



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

Case No: 2566/2021

In the matter between:

SYDNEY CLARENCE WILLIAM POOLE

Applicant

and

LUKE BERNARD SAFFY N.O.

RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE *5 February 2022* SIGNATURE 

JUDGMENT

HF JACOBS, AJ:

INTRODUCTION AND BACKGROUND

[1] This is the application for the provisional sequestration of the estate of the late Mr Nicolas Georgiou. Mr Georgiou passed away on 10 September 2021 and the present respondent, Mr Luke Bernard Saffy, was

appointed as the executor of his estate and a formal substitution in terms of the rules of court took place on 28 July 2022.

[2] By that time Mr Georgiou had deposed to an answering affidavit (on 10 May 2021) and instituted a counter application for the stay of this sequestration application. The applicant applies for the provisional sequestration of the estate as a judgment creditor for an unsatisfied judgment in the sum of R4,400,000.00. I have been informed by counsel for the applicant that the Registrar has indicated that should a provisional order follow, the date of 29 April 2024 is available on the opposed roll for the return day. The application for sequestration was set down for hearing during the week of 22 January 2024. On 21 December 2023 I issued a directive and allocated the time and date of the hearing as 10h00 on Thursday 24 January 2024.

[3] On 23 January 2024 the two trustees of the N Georgiou Trust (hereinafter referred to as "the Trust") delivered an application to intervene in the sequestration proceedings and to postpone this application and uploaded the papers onto CaseLines to do so. When the matter was called on 24 January 2024 counsel for the Trust was invited to move the application for intervention and for postponement of the hearing of the sequestration application whereafter counsel for the applicant and respondent were invited to argue the counter application and the sequestration application in full. The respondent as executor associates himself with the intervention application and the application for postponement and other relief sought in the notice of motion dated 23 January 2024.

[4] The Trust tenders payment of any wasted costs a postponement may cause and sought directions for the exchange of further affidavits should it be necessary.

[5] The relief sought includes an application for the stay of the sequestration application pending the outcome of two existing applications to set aside a confirmed business rescue plan in respect of Zephan Properties (Pty) Ltd which is currently in business rescue.

[6] Before I turn to the submissions presented in support of and opposition to the relief sought, it would be convenient to record some particulars of the corporate entities mentioned in the affidavits and the relationship between those entities and the parties to these proceedings.

[7] Zephan (Proprietary) Limited: Zephan was a company of which Mr Georgiou was the managing director and only shareholder. Zephan is presently under voluntary business rescue proceedings in terms of the provisions of section 129 of the Companies Act¹ and a moratorium on legal proceedings against Zephan is in place in terms of section 133(1) of the Companies Act.

[8] Two of the trustees of the Trust referred to in paragraph [3] above, apply for leave to intervene in this application. Prior to his death Mr Georgiou was, with the current two trustees, a trustee of the Trust.

¹ 71 of 2008

[9] The applicant obtained the judgment mentioned in paragraph [2] above against Mr Georgiou, Zephan, and the Trust in the same action and on the same cause of action. The judgments were obtained on a claim based on a "*buy-back agreement*" in terms of which Mr Georgiou, Zephan and the Trust jointly and severally undertook to repurchase all the shares sold by a company Highveld Syndication Company 22 Limited (HS 22) from the original purchasers of the shares five years after the individual initial purchase dates. The buy-back agreement stipulated the repurchase price as double the original selling price.

[10] HS22 has as its main business that of a property syndication company. Highveld Syndication Company 21 Ltd, is a company like HS 22 the shares of which were made subject to a buy-back agreement. There were twenty other companies, all similarly named (having started from Highveld Syndication No 1 Ltd to HS 22). All those companies conducted business as property syndication companies. Eight of the Highveld Syndication companies (HS 15 – HS 22) were placed under business rescue during September 2011 and business rescue plans were adopted in respect of those eight companies on 14 December 2011.

[11] Orthotouch Limited: Mr Georgiou was the managing director of Orthotouch and the Trust is the sole shareholder of Orthotouch. Orthotouch is currently under business rescue.

[12] The reason for the financial difficulty the property syndication companies found themselves in is explained in Mr Georgiou's answering

affidavit. During or about 2010/2011 the Highveld Syndication companies ran into financial difficulty and around March 2011 they agreed with a company known as Orthotouch Ltd (of which Mr Georgiou was the managing director and the Trust the shareholder) to sell certain of their properties to Orthotouch. The agreements with Orthotouch failed and were not proceeded with. The continued financial difficulty the Highveld Syndication companies experienced after the failure of the Orthotouch agreement, caused those eight companies to be placed under voluntary business rescue in terms of section 129 of the Companies Act during September 2011, so the answering affidavit say.

[13] On 30 November 2011, the business rescue practitioner published a business rescue plan in respect of the Highveld Syndication companies which was voted on at a meeting held on 14 December 2011 and approved by 99% of the investors in the eight Highveld Syndication companies. The material terms of the business rescue plan were that Orthotouch (in other words Mr Georgiou and the Trust under another corporate entity) submitted an offer similar to its earlier one to the effect that Orthotouch would acquire the properties to which the Highveld Syndication companies held the rights against implementation of a payment plan and pending payment by Orthotouch on the fifth anniversary of the plan, Orthotouch would pay to the Highveld Syndication companies interest (to be paid monthly to the shareholders) on the total purchase price in respect of the properties acquired by Orthotouch.

[14] Litigation followed the events mentioned above. I have been referred to the following judgments in which the Trust and others were

parties: *Jacques Du Toit N.O. v Theron & Partners N.O. and Others* case number 4049/2021 in the High Court of South Africa (Gauteng Division, Pretoria); the judgment *Zephan (Pty) Ltd v Noomahomed* 2019 JDR 2380 (SCA); *Zephan (Pty) Ltd v De Lange* 2016 JDR 2263 (SCA). From these judgments it seems that much litigation followed the business rescue proceedings and the judgments granted against the Highveld Syndication companies, Mr Georgiou and the Trust. I have been informed from the bar that sequestration proceedings are pending against the Trust and other applications are pending as part of the challenge of the business rescue proceedings and the business rescue plans concluded in terms of the Companies Act. The background to the litigation appears from the judgment of Davis J in *Jacques Du Toit NO* above at para [3] – [15]:

“[3] The boards of directors of these syndication companies would identify commercial properties which would be purchased from sellers and registered in the name of the syndication companies. The funds raised by members of the public purchasing shares (and making loans to the syndication companies) would be utilized to purchase and develop these properties which would in turn be let out to commercial tenants with large retailers often being anchor tenants. From the rental income investors would be paid returns on their investments in the form of interest. It was envisaged that these properties or their developments would have trading lifespans of 5 – 7 years whereafter they would have to be renewed or refurbished. The properties were then sold and the investors repaid their capital.

[4] In respect of HS 1-14 the scheme worked well and all the investors had been repaid their capital and interest. HS 15-20 are not strictly relevant to this litigation, except for the fact that the properties were by and large no longer acquired from third party sellers but principally at first, and later

exclusively, from Zelpy 2095 (Pty) Ltd, which later became Zephan (Pty) Ltd (Zephan). Due to disputes between the syndication companies and their promoters and/or the developers, these latter properties were never transferred to the syndication companies but remained registered in the name of Zephan. In respect of HS 18, there was a "buy-back" agreement in respect of the properties, but this is to be distinguished from the shares buy-back agreements which form the crux of the BRP's purported dilemma.

[5] In the applications for acquisition of shares by members of the public in HS 21 and HS 22 and in each company's respective prospectuses, provision was made for the buy-back of the shares of investors. This was made by the so-called "Georgiou interest group", consisting of Zephan (then still known as Zelpy 2095 (Pty) Ltd) or its nominee, the N Georgiou Trust, both represented by Mr N Georgiou and Mr N Georgiou personally. Mr Georgiou has recently passed away in September 2022.

[6] The buy-back agreement in HS 21 reads as follows: "The second, third and fourth party, jointly and severally, hereby irrevocably undertakes to re-purchase all the shares sold by the first party to the original purchasers of the shares five years after the individual purchase dates . . . at R1,00 per share with a loan account of R999.00 (hereinafter referred to as the "repurchase price")". The "first party" referred to HS 21 and the "second" "third" and "fourth" parties referred to the members of the Georgiou interest group.

[7] The buy-back agreement in HS 22 reads virtually identical, save that the repurchase price is R 1001.00 per share together with a R999.00 share premium.

[8] The reason why the repurchase price in HS 21 was only for return of the initial investment while in HS 22 it was for double that, was that in HS 21 investors received 12.5% annual interest on their investments and in HS 22 they did not.

[9] The offer of shares in HS 21 was oversubscribed and the promoter accommodated the oversubscription by issuing shares in HS 22, but on the same terms as for investors in HS 21. The remainder of investors who had only subscribed to HS 22, received the buy-back benefits of double their investments as described above. All this took place as long ago as around 2008.

[10] Subsequent to investments having been made by literally thousands of investors, the economy took a downturn and in September 2011 HS 15 to HS 22 were placed in voluntary business rescue. One Mr J F Klopper was appointed as their BRP.

[11] In terms of a combined business rescue plan adopted in the aforementioned HS group of companies on 14 December 2011, a new player entered the scene, Orthotouch (Pty) Ltd (Orthotouch). The plan was to the effect that Orthotouch would procure the transfer and registration of all the properties in question from Zephan into its own name and pay investors interest of 6% in the first year, 6.25% in years two and three, 6.75% in year four and 7% in the fifth year. Hereafter all the investors' shares would be redeemed.

[12] Although Orthotouch is alleged to have paid investors an amount of more than R807 million, it became unable to fulfill its obligations in terms of the business rescue plan and proposed a scheme of arrangement in terms of section 155 of the Companies Act 71 of 2008.

[13] The scheme dealt with Orthotouch's "trade creditors" but also purported to affect the rights of HS investors. Not only is the scheme an intricate document, but the clauses dealing with the rights of HS investors are fraught with interpretational hurdles and labyrinthine provisions. This appears from the principal clause in the scheme relied on by Orthotouch, quoted in the applicant's papers and heads of argument delivered on his behalf. It reads as follows: "2.2.4. The arrangement proposed by the company [Orthotouch] to HS investors specifically, is recorded in this paragraph 2.2.4 read together with 2.2.5 below, and companies of the rights of HS investors to obtain, in full and final settlement and full

substitution of their rights, the rights against and in respect of the company, the HS company and the other parties recorded in 2.2.2.2, 2.2.2.3, 2.2.2.4, and 2.2.2.5 above, as proposed to them in this arrangement, the specific restricting arrangements being recorded in this paragraph 2.2.4 and further, in 2.2.5 below, with effect from the effective date, but subject to the arrival of the final date . . .". Provisions are then made for proxies, voting and ancillary matters, together with an election option to choose from three different scenario's. In the event of a failure to exercise an election, the default position would be that HS investors would "become entitled to be paid their pro rata shares of the full amount of their historical investments on the tenth anniversary of the final date and during the period from such acceptance until the tenth anniversary, HS investors having elected this Alternative I will receive interest calculated and payable at 4% per annum, monthly in arrears on the perceived value as from the final date, the capital being payable on the tenth anniversary as envisaged in paragraph 2.2.5.3 of the Arrangement". The "perceived value" meant "the value of the properties as same was perceived by Georgiou and the HS companies as at 24 March 2011 and for purposes of the initial Orthotouch agreement in the aggregate amount of some R2.6 billion . . .".

[14] There is a huge dispute as to how voting went for the approval of this scheme and what the percentage approval for it was on the part of HS investors. The applicant alleges that 3082 investors voted in favour of the scheme, representing 93.44% of the total of those who voted. The opposing respondents contend that it is improper to rely on this figure as those who voted only represent a fraction of all the investors. This is illustrated by the 46 pending actions against the Georgiou group, the matters that came before the Supreme Court of Appeal as referred to hereinlater and the intended class action by disgruntled investors, sanctioned by this court on 10 December 2019 in case no 80811/2014.

[15] Shortly before the class action was authorised, Zephan and Orthotouch were placed in business rescue on 7 November 2019. The applicant in the current application is the BRP of both these companies.

Despite the passage of some three years, the business rescue plans for these companies are not, in the words of the BRP, "complete"."

THE SEQUESTRATION APPLICATION

[15] A court may grant an application for the sequestration of a debtors estate if it is satisfied that the applicant has established a claim which entitles him under section 9(1) of the Insolvency Act of 1936 to apply for sequestration of the estate concerned, that the debtor committed an act of insolvency or is insolvent, and there is reason to believe that it will be to the advantage of the creditors of the debtor if the estate is sequestrated.² The onus for satisfying the court on these matters is throughout on the sequestrating creditor and the debtor has no onus to disprove any element of the claim. Section 10 of the Insolvency Act provides that if the court is of the opinion that prima facie the applicant has established against the debtor a claim which is of the kind mentioned under subsection 9(1) and the debtor has committed an act of insolvency or is insolvent and there is reason to believe that it will be to the advantage of creditors of the debtor of the estate that the estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.

[16] The respondent (and the Trust) both challenge the applicants right to apply for the sequestration of the estate. Their challenge is premised on the contention that the applicant's judgment against the estate (which is joint and several against the Trust and HSC22) no longer exists by reason of the provisions of clause 34 of the business rescue plan consented to by 99% of the debtors of HSC22. The argument is in my view without merit. The business

² See section 12(1) of the Insolvency Act

rescue proceedings (and any suspension of the claim against HSC22 or the *ex lege* cession of such a claim) do not, in my view, affect the validity of the judgment the applicant has against the estate of Mr Georgiou or the Trust. I am of the opinion that the applicant has satisfied the onus and is entitled to the provisional order of sequestration and on all the evidence before me I am of the opinion, that, *prima facie*, there is reason to believe that it will be to the advantage of creditors of the estate if it is provisionally sequestrated and that an order be granted in that connection.

[17] The papers in these proceedings so show a multitude of claims against the estate of the late Mr Georgiou, the companies he owned and/or managed and the Trust. The claims against the estate are substantial in monetary value and the dividend a sequestration order may achieve is argued to be rather small or insignificant at this stage but, proper inquiry by the trustee of the estate beyond what appears at face value to be available to creditors, might paint a different picture. To date hereof such an inquiry has not taken place at all. In the exercise of my discretion in this connection I am of the view that *prima facie* the requirements for a sequestration order have been satisfied and that would be to the advantage of creditors of the estate if it is provisionally sequestrated.

THE AUTHORITY OF THE TRUSTEES TO INTERVENE

[18] Counsel for the applicant submits that the remaining two trustees of the Trust do not have authority to bind the Trust in proceedings of this kind. I have considered the authorities referred to in this context and the provisions of the trust deed. In my view the present trustees cannot bind the Trust to

litigate as the Trust here does. To do so they need to observe the provisions of the Trust Deed which require that they appoint a third trustee when a vacancy occurs. They failed to fulfil that requirement. I agree with the reasoning in this context which appears from the judgment of Baqwa J in *Lesley and Price and Another v Morris Kaplan N.O. and Others* (unreported judgment of 14 June 2022) in the High Court of South Africa Gauteng Division, Pretoria case number 44937/2019.

[19] Notwithstanding my view in this regard, I will continue to consider the legal requirements and the factual allegations made by the Trust in support of its applications as if the two remaining trustees have the authority to represent the Trust.

INTERVENTION APPLICATIONS

[20] The Trust asserts its right to intervene in these proceedings under rule 12. At common law a person applying for leave to intervene had to show: (a) an interest in the suit or that its interests would probably be affected; and (b) a common cause of action or common ground with the party with whom a joinder is sought. Our common law also recognises that interests of convenience, equity, costs, and avoidance of a multiplicity of actions may justify intervention. Rule 12 recognises wider grounds for intervention. It reads as follows:

12 Intervention of persons as plaintiffs or defendants

Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may

upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.

[21] An intervening person under rule 12 no longer needs to show that it has a common cause of action or common ground with a party to the proceedings or a direct or substantial interest in the proceedings afoot. A direct and substantial interest is still a ground for intervention but not a *sine qua non*. The success of an application to intervene depends on whether the applicant has *locus standi* in the proceedings in which they sought leave to intervene. That in turn will be determined by whether the applicant had a direct and substantial interest in the proceedings concerned and whether they have such an interest will depend upon whether the order sought in the proceedings would affect their rights or interests adversely or had the potential to affect their rights or interests. In determining whether a person has standing in an application for intervention the court is required to assume that the allegations of fact made by that person in the case are true and correct.³

[22] Intervention in sequestration proceedings is neither a pure intervention nor substitution of applicants but a *sui generis* application from a procedural perspective. The Trust applies to intervene not as a creditor, but as a respondent or to oppose the application for sequestration. I therefore will

³ See Herbstein and Van Winsen *The Civil Practice of High Courts of South Africa*, Fifth Edition Vol 1 page 225; *Zulu and Others v Ethekwini Municipality and Others* 2014 (4) SA 590 CC at [16] and [21]

consider whether it has the right to do so or put differently “sufficient legal interest” to intervene.⁴

THE FACTS AND ALLEGATIONS THE TRUST RELIES ON FOR ITS INTERVENTION

[23] I will assume that the following facts and allegations are correct as stated by the Constitutional Court in *Zulu*⁵. The Trust alleges that the applicant has lost the right to seek an order for sequestration. It relies on clause 34 of the business rescue plan in support of this allegation. Clause 34 reads as follows:

“Consequences of adoption of the Plan

34. *Upon adoption of the Plan the following consequences will be of immediate and automatic effect:*

34.1. *The Companies will be released from all their debts to all Creditors.*

34.2. *All Claims and Related claims of Creditors will be deemed to have been ceded to the Proposer and the Companies will be released from the payment of any other claims or debts.*

34.3. *The holders of all Valid Claims as proved will be paid a cash amount equal to 5 cents for every Rand of the Valid Claim.*

34.4. *All the shares in the Companies will be transferred to the Proposer or its nominee.”*

⁴ See *Fullard v Fullard* 1979 (1) SA 368 (T); High Court Motion Procedure: A Practical Guide, Joffe, Neukircher, Fourie and Haupt par 4.3 page 4-14 to 4-16; *Levay and Another v Van Der Heever and Others* NNO 2018 (4) SA 473 (GJ); *Helderberg Laboratories CC and Others v Sola Technologies (Pty) Ltd* 2008 (2) SA 627 (C); *Maritz t/a Maritz & Kie Rekenmeesters v Walters and Another* 2002 (1) SA 689 (C)

⁵ (supra) at [16] and [21]

[24] The Trust alleges that clause 9.17 of the adopted business rescue plan defines the term “Related Claims” as follows:

“9.17 Related Claims mean all claims and rights of all Creditors against others that may be jointly and/or severally liable with either of the Companies to or in favour of any Creditor, such others to include inter alia any of the HS Companies, the N Georgiou Trust, Mr Nic Georgiou, Hans Klopper, Michael Georgiou, George Georgiou, Connie Myburg or any other person, natural or juristic and arising out of any agreements or judgments relating in any way to the Creditor’s investment in any of the HS Companies and entered into by either of the Companies or any Creditor prior to the Commencement of Business Rescue (whether pursuant to the initial syndication investment, any buy-back agreement, the Klopper 2011 BR Plan, the Orthotouch 2014 SOA, any High Court proceedings or High Court orders or otherwise and including any claims against any guarantor or surety or joint debtor.”

[25] The Trust alleges that the applicant was a creditor of Zephan and also had Related Claims against Mr Georgiou and the Trust. On the strength of the above quoted clauses the Trust alleges that those Related Claims no longer belong to the applicant since they were ceded to the Proposer of the business plan. In my view the moratorium and cession created by the business rescue plan do not suspend the claims of the applicant as creditor of the estate.

DO THE FACTS SET OUT AND ALLEGATIONS MADE BY THE TRUST AFFORD IT STANDING TO INTERVENE?

[26] The Trust relies on the last will and testament of Mr Georgiou and the trustees allege that the right to inherit not less than R200,000.00 from the estate accrued to the Trust. For purposes of the intervention application, I

must accept that to be so. It must then be considered whether the bequest constitute a right that would afford it *locus standi in judicio* to succeed in the intervention application. It is correct that the Trust is a beneficiary in the estate of Mr Georgiou. The nature of the interest of a beneficiary in both testate and intestate succession is a personal right against the executor to claim at some future date, being the finalisation of the estate accounts in terms of section 35 of the Administration of Estates Act⁶, payment, delivery, transfer or cession of the entitlement under the will or the account.⁷

[27] Section 34(1) of the Administration of Estates Act⁸ requires from the executor in the deceased estate to satisfy himself as to insolvency of the estate and, if the estate is found to be insolvent then or at any time before distribution under sub-section 35(12), he shall forthwith by notice in writing report the position of the estate to the creditors informing them that unless the majority in number and value of the creditors instructing in writing within a period specified in the notice to surrender the estate under the Insolvency Act, he will proceed to realise the assets in the estate in accordance with the provisions of sub-section 35(2). The provisions of section 34 do not exclude

⁶ 66 of 1965

⁷ See Hofmeyer & Paleker, the Law of Succession in South Africa, Third Edition, page 238 par 1.5; *Estate Smith v Estate Follett* 1942 AD 364 at 383; *CIR v Estate Crewe* 1943 AD 656 at 692; *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A) at 364G-H; *Goosen v Wiehahn* 2020 (2) SA 341 (SCA) at par 11 and 12

⁸ 66 of 1965

the right of a creditor to apply for the compulsory sequestration of a deceased estate⁹.

[28] Under the circumstances the Trust does not have the right to the assets of the estate or a “sufficient legal interest” to afford it *locus standi in judicio* to succeed with the application for intervention. The Trust and the respondent do not have standing to apply for the relief they seek in these proceedings. The application for intervention, postponement of the sequestration proceedings and the suspension thereof claimed in paragraphs 1, 2 and 3 of the notice of motion must, therefore, fail.

THE ORDER

Under the circumstances, I make the following order:

1. The applications for the relief sought in terms of paragraphs 1, 2 and 3 of the notice of motion of the Trustees of the N Georgiou Trust dated 23 January 2024, are dismissed with costs.
2. The counter application of the respondent is dismissed.
3. The estate of the late Nicolas Georgiou is provisionally sequestrated, and the assets of the estate are placed in the hand of the Master of the High Court.

⁹ See section 35(13); *Paarl Ward of Executors v Estate Ansell* 1916 CPD 8; *Hassim v Mohideem* 1930 TPD 652; *Lockhat Bros & Co Ltd v Joffe's Estate* 1937 EDL 2; Hockly's Law of Insolvency Winding-Up & Business Rescue Tenth Edition by Smith, Van Der Linde and Calitz, page 269 par 21.5

4. The respondent is called upon to advance reasons, if any, why the Court should not order final sequestration of the said estate on 29 April 2024 at 10h00 or as soon thereafter as the matter may be heard.
5. Costs of the application shall be costs in the sequestration.



H F JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 5th February 2024.

APPEARANCES

Applicant's counsel:	Adv L Bolt
Applicants' attorneys:	Le Grange Attorneys
Respondent's counsel:	Adv
Respondent's attorneys:	Kyriacou Incorporated
Intervening Party counsel:	Adv D Goodenough
Intervening Party attorneys:	Mr Stefan Redelinghuys