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**REPUBLIC OF SOUTH AFRICA
KWAZULU-NATAL HIGH COURTS
IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 12504/2022P

ROBERT ANTHONY LE SUEUR

APPLICANT

and

RODERICK ROBERT STANTON

RESPONDENT

IDENTITY NO. 6[...]

DATE OF BIRTH: 7 SEPTEMBER 1969

MARRIED OUT OF COMMUNITY OF PROPERTY TO

LINDA-JANE STANTON

IDENTITY NO: 6[...]

JUDGMENT

ANNANDALE AJ:

[1] This application served before me as an opposed motion on the extended return date of an order provisionally sequestrating the respondent's estate. Having heard argument, I reserved judgment and extended the rule until judgment was handed down.

[2] When this case was allocated to me for hearing, I advised the parties by email via my registrar that as counsel I am involved in litigation which includes

allegations that transactions to which the respondent was a party were improper or simulated, and that on 2 August 2023 whilst presiding in motion court I had granted default judgment against various parties including the respondent in case 9788/2023P. I requested the parties to indicate via email by 10 am on the day before I was due to hear the matter, whether they were of the view that either of the matters canvassed created in their clients' minds an apprehension of bias such that the application should be heard by a different judge, or whether the default judgment which I had granted needed to be addressed either by way of supplementary affidavits or supplementary heads of argument and, if so, when these would be filed.

[3] Both parties responded that the disclosures did not create any perception of bias on the part of their clients and that the default judgment did not need to be addressed either by way of supplementary affidavits or heads of argument. In addition, the respondent's attorneys placed on record that the respondent had consulted with me as counsel in late 2020 for advice on matters relating to one of the developments in which his company, Rokwil Civils (Pty) Ltd (Rokwil) had been involved.

[4] At the start of the hearing I requested both legal representatives to confirm the positions conveyed on email which they did. I also raised with counsel for the applicant whether the fact that I had consulted with the respondent changed his client's position regarding the appropriateness or otherwise of my hearing the application. He advised that it did not.

[5] I consequently dealt with the application. During argument, Mr Pedersen, who appeared for the respondent made oral applications for leave to file a further affidavit and for the postponement of the hearing. I heard submissions on both interlocutory applications but directed Mr Pedersen also to address me on the merits as I was not disposed to deal with the matter piecemeal and wanted to be able to give judgment on the merits without delay if I refused the interlocutory applications. I deal with both

of these during the course of this judgment rather than at the outset, as the applications and my decisions on them need to be understood in context.

Requirements for a final sequestration order

[6] The prerequisite for a final order of sequestration are prescribed in section 12(1) of the Insolvency Act 24 of 1936, as follows: –

‘12. Final sequestration or dismissal of petition for sequestration.—

(1) If 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 nine¹; 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.’

[7] The first two of these three conjunctive requirements are not in dispute. The applicant has a high court judgment against the respondent in an amount exceeding R103 million for which he holds no security. The respondent disputed and resisted the applicant’s claim all the way to the Constitutional Court, but his attempts were in vain. The Sherriff rendered a *nulla bona* return in respect of that judgment which constitutes an act of insolvency contemplated by section 8(b) of the Insolvency Act.

¹ A liquidated claim of not less than R 100.

The respondent is also factually insolvent. He states he has no assets, although he has not put up any bank statements or tax returns in support of that statement. In addition to the judgment in favour of the applicant, there are three other judgments against the respondent, which exceed in aggregate R36 million, excluding the judgment granted at the instance of Investec Bank referred to at the outset of this judgment. All these debts arose because the respondent stood surety for Rokwil, which has gone into liquidation. The respondent has additional contingent liabilities of between R 242 and R 342 million arising out of other suretyships which have not yet been called up.

[8] The respondent asserts that the sequestration of his estate will not be to the advantage of creditors because he has no assets with which to satisfy any of the judgments.

[9] The only issue is therefore whether there is reason to believe that the sequestration of the respondent's estate will be to the advantage of creditors.

[10] The applicant bears the onus in this regard.² Discharging that onus does not require proof on a balance of probabilities that advantage will accrue, simply that there is reason to believe that an advantage will accrue, which is a considerably lower threshold.³

[11] In *Stratford and others v Investec Bank Ltd and others* 2015 (3) SA 1 (CC) para 43, the Constitutional Court reaffirmed the principle of long standing originally articulated in *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559 that:

‘..the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a

² *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) at 112C-D.

³ *Amod v Khan* 1947(2) SA 432 (N) at 437 – 438 *Industrial Development Corporation of South Africa Ltd v Burger and Another, InRe; Industrial Development Corporation of South Africa Ltd v Burger and Another* (10679/13 & 10680/13) [2014] ZAWCHC 23 (4 March 2014) para 19

prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the [Insolvency Act] some may be revealed or recovered for the benefits of creditors, that is sufficient.’

[12] In addition, as was stated in the oft endorsed *dictum* in *Chenille Industries v Vorster* 1953 (2) SA 691 (O) at p 699 F – G :-

‘Apart from the direct financial advantage resulting from sequestration, the Court must have regard, *inter alia*, to the superior legal machinery which creditors acquire by sequestration, the right to control the collection, custody, and disposal of all the assets through their nominee, the trustee, the right to control similarly the sale of the assets, the certainty that the insolvent cannot contract further debts and administer the estate, and the assurance that all creditors will be accorded the treatment prescribed by law in the division of the proceeds.’

[13] It is convenient whilst considering matters of principle to deal with the submissions made by the respondent on the basis of the well-established requirement that sequestration must be to the advantage of all creditors, or at least the general body of creditors.⁴ The respondent argues that the fact that only the applicant has applied to sequester his estate whilst other creditors have only sought money judgments requires me to draw the inference that the other creditors do not believe that the respondent’s sequestration will be to their advantage.

⁴ *Lawclaims (Pty) Ltd v Rea Shipping Co* SA 1979 (4) SA 745 (N) at 755H.

[14] Inferences can only properly be drawn in civil proceedings when they are both consistent with all the facts and where the inference sought to be drawn is the more natural or plausible conclusion than others that could be drawn from the same facts.⁵ Here, there could be any number of reasons why the respondent's other creditors have not applied for his sequestration, including the fact that the present application is pending. Reaching the conclusion contended for by the respondent would therefore be engaging in speculation, not inferential reasoning.

Applicant's claimed grounds of advantage to creditors and respondent's stance

[15] The applicant seeks to demonstrate that the sequestration of the respondent's estate will be to the advantage of creditors as contemplated in three respects.

[16] First, relying on *Chenille Industries*, the applicant submits that the machinery of sequestration is to the benefit of the general body of creditors. It ensures a fair distribution between them and avoids piecemeal execution which could result in a preference of one creditor over another. That machinery is however of no use without the prospect of a pecuniary benefit to the creditors and its mere existence does not create advantage to creditors.

[17] Second, the sequestration of the respondent's estate would protect the commercial public, as it would prohibit the respondent from continuing to act as a director of any company which would be to the advantage of creditors generally given the respondent's past conduct. This was not a basis upon which the applicant sought to demonstrate advantage to creditors in its founding affidavit. The argument was instead advanced in response to submission in the heads of argument filed on the respondent's behalf, that sequestration would be personally prejudicial as it would prevent him from practicing as a chartered accountant and preclude him from

⁵ *Govan v Skidmore* 1952 (1) SA 732 (N) at 734 C- D, approved in *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614 H – 615 C.

his 'line of business as director of companies in large-scale property, development, construction, industry, and project management.'

[18] There are two reasons why it would not be appropriate to regard this as a ground upon which advantage to creditors could be demonstrated. First, the applicant did not rely on this ground originally and so the respondent was not given an opportunity to deal with it in answer. Second, the respondent's complaints regarding this kind of prejudice which would result from his sequestration would be irrelevant if I were to be satisfied that there was reason to believe that his sequestration would be to the advantage of creditors. The complaints are akin to a defendant arguing that judgment should not be granted against them as they did not have sufficient assets to satisfy the judgment even though the plaintiff had proved their claim.

[19] The third and main ground relied on by the applicant is that there are reasons to believe that an enquiry under the Insolvency Act may uncover assets that can be realised for the benefit of creditors. These reasons are based primarily on what was revealed by an audit and review conducted in 2018 at the behest of the applicant on the books of account and bank statements of Rokwil (the 2018 investigation) and the respondent's explanations regarding its findings. In addition, but to a much lesser extent, the applicant relies on matter in a report filed by the respondent's provisional trustees.

[20] The respondent disputes that the sequestration of his estate will be to the advantage of creditors. He asserts that an enquiry will not reveal anything more than the applicant already knows by virtue of the 2018 investigation. If that investigation didn't uncover any assets, argues the respondent, it is because they simply don't exist. The respondent contends that to the extent an enquiry is warranted, this can be achieved by means short of sequestering him, namely: an enquiry in the Rokwil liquidation or referring this application for the hearing of oral evidence or by adjourning the sequestration application and requiring the respondent's provisional

trustees to conduct an enquiry and deliver a report to court on advantage to creditors.

[21] To assess these competing contentions, it is necessary first to consider what emerged from the 2018 investigation and the respondent's explanations for its findings and then the aspects of the provisional trustees' report upon which the applicant relies.

Flows of funds revealed in the 2018 investigation

[22] The 2018 investigation was conducted for the purpose of establishing the value created in Rokwil and the financial benefits obtained by the respondent from that company. It occurred with the consent and co-operation of the respondent and Rokwil and was performed over a period of eight months by three accountants who were given access to the bank account statements of the respondent and his wife.

[23] The 2018 investigation revealed significant flows of funds between the bank accounts of Rokwil and the respondent and his spouse. The flows of funds are not disputed, what is in issue is whether they have been satisfactorily explained or constitute a basis upon which there is reason to believe that the respondent's sequestration would be to the advantage of creditors.

[24] The respondent drew more than R182 million from Rokwil during the period February 2013 to October 2017. Based on the 2018 investigation, the applicant submits that R 63.8 million of this was used to fund the respondent's lifestyle. The respondent denies that he received in excess of R63 million to fund his lifestyle but gives no details of what became of the R63.8 million.

[25] During part of the period referred to in the immediately preceding paragraph, namely between February 2016 to October 2017, R 108 million was transferred from Rokwil to the respondent's personal bank account, and a little over R74 million was transferred back to Rokwil. I refer to the difference between the two sums as the R

34 million differential. The applicant submits that as the respondent obtained the benefit of the R 34 million differential over those 21 months it is therefore unlikely that he has no assets. The respondent denies this but has not explained what became of the R 34 million differential.

[26] Over R194 million was transferred from Rokwil to the personal bank accounts of the respondent's spouse between February 2016 and October 2017. During the same period, a little over R192 million was transferred from the personal bank accounts of the respondent's spouse to Rokwil. The use to which the R 2 million differential was put is not explained by the respondent.

[27] The applicant submits that in the light of the above, it is unlikely that the respondent has no assets, and the flow of funds cries out for investigation, particularly what became of the R 63.8 million and the R 34 million differential. According to the applicant that clamour increased in volume with the respondent's explanations in his answering affidavit, which are labelled as questionable and themselves warranting investigation.

The respondent's explanations of the flow of funds

[28] The respondent stated that there was nothing untoward about the flow of funds, which were simply movement of monies between four accounts: Rokwil, Keystone Trust and two Investec market link accounts in his name. As will become apparent, the respondent's wife's account was also involved.

[29] In relation to flows to the Investec market link accounts, the respondent stated that sometimes when Rokwil received funds they would be paid into the market link accounts because the respondent was extremely concerned when dealing with large sums of monies that the day-to-day bank account of Rokwil could be hacked if he left all his 'proverbial eggs in one basket'. To avert this, surplus funds not immediately required by Rokwil would be left in the Investec accounts rather than paid into

Rokwil's day to day bank accounts. Quite why the respondent's Investec accounts would be any less susceptible to hacking than those of Rokwil is not explained.

[30] The respondent has not adduced the trust deed of the Keystone Trust. He does however disclose that he and his family are the beneficiaries and that it was established 'for both asset protection and estate planning'. It is not without significance that the reason for the establishment of the trust is provided in the context of the respondent explaining that he does not have any movable property registered in his name, and that when he started out in business, having previously qualified as a chartered accountant, he was aware from his education and based on legal advice from his attorneys that there were no certainties in business.

[31] The respondent states that the trust sold 'part of' its shares in Keystone Park CC for R 15 million. What other assets the trust has or how it acquired them is not disclosed and the respondent has not put up any financial statements of the trust.

[32] Whilst stressing that the purchase price of the shares was paid into the trust's account because it was the true owner of the shares, the respondent states: 'I chose to keep the money to assist in the liquidity of (Rokwil)'. That suggests a measure of unilateral control of the trust as the respondent's alter ego.

[33] The respondent's explanation of the way in which he gave effect to his choice of how the funds should be utilised is curious:-

'..when money was needed by Rokwil, it would be loaned into my wife Linda's account, to then "loan" same to Rokwil. This money would then be utilised for company expenses. As soon as money was received back into Rokwil's account, such would again be reversed paid back to Linda's account, which would be given back to the Keystone Trust.'

[34] The respondent does not explain why his wife's account was interposed in these flows of funds if they were loans between Rokwil and the trust. There is no indication on the papers that the respondent's wife had anything to do with the business of Rokwil. In addition, the respondent has not put up any of the bank statements of the trust which show the flow of funds as he alleges.

The provisional trustees' report

[35] The provisional trustees filed a report on 13 April 2023 pursuant to paragraph 3.1 of the provisional sequestration order which directed them to report to the court prior to the return date. I deal with the implications of that portion of the order later in this judgment.

[36] The provisional trustees' report stressed that their powers were very limited and obtaining information from the respondent had been impossible because he had been totally uncooperative. Annexed to the report are a series of emails and WhatsApp messages evidencing attempts to contact the respondent and his wife and obtain information from them, including the mandatory statement of affairs and personal particulars. According to the provisional trustees, these efforts were met with silence.

The provisional trustees were in no position to express a view on advantage to creditors. The report does however detail such additional information as the provisional trustees were able to obtain through searches of the companies and deeds offices.

[37] This information included the fact that the respondent is a director or member of fourteen different corporate entities in which he may have some financial interest as a shareholder or as a creditor with claims on loan accounts. The respondent did not mention these in his opposing affidavit, but the applicant does not seek to make anything of that, or of the existence of these interests as he regards them as worthless given the collapse of Rokwil and other companies associated with it.

[38] The report details that the respondent and his wife were married in 1996 and both declared the nett value of their estates as zero in their antenuptial contract. The respondent's wife has not been an active director of any company since 2018. Whilst the respondent has no immovable properties registered in his name, his wife owns three: one in Kloof, another in Everton and a third in Assegai. Only one of the properties is subject to a mortgage bond, which is in the sum of R 3.9 million and in favour of Investec. The respondent and his wife reside in the unencumbered property in Kloof, which is described in the report as 'a palatial home in an upmarket area.' The provisional trustees conducted a Google search which confirmed that the improvements to this property are substantial and the grounds large. The respondent's wife has not applied for the release of any asset to which she may lay claim, even though the immovable properties vest in the insolvent estate until released by the trustees in terms of section 21 of the Insolvency Act.

[39] The applicant submitted that it might be that some of the funds received by the respondent and his wife from Rokwil were used to acquire the immovable properties registered in his wife's name.

[40] In heads of argument filed on his behalf, the respondent takes issue with the report insofar as it records that he and his wife had been uncooperative. The heads of argument 'record his dispute with the contents' of the report, without any further particularity. The respondent did not file an affidavit dealing with the aspects of the report which he regards as incorrect.

[41] During the hearing, Mr Pedersen attempted to make several submissions regarding why the report was incorrect when it stated that his client and his wife had been uncooperative and sought to hand to the court the respondent's statement of affairs which he submitted had been filed after the report was furnished. He also sought to advance arguments regarding the knowledge he suggests one of the provisional trustees must have regarding the respondent's affairs and why his sequestration would not be to the advantage of creditors, by virtue of that provisional

trustee's employment with the firm 'handling a number of matters interrelated with the respondent'. The difficulty with all of this is that there was nothing on the papers to support these submissions, which therefore amounted to attempts to give evidence from the bar.

[42] When confronted with this obstacle, Mr Pedersen submitted that the rules make no provision for filing further affidavits or other means of responding to the trustees' report, so it was sufficient for the respondent merely to record his disagreement and argue these matters. That submission is not sound in law. I engaged Mr Pedersen on the principle that the court has a discretion to allow the filing of further affidavits⁶ and would tend to allow a further affidavit by a respondent if they wanted to deal with new matter arising in the replying affidavit.⁷ Here, the new matter arises not from the replying affidavit but from the appointment of a provisional trustee with particular knowledge and the provisional trustees' report, but by parity of reasoning, the respondent could have applied to file a further affidavit dealing with that report. The court would have been inclined to allow such an affidavit to be filed, had application been made timeously, the purpose of the affidavit explained, and its content relevant to a determination of the issues.

[43] Mr Pedersen thereupon applied for an adjournment of the hearing and for leave to file a further affidavit. He stated that the purpose of the further affidavit would be to explain why the respondent disputed the provisional trustees' assertions that he and his wife had been uncooperative, and to put up the statement of affairs that had been submitted to the provisional trustees after their report was filed.

[44] The respondent's case has been unwavering that he has no assets registered in his name. The statement of affairs is therefore unlikely to be helpful in determining this application. I do not intend to attach any weight to the provisional trustees' assertions regarding the respondent's lack of cooperation in determining whether

⁶ *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA) paras 10 – 13.

⁷ *Rens v Gutman NO* [2002] 4 All SA 30 (C) 36.

there is reason to believe that the sequestration of his estate would be to the advantage of creditors. The affidavit the respondent envisages filing would therefore take the matter no further. In any event, the respondent has been in possession of the report since 13 April 2023, and should have made application to file any further affidavits long before the date on which the matter was set down. That would have avoided the prejudice necessarily occasioned by adjourning the matter on the scheduled date of an opposed hearing. I therefore refuse the application to file a further affidavit and will determine whether there is reason to believe that sequestration of the respondent's estate will be to the advantage of creditors on the papers as they stand.

Analysis

[45] There are a number of matters which could be usefully investigated.

[46] The respondent has failed to explain what became of the admitted R 34 million differential or the R 2 million that flowed from Rokwil to his wife. The respondent does not engage with the assertion based on the 2018 investigation that he received R 63.8 million to fund his lifestyle between February 2013 and October 2017 beyond proffering a bare denial. These sums are substantial and the use to which the funds were put is not explained. It is in my view a prospect not too remote that investigation into what became of these monies may reveal assets which can be recovered for the benefit of creditors.

[47] The respondent's explanation regarding the transfers to and from his Investec accounts due to fear of hacking is unconvincing. No reason is suggested why the Investec accounts were any less susceptible to being hacked than those of Rokwil. The reasons for the transfers and what became of the funds also appear worthy of investigation.

[48] The involvement of the respondent's wife in what are said to be loans by the Keystone Trust to Rokwil is unexplained and does not make sense on the

respondent's version regarding the nature of the transactions. The role of the Keystone Trust and its financial position also raise questions, including whether it has been used as the respondent's alter ego or as an illegitimate means of placing assets which are actually his own beyond the reach of creditors. The respondent's failure to produce any documentation regarding the Keystone Trust or the transactions in which it was involved underlines the need for an investigation.

[49] The means by which the respondent's wife was able to acquire significant immovable properties is not disclosed and she has not sought their release. Were she to do so she would be required to prove that they were in fact her separate property and that the transactions in terms of which she acquired them were not simulated or designed to defeat the rights of creditors in the event of her husband's insolvency.⁸ In these circumstances, the submission by counsel for the applicant that investigation into the source of the funds to purchase these properties may reveal that they were acquired with some of the funds received by the respondent from Rokwil is not at all far-fetched.

[50] All these matters, together with the nature of the flows of funds, their significant magnitude and the scant or total lack of information provided by the respondent warrant investigation and satisfy me that there is a not too remote a prospect of the recovery of assets through a process of an enquiry.⁹

[51] It is of course difficult to assess in circumstances like the present what dividend would result if assets were recovered. There is no absolute rule that sequestration will not be to the advantage of creditors if the likely dividend is below a certain number of cents in the rand. The claims against the respondent are significant, but so are the funds he and his wife received. If recovery were to encompass the R 63 million received by the respondent and the R 2 million retained by his wife, that would yield a dividend of between 13.5 and 17 cents in the rand

⁸ *Kilburn v Estate Kilburn* 1931 AD 501 at 507- 508.

⁹ *Commissioner SARS v Hawker Air Services (Pty) Ltd* and others 2006 (4) SA 292 (SCA) para 29.

depending on whether the respondent's contingent liabilities are at the top or bottom of the range he states.

[52] It follows that there is reason to believe that the sequestration of the respondent's estate will be to the advantage of creditors as envisaged in section 12(1)(c) of the Insolvency Act, and that I should grant a final order, unless the respondent's contentions that there are other satisfactory means of having an enquiry which are preferable to sequestration have merit. I therefore deal with each of the three alternatives he proposes

An enquiry in the Rokwil liquidation

[53] The respondent's first proposal is that there could be interrogation proceedings in the winding up of Rokwil. Section 415(1) of the Companies Act 61 of 1973 permits interrogations 'concerning all matters relating to the company, or its business or affairs... and concerning any property belonging to the company.' Section 417 of the 1973 Companies Act is to similar effect insofar as the ambit of an enquiry is concerned, permitting interrogation 'concerning the trade, dealings affairs and property of the company'. Such proceedings could not investigate the matters highlighted in this judgment as any interrogation in the Rokwil liquidation would perforce focus on Rokwil. It would be an abuse for the focus to be diverted to the respondent. In any event, any information obtained during such an enquiry is not evidence, and if obtained from third parties would not be admissible against the respondent.¹⁰

[54] The possibility that an enquiry could be held in the Rokwil liquidation is therefore no reason to refuse a final order of sequestration for all the reasons articulated by Rogers J as follows in *Industrial Development Corporation of South Africa Ltd v Burger and Another* (10679/13 & 10680/13) [2014] ZAWCHC 23 (4 March 2014):-

¹⁰ *Cordiant Trading CC v Daimler Chrysler Financial Services* 2005 (4) SA 389 (DCLD) at 397 D -F.

[13] I do not think that the possibility of investigation in other liquidations and sequestrations is a reason not to make available to creditors the investigative advantages which would flow from a sequestration of the personal estates of the Burgers. The investigation which can permissibly be conducted in relation to any particular liquidation or sequestration is circumscribed. It cannot be taken for granted that all the dealings of the Burgers in their individual capacities, including transactions between themselves and their spouses and between themselves and family trusts, could permissibly be investigated in (for example) the liquidation of SBT. Moreover, and even if the investigations legitimately conducted in other liquidations and sequestrations could uncover irregular dealings of the Burgers in their personal capacities, only a trustee in the insolvent estates of the Burgers could exercise certain resultant remedies such as those pertaining to impeachable transactions.'

Reference to oral evidence

[55] The second alternative proposed by the respondent is that I refer this application to oral evidence to enable cross-examination of witnesses and production of documents. In my view such an order would not be appropriate. A reference to oral evidence is competent where there is a genuine dispute of fact in motion proceedings. An enquiry into whether there is reason to believe that sequestration will be to the advantage of creditors calls for a value judgement. It is not an inquiry into objective facts, such as the whether the debtor has committed an act of insolvency. Consequently:-

'Where the advantage to creditors is said to lie in the pecuniary benefit which may be yielded by investigation, the court, in making its value judgement, does not necessarily

need to resolve disputed allegations of impropriety on the part of the debtor. The very fact that there are allegations of impropriety is a relevant consideration, even though they may be disputed. The court cannot be expected, in order to determine whether there is reason to believe that it will be to the advantage of creditors to grant a final sequestration order, to investigate and determine the very matters which the petitioning creditor says should be investigated by way of the machinery provided by the *Insolvency Act*. Where a court grants a final sequestration order because of the benefits which might flow from future investigation, the possibility always exists that in the event the investigation will not bear fruit. That does not mean that the court, when it granted the final order, erred in being satisfied that there was reason to believe that sequestration would be to the advantage of creditors.’¹¹

Enquiry by the provisional trustees

[56] The respondent’s third proposal is that these proceedings be adjourned to allow his provisional trustees to conduct an enquiry and report to the court on advantage to creditors before a decision is made on the grant of a final order. This rather unusual suggestion has its origins in the inclusion of paragraph 3.1 of the provisional sequestration order which reads:-

‘3.1 The trustee is directed to report to Court prior to the return date on whether there is an advantage to creditors.’

[57] Mr Pedersen submitted that paragraph 3.1 of the provisional sequestration order both requires and empowers the provisional trustees to conduct an enquiry,

¹¹ *Industrial Development Corporation op cit* paragraph 58, para 22.

including subpoenaing documents and witnesses if necessary and then to report on advantage to creditors, which they have failed to do. Their report was not preceded by an enquiry and expressed no view on advantage to creditors. Mr Pedersen argued that the order had to be complied with before a final decision on the application could be taken and this meant that the application had to be adjourned for the provisional trustees to conduct an enquiry and file a report. Evaluation of these submissions requires me to interpret paragraph 3.1 of the provisional sequestration order.

[58] Mr Pedersen also informed me from the bar that there was to be ‘an enquiry’ by the provisional trustees on 24 August 2023, although he was not sure what form the ‘enquiry’ would take and accepted it might only be a meeting. Mr Pedersen moved for the adjournment of the application pending the finalisation of that enquiry, submitting that the application should be re-enrolled for further argument and final decision only once the provisional trustees had filed a report following the enquiry or meeting.

[59] As I understood his argument, the adjournment was sought regardless of my decision on the interpretation of paragraph 3.1 of the provisional sequestration order. I accordingly deal with the application for a postponement on both bases.

Interpretation of paragraph 3.1 of the provisional sequestration order

[60] The language of paragraph 3.1 of the provisional sequestration order must be interpreted purposively and in the context of the contentions in the litigation and the scheme of the Insolvency Act.

[61] The provisional sequestration order was handed down immediately after argument had been heard on an opposed basis. No judgment was delivered which can provide further context. However, given the respondent’s contentions in his opposing affidavit, the report was presumably intended to assist the court seized with the matter on the return date in dealing with the question of advantage to creditors.

[62] Although there is no statutory duty on a provisional trustee to carry out an investigation and report, such reports are unobjectionable if a provisional trustee obtains information which has a bearing upon the various matters arising for determination on the return day.¹² The extent to which they can be of assistance is however constrained by the limited powers of provisional trustees to obtain information in the light of various provisions of the Insolvency Act, and the fact that the duty to investigate and report in accordance with section 80 of the Insolvency Act rests on final and not provisional trustees. The court which granted the order would have been alive to these limitations.

[63] Turning to the language, the order does not direct the trustees to conduct an enquiry, simply to report. That is in my view significant, as provisional trustees have no independent power to conduct enquiries.

[64] Sections 64 to 66 of the Insolvency Act provide for enquiries at meetings of creditors and create the means whereby the attendance of persons to be interrogated can be secured and enforced. Such meetings are only convened after the grant of final orders of sequestration.¹³ Those sections could not therefore empower the provisional trustees to conduct the enquiry the respondent contends was envisaged by paragraph 3.1 of the order.

[65] Provisional trustees can apply to the Master for permission to invoke section 152 of the Insolvency Act for the purpose of examining persons before the Master or a member of the public service designated by the Master.¹⁴ This process would need to be funded by someone, something for which paragraph 1.3 of the order makes no provision and it would take time both to seek and obtain approval and to hold the enquiry. The return date of the rule issued on 26 January 2023 was 13 April 2023, it is highly unlikely that an enquiry under section 152 could have been approved and

¹² Cf *Smith and Walton (SA) (Pty) Ltd v Holt* 1961 (4) SA 157 (D) at 162.

¹³ Section 40(1) of the Insolvency Act.

¹⁴ *Appleson v The Master* 1951 (3) SA 141 (T).

conducted before the return date. An examination under section 152 of the Insolvency Act is by the Master or his designate, not by the provisional trustee and if the Master were to refuse permission, the examination could be not held. In addition, section 152 examinations are private, and the information obtained cannot ordinarily be shared with the public,¹⁵ and could not therefore properly be put before the court in a report unless additional permission to disclose the information had been obtained. So section 152 of the Insolvency Act also accords the provisional trustees no power to do what the respondent submits was required by paragraph 3.1 of the order.

[66] Mr Pedersen submitted that despite these provisions of the Insolvency Act paragraph 3.1 of the order must be interpreted as conferring the power to conduct enquiries on the provisional trustees by implication. That would be a very far-reaching implication indeed. It would run counter to the whole scheme of the Insolvency Act, and it is not apparent where a court would source the power to make such an order even if it were so minded. Neither of the representatives appearing for the parties could identify a suitable empowering provision.

[67] I consequently find that paragraph 3.1 of the provisional sequestration order cannot be interpreted as the respondent contends. The effect of this finding is that the respondent's submission that an enquiry could be held by the trustees as an alternative to the final sequestration of his estate cannot be upheld, and the application for an adjournment on the basis of alleged non-compliance with paragraph 3.1 must be dismissed.

Adjournment due to meeting scheduled with provisional trustees

[68] I turn then to the respondent's application for an adjournment due to the meeting with the provisional trustees scheduled for 24 August 2023. It is clear from the scheme of the Insolvency Act outlined above that what is scheduled is not an enquiry but a meeting.

¹⁵ *Simmons, NO v Gilbert Hamer & Co Ltd* 1962 (2) SA 487 (D) at 496 E -F.

[69] I enquired of Mr Pedersen what would be disclosed at such a meeting which would likely affect the outcome of the application. He submitted that the respondent would answer whatever questions the provisional trustees wished to ask him at the meeting, and also wanted to give details to the provisional trustees of what he called 'avoidable debts' in the region of R600 million, in respect of his potential suretyship exposure, which could be avoided if he were not sequestered.

[70] There are questions regarding the R 34 million differential and the R 63 million alleged benefit the respondent derived from Rokwil as well as the R 2 million which his wife retained, which were raised pertinently on the founding papers and which the respondent chose not to answer when he should have done. The consequences of that election cannot be undone at the eleventh hour by the notional possibility of what might happen at the meeting. If anything, proffering an explanation to the provisional trustees which was not proffered on oath to the court could reflect adversely on the respondent's credibility.

[71] The extent of the respondent's suretyship exposure is already apparent from the papers. There is nothing to indicate that the creditors in whose favour those suretyships have been given will not act on them if the respondent is not sequestered. In any event, if assets or impeachable transactions are discovered, any execution or recovery will benefit the holders of the suretyships.

[72] I therefore find that neither of the reasons advanced for the postponement warrant deferring making a final decision on this application on the papers and the application for a postponement is refused.

[73] On the papers, for the reasons set out above, I am satisfied that there is reason to believe that the sequestration of the respondent's state will be to the advantage of creditors. It is not in dispute that the relevant statutory formalities have

all been complied with both in respect of the application and service of the provisional order.

Order

[74] I consequently grant the following order :-

1. The respondent's application to file a further affidavit is refused.
2. The respondent's application for a postponement is refused.
3. The rule nisi granted on 26 January 2023 is confirmed.

A.M. ANNANDALE, AJ

JUDGMENT RESERVED: 15 AUGUST 2023

JUDGMENT HANDED DOWN: 6 OCTOBER 2023

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