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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

CASE NO: 85785/2017

7/3/2019

IMRAN DINATH N.O

First Applicant

HELENA JEANETHA N.O

Second Applicant

BRAHAM VICTOR DAWSON N.O

Third Applicant

(In their capacities as the appointed provisional
trustees in the insolvent estate of **GERHARD**

JACQUES DU PLESSIS Masters-ref: T3317/17

and

NKATEKO TREVOR MUKHAWANA

Respondent

(Identity Number [...])

JUDGMENT

SKIBI AJ

Introduction

- [1] This is an application for final sequestration of the respondent's estate.
The estate of the respondent was provisionally sequestrated on 20

December 2017 by virtue of a court order granted by Mabuse J on an urgent basis.

- [2] The application for a final sequestration order is opposed by the respondent.

The parties

- [3] The applicants are the duly appointed provisional trustees in the insolvent estate of Gerard Jacques du Plessis (Identity Number [....]) ("the insolvent" or "the insolvent estate" and "Du Plessis"), whose estate was provisionally sequestrated by order of this Court on 1 December 2017.
- [4] The respondent is an adult male erstwhile employee of Madibeng Local Municipality ("the Municipality"). He is also a sole director of the company, Mukhawana & Mukhawana Supply & Logistics (Pty) Ltd registered in terms of the Company Laws of the Republic, registered number 2014/190691/07.

Factual background

- [5] For anyone to follow this judgment the following background facts need to be set out. These facts are neither disputed or contested. The insolvent's estate was provisionally sequestrated on application of the following entities:

[5.1.] Brits X98 Home Owners Association NPC ("Brits X98"), a non profit company with registration number 2008/009639/08 with physical address at 84 L'Ecluse Place, De Kroon Villas, Brits North West Province. Brits X98 was appointed as the entity that administers the Brits Mall responsible to make payment to Madibeng Local Municipality of rates and taxes and all services in respect of the Brits Mall.

[5.2] Resilient Properties (Pty) Ltd ("Resilient"), a company duly registered in terms of the Company Laws of the Republic of South Africa with registration number 2002/016890/07.

[5.3] Snowy Owl Properties 300 (Pty) Ltd ("Snowy Owl"), a company duly registered in terms of the Company Laws of the Republic of South Africa

with registration number 2003/017970/07 and with registered address at 02 Barnard Street, Potchefstroom, North West Province.

[5.4] The companies referred to above will be referred hereinafter as "sequestrating applicants".

[5.5] Resilient and Snowy Owl are the co-owners of Brits Mall, a regional mall in the Brits area. The Brits Mall opened during October 2010.

[6] The insolvent, in his capacity as an attorney, acted as a consultant on behalf of the sequestrating applicants and more specially at all material times acted as the sequestrating applicants' liaison with Madibeng Local Municipality. The insolvent was a specialist in the field of township planning and establishment and dealt with the Municipality on a daily basis.

[7] Before the fraud perpetrated was uncovered, the payment of rates and taxes and services accounts, occurred in the following manner:- All tenants in the Brits Mall were paying their monthly obligations, which include services contributions, towards the Centre Management entity contracted by the Brits Mall. The Centre Management distributes these funds to the account of Resilient and Snowy Owl. Brits X98, on a monthly basis receives an account in respect of rates and taxes and other services from the Municipality. Based on the aforesaid mentioned, Brits collected these funds from the Resilient and Snowy Owl and, on monthly basis, makes payment to the municipality.

[8] After the opening of the Mall in 2010 until June 2016, Brits X98 effected payment in respect of the rates and taxes and services accounts directly to the Municipality. During 2014 the municipality caused a stir when it unilateral increased the rates and taxes levied against the Brits Mall exceeding a 260% increase. The average monthly rates and taxes payment increased from approximately R170 000.00 to approximately R422 000.00. Since September 2014, the insolvent, on behalf of the sequestrating applicants, engaged the Municipality to address the drastic increase negotiated a discount in respect of this liability. During this

process however, Brits X98 continued to make payment of the full monthly rates and taxes levied and the full services accounts.

- [9] During June 2016, the insolvent approached a representative of Brits X98 (Mr Klaas L'Ecluse") and Snowy Owl and advised them that he had been successful in negotiating a rebate in favour of the sequestrating applicants, with the Madibeng Local Municipality. The effect of such rebate was that the sequestrating applicants were entitled to a monthly credit on the account in the sum of R422 000.00 for a period of 10 months. The insolvent further advised that, seeing as he concluded this agreement with the Madibeng Local Municipality in his capacity as an attorney, and seeing as the Municipality had such a requirement, the monthly payment from the Brits X98 had to be made into the trust account of the insolvent. The insolvent undertook to ensure payment towards the municipality and also to ensure that there is proper accounting in respect of all funds paid including the monthly rebate as agreed on.
- [10] On 6 October 2017, representatives of the municipality delivered to the Centre Management a notice of demand for payment in the sum of R18 983 510.00. Upon the receipt of such demand from Centre Management, L'Ecluse immediately contacted the insolvent seeing as Brits X98 diligently made monthly payments of the requisite amounts into the trust account of the insolvent as agreed. The insolvent gave L'Ecluse every assurance that it has to be a mistake on the part of the municipality and undertook to immediately rectify the problem. To the sequestrating applicants' shock and surprise, the electricity supply to the Brits Mall was disconnected on 9 October 2017 by representatives of the municipality. The disconnection led to an urgent spoliation application brought by the sequestrating applicants against the municipality under case number 69330/17 on that very same day. A rule *nisi* was issued in favour of the sequestrating applicants. In the urgent application, the sequestrating applicants provided proof of the payments made in respect of the monthly rates and taxes and services accounts.
- [11] On 21 November 2017, L'Ecluse attended a meeting at the offices of the municipality where various issues were discussed. They were advised that

the municipality had received no payments from Brits X98 since July 2016. It transpired that officials in the municipality who (some of them) had already resigned were accomplices in a fraudulent scheme to defraud the municipality and rate payers. When this was discovered, the fraudulent entries were reversed by the municipality which resulted in the disconnection of the electricity supply to the Brits Mall on 9 October 2017. None of the funds that were paid over to the insolvent's trust account since July 2016, were paid over to the municipality's account although monthly accounts reflected such payments. Of the total sum of R33 00 901.01 paid into the trust account of the insolvent, the sum of R26 309 854.34 had been reversed and indications are that further funds were to be reversed on their system. The insolvent and his accomplice/s have effectively stolen a sum in excess of R33 million, which funds have now been utilised and misappropriated as the fruits of their fraudulent scheme.

- [12] The aforementioned facts culminated in an urgent application, for the provisional sequestration of the estate of the insolvent which was duly granted.
- [13] The applicant's case against the respondent is that the first applicant met with the insolvent on 5 December 2017 wherein he admitted his involvement in the fraudulent scheme at Madibeng Local Municipality. In this meeting he exposed the identity of one of his accomplices and named the respondent. The evidence of conversation between the insolvent and the first applicant is inadmissible.
- [14] Further investigation by the provisional trustees to the appointment of an investigator, Mr Jan Brink (Mr Brink) of an investigative firm operating under the name of Pinkerton Consultants for the purpose of identifying the flow of funds from the insolvent to the individuals and other entities who ultimately benefited from these funds.
- [15] The preliminary findings of Mr Brink are summarised as follows:
 - [15.1] Funds were initially paid into the trust account of the insolvent's attorney's firm. These funds were earmarked for the payment of the monthly electricity and services bill of the Brits Mall;

- [15.2] From this account, the bulk of the funds were transferred into the personal banking account and the business account of the insolvent and a substantial portion of these funds was transferred from there to the First National Bank account of the company, *Mukhawana and Mukhawana Supply and Logistic* (Pty) Ltd which belong to the respondent;
- [15.3] Fake beneficiaries and references were created in order to systematically syphon a sum exceeding R33 million. An amount in excess of **R11 000 000.00** (eleven million rand) was paid into the account nominated by the insolvent's accomplice, the respondent;
- [15.4] The applicants obtained an affidavit deposed to by Ms Grace Mogale, Municipal Manager at Madibeng Local Municipality confirms the complicity of the respondent. Ms Mogale states that the respondent was an employee of Madibeng Municipality at the time, who was working in the Finance Department. When the Municipality became aware of the deception he was suspended for four weeks and later resigned to avoid disciplinary action according to the municipality. Miss Mogale states further that criminal charges were laid against the respondent however, it was submitted from the bar that no criminal charges were preferred against the respondent;
- [16] The applicant, on the other hand, says that the result of the investigation directly implicates him to the wrongdoing at the Municipality.
- [17] The respondent does not dispute that he used to work for Madibeng Local Municipality in the finance department but he denies having been involved in any fraudulent activities ¹. He also admits that Mukhawana & Mukhawana Supply & Logistic (Pty) Ltd is his own company and that he is the sole director of this company². His company was focused mainly on delivery of material, supply of material and plant hire.
- [18] The respondent says he bought his first truck in 2015 and whilst doing operations he acquired more plant equipment. In an attempt to prove the

¹ Answering affidavit page 233

² Answering affidavit page 219 at para 10

extent of his business he produced some invoices annexed as Annexure **"NTM11"** and **"NTM 12"**. He admits that in 2015 he met with the insolvent through a business associate, Mr Jason van Der Westhuizen . He states further that the insolvent had required him to supply material and plant hire as he was both a property developer and a property attorney. The respondent also admitted that he rendered services to the insolvent through his company at the request of the insolvent and he duly received payment for services rendered.

- [19] The respondent says that invoices were issued to him either electronically or were hand delivered, in which case he would sign for receipt. He relies on annexures **"NTM13"** and **"NTM 14"** as copies of the invoices which were issued to the insolvent. He says he purchased material from different suppliers, such as Vibro Bricks and Paving. The invoices referred to are annexed as Annexure **"NTM15"**³. In essence the respondent says his company received payment from the insolvent for legitimate services rendered. He denies working at the finance section dealing with allocation of funds for levies and taxes.

Issues in dispute

- [20] The respondent puts the following issues in dispute:
- [20.1] The preliminary report of the forensic investigator, by Mr Jan Brink has been put in dispute and his qualifications as a forensic investigator;
 - [20.2] whether the legal requirements for final sequestration order have been proven.
 - [20.3] There is also an issue about the lifting of the corporate veil;
- [21] Before dealing with the issues and the applicable law, I am going to deal with the admissibility or otherwise of the evidence of Mr Jan Brink.
- [22] The respondent for the first time during the oral argument in court raised an issue about the admissibility of the conversation between the first

³ Record page 224

applicant and the insolvent where it was revealed that the respondent was an accomplice in the fraudulent scheme at the Municipality. In his answering affidavit when dealing with the paragraph which alleges that he was an accomplice to the fraud he denies any allegation of him being an accomplice and he carries no knowledge⁴. In his answering papers he does not raise any legal issue regarding the objection to the admissibility of this piece of evidence.

- [23] This court will look at the evidence in totality and decide whether the respondent worked together with the insolvent or was involved in the fraudulent scheme at the Municipality. This court will decide at the end whether the final sequestration order be granted or the rule *nisi* be discharged.
- [24] The respondent does not point out which opinion was provided by Mr Brink. All what Mr Brink did was to conduct a forensic investigation and provided a preliminary report as per his mandate.
- [25] The evidence of the forensic investigator, Mr Brink is challenged on the basis that no qualifications stated in the affidavit, therefore an opinion he provided is inadmissible. Again counsel for the respondent raised the challenge regarding the admissibility of the qualifications of Mr Brink for the first time during the argument in court. Nowhere in the answering affidavit did the respondent put in dispute the qualifications of Mr Brink. In fact, in his answering affidavit the respondent admits that he received payments from the insolvent but it was unknown to him where the money came from. He says that was for legitimate business.
- [26] The evidence on record is that Mr Brink is a retired Colonel from South African Police Services (SAPS) with 35 years' experience in forensic investigation and asset management in the insolvency industry.
- [27] The applicants' submission is that there is no reason why the evidence of Mr Brink cannot be admitted. It is contended that Mr Brink's investigation resulted in the production of the bank statements with the transactions which are not denied by the respondent, save to say that they were for

⁴ Page 222, at para 21

legitimate business. The court concludes that the evidence of Mr Brink regarding the obtaining of the bank statements and the tracing of the flow of funds from the insolvent to other entities or individuals is admissible. This evidence relates to the bank statements and there is no prejudice to the respondent because he provides a justification for the transactions and he admits that payments were made by the insolvent to his company's account.

Law

[28] It is trite law that for an order for final sequestration to be granted the applicant must establish three statutory requirements :

[28.1] the creditor must establish that he/she has a liquidated claim of not less than R100,00 or if there are two or more creditors, liquidated claim of an aggregate amount of not less than R200,00.⁵

[28.2] the debtor has committed an act of insolvency or is insolvent⁶ or is factually insolvent, with reference to section 8 of the Insolvency Act;

[28.3] that there is a reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated⁷.

Application of law to the facts

Whether the applicants have proven a claim

[29] The applicants case is that they succeeded in proving the claim against the respondent and this requirement has been met. The amount sought to be recovered from the respondent is in excess of **R11 000 000.00**. The contention of the applicants is that funds were transferred from the estate of the insolvent to that of the respondent constitutes impugnable transactions as contemplated in the Insolvency Act, 1936. The estate of the insolvent is entitled to recover these monies as a result the insolvent estate is a substantial creditor of the respondent.

⁵ Section 12 (1) read with section 9(1) and 10(a) of the Insolvency Act 24 of 1936 as amended

⁶ Section 12 (1) (b) read with 10 (b) of the Insolvency Act 24 of 1936

⁷ Section 12 (1) c) read with 10 (c) of the Insolvency Act 24 of 1936

- [30] The respondent also contends that there is no causal link between the applicants, Insolvent and the respondent. His argument is that the evidence of Mr Brink cannot be relied upon in the absence of the evidence that he has done an accounting to can conclude that the respondent owes **R11 000 000.00**. He says that the applicant failed to make out a case on the founding affidavit. The applicants maintain that a proper case has been made on the papers and this statutory requirement has been complied with. The applicants' argument is that there is no legal requirement that the forensic investigator must have done accounting.
- [31] The court agrees with the submission by the applicant that the respondent's argument on this requirement has no merit. Mr Brink in the course of his investigation obtained insolvent's bank statements indicating the flow of funds which were transferred from the insolvent's bank account to the respondent's company. The total amount of money paid from the insolvent to the respondent's company's account has been arrived based on the transactions reflected in the bank account of the respondent's company. The said calculation does not need one to have a diploma in accounting.
- [32] The court makes a finding that the applicants have managed to prove on a balance of probabilities that they have a claim against the respondent. The amount claimed is above the minimum threshold.

Whether an act of insolvency has been proven or the respondent is insolvent

- [33] The applicants' submission is that the respondent has committed an act of insolvency. The respondent contends that the applicants have failed to distinguish their right based on an alleged liquid claim which grants them *locus standi* in terms of section 9 (1) of the Insolvency Act and the second requirement which requires an actual act of insolvency. The respondent's argument is that none of the requirements set out in section 8(1) of the Insolvency Act have been proven. This is clearly wrong, the applicants have stated in their supplementary affidavit and established two although they say they believe that the respondent has committed more than two

acts of insolvency.

- [34] The applicants' contention is that their investigation has not identified sufficient realisable assets to meet **R11 000 000.00**. They argue that the respondent is insolvent and his propensity to liquidate assets (probably to defeat the claims against his estate) constitute discrete deeds of insolvency. The court concludes that there is no substance in the argument by the respondent on this point. From the evidence presented it has been established that the respondent has accounted for only **R3 000 000.00**, the rest of it has not been accounted for. The applicants have been able to show that their investigation has not identified the existence of realisable assets to meet R11, 000 000.00. From those facts the only reasonable inference which can be drawn is that the respondent is insolvent. The respondent has no realisable assets to meet a demand of R11, 000 .000. The applicants have identified assets to the value of approximately R2 235 000.00 and the rest of the money is not known where it went. From the best evidence available the respondent is a debtor to the applicants in a liquidated claim of R11 480 867.78⁸. The Act⁹ defines various deeds of insolvency, in the case at hand the applicants rely on two discrete sections¹⁰. *Firstly, in that during December 2017 and after having been discovered as a co-conspirator to the fraud, financed his Porsche motor vehicle that had been bought and paid for in cash during February of 2017. This constitutes a realisation and liquidation of the asset and a disposition that has or would have the effect of prejudicing his creditors as contemplated in section 8 (c) of the Act. Secondly, the respondent has effectively commenced the devaluation of his estate through the leveraging of his assets. Given the timing of this re-financing (ie after the discovery of the fraud and his suspension from his employment), the respondent did this in order to defeat the claims of creditors to their prejudice as contemplated in section *(d) of the Act.*

⁸ Page 18 of the paginated record: Brink report

⁹ Section 8 of the Insolvency Act

¹⁰ Applicants' supplementary affidavit page 180-181

Factually insolvent and advantage to creditors

- [35] The applicants case is that they have proven that the respondent is factually insolvent in that his liabilities exceed his assets. The respondent contends that the applicants have failed to prove this requirement and there is no evidence presented that the respondent has committed an act of insolvency or that his estate is in fact insolvent and is asking the court to exercise its powers in terms section 12 (2) of the Insolvency Act to dismiss the application. I am persuaded from the evidence¹¹ presented before me and I am satisfied that the applicants have been able to prove on a balance of probabilities that the respondent is both commercially and factually insolvent. The respondent has been unable to discharge evidential burden about being able to meet a demand of R11 000 000.00 or any realisable assets which exceeds his liability.
- [36] The element which must be established that it will be to the advantage of the creditors if the respondent is sequestrated always presents a challenge. In the instant case the respondent contends that there is no evidence that if the court grants a sequestration it will be to the advantage of the creditors. The applicants contend that an investigation has been conducted to search if the respondent has employees but could not find any employees of the respondent. I am of the view that the applicants have proven that it will be to the advantage of creditors if the respondent is sequestrated In this regard the advantage, as a starting point, relies on the fact that the trustees would be empowered to investigate the extent of fraud and theft, and further follow the flow of funds from the respondent to other third parties' estates, specially through the invocation of the mechanisms contained in the Insolvency Act, 1936, in order to recover monies from the individuals and/or entities. In *Stratford v Investec Bank*¹² where Leeuw AJ said "*The meaning of the term 'advantage' is broad and should not be rigidified. This includes the nebulous 'not negligible' pecuniary benefit on which the applicants rely... The correct approach in evaluating advantage to creditors is for a court to exercise its discretion*

¹¹ Supplementary affidavit by Mr I Dinath at page 179 to 181

guided by the dicta outlined in Friedman. For example, it is up to the 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 creditors".

- [37] The court makes a finding from the evidence presented that the applicants have managed to prove all the three requirements. The applicants have managed to establish against the respondent a liquidated claim of not less than R100.00; that the respondent has committed an act of insolvency or is insolvent and that there is a reason to believe that it will be to the advantage if the creditors if his estate is sequestrated. The applicants have complied with formal requirements pursuant to the final sequestration and the provisional order. Ms Nerine Diederichs¹³ has deposed to an affidavit regarding the service of process after the provisional order was granted. There has been publication of the provisional order to the newspaper, in the government Gazette; service in the Master's Office and to various attorneys of the respondent.

The lifting of the corporate veil

- [38] The description of the word piercing or lifting the corporate veil has been highlighted in few cases : Binns- Ward J quoting from the English case law in the *Ex Parle Gore and Others*¹⁴ said ... "piercing of the corporate veil a familiar term in this context, locally and in the English common law jurisdictions, before the introduction of s 20(9) of the new Companies Act. Some might suggest that 'lifting' the veil was the more appropriate label in the circumstances. Staughton LJ offered the following basis for a distinction in *Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose*¹⁵. To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or

¹² 2015 (3) SA 1 (CC) at para [44] & [45]

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¹⁴ Case No : 18127/ 2012 (Judgment of the Western Cape High Court delivered on 13 September 2013

¹⁵ (No. 1) [1991] 4 All SA 769 (CA), at 779

activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company [in other words, to its controllers] for some legal purpose.

- [39] In the instant case, the respondent in his answering papers admitted that funds were transferred from the account of the insolvent to the account of his company, Mukhawana & Mukhawana Supply Logistic Pty Ltd. During argument his counsel contended strongly that the court is not empowered to grant a sequestration order against him because the company as a juristic person is a separate entity from the respondent as an individual. The court has been referred to *MARS: The Law of Insolvency in South Africa*¹⁶ where it reads: *"the mere fact that the creditor alleges that the debtor had carried on his business under the name of a company and that his affairs had been inseparably intermingled to justify such a conclusion, does not affect the legal position that the company is nevertheless a separate entity and not a mere agent or alias of the debtor, and consequently a debt due by the company cannot be held to be providing a ground for sequestration of his estate."* The court was also referred to the case of *Estate Salzmann v Van Rooyen*¹⁷. MARS, set out is a general the legal position but the facts of this case are so unique from the general rule. The facts of this case places the respondent at the finance department of the Municipality at the section where fictitious beneficiaries and reference numbers were created. Miss Mogale, the Municipal Manager points to the respondent's involvement. By co-incident he happened to have business dealings with the insolvent and the latter received monies and transferred some to the respondent's company whose sole director is the respondent.
- [40] Section 20 (9) of the new Companies Act¹⁸ has introduced a statutory basis for piercing or lifting the corporate veil of companies. It provides:

"If, on application by interested person, or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the comp any, or any act by or on behalf of the company,

¹⁶ Ninth edition, 2008, Juta & Co Ltd, at page at page 113 to 114

¹⁷ 1944 OPD 1

constitutes an unconscionable abuse of the Juristic personality as a separate entity, the court may-

- (a) declare that company is to be deemed not to be a Juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, or of another person specified in the declaration; and*
- (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).*

[41] In the *Ex Parte: Gore NO and Others*¹⁹ *Binns-Ward J* holds at para [32] to [35]:

[32] "the language of section 20(9) is cast in wide terms, indicative of an appreciation by lawgiver that the provision might find application in widely varying factual circumstances.

[34] The newly introduced statutory provision affords a firm, albeit very flexible defined, basis for the remedy, which inevitably operate, I think, to erode the foundation of the philosophy that piercing the corporate veil should be approached with a priori difference. By expressly establishing its availability simply when the facts of a case justify it, the provision detracts from the notion that the remedy should be regarded as exceptional, or 'drastic.' This much seems to be underscored by the choice of words 'unconscionable abuse' in preference to the 'gross abuse' employed in the equivalent provision of the Close Corporation Act; the latter term having more extreme connotation than the former. The term 'unconscionable abuse of the juristic personality of a company' postulates conduct in relation to the formation and use of companies diverse enough to cover all the descriptive terms like 'sham', 'device'; 'stratagem' and the like used in that connection in the earlier cases, and- as the current cases illustrate- conceivably much more. The provision brings about that a remedy can be provided whenever the legitimate use of the concept

of juristic personality adversely affect the third person in a way that should not countenanced. Having regard to the established predisposition against categorisation in the area of law and the elusiveness of a convincing definition of the pertinent common law principles, it seems that it would be appropriate to regard section 20(9) of the Companies Act as supplemental to the common law, rather than substitutive. The unqualified availability of the remedy in terms of the statutory provision also militates against an approach that it should be granted only in the absence of any alternative remedy. Paragraph (b) of the subsection affords the court the very widest of powers to grant consequential relief. An order made in terms of paragraph (b) will always have the effect, however, of fixing the right, obligation or liability in issue in the company somewhere else. In the current case the right, involved is the property held by the subsidiary companies in the King Group and The obligation or liability is that which any of them might actually have to account to and make payment to the investors ...

[35] Relief in terms of section 20(9) of the Companies Act may be granted on application by any 'interested person', or mero motu in any proceedings in which a company is involved. The term 'interested person' is not defined. I don't think any mystique should be attached to it. The standing of any person to seek a remedy in terms of the provisions should be determined on the basis of well-established principle; see Jacobs en 'Anderv Waks en Andere 1992 (1) SA 521 (A), at 533J-534E, and, of course, if the facts happen to implicate a right in the Bill of Rights, section 38 of the Constitution. There can be no doubting that the applicants have a direct and sufficient interest in the relief sought so as to qualify as 'interested persons' within the meaning of the provision."

¹⁹ [2013] 2 All SA 437 (WCC) (13 February 2013)

- [42] The court concludes that section 20(9) applies squarely in the case of the applicant against the respondent. Section 20(9) of the new Companies Act gives a discretion to court to grant any consequential relief sought. The respondent's company received stolen money which were transferred from the insolvent's trust account. He was the sole director of the company and he on his own version says he was involved in the business of his company by giving a response that the business he had with the insolvent were legitimate business transactions. Based on the authority cited above and section 20 (9) of the Companies Act²⁰ the merit of the case remains unaffected by whether the funds were received by the respondent personally, or by the company.
- [43] There is ample evidence which points out that funds which were paid from the account of du Plessis to Mukhawana & Mukhawana Supply & Logistic (Pty) Ltd were stolen as a result of fraudulent scheme, and paid pursuant thereto, that being the case renders inconsequential the question as to whether the funds were paid into the account of the company or to du Plessis personally. Funds were meant for Brits Mall.
- [44] The service providers paid for their levies and taxes millions of rands to the insolvent's trust account. The fake beneficiaries and reference numbers were created in order to systematically syphon the entire sum exceeding R33 Million. **Miss** Mogale, Madibeng Municipal Manager says " *...the Municipality has been a victim of grand manipulation. It has in fact been defrauded by Mr du Plessis and his employees. The receipted payments that appeared in the cash book were fictitious. They were not genuine payments and had been falsely created by Mr Mukhawana. He appears to have acted in concert in defrauding the Municipality with the applicant's legal representative, Jacques du Plessis*"²¹.
- [45] The respondent was the head of the section responsible for preparation of the Municipal bank reconciliation. He was tasked with reconciliation of the bank statements with cash book and Mr Nelson Sambo was assisting him. It was uncovered that the Brits Mall's payments were never reflected in the

²⁰ 71 of 2008

²¹ Affidavit of Miss Mogale, Municipal Manager at Madibeng Municipality, page 102 para 22

bank statements as having been paid. Payments were only reflected in the cash book. The payments had been inserted manually. The System Administrator of the Municipality, Thami Ntantiso confirms that the entries were reflecting purported payments made by service providers were made by Mr Mukhawana. Mr Ntantiso's confirmatory affidavit has been attached.²²

[46] During the occurrence of the fraudulent scheme from June 2016 and onward du Plessis transferred, by way of intermittent electronic bank transfers from First National Bank account, an aggregate amount of **R11 480 867.78** of the stolen funds to a bank account reference "M Supply & Log S²³" on the duplicitous version proffered by the respondent in the answering affidavit these transactions were received either by himself²⁴ or by Mukhawana & Mukhawana Supply and Logistic (Pty) Ltd, a private company of which the respondent is the sole Director²⁵.

[47] Aside from the vague and contradictory on the question of which party in fact received the stolen funds (as it appears common cause that it was either received by himself or the company which he wholly owns and operates), the respondent positively states that the money was in fact received from du Plessis pursuant to legitimate business transactions. From the evidence on record it has been proven that the respondent was complicity in the fraud as alleged and an order sequestrating the respondent is justified.

The dictum by Lord Denning in *Lazarus Estate Ltd v Beasley* [1956] 1 QB ; [1956] 2 W.L.R 502, which has long since been adopted as part of South African law, is apposite and instructive in this respect: "*No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.. . once it is proved, it vitiates judgments, contracts and all transactions whatever.. .*"

²² Affidavit of Mss Mogale, page 101 para 15, 16

²³ See payment schedule at page 55

²⁴ Answering affidavit page 224-225, para 23.7 and para 24

²⁵ 1944 OPD 1

[48] The respondent places reliance to the quotation in MARS: *The Law of Insolvency in South Africa*²⁶ and the *dictum* in the case of *Estate Salzmänn v Van Rooyen*²⁷ where the court made the following remarks: "*Now I do not propose traversing all the grounds covered under this heading. Suffice it to say that to my mind sequestration proceedings are not the proper steps to take in achieving this end; the mere fact that the company is alleged to be a **"one man company"** does not affect the legal position that the **company** is nevertheless a **separate entity** and presumably it can never be considered a mere alias or agent of the respondent;*

[49] The passage quoted in the *Estate Salzman's* case was a *dictum* is not a decision of that case. In fact, the sequestration was granted in favour of the applicant in the said case. The facts of that case are distinguishable from this one. In that case the respondent was a sole director of a company after the resignation of the other directors of the said company. Once the new directors were reappointed he relocated to Cape Town and on arrival in Cape Town he sent a letter of resignation and the new directors who were re-appointed and they uncovered that certain money was missing from the estate. After all the evidence was presented it was found that he is liable for sequestration. In that case there was no fraudulent claims except the suspected theft. In the case at hand the respondent was not just a sole director of the company which received stolen funds from the insolvent but there is a strong *prima facie* evidence which places him at the finance department of the Municipality where funds were due to be paid and Brits Mall didn't receive monies and fictitious reference numbers were created at the municipality which misled the municipality to believe that funds for services were received only to be discovered it was not so a year later. From the evidence of Mr Brink and Miss Mogale there is a *prima facie* case evidence which demonstrates an irresistible inference that the respondent was complicity working with the insolvent. In conclusion on this although ordinarily the respondent and his

²⁶ Answering affidavit page 225 para 23.8

²⁷ Ninth edition , 2008 , Juta & Co Lt d, at page at page 113 to 114

company are separate individuals but the facts of this case are such that the individual and the company are interlinked and indistinguishable. Section 20(9) gives me a wide discretion to make a final sequestration order. See *Ex Parte Gore*²⁸

[50] The payment of the respondent's company under those circumstances as stated above would constitute the very definition of an unconscionable abuse of corporate personality of which a Court should not countenance. The respondent does not deny having received the amount of **R11 480.78**. He rather contends that these intermittent payments were made pursuant to legitimate transactions in the form of the selling and/or renting of plant to the insolvent throughout the occurrence of the relationship between the two.²⁹

[51] The respondent, in ostensible fortification of this denial, annexes to its answering affidavit annexures "**NTM11**" and "**NTM12**", being "some of the copies of the invoices" which were issued, presumably for services rendered to different companies.³⁰ The respondent further more attaches annexure "**NTM13**" and "**NTM14**" as alleged invoices issued to the insolvent.³¹

[52] In order to gauge the lack of *bona fides* in the respondent in assessing the transactions between the respondent and the insolvent were legitimate business transactions, one must first contextualise the respondent's version where he purports to deal with the affidavit³² of Mogale, the Municipal Manager at Madibeng and his erstwhile employer. This criticism is outlined³³ as follows in brief:

[52.1] The respondent in his answering affidavit creates an impression that it was impossible to download or upload any statements into the financial system of Madibeng using Excel from FNB using a "CNV" presumable he meant to say "CSV" type files. According to

²⁸ Supra at para [35]

²⁹ Para 12-14 of the respondent's answering affidavit

³⁰ Record page 290-342

³¹ Record page 343-359

³² Pages 96-162

³³ Record page 377-380

the Municipal Manager, Miss Grace Mogale she says that cash book of the Municipality has been manipulated by Mr Mukhawana by entering fabricated receipts of Brits Mall services payments therein. Fraud was uncovered after bank statements were obtained and compared with cash book entries.

[52.2] The respondent proffered a defence stating that no one can upload information into the Madibeng financial system using Excel. The applicants in their reply produced the FNB system detailing the functionality of FNB system which clearly demonstrates that the version of the respondent was not true on this point.

[52.3] The respondent in attempt to exonerate himself of any wrongdoing in his answering affidavit says that it was Revenue Department which was responsible for allocation of payments and was not his function. This does not help him either, the allocation of payments was done utilising the information in the municipal cashbook which is the book Mr Mukhawana manipulated. This is illustrated for example, when cash payment indicates payment by Brits Mall, these fabricated payments will be allocated to Brits Mall by the responsible individual as they appear from the cash book.

[52.4] Although the respondent denies committing fraud, he admits that payments were made by Du Plessis for legitimate services rendered by his company Mukhawana & Mukhawana Supply & Logistic (Pty) Ltd. He says the payments were due and payable to him. All what he could do was to produce vouchers for the transactions entered into that make up the amount of **R11 480 867.78** which he does not deny he received.

[52.5] The respondent in his answering affidavit in an attempt to justify his business transactions with the insolvent he produces vouchers "**NTM13**" and "**NTM14**" which consists of 148 pages. In these vouchers he accounts for the total amount of **R3 055 415.32**. for the alleged goods.

[52.6] The respondent claims in "**NTM13**" where he shows 5 invoices for

the value of **R154 540.00** which relates to the period 10 March 2017 to 4 October 2017. All those invoices are cash invoices and no delivery address or proof of delivery appears from them. The applicants say that they obtained a lawful subpoena in order to get his bank statement for the period from 10 March 2017 to 4 October 2017 where he accounted for **R154 540.00**. In the bank statements which have been submitted as annexure "10 13 " in actual the actual revue which went to Mr Mukhawana is for the amount of **RS 176 475.91**.

[53] All what is expected of the respondent is to discharge the evidential burden that he received funds from the insolvent on reasonable grounds or in a *bona fide* manner. In *Kalil v Detoex (Pty) Ltd and Another*³⁴ Cobert JA said the following: *"As in the present case, the dispute arise on the affidavits may relate to the locus standi of the applicant, either as a member or creditor, or as to whether proper ground for winding-up have been established. In regard to locus standi as a creditor, it has been held, following certain English authority, that application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on a bona fide and reasonable grounds, the Court will refuse winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it merely to show that the indebtedness is disputed on bona fide and reasonable grounds."*

[54] The respondent has failed to discharge evidentiary burden to illustrate its purported opposition. It is clear from the evidence before me that stolen funds were channelled to the respondent, and on his own version proffered, using the company as a vehicle to facilitate the receipts of the funds.

[55] The applicants have managed to prove all statutory requirements:

³⁴ 1988 (1) SA 943 (AD) at 980B

[55.1] The respondent cannot repay the money and he is accordingly both commercially and factually insolvent. He has not denied this fact. He has committed discreet deeds of insolvency.

[55.2] The applicants have shown a reason to believe that it will be to the advantage of the creditors if the respondent's estate is finally sequestrated. The trustees will be empowered to investigate the extent of the fraud and theft, and further follow flow of funds from the respondent to other third parties' estates, specifically through the invocation of mechanisms contained in the Insolvency Act, 1936, in order to recover monies from the individuals and/ or entities.

[55.3] It appears that the respondent has appropriated the stolen funds through the purchase of substantial immovable assets in the company, which for all the reasons proffered, would also have to be recovered by the applicants for distribution amongst the *concursum*. To my mind there is no doubt that the sequestration of the estate of the respondent will render a financial dividend to the creditors which will be negligible.

Result

[56] After a thorough reading of the papers and hearing the submissions of the respective parties, I am of the considered view that a final sequestration order should be granted. A declaratory order in terms of section 20(9) of the Companies Act³⁵ as amended, that Mukhawana & Mukhawana Supply and Logistic (Pty) Ltd be deemed not to be juristic person is warranted. An argument that the applicant's application is not made in terms of section 20(9) of the Act has no merit. This court may *mero motu* grant an order in terms of this section. See *Ex Parte Gore and Others*³⁶.

Costs

[57] Cost order is a matter which is within the court's discretion. Counsel for the

³⁵ 71 of 2008

applicant submitted that this matter is a complex matter and it deserved the appointment of two counsel and ask an order that a consequential cost order as a result of appointment of two counsel should be granted. The respondent was legally represented by one counsel in the matter. However, having read the matter and the applicable law, the request for a cost order for two counsel is justified.

Order

[58] It is ordered that:

[59.1.] The estate of the respondent is placed under final sequestration;

[59.2] The respondent to pay costs of the applicant including the costs of two counsel.

SKIBI AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Heard on : 6 February 2019

Judgment delivered : 7 March 2019

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³⁶ Supra at para [35]

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