

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 884/21

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

Date: 14 March 2022

E van der Schyff

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

APPLICANT

and

ANDRIES FRANCOIS DU TOIT MARAIS

RESPONDENT

JUDGMENT

Van der Schyff J

- [1] The applicant seeks the final sequestration of the respondent pursuant to a provisional sequestration order having been granted on 8 December 2021. The respondent opposes the application. He contends that he is not insolvent and he tenders to pay the applicant the amount owed to it by 31 May 2022.

- [2] The provisional sequestration order was granted by Matshitse AJ on 3 December 2021 after having heard both parties. Matshitse AJ found that the applicant established a *prima facie* case and satisfied the requirements in terms of the Insolvency Act, 24 of 1936 (Insolvency Act), to be granted a provisional sequestration order against the respondent.
- [3] Matshitse AJ held with reference to *DP Du Plessis Prokureurs v Van Aarde*¹ that the estate of a debtor who has committed an act of insolvency may be sequestrated even if his estate is technically solvent. He reiterated that the court may also have regard to 'undisputed and unexplained indication of a debtor's inability to pay his debts, or failure to make an open an[d] honest disclosure of his position in this regard.'
- [4] Bertelsman *et al*, explain with reference to section 12 of the Insolvency Act and applicable caselaw in Mars: The Law of Insolvency in South Africa,² that a court may grant an order for the final sequestration of the estate at the hearing on the return date of the *rule nisi*, if the court is satisfied that-
- a) the sequestrating creditor has established against the debtor a claim entitling him to apply for the sequestration of the debtor's estate; and
 - b) either the debtor has committed an act of insolvency or the debtor is insolvent; and
 - c) there is reason to believe that it will be to the advantage of creditors if the debtor's estate be sequestrated

but that it is not bound to do so. Even where the court is satisfied that a proper case has been made out, it still has a discretion either to grant or refuse a final sequestration order.³

¹ 1999 (4) SA (TPD) at 13335E-G.

² JUTA, 9th ed, 134.

³ *Amod v Kahn* [1947] 2 All SA 370 (N) at 372; *Braithwaite v Gilbert (Volkskas Bpk Intervening)* [1984] 4 All SA 495 (W).

[5] It was held in *Amod v Khan* that:⁴

‘where the debtor opposes the final order and there is evidence on both sides before the Court, that the case has to be decided on the balance of probabilities’

- [6] It is common cause that the respondent is a judgment debtor of the applicant. The applicant issued summons against the respondent and applied for summary judgment. An agreement between the parties wherein the respondent acknowledged his indebtedness to the plaintiff in respect of the claims contained in the summons was made an order of court. The agreement contained a payment schedule. The parties further agreed that in the event of any default by the respondent, the full amount owing would become due and payable and that the applicant may then attach the immovable properties described in the summons and issue writs of execution in respect of the immovable properties. The judgment debt remained unsatisfied and the respondent is still indebted to the applicant in the amount of R9 354 620.78 together with interest thereon at the rate of 10.6% p.a. calculated daily and compounded monthly in arrear from 31 October 2020 to date of payment.
- [7] The applicant holds security for the indebtedness of the respondent in the form of First and Second Continuing Covering Mortgage Bonds for the amounts of R8 000 000.00 and R7 600 000.00 respectively on the immovable farm properties described in the founding affidavit. The applicant obtained a sworn valuation of the immovable properties in 2018. On the date of valuation, the market value of the properties was R29 700 000.00 and the forced sale value of the properties was R21 000 000.00.
- [8] The properties were attached after the respondent defaulted but a scheduled sale was cancelled as a result of Covid-19 regulations. The applicant placed on record that it is not practically possible to sell the four portions of the immovable properties at a Sheriff's sale in execution, ‘considering the large-scale commercial farming operations conducted by the respondent on the farm properties, and considering the

⁴ [1947] 2 All SA 370 (N) at 372.

livestock on the farms, the crops on the land, the farming implements and the fact that the respondent does not allow physical access to the farm properties.'

- [9] It is undisputed that the respondent did not honour the payment arrangement concluded between the parties. In a letter dated 17 March 2020, the applicant's attorney addressed a letter to the respondent's attorney and placed on record that the respondent, despite several indulgences being afforded to him, simply stopped paying in terms of the court order. The applicant relates in the founding affidavit that the respondent's attorney had informed the applicant's attorney that the 'respondent was receiving money from his maize harvest, his wheat harvest and the sale of cattle, the proceeds of which would all have been paid to the applicant by no later than the end of November 2019. No such payments were however received. In a letter dated 19 March 2020 the respondent's attorney described the respondent's alleged difficulties experiencing in making payments to the applicant. By this time the applicant no longer had any patience with the respondent and expressed its view that the respondent failed to repay the applicant while he is, on the face of the financial statements, a wealthy man. The applicant was frustrated because the respondent failed to cooperate in any way, and wanted to negotiate only on his own terms, refused to allow the Sheriff physical access to his properties to serve writs of execution on movable properties, and eventually refused that the sequestration application be served at his attorney's office while evading the Sheriff.
- [10] The respondent belatedly filed an answering affidavit subsequent to the provisional sequestration order being granted. Taking into consideration that the respondent was called upon in the *rule nisi* to appear on 28 February 2022 and to show cause why his estate should not be finally sequestrated, and in light of the explanation proffered that he waited until he was sure that he would be able to settle the applicant's and other creditors' claims, the late filing of this second answering affidavit is condoned. The respondent states that he does not intend to deal with every allegation in the founding affidavit but will demonstrate that the applicant is not entitled to a final sequestration order because he is solvent and able to pay his creditors. He places the following before the court:

- a) A valuation procured by him values the immovable farm properties at R35 7000 000.00;
- b) His residential property is estimated to be worth at least R5 000 000,00;
- c) He owes creditors a maximum amount of R12 507 156.68, although the extent of the debts owed to ESKOM, Unigrain and the Tshwane Municipality are disputed.

[11] The respondent explains that he experienced cash flow problems and had difficulties converting his assets into cash. It is unfortunate that the respondent did not disclose the extent of his efforts to convert his assets into cash except for the written agreement of sale concluded prior to the hearing when the provisional sequestration order was granted. He requested a postponement of the hearing date for his provisional sequestration on the bases that he entered into a written agreement of sale in terms of which Kitsiphase (Pty) Ltd would purchase the farm properties for an amount of R33 000 000,00. The application for postponement was denied. After being provisionally sequestrated, he lacked the necessary legal capacity to agree to an extension of the period within which Kitsiphase (Pty) Ltd had to fulfil the suspensive conditions in the said written agreement of sale and the sale consequently lapsed.

[12] He claims that he is still able to settle all his debts if the provisional sequestration order is discharged based on the following:

- a) His neighbour signed an offer to purchase the farm properties for a purchase price of R25 000 000,00. This offer will constitute an agreement of sale once accepted. The sale is subject to the suspensive condition that the purchaser must obtain a loan for a sum of not less than R20 000 000,00 within 90 days of the signature date but that the seller may extend the date for fulfilment of the suspensive conditions;
- b) He was able to procure bridging finance from Kaliber Holdings (Pty) Ltd in the amount of R7 860 000,00 on condition that the provisional sequestration is discharged. I pause to state that when the application was heard, the money destined for the bridging finance is still in an account in Botswana, but a

confirmatory affidavit by the attorney attending to the matter in Botswana was filed. Since the matter was heard, the respondent's attorney of record filed supplementary affidavits wherein it was confirmed that an amount of R8 000 000.00 was paid over into its trust account but that the funds are subject to a delay of six to eight weeks due to an application that had to be submitted to the South African Reserve Bank. This delay is apparently caused because the funds are to be paid into a third party, the respondent's attorneys of record's trust account. The applicant takes issue with the delay and states that it is yet another delay tactic implemented by the respondent.

The respondent contends that the deposit paid by the purchaser of his farm properties and the amount of the bridging finance are sufficient to settle his admitted debts.

- [13] The reality is, however, that the utilisation of the bridging finance and deposit is subject to suspensive conditions in the offer that has not yet been accepted and even if accepted, remains subject to suspensive conditions. The alleged bridging finance has not yet been received. In light of the respondent's undisputed history of non-honouring payment agreements and evading agreed to responsibilities, the applicant cannot be faulted for seeking a final sequestration order, despite the respondent being so confident that the applicant and other creditors whose claims are not disputed will be paid in full by 31 May 2022, that he consents to the applicant approaching this court on the same papers, duly supplemented if necessary for a final sequestration order if the applicant's claim has not been settled in full by 31 May 2022.
- [14] The respondent avers that it will not be to the benefit of creditors if a final sequestration order is granted or the provisional order extended, because he will not be able to procure liquidity as enunciated. In addition, the costs pertaining to the administration of an insolvent estate and the sale of properties on an insolvency auction dictate against a final sequestration order being granted.

- [15] I am satisfied that the applicant discharged the onus of establishing on a balance of probabilities that it is a creditor with a claim against the respondent which entitles it to apply for the sequestration, and that the respondent has committed an act of insolvency as contemplated in s 8(e) read with s 9 of the Insolvency Act when his attorneys wrote to the applicant's attorney:

'That your client, having regard to the fact that R24 981 463.29 has since been paid towards reducing our client's indebtedness to your client, specifically in relation to the overdraft account and medium term loans, provides us with a lesser amount, which it will accept in full and final settlement of our client's indebtedness towards it ..."

On 19 March 2020 the respondent again made or offered to make an arrangement with the applicant, for releasing the respondent from his debt when his attorneys wrote:

'If your client is willing to consider a reduced settlement amount, having regard to the payments already made, our client is positive that the other banks may reconsider the application, as our client can provide sufficient security and will hopefully be able to provide better cash flow projections with the inclusion of the Multi Span project as a further commercial unit;'

Similar requests were made at other times, which requests are referred to in the applicant's founding affidavit. The respondent did not deny that he committed acts of insolvency in any of the answering affidavits filed by him.

- [16] Counsel for the respondent submitted with reference to *Retief v Brink*⁵ that proof of acts of insolvency constitutes only *prima facie* evidence of insolvency that cloaks the respondent with the onus of proving that he is not in fact insolvent, and if the respondent discharges this onus on the return date, the provisional sequestration

⁵ 1904 TS 564, 566.

order may be set aside. In *Hassan & Another v De Villiers Berrange NO*⁶ the Supreme Court of Appeal held that where it is proved that acts of insolvency were committed, it is not necessary to consider whether factual insolvency was established in terms of s 9 of the Insolvency Act.

- [17] This leaves the final criteria provided for in s 12(1)(c), namely whether there is reason to believe that it will be to the advantage of creditors for the debtor's estate to be sequestrated. In *Michaelson v Lowenstein*⁷ Mason J held that:

'Now where there has been a definite act of insolvency I think that the Court, even where it is shown that there is any probability of assets sufficient to discharge the total liabilities, can confirm a provisional rule if it is of opinion that it is in the interests of the general body of creditors that the estate should be placed in sequestration. The law definitely gives a creditor the right provisional sequestration if the debtor fails to point out sufficient disposable property to satisfy the writ, but I do not think the Court is bound to confirm a provisional rule where there has been a definite act of insolvency. It may not be to the interests of creditors, as in the case of *Bloxam and Others v Green* where the provisional rule was discharged and it was generally against the general interests of the creditors that the debtor should be sequestrated after a definite and specific act of insolvency.'

- [18] In *Michaelson*, the debtor's statement that it is not in the interest of his creditors that his estate should be liquidated was supported by the bulk of his creditors. In the present matter, however, the creditors of the respondent, excluding the applicant, are silent. The hearsay contained in the founding affidavit that the applicant's attorney received several phone calls from the attorneys representing other creditors of the respondent stating that they were unable to gain access to the respondent's

⁶ [2006] JOL 17346 (SCA) at para [48].

⁷ 1906 TS 12, 13.

farm properties cannot be considered in the absence of a confirmatory affidavit by the applicant's attorney, or the unidentified creditors.

- [19] Can it then be said that there is reason to believe that the respondent's sequestration will be to the advantage of his creditors in circumstances where, on the papers before the court, the respondent is solvent? Although the respondent refers to his current creditors, the papers do not indicate that there is any other judgment debt in existence except for the debt underpinning this application. The facts do not support a finding that the respondent has a variety of creditors but insufficient assets to meet all their competing claims, and that sequestration seems likely to benefit them as a group by ending the danger that some may be preferred to the others and ensuing instead that the proceeds are shared fairly. I still find it difficult to understand why the applicant did not proceed with the attachment of the immovable property and its sale, instead of the present proceedings. As stated by Burger J in *Mamacos v Davids*:⁸

'[t]his [the attachment and sale of the property] would be to his own advantage in that he does not have to incur the further costs of sequestration, especially as he already has a judgment of the Court.'

- [20] Didcott J dealt with the question as to whether there is reason to believe that the sequestration of a partnership estate would be to the advantage of the partnership creditor's in *Gardee v Dhanmanta Holdings and Others*.⁹ He explained:¹⁰

'While there may be no reason in principle why a debtor with only one creditor should not have his estate sequestrated, the potential advantages in that situation are inherently fewer, and the case for it is correspondingly weaker. Then it is really no more than an elaborate means of execution and, because of its costs, an expensive one too.'

⁸ [1976] 1 All SA 391 (C) 393.

⁹ 1978 (1) SA 1066 (N).

¹⁰ 1067.

That the applicant himself is convinced of its benefits to him is not decisive, even when he is the only creditor. It is for the Court to decide the question. A single creditor must satisfy the Court, at the least, that there is reason to believe that, after the costs of sequestration are paid, he will recover an amount which is not negligible. What is more, he must demonstrate some reasonable expectation that it will exceed the likely proceeds of ordinary execution. Unless he does that, the laborious and substantially more expensive remedy of sequestration can hardly be thought advantageous.'

- [21] Didcott J continued and stated that there may be enough merit in some circumstances for the court nevertheless to sanction the debtor's sequestration –¹¹

'This may consist of the possibility that, through the Act's machinery, impeachable transactions, the concealment of assets and other irregularities are detected, exposed and remedied, with the result that the single creditor eventually recovers more than ordinary execution would have yielded.'

I pause to state, that *in casu*, the evidence does not support a finding that the respondent engaged in impeachable transactions, or is concealing any assets.

- [22] After hearing argument that the satisfaction of the judgment was plainly to the applicant's advantage and that, having tried but failed to achieve that object in the normal way, the applicant was now entitled to a sequestration order as an alternative method of execution, as proffered by the applicant's counsel, Didcott J elaborated:¹²

'Sequestration, it is true, has been described on occasions as a legitimate form of execution. (See *Wilkins v. Pieterse*, 1937 CPD 165 at p. 170; *Moldenhauer v. De Beer*, 1959 (1) SA 890 (O) at p. 892F.) That does not however mean that the judgment creditor has the same automatic right to it which ordinarily governs execution of the routine

¹¹ Supra 1069.

¹² Ibid.

kind. Like everyone else seeking sequestration, he must first show the Court reason to believe in its advantages to creditors and then, having done so, await the Court's exercise of its discretion in his favour. Nor even has he *ex debito justitiae* as strong a claim for relief as the creditor of a company who applies for its liquidation when it cannot pay its debts. The grant of a winding-up order is not absolutely dependent, in terms of the Companies Act, on its advantages to the company's creditors. That the applicant for sequestration is himself convinced of its benefits to him is not decisive, even when he is the only creditor. It is for the Court to decide the question.' (My emphasis).

[23] Didcott J concluded by stating that –

'The notion of advantage to creditors is a relative and not an absolute one. Sequestration cannot be said to be to the creditor's advantage unless it suits them better than any feasibly and reasonable available alternative course. It follows that the enquiry necessarily postulates a comparison. Hathorn, J.P. made the point very clearly in *O'Flaherty & Co. v Meiklejohn*, 1940 NPD 371, by saying (at p. 371):

'It is obvious that, in order to form an opinion upon the question whether or not *prima facie* there is reason to believe that it will be to the best advantage of creditors if the estate is sequestrated, the Court must compare the position of the creditors if there is no sequestration with their position if there is sequestration'

[24] An investigation to the meaning attributed to the phrase 'advantage to creditors', however requires scrutiny of the judgment of the Constitutional Court in *Stratford and Others v Investec Bank Ltd and Others*.¹³ The Constitutional Court confirmed that it is the petitioner who bears the onus of demonstrating that there is reason to believe that it will be to the advantage of the creditors of the debtors if his estate is

¹³ 2015 (3) SA 1 (CC).

sequestrated.¹⁴ As to the meaning of the phrase 'advantage to creditors' the court expressed itself as follows:

'[44] The meaning of the term 'advantage' is broad and should not be rigidified. This includes the nebulous 'not-negligible' pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or 'not-negligible' benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin et al state that —

'the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order.' [Footnotes omitted.]

[45] The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in *Friedman*. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment, except through sequestration; or that some pecuniary benefit will redound to the creditors.' [Footnotes omitted]

[25] A court should also consider that in determining the reasonableness of the prospects of there being a benefit to creditors in sequestration, it is proper to have regard to

¹⁴ At para [43].

the significance itself of the very fact of the administration in insolvency. Horwitz J observed in *Chenille Industries v Vorster*:¹⁵

'[There are] ... 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 diminish the estate, and the assurance that all creditors will be accorded the treatment prescribed by law in the division of the proceeds.'

[26] The applicant seemingly relies on these salient benefits that sequestration holds because it states in the founding affidavit that:

- a) the appointment of a trustee will ensure that the property of the respondent, movable and immovable can be realised for the true value and to the advantage of all the creditors of the respondent;
- b) to proceed with piecemeal sales in execution of the various portions of the farm properties through the Sheriff is impractical and will prove disastrous and costly;
- c) The applicant will not realise fair values at Sheriff's sales in execution, and it will be to the detriment of creditors if such sales are to be attempted;
- d) A trustee will be able to take control of the process of advertising and selling of the said farm properties, together with other movable and immovable assets of the respondent with a view to avoid an unfair distribution of the respondent's assets;
- e) A trustee will be able to conduct a proper investigation of the respondent's affairs;
- f) There is a reasonable prospect that assets may be revealed upon a proper investigation by a trustee, and a trustee will be able to ascertain what assets fall within the respondent's estate and to deal with them to the benefit of the general body of creditors;

¹⁵ 1953 (2) SA 691 (O) at 699F-H.

- g) A trustee will be able to ascertain whether there are any undue preference and/or dispositions which may be set aside in terms of the relevant provisions of the Act;
- h) A trustee will be in the position to deal with the assets according to the ranking of creditor's claims in terms of the Act.

[27] Although all the aspects mentioned above may in the applicable circumstances prove that a sequestration will be to the advantage of creditors, the facts of each case need to be considered. *In casu*, there is no doubt that the respondent is factually solvent. The known assets are sufficient to cover the full extent of the respondent's disclosed and undisputed liabilities. The applicant does not make out a case of undue preference or dispositions. No need exists to realise all the movable and immovable assets, and the sale of the immovable farm properties itself would be more than sufficient to cover the full extent of the respondent's disclosed liabilities. In light of the applicant's statement that it would be to the benefit of all the creditors if a trustee is able to take control of the process of advertising and selling the farm properties in light of the difficulties envisaged in having the properties sold by the Sheriff, I find it perplexing that the applicant refuses to provide the respondent with a final chance at attempting to sell the farm properties in circumstances where a written offer, albeit it subject to suspensive conditions, was obtained.

[28] Counsel for the applicant referred me to *Estate Logie v Priest*¹⁶ as authority for the contention that it is not improper for a creditor to sequester his debtor's estate with the object of obtaining payment of his debt. This position is in line with Didcott J's view that sequestration has been described as a legitimate form of execution. However, after considering the facts before me, I cannot find that the creditors cannot get payment except through sequestration. The Constitutional Court's decision did not alter the position as related by Didcott J - that although sequestration is a legitimate form of execution a judgment creditor does not have the same automatic right to it which ordinarily governs execution of the routine kind.

¹⁶ 1926 AD 312

- [29] The applicant is a secured creditor. It cannot be disputed that the respondent gave the applicant the run-around and that his evasive and obstructive conduct precipitated this sequestration application, but the applicant is factually solvent. He is in the process of obtaining bridging finance and of selling his immovable farming properties. He stated unequivocally that he consents to the applicant approaching this court for a final sequestration order if the applicant's claim has not been settled in full by 31 May 2022. I am of the view that a failure to sell the farm properties, or obtain bridging finance to settle the applicant's claim in full by 31 May 2022 will constitute conclusive proof that it is to the creditor's advantage that a trustee step in to realise the assets.
- [30] I considered extending the provisional order. The provisional trustees are, however, not empowered to sell any of the respondent's property without being duly authorised by the court. The extension of the provisional order will thus not serve any purpose.
- [31] In the circumstances I cannot find that the applicant made out a case that it would be to the advantage of creditors to grant a final sequestration order at this stage. The respondent's preceding conduct, however, informs the order, and the costs order that I am granting and justifies a departure from the general rule that costs follow suit.

ORDER

In the result the following order is granted:

1. The rule *nisi* is discharged;
2. The applicant may approach Van der Schyff J or any other judge appointed by the Deputy Judge President on notice to the respondent, on the same papers, duly supplemented, for a final sequestration order if its claim has not been settled in full by 31 May 2022;
3. Such notice may be delivered at the office of the respondent's current attorneys of record;

4. In the event that the respondent's current attorneys of record's mandate is terminated the notice may be delivered by emailing it to the respondent's last known email address;
5. The respondent is to pay the costs of this application on an attorney and client scale.

 E van der Schyff
 Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 14 March 2022.

Counsel for the applicant:	Adv. Y Coertzen
Instructed by:	Newtons Inc.
For the respondent:	Adv. D B Du Preez SC
Instructed by:	Ross & Jacobz Inc.
Date of the hearing:	28 February 2022
Date of judgment:	14 March 2022