *Stratford and Others v Investec Bank Limited and Others*, held that:

*‘... it is up to a court to assess whether ... there is a substantial estate from which the creditors cannot get payment except through sequestration; or that some pecuniary benefit will result for the creditors’.*²³

- [57] It cannot be doubted that sequestration is not the only means that can be used in this matter by creditors to secure their payment. There is no justification for the Trust to be sequestrated.

iii) Friendly Sequestration

- [58] It was submitted on behalf of the applicant that this application constitutes a friendly sequestration. Friendly sequestration is a type of sequestration where a creditor who has some form of relationship with the debtor, in circumstances where the debtor is pressed by any or some of his other creditors and without colluding with the debtor, comes to the assistance of the debtor by instituting sequestration proceedings against them.²⁴ According to Evans:

*‘[t]he debt upon which the sequestrating creditor relies is usually a very small, unsecured loan, often made in circumstances where it is obvious that the debtor is in dire financial circumstances. There is usually no documentary evidence of the loan, and often the debtor and creditor are related’.*²⁵

- [59] While friendly sequestrations are lawful, our courts have observed that they can be abused where the initiating creditor attempts to rescue the debtor from other creditors, *‘and in the process the court is more often than not provided with incorrect, if not false, and/or unreliable evidence’.*²⁶ It is not clear whether the applicant insinuates that she is related to the Trust in her personal capacity or representative capacity to make her application a friendly sequestration. The applicant is acting in her personal capacity. The only relation that the applicant has in her personal capacity with the Trust is as a beneficiary. She came to this court, neither as a beneficiary nor trustee, but as a creditor.

- [60] To be lawful, a friendly sequestration should be brought to assist the person being sequestrated for the benefit of all creditors and not necessarily to benefit

²³ 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC) para 45 (footnotes omitted).

²⁴ *Wepener v Ericson* 1926 WLD 81 at 84.

²⁵ ‘Friendly sequestrations, the abuse of the process of court, and possible solutions for overburdened debtors’ (2001) 4 SA Merc LJ 485 at 487.

²⁶ *Botha v Botha* [2017] JOL 39349 (FB) para 1.

the creditor that brings such an application.²⁷ Otherwise, an application for friendly sequestration designed to benefit the initiating creditor is more likely to result in collusion which will immediately render it unlawful. In *Esterhuizen v Swanepoel and Sixteen Other Cases*, it was held that:

*'[t]here is not necessarily anything sinister in a "friendly" sequestration and an order should not be refused merely because of "goodwill between the parties". What is of concern is the prospect of 'collusion' ...' in these applications.*²⁸

- [61] It is difficult to see how this application can be referred to as friendly sequestration while the applicant is not necessarily 'assisting' the Trust and her sole intention is to receive payment from the Trust. There is no evidence that any other creditor of the Trust exerted pressure on the Trust to pay any of its debts. If indeed this application can be referred to as a friendly sequestration, the conclusion that the applicant in her capacity as the beneficiary is colluding with the first and second respondents as the trustees of the Trust to secure payment will be unavoidable. I am not convinced that this application meets the criteria for friendly sequestration.

D CONCLUSION

- [62] The extent to which there may be illegal activities conducted at the trust property, such activities must be reported to the relevant law enforcement agencies. I do not think that it is adequate where none of the parties made the necessary application for the removal or replacement of trustees for this court to make any order to that effect. Equally so, there is nothing that should prevent the third respondent from carrying out his obligations in line with the terms of the parties' initial agreement when the Trust was registered regarding payments to the bank.

²⁷ See *Kerbel v Chames* 1952 WLD 72 at 75-6 where it was stated that 'it is said that very frequently, in this Court particularly, what are called "friendly sequestrations" take place . . . and one has a strong suspicion that in a very large number of sequestrations in this Court, these sequestration proceedings are not for the benefit of the creditors, but are entirely for the benefit of the insolvent, and are very often instituted by a friend to help the debtor out of his difficulties'.

²⁸ 2004 (4) SA 89 (W) 91.

- [63] It is important that the reasoning in this judgment should not be misconstrued. I am not suggesting that family members cannot legitimately be creditors of each other. Where one family member is owed money by the other, such a family member is well within his or her right to institute sequestration proceedings where it can be proven that the liabilities of the other family member exceed his or her assets and all the creditors of that family member will benefit from the sequestration of the debtor's estate.
- [64] The applicant failed to satisfy the requirements for sequestration and her application should accordingly fail. Usually, costs should follow the result. However, given the circumstances of this case and the ongoing family feud, the applicant cannot be faulted for trying to recover amounts that she spent on the Trust in circumstances where the third respondent made communication with him almost impossible. It will be just for each party to pay their own costs.
- [65] Hopefully, the parties will consider engaging each other on the continued existence of the Trust and reach an agreement on how the applicant can be reimbursed for all the expenses she incurred, which the third respondent does not seem to dispute. What is clearly in dispute is how the applicant arrived at the amount she claims.

ORDER

- [66] In the result, I make the following order:

1. The applicant's application is dismissed.
2. The third respondent's late filing of his answering affidavit is condoned.
3. Each party to pay their respective costs.



C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

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Date of the hearing:	13 October 2023
Date of judgment:	10 January 2024