IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 5603/2017

In the matter between:

NUTRIGRUN (PTY) LTD Applicant

and

WILLEM ADRIAAN ODENDAAL 1st Respondent
ANNA CATHARINA NEL ODENDAAL 2nd Respondent

HEARD ON: 26 APRIL 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 3 MAY 2018

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[1] This is an opposed application for the provisional sequestration of the joint estate of the respondents. The applicant is a company with limited liability duly incorporated in terms of the laws of the Republic based at Senekal, Free State and trading in the agricultural sector. The 1st respondent is a farmer residing at

Marquard, Free State. He is married in community of property to the 2nd respondent.

[2] It is common cause that the respondents are indebted to the applicant in the sum of R467 992.30. This is for goods sold and delivered by the applicant to the respondents at the latter's special instance and request. On 11 August 2016 the applicant instituted an action against the 1st respondent for payment of the aforementioned amount together with interest at the rate of 10.26% per annum *a tempore morae*. The 1st respondent defended the matter. The applicant responded by launching an application for summary judgement which was granted by my sister Gela AJ. The application for leave to appeal that decision was unsuccessful before my sister Reinders J. Despite every effort to enforce this judgement, the respondents have been unable to make payment. The respondents are admitting indebtedness to the applicant and inability to liquidate the debt.

[3] The entire application turns on the following issue. Whether sequestration of the joint estate of the respondents will be to the advantage of the creditors. The opinion of the counsel for the applicant is that it will be while counsel for the respondents is vehemently opposed to such an action.

[4] In order to succeed in the application, the applicant must comply with the requirements stipulated in section 10 of the Insolvency Act 24 of 1936.[1] As alluded to above, the point of contention is whether

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[1] Provinsional Sequastration:- If the Court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* -

the applicant has complied with the requirements of paragraph (c). The section provides that the court may not grant a sequestration order unless it is established that there is reason to believe that it will be to the advantage of the creditors that the estate of the debtor is sequestrated. The applicant bears the necessary onus.[2]

[5] At this stage of the proceedings, what needs to be established is that there is a *prima facie* reason to believe that sequestration will be to the advantage of the creditors. It is not necessary that the advantage to the creditors be established.[3] There must be facts proved that indicate such reasonable prospect not necessarily a likelihood that some pecuniary benefit will result to creditors. This is the approach that was adopted in Meskin & Co v Friedman.[4] The learned judge expressed himself in the following manner:-

> **"In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. Even if there are none at all, but there are reasons for thinking that as a result of the enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient ..."** (Footnotes omitted)

[6] This approach in Meskin & Co case was followed by the Constitutional Court in **Stratford and Others v Investec Bank**

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in sub-section (1) of section *nine*; and
(b) the debtor has committed an act of insolvency or is insolvent; and
(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.

[2] Braithwaite v Gilbert (Volkskas Intervening) 1984 (4) 717 (W) at 718 B
[3] This is the view of the authors in their seminal work "Insolvency Law and its operation in winding-up" edited by Boraine at 2-21.
[4] 1948 (2) SA 555 (W) at 559

Limited and Others.[5] In paragraph 44 the court stated the following:-

> **"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—**
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> **"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."**

[7] Counsel for the applicant submitted that there is a possibility that the granting of an application can lead to the unearthing of assets or claims in favour of the estate. He referred to a number of facts which in his opinion support his assertion. The entity called Paradiso South Africa that laid claim to the attached assets was only incorporated in 2016. Its only director and shareholder is the respondents' son. He was present at all times when the sheriff

[5] 2015 (3) BCLR 358 (CC)

attached the movable property and did not raise a word that the assets belonged to his company. The brand mark for the animals was only approved on 4 November 2016. The transfer of the Mercedes Benz was also concluded in November 2016. These incidents are relevant because that is the period that litigation between the parties commenced culminating with the summary judgement granted on 1 December 2016. Accordingly the respondents were disposing their assets. Further that there were assets that the respondents disposed and that they had not as yet received the payment. Such payment can accrue to the estate to defray the expenses and benefit the creditors.

[8] On behalf of the respondents, counsel differed sharply with his counterpart. He submitted that the applicant was raising a suspicion in order to persuade the court to grant the application. The company referred to viz Paradiso South Africa was incorporated in July 2016 before the applicant commenced with litigation. In this matter, the applicant has not established that there is *prima facie* reason to believe that it will be to the advantage of the creditors. He submitted that the respondents did not possess any assets of significant value. They had been rendered destitute by the drought of 2014/2015. He argued that the applicant was in essence engaging in a “fishing expedition” hoping to unearth something during the interrogation in the event the application is granted. Lastly that there were other less “draconian” procedures that could be engaged to achieve the enquiry of the financial position of the respondents. He specifically referred to Section 65A of the Magistrate’s Court Act 32 of 1944. In his opinion, the application ought to be dismissed with costs.

[9] The court must exercise its discretion judicially and lawfully. In the exercise of such discretion, the court is guided by the dicta outlined in Meskin & Co which was followed in Stratford case. The court is called upon to assess whether the sequestration will result in some payment to the creditors. In this matter the question must be answered in the affirmative.

[10] The respondents procured the fertilizers to plough their farmland. The disposition of the crop and others assets is not dealt with sufficiently to support the allegations made. The respondents are residing on the farm with equipment, livestock and crops. The surrounding circumstances regarding the manner in which attachment of assets took place and the timing of the interpleader proceedings are matters that must be scrutinized at length. These can be investigated if a Trustee is appointed and proper investigation is undertaken. I do not agree with counsel for the respondents that the applicant's hopes are pinned solely on the Trustee to investigate. There are cogent reasons given the surrounding circumstances that such investigation may reveal or recover some assets to the benefit of the creditors. The argument also that there are less "draconian" procedures like section 65A of the Magistrate's Court is also misplaced. The said section is designed to deal with the enquiry into the financial position of the judgement debtor. It is much more limited in scope and intensity as opposed to an interrogation in terms of section 64 of the Insolvency Act.

[11] In the exercise of my discretion. I am satisfied that there is a *prima facie* reason to believe that the sequestration will be to the advantage of the creditors.

[12] In the circumstances, I make the following order.

12.1. The joint estate of the respondents is hereby placed under provisional sequestration order.

12.2. A provisional order is hereby issued calling upon the respondent and/or any other interested party to show cause, if any on **14 June 2018** why a final order of sequestration should not be granted against the respondents' estate.

12.3. This order, together with a copy of the Notice of Motion and annexures thereto, must be served upon the respondents.

12.4. The copy of this order must be served on:

12.4.1. Any registered trade union that as far as the Sheriff can reasonably ascertain represents any of the employees of the respondents;

12.4.2. The respondents' employees, if any, by affixing a copy of the order and the application to any notice board, to which the employees have access inside the respondents' premises, or if there is no access to the premises by the employees, by fixing copy to the front gate, where applicable, failing which, to the front door of the premises from which the respondents reside and/or conduct any business;

12.4.3. The South African Revenue Service;

12.5. The costs of this application to be costs in the administration of the insolvent estate of the respondents.

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M. A. MATHEBULA, J

On behalf of the applicant:	Adv. J. M. C. Johnson
Instructed by:	Lovius Block BLOEMFONTEIN
On behalf of the respondents:	Adv. A. Berry
Instructed by:	F J Senekal incorporated BLOEMFONTEIN

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