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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON LOCAL COURT)**

CASE NO: 1440/2023

- 1. REPORTABLE: YES / NO**
- 2. OF INTEREST TO OTHER JUDGES: YES / NO**
- 3. REVISED.**

In the matter between:

MILLICENT MOLOSE N.O.	First Applicant
ANDISWA FITSHANE N.O.	Second Applicant
THANDISWA XHANTI N.O.	Third Applicant
LIHLE MININYE	Fourth Applicant
MIRRIAM PIKANI N.O.	Fifth Applicant
YANDISA FENI N.O.	Sixth Applicant
NOLUKHO NKAMPA N.O.	Seventh Applicant
SIVE MDENI N.O.	Eight Applicant

NO-OMA MNYIBASHE N.O.

Ninth Applicant

ANALO DOVALA N.O.

Tenth Applicant

OLWETHU BALIKHULU N.O.

Eleventh Applicant

and

ZACK MACK MICHAEL NONXUBA

First Respondent

THE LEGAL PRACTICE COUNCIL

Second Respondent

**EXECUTIVE COUNCIL FOR HEALTH,
EASTERN CAPE**

Third Respondent

CASE NO: 1441/2023

In the matter between:

MILLICENT MOLOSE N.O.

First Applicant

ANDISWA FITSHANE N.O.

Second Applicant

THANDISWA XHANTI N.O.

Third Applicant

LIHLE MININYE

Fourth Applicant

MIRRIAM PIKANI N.O.

Fifth Applicant

YANDISA FENI N.O.	Sixth Applicant
NOLUKHO NKAMPA N.O.	Seventh Applicant
SIVE MDENI N.O.	Eight Applicant
NO-OMA MNYIBASHE N.O.	Ninth Applicant
ANALO DOVALA N.O.	Tenth Applicant
OLWETHU BALIKHULU N.O.	Eleventh Applicant

and

ALICIA NOVELANO NONXUBA	First Respondent
THE LEGAL PRACTICE COUNCIL	Second Respondent
EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE	Third Respondent

Rabkin-Naicker J

JUDGMENT

POTGIETER J

Introduction

[1] These are opposed urgent applications for the provisional sequestration of the respective estates of spouses who are married out of community of property. The application in respect of the husband, Mr Nonxuba, is brought under case number EL 1440/2023 and in respect of the wife, Ms Nonxuba, under case number 1441/2023. The issues in both applications are virtually identical and they were consequently heard together. This judgement accordingly deals with both applications.

The parties

[2] The spouses are the respective first respondents in each application. The second and third respondents in both applications are the Legal Practice Council ('LPC') and the Executive Council for Health: Eastern Cape ('the Health Department') respectively. The latter respondents have not entered the matters (save for a report submitted by the LPC in each case) which is being opposed by the respective first respondents ('the respondents') in both matters.

[3] The original applicants in both applications were identical but this has since changed. They are the parents or guardians of minor children who all suffered severe bodily harm due to the negligent medical treatment administered to them by the employees or agents of the Health Department. Five of the original applicants, namely second, fourth, seventh, ninth and tenth applicants, have since terminated the mandate of the applicants' attorneys of record on the basis of averred untoward conduct on the part of the attorneys. They no longer participate in the proceedings. The 11th applicant acted on behalf of her minor child, T[....], who has unfortunately passed away after the applications were launched. The respondents contend, correctly in my view, that the 11th applicant no longer enjoys *locus standi* to bring the applications, currently leaving only five applicants. Furthermore, with regard to the claims of the sixth and eighth applicants there are pending proceedings in the Mthatha High Court instituted by the Special Investigating Unit to rescind the awards made in respect of the respective minor

children of the said applicants and to defend the relevant damages actions. It is accordingly only the awards in respect of the first, third and fifth applicants that are presently enforceable and that are accordingly relevant for purposes of the present applications. The total sum of such awards amounts to R 49 691 649.00.

Background

[4] The relevant background briefly is that the applicants mandated Nonxuba Inc, a Johannesburg firm of attorneys, to institute actions for damages on behalf of the minor children against the Health Department. Mr Nonxuba is an admitted attorney. At all material times he was the managing director of the firm. Ms Nonxuba, who is also an admitted attorney, was in the employ of the firm between February 2018 – September 2021. She resigned and started her own firm, NA Nonxuba Attorneys Inc of which she is the sole director. Her exact former position in Nonxuba Inc is not altogether clear. According to her answering affidavit she was a salaried and not a profit-sharing director of that firm. For present purposes, it is accepted that she was a director of Nonxuba Inc during the period February 2018 – September 2021 when she resigned.

[5] Both respondents have ceased to be practising attorneys. Mr Nonxuba was suspended from practice pursuant to an order of the Western Cape High Court granted on 12 April 2022. The relevant court order makes provision for the LPC to bring an application to strike his name from the roll of attorneys. It does not appear that this has happened as yet. Ms Nonxuba has ceased to practice after the LPC refused to provide her with a fidelity fund certificate due to the difficulties at Nonxuba Inc that resulted in the suspension of Mr Nonxuba. She was in fact cited as a respondent in the suspension application against Mr Nonxuba. She unsuccessfully applied in the North Gauteng High Court for a review of that decision. The matter is presently on appeal.

[6] The aforesaid mandate to institute claims against the Health Department was given to Nonxuba Inc during the period 2016 – 2018. All these claims succeeded, resulting in awards of damages (which are enforceable in respect of the first, third and fifth

applicants) in the total sum of R49 691 649.00 which was paid into the trust account of the firm by the Health Department. In terms of the relevant court orders, Nonxuba Inc had to register a trust for each one of the relevant beneficiaries and the proceeds of the awards, less the fees and disbursements due to the firm, had to be paid over to the respective trusts. According to the applicants this never happened. Instead, Nonxuba Inc stole the funds and the respondents were involved in the theft. I proceed to consider the applicants' case.

The applicants' case

[7] The gravamen of the applicants' case is that Nonxuba Inc is indebted to them pursuant to the theft of the funds. The amount stolen is given variously as R198m, more than R180m or more than R300m. Although it is not entirely clear, it appears that the case of the said applicants with enforceable awards is that all their money was stolen amounting to almost R50m. None of this has, however, been established since it appears that there is a credit balance of approximately R105m in the trust account of Nonxuba Inc. It is also unclear what nett amounts are payable to the trusts ie after the deduction of the fees and disbursements of Nonxuba Inc from the awards.

[8] All the claims were regulated by contingency fee agreements. According to Mr Nonxuba the fees and disbursements in medical negligence cases, such as those applicable in this case, average between 35% – 40% of the award. He attempted to demonstrate this by means of summaries of the accounts in respect of the claims of the fourth and fifth applicants which are annexed to his supplementary answering affidavit. It should be pointed out that this accounting is disputed by the applicants. It appears that this is only in respect of the account of the fifth applicant, since the fourth applicant terminated the mandate of the applicants' attorneys of record and is no longer participating in the proceedings.

[9] It is also unclear what amounts may be due to other trust creditors of Nonxuba Inc. The applicants refer in this regard to an averment by an official of the LPC in

correspondence dated 31 August 2023 to the effect that it had been established in collaboration with the National Prosecuting Authority ('NPA') and the Special Investigating Unit ('SIU') that there was a substantial shortfall on the trust account of Nonxuba Inc. No detail was provided in this regard. However, this has not been confirmed in these proceedings by the LPC and is denied by Mr Nonxuba.

[10] Ms Killian, who appeared on behalf of the respondents together with Mr McKelvey, submitted that this information amounted to double hearsay, in that the applicants are relying on the averment of the LPC official who in turn rely on information from the NPA and SIU about what was allegedly uncovered. She submitted that the LPC has been unable to confirm any shortfall in the trust account of Nonxuba Inc as appears from the report that it submitted in both applications indicating that it leaves the matter in the hands of the court. She also correctly indicated that the allegation in the replying affidavit is unfounded that the Western Cape High Court had determined in the suspension judgement against Mr Nonxuba that Nonxuba Inc had misappropriated trust funds and misconducted the trust account. That court suspended Mr Nonxuba on the basis that it accepted the case of the LPC that he had fabricated the trust reconciliation. The further case of the LPC was not sustained that the accounting irregularities and the delay in paying over the damages awards to the relevant beneficiaries taken together with certain round figure transfers from the trust to the business accounts, gave rise to a suspicion that Mr Nonxuba had stolen trust monies.

[11] The applicants further aver in the replying affidavit that was deposed to by their attorney that according to a media report the LPC had apparently determined the total sum of trust monies that were stolen by Nonxuba Inc amounted to R345m. This was also not confirmed by the LPC.

[12] It is therefore unclear what amount exactly was stolen on the applicants' version. At worst, it would be their entire awards amounting to R 49 691 649.00. This is, however, far from clear and it is not supported by any direct evidence. The applicants rely on an alleged deficit in the trust account of Nonxuba Inc for the inference that the funds were

stolen. There is no acceptable evidence of a deficit in the trust account. In fact, the balance of the trust account clearly covers the total gross amount of their claims and by the same token the nett amounts payable to the relevant trusts.

[13] There is no indication whether or not Nonxuba Inc has any trust creditors other than the applicants. This appears to be unlikely. According to the Western Cape High Court judgement Nonxuba Inc had 12 trust creditors as at 31 July 2021. One of these was the firm itself. It is therefore overwhelmingly probable that the remaining 11 creditors were the original 11 applicants in these proceedings.

[14] Both respondents denied having stolen any funds or that funds were stolen at all. Ms Nonxuba furthermore indicated that as an employee, she had no access to the trust account or any involvement in the administration of Nonxuba Inc. She also indicated that most of the damages claims of the applicants were finalised before her term of office as a director of Nonxuba Inc.

[15] No proceedings other than the present provisional sequestration applications were instituted to recover any of the amounts that are said to have been stolen. Although it is alluded to in the applicants' papers that steps will be taken to liquidate Nonxuba Inc, this has not materialised. The indebtedness, if any, of Nonxuba Inc to the applicants has thus not been established in any legal proceedings.

Merits

[16] The applicants' case against the respondents in a nutshell, is that pursuant to the provisions of section 19(3)¹ of the Companies Act, 71 of 2008, the respondents are jointly and severally liable in their capacities as directors with Nonxuba Inc for the latter's indebtedness to the applicants. In effect, the applicants' contention is that

¹ The subsection provides as follows:

19. Legal status of companies. –

- (3) If a company is a personal liability company the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.' (Emphasis supplied)

because Nonxuba Inc is a personal liability company (which is common cause) the respondents have incurred statutory liability in terms of the subsection as co-debtors with Nonxuba Inc. The applicants' case accordingly turns on the proper interpretation of section 19(3).

[17] Section 19(3) is substantially similarly worded to its predecessor, section 53(b)² of the Companies Act, 1973. The former Appellate Division dealt with the proper construction of the latter subsection in *Fundtrust*³ where it concluded that the subsection applies to contractual debts of the company arising from its ordinary financial or commercial commitments ie ordinary business debts.⁴

[18] In my view, the above interpretation would apply with equal force to section 19(3).⁵ It follows that the subsection provides for personal liability of directors for the ordinary commercial contractual debts or liability that are incurred by a personal liability company during the term of office of the director in question.

[19] On the applicants' version the debt of Nonxuba Inc arose from the theft of the trust funds. The respondents contend that this does not amount to a consensual, contractual debt incurred in the ordinary course of business but is a claim based in delict. The debt relied upon by the applicants accordingly does not fall within the provisions of section 19(3) of the Companies Act. It follows that the respondents did not incur joint and several liability together with Nonxuba Inc for the payment of such debt. In the

² The subsection is to the following effect:

'The memorandum of a company may, in addition to the requirements of s 52 –

(a) ...

(b) in the case of a private company, provide that the directors and past directors shall be liable jointly and severally, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office, in which case the said directors and past directors shall be so liable.' (Emphasis supplied)

³ *Fundtrust (Pty) Ltd (in liquidation) v Van Deventer* 1997(1) SA 710 (AD).

⁴ At 734G-H where the following appears: '... I do not think that the liability arising from the commission of a delict would normally be regarded as one of its ordinary business debts. This may also apply to statutory liabilities which do not form part of the company's regular expenses.' See also: *Maritz & Another v Maritz & Pieterse Inc (in liquidation)* 2006(3) SA 481 (SCA) para13.

⁵ Cf *Casim et al Contemporary Company Law* pp 79-80 para 3.6.4.; *Laniyan v Negota Ssh (Gauteng) Inc* 2013 JDR 0331 (GSJ).

respondents' view the applicants have accordingly failed to establish the basis for the relief which they seek against the respondents and the applications cannot succeed.

[20] While this argument appears to be attractive, it strikes me as being fallacious in that it fails to have due regard to the relationship between Nonxuba Inc and the applicants. The mandate granted to Nonxuba Inc to recover damages from the Health Department, clearly established a contractual relationship between the parties one of the terms whereof was that any damages recovered should accrue to the benefit of the beneficiaries. Theft of such damages awards would amount to a breach of the contract and would give rise to a contractual claim against Nonxuba Inc apart from any delictual claims that are available.⁶ The case as presented is accordingly wide enough to cover contractual claims for any loss suffered as a result of theft thus falling within the purview of section 19(3).

[21] The respondents further argued (if I understood it correctly) that section 19(3) *per se* does not authorise a creditor to obtain the sequestration of the directors without having first instituted legal proceedings to recover the debt from the directors and the debt remains unsatisfied. They indicated that the statutory mechanism created by section 19(3) relates to the recovery of the relevant debt. The corporation remains the principal debtor, while the subsection creates an additional right of recourse against the directors. The separate legal identity of the corporation and the principle that a director is not personally liable for the debts of the corporation, continue to apply. The subsection does not alter or affect the status of the directors nor does it render the directors without more debtors for the purposes of sections 9 and 10 of the Insolvency Act ('the Act'). For the purposes of this argument, Nonxuba Inc would remain the debtor for the purposes of those sections. The directors do not become the debtor in their personal capacities thus vesting the creditor with *locus standi*, by reliance solely on section 19(3), to move for their provisional sequestration in terms of sections 9 and 10. The liability of the directors is accessory to that of the corporation, being the principal debtor, and is not such as to empower the creditor through direct reliance only on

⁶ *Fundstrust* supra fn3 at 734C

section 19(3), to seek the sequestration of the directors independently from the corporation. The creditor is required first to establish the liability in terms of section 19(3) of the directors by means of legal proceedings instituted for that purpose against the directors thus rendering the latter debtors for the purposes of sections 9 and 10, before being able to move for their sequestration. The respondents therefore do not fall within the definition of ‘*debtor*’ in the Act. Ms Killian indicated that she has been unable to find authority supporting the present scenario where a sequestration is sought without having acted against the corporation or having established the liability of the director through proceedings instituted for that purpose against the latter. She therefore submitted that the applicants’ reliance on section 19(3) is not competent in the present circumstances.

[22] While this argument is persuasive on the face of it, I prefer not to make a determination with regard thereto given the undermentioned conclusion to which I have come on the merits of the applications. For the same reason I do not regard it necessary to determine the points *in limine* raised by the respondents with regard to service of the application on the Master and the provision of security which in any event appear to be without merit.

[23] The more fundamental question on the merits is whether there is a debt due by Nonxuba Inc to the applicants such as to justify the provisional sequestration of the respondents as debtors at the instance of the applicants. This is closely linked to the issue whether or not the applicants have established that Nonxuba Inc stole the awards. I proceed to deal with this aspect.

[24] As indicated, there is no direct evidence of theft. Moreover, it has not been established (*prima facie* or otherwise) that there is a shortfall in the trust account of Nonxuba Inc from which theft of the trust funds could be inferred. The applicants rely in this regard on the aforesaid email from the LPC official to the effect that there was a substantial shortfall on the trust account. This allegation is not supported by an affidavit from the official in question or in any other manner by the LPC itself which has filed a

report in these proceedings indicating that it left the decision with regard to the applications in the hands of the court. It should be pointed out that there is merit in the respondents' contention that sufficient time has elapsed since the beginning of September 2023 when the applications were launched, for the applicants to have obtained the necessary affidavits supporting the allegation of a shortfall which is disputed by Mr Nonxuba. Furthermore, section 9(3) of the Act requires that the facts relied upon for the sequestration application be confirmed by affidavit.

[25] I am accordingly not satisfied, even on the lower threshold applicable to these proceedings in terms of section 10 of the Act, that the applicants have established that there is a shortfall on the trust account of Nonxuba Inc. The indications are in fact to the contrary. The gross amount of the applicants' claims of approximately R50m is amply covered by the credit balance in the trust account. The main strut of the applicants' case, namely the theft of the trust funds, has not been established (either *prima facie* or otherwise) nor in the result that the applicants have a claim as envisaged in section 9(1) of the Act.

[26] It is furthermore common cause that, for the purposes of section 10(b) of the Act, the applicants are relying on the factual insolvency of Nonxuba Inc and consequently of the respondents themselves, for the relief that they are seeking. It is clear from what is set out above, that the evidence does not warrant this conclusion. According to the applicants the shortfall in the trust account shows that Nonxuba Inc was unable to pay its creditors. This in turn justifies the inference that it was factually insolvent and unable to pay the nett amounts of their damages awards. For the same reason the respondents, who have insufficient assets to satisfy the claim, can be inferred to be factually insolvent. However, as things stand Nonxuba Inc is well able to pay the gross amount of the applicants' claims of approximately R 50m from the available trust funds. This puts paid to a finding of factual insolvency or by the same token any possible claim against the respondents.

[27] Insofar as the remaining requirement contained in section 10(c) of the Act is concerned, suffice it to say that at least as far as Ms Nonxuba is concerned there is no indication or reason to believe that it will be to the advantage of creditors if her estate, which is bereft of any noteworthy assets, is sequestrated.

Conclusion

[28] It follows that the applicants have failed to make out a case for the provisional sequestration of the estates of the respondents.

[29] For the sake of completeness, it should be indicated that even assuming that the basis for liability in terms of section 19(3) has been established, the applicants' case against Ms Nonxuba is most tenuous. As indicated, she can only be held liable for debts incurred during her term of office as a director of Nonxuba Inc where her employment commenced in February 2018. There is no evidence at all that any theft occurred during her tenure. There is accordingly no basis to pursue her for any debts of Nonxuba Inc even assuming that the funds were indeed stolen. For this further reason, the application against Ms Nonxuba cannot succeed.

[30] I am constrained to refer in passing to the following striking features of this matter. The stated purpose of these proceedings is to expedite payment of the proceeds of the claims for the benefit of the affected children who are in dire need of assistance as Mr Cassim, who appeared on behalf of the applicants together with Mr Desai, repeatedly (and I should add correctly) impressed upon me. However, there is no explanation why no steps have been taken against Nonxuba Inc, the perpetrator of the theft on the applicants' version, to obtain payment of the proceeds of the claims. There is a credit balance of at least R105m in its trust account. The claim for payment of the awards is liquidated. There is no reason why such a claim could not be pursued by means of urgent, or even ordinary, motion proceedings on an expedited hearings date by arrangement with the Judge President as often happens in this Division. Given the

credit balance of the trust account, there is every prospect of recovering the entire amount of the relevant awards or at the very least a substantial portion thereof. I should add that the fact that a curator was appointed by the Western Cape High Court to administer the trust account, is no bar to recovering debts due directly from Nonxuba Inc which is not in liquidation. The order of the Western Cape High Court expressly reserves the right of trust creditors to approach the civil courts in paragraph 1.10.5 thereof. Instead of pursuing Nonxuba Inc the present proceedings (which on established authority is ill-suited as a debt recovery procedure or where the debt is disputed) were instituted against the respondents who are said not to have sufficient funds to satisfy any claim. Ms Nonxuba has stated in terms that she does not possess any assets, that she is unemployed and dependent on Mr Nonxuba for maintenance. This is undisputed. However, it is even more disconcerting that any continued failure to act promptly against Nonxuba Inc might very well redound to the detriment of the children (one of whom has already passed away) whose best interests must be the overriding consideration. This is to be deprecated.

[31] I should add that there is clearly no basis for the rumours that Mr Nonxuba has bought a Jet. It is mystifying why this allegation was put in the court papers without even the slightest evidence.

[32] Insofar as the issue of costs is concerned, this is a high-profile matter that entails very serious consequences for the respondents who are both professionals. It furthermore concerned relatively novel issues relating in particular to the construction of section 19(3) of the Companies Act. The engagement of senior and junior counsel by both sides was therefore justified in the circumstances and such costs should be allowed.

Order

[33] In the result I make the following order:

(a) the applications under case numbers 1440/2023 and 1441/2023 are dismissed;

(b) the applicants are ordered to pay the costs of both applications, including the costs consequent upon the employment of two counsel, jointly and severally the one paying the others to be absolved.

D.O. POTGIETER
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants: Adv. N Cassim SC and Adv. M Desai, instructed by: Andraos & Hatchett Inc., c/o Gravette Schoeman Inc., The Hub, Bonza Bay Road, Beacon Bay North, East London

For the First Respondents: Adv. E Killian SC and Adv. C McKelvey, instructed by: Enzo Meyers Attorneys, 121 Devereux Avenue, Vincent, East London

Date of hearing: 23 November 2023

Date of delivery of judgment: 05 December 2023