IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

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

Case number: 1940/2018

In the matter between:

ABSA BANK LTD **Applicant**

and

CORNELIUS ABRAHAM TROSKIE N.O. **1st Respondent**

JACOBUS GERHARDUS TROSKIE N.O. **2nd Respondent**

STEPHANUS FRANCOIS NEL N.O. **3rd Respondent**

CEDRIC JOHN PETERSEN N.O. **4th Respondent**

(in their respective capacities as trustees of the
Boet Troskie Kinders Trust, registration no TMP1447)

THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION **5th Respondent**

CLOETE MURRAY N.O. **6th Respondent**
[In his capacity as duly appointed business rescue
practitioner of B & B Eiendomme (Pty) Ltd (in business rescue)]

ALL OTHER AFFECTED PERSONS

CORAM:	DAFFUE, J
HEARD ON:	22 NOVEMBER 2018
JUDGMENT BY:	DAFFUE, J
DELIVERED ON:	29 NOVEMBER 2018

I INTRODUCTION

[1] During April 2018 a registered bank and credit provider launched urgent proceedings by way of a hostile compulsory sequestration application against a trust. The aspect of urgency has fallen away and has become moot.

[2] The matter was eventually ripe for hearing on 22 November 2018. After hearing argument, I reserved judgment and informed the parties that judgment would be delivered on 29 November 2018.

II THE PARTIES

[3] The applicant is Absa Bank Ltd, a registered bank and credit provider. It was represented by Advv KW Lüderitz SC and S Tsangarakis.

[4] The first four respondents are the businessmen, Messrs CA Troskie, JG Troskie, SF Nel and an auditor of profession, Mr CJ Peterson in their representative capacities as the trustees of the debtor, the Boet Troskie Kinders Trust (“the Trust”), registration number TMP 1447. They have been represented by Advv P Zietsman SC and JC Coetzer.

[5] The Companies and Intellectual Property Commission was cited as fifth respondent and Mr Cloete Murray was cited in his representative capacity as Business Rescue Practitioner (“BRP”) of B & B Eiendomme (Pty) Ltd (“B & B”), a company under business rescue and supervision. These two respondents do not oppose the application.

III THE RELIEF SOUGHT

[6] Applicant seeks the usual provisional sequestration order against the Trust as represented by its trustees. The return date was left in the hands of the court.

IV PROCEEDINGS PRIOR TO THE HEARING ON 22 NOVEMBER 2018

[7] On 17 April 2018 applicant issued an application on a semi-urgent basis, intending to obtain a provisional sequestration order on 25 April 2018.

[8] On 24 April 2018 an answering affidavit was filed, dealing with the issue of urgency in particular. This caused the applicant to remove the matter from the roll of 25 April 2018 by agreement between the parties, no order as to costs.

[9] On 15 June 2015 the Trust filed a comprehensive supplementary affidavit by agreement and on 6 July 2018 applicant filed its replying affidavit.

[10] On 20 September 2018 the matter was postponed to 22 November 2018, costs to be costs in the cause.

[11] On 9 November 2018 applicant filed an interlocutory application wherein it indicated that it would seek leave on 22 November 2018 for the filing of a supplementary affidavit. The Trust responded by way of an affidavit by its attorney which was filed on 16 November 2018 and applicant replied thereto on 20 November 2018.

V **POINTS *IN LIMINE***

[12] Several points *in limine* were raised by the Trust. I directed that these points be argued together with the merits of the application. I shall now briefly deal with these aspects. The first issue on the papers was a lack of urgency. This has become moot and Mr Zietsman did not make any submissions in either the heads of argument or during his oral argument. Secondly, the applicant's lack of *locus standi* was raised. This deals with the merits of the matter and I shall deal extensively therewith *infra*. Thirdly, the Trust alleged that Standard Bank should have been joined in the application insofar as applicant had in mind the eventual setting aside (by trustees to be appointed if a sequestration order is granted) of a bond recently registered in the amount of R40m in favour of Standard Bank over the Trust's most valuable property situated in Constantia, Cape Town. There is no sound basis for such argument as this would mean that each and every time a creditor applies for sequestration, alleging that the respondent's transactions may be set aside in terms of anyone of ss 26, 29 - 31 of the Insolvency Act, 24 of 1936 ("the Act"), all others involved in his/her dealings should be joined. This is unheard of. Standard Bank may have a financial interest, but no legal interest in the relief sought. There is no application for the setting aside of its bond. Mr Zietsman did not make any submissions in this regard.

[13] The Trust also took a fourth point. Insofar as applicant relies upon an act of insolvency in terms of s 8 (c) or (d) of the Act pertaining

to registration of the Standard Bank bond, applicant failed to prove that the Trust was insolvent at the time. This is an issue relating to the merits and I shall consider this aspect *infra*. It was also alleged in the answering affidavit that any claim that applicant might have had, had become prescribed. Although Mr Zietsman did not deal with the issue in his heads of argument, he handed a recent judgment to me from the bar. I refer to *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC). Mr Zietsman readily conceded that this judgment is distinguishable on the facts and therefore irrelevant *in casu.* In fact, he conceded that the prescription defence was not sustainable and that the point taken was not good at all. It is apparent that the loan between B & B and the Trust was by intent a long term loan with no fixed terms of repayment. It is not the typical commercial loan considered in *Trinity supra.* In any event the trustees admitted the loan (or part thereof) in the 2107 financial statements.

[14] Lastly, Mr Zietsman pointed out that applicant failed to comply with a peremptory requirement of s 9(3) of the Act in that it failed to state whether or not it relies on any security for its claim. Applicant did not state that it has no security. In my view this requirement is relevant to indicate to the court how to exercise its discretion. A creditor who has sufficient security for its claim against a debtor may be hard pressed to convince a court to grant a sequestration order even if all requirements for such order have been met. *In casu* it is common cause that applicant has no security for its claim; in fact it is the Trust's version that applicant is not even its

creditor. Non-compliance may be condoned in terms of s 157 of the Act and insofar as necessary, condonation is granted. All points *in limine* are dismissed.

VI **NEW MATTER IN REPLY AND FILING OF SUPPLEMENTARY AFFIDAVITS**

[15] The general rule is that in motion proceedings the applicant must make out his case in the founding affidavit and new matter shall not be introduced in the replying affidavit. This is not an inflexible and/or absolute rule. In *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205E and further the full bench dealt with the general rule, but stated, relying on *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O) that it may be apposite to allow new matter in a replying affidavit. This will *inter alia* be the case when it appears that "… the ramifications of respondent's affairs were extensive and complex, and that it was impossible for applicant to have all the facts fully at his disposal before he launched his application."

[16] At 206D –E the court in *Shepherd* found that there could not be any objection that material information be placed before it by way of the provisional trustee's affidavit on the return date of a provisional sequestration order. Although new matter is placed before the court in such instance as the trustee reports on what he has ascertained during the execution of his statutory duties, it should be considered insofar as it is relevant to issues canvassed in the affidavits. *In casu* the Trust was not confronted with a provisional trustee's report as no trustee could have been

appointed yet, but by significant and material information obtained by applicant after filing of the replying affidavit. Based on the principle enunciated in *Shepherd* there can be no reason why material information that became available at a later stage may not be presented to the court with the necessary leave.

[17] As mentioned the court may in its discretion permit the filing of further affidavits. See rule 6(5)(e) of the Uniform Rules of Court and *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) at para [10]. It is true that in the absence of leave being granted by the court, parties are not allowed, even by agreement, to file further affidavits. It is stated in *Hano Trading* at para [11] that the court hearing the application, "…as arbiter, has the sole discretion whether to allow the affidavits or not" and "…will only exercise its discretion in this regard where there is good reason for doing so."

[18] *In casu* the application for leave was not applied for in a separate application. In my view it would be an unnecessary waste of time and expense to follow such route, bearing in mind that the matter has been dragging on for seven months. Respondent was invited to respond and cannot claim any prejudice if the further affidavit is allowed. Applicant established that two valuable St Francis Bay properties have been sold, that the proceeds have not been offered to it, but paid over to Standard Bank. The Trust, through its attorney, elected to respond in detail to the averments contained in the supplementary affidavit. I unreservedly accept the version of the Trust's attorney, a person that I admire and hold in high esteem, to the effect that he was unaware of the overdraft facility

granted by Standard Bank to the Trust and consequently the terms thereof. He (as well as his counsel) only became aware of the sale of the two St Francis Bay properties after being made aware thereof by applicant's attorney in a letter of 25 October 2018. I am satisfied that the further evidence is vital and that applicant has made out a proper case for the admission of its supplementary affidavit. The interlocutory application is therefore allowed together with the affidavits filed thereafter. In so doing, the full factual matrix is before the court in order to properly consider all relevant aspects.

VII DISPUTE ON THE MERITS

[19] The Trust denies that applicant has proven that it is one of its creditors. Therefore the first requirement of s 10 of the Act fully set out *infra* has not been met.

[20] The Trust alleges that it is solvent and that no act of insolvency has been committed. Therefore, in the absence of proof of insolvency or commission of an act of insolvency, the second requirement for a provisional sequestration order has not been met.

[21] The third requirement, advantage to creditors, is also in dispute, and lastly, it is the Trust's case that applicant brought the application with an ulterior motive and abused the process;

therefore the court should in the exercise of its discretion dismiss the application.

VIII **<u>COMMON CAUSE FACTS</u>**

[22] The following are common cause:

1) On 20 March 2012 two general notarial bonds were registered in securitisation of B & B indebtedness to applicant.

2) On 18 September 2017 the five directors of B & B admitted in writing that B & B owed two amounts, totalling in excess of R245m, to applicant and consented to perfection of the bonds.

3.) On 12 October 2017 a meeting took place between representatives of applicant and B & B. B & B was *inter alia* represented by Mr CA Troskie. At this meeting applicant sought a power of attorney to sell certain farms of B & B and also indicated that applicant would apply for the winding up of B & B as the required s 345 letter of demand (in terms of the Companies Act, 61 of 1973) had been delivered by then.

4) On 17 October 2017, five days after the meeting with applicant when the threat was communicated, B & B adopted a resolution to "net off" an amount in excess of R36m, or put otherwise, to reduce the Trust's loan account in favour of B & B with this amount, resulting in the Trust's debt towards B & B to be decreased. This appears *inter alia* from the financial statements of the two entities for the 2016 and 2017 financial years.

5) Two days later, on 19 October 2017, B & B's board of directors resolved to place the company under business rescue and supervision ("business rescue").

6) On 20 October 2017 B & B was indeed placed under business rescue. On that same day B & B's financial statements for the year ending on 28 February 2017 were approved by its board of directors and signed off by two directors, Messrs CA and JG Troskie, and its auditors.

7) The following note appears at item 5 of B & B's audited financial statements for the 2017 financial year in respect of the Trust's loan: "The loan has been ceded to ABSA and ABSA has laid claim to the loan account. The loan bears interest at the SARS official rate, has no fixed terms of repayment and by intent is of a long term nature." It is also evident that the loan was reduced from R75 962 148.00 in the 2016 financial year to R41 446 344.00 in the 2017 financial year.

8) Mr SR Robinson, a forensic accountant and auditor, was mandated by Mr Cloete Murray, the business rescue practitioner of B & B to review B & B's financial statements and examine its accounting records particularly pertaining to the loan account between B & B and the Trust. He found that B & B was hopelessly illiquid at all relevant times, that Mimosa Rolprentproduksies (Pty) Ltd ("MRP") was B & B's holding company and that the transfer of the MRP loan to the Trust did not follow the practice of B & B's directors in previous years and that as a result of the transaction the assets of B & B were reduced by R36 942 257. In his opinion the transfer was done as an afterthought in anticipation of an impending

action by applicant for B & B's winding up and the loan account should be accepted to be R78 388 601. Although the Trust requested extra time to obtain the services of its own expert and received ample time - about sixty days - to file its supplementary affidavit, it did not file an expert witness' report to challenge Robinson's version which therefore remains unchallenged.

9) The Trust's immovable properties have been valued in the total amount of R107 900 000.00, although two of those properties to the value of some R15m have been sold during the litigation and the proceeds paid over to another creditor, the Standard Bank.

10) The valuable Constantia property of the Trust which was purchased in 2010 and previously unencumbered, was hypothecated by a mortgage bond in the amount of R40m in favour of Standard Bank during October 2017.

IX THE REQUIREMENTS FOR A PROVISIONAL SEQUESTRATION ORDER

[23] Section 10 of the Act reads as follows:

"10 Provisional sequestration

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*-

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (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."

[24] In *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA) Cachalia JA stated at para [4] that

> "… a sequestration order is a species of execution, affecting not only the rights of the two litigants, but also of third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditors' ordinary remedies imposing disabilities on the insolvent – it is not an ordinary judgment entitling a creditor to execute against a debtor."

[25] It is important to note that if the court forms an opinion that *prima facie* the three requisites set out in s 10 have been met, a provisional sequestration order may be issued. The threshold is much lower than at the stage when a final order is sought in terms of s 12.

X THE LETTER WRITTEN WITHOUT PREJUDICE OF RIGHTS

[26] It is apposite to deal already at this stage with correspondence between the parties' attorneys and in particular the letter written by Lovius Block, B & B and the Trust's attorneys, dated 31 May 2018. I refrain from dealing with correspondence of October 2017 at this stage which will be considered *infra.* It will be recalled that the

application was set down for hearing on 25 April 2018, but removed from the roll by agreement. On 31 May 2018 the Trust's attorney wrote a letter to applicant's attorney, duly marked without prejudice of rights, which applicant decided to attach to its replying affidavit. It is the Trust's case that this letter contains inadmissible evidence, being without prejudice communication and settlement negotiations. I must now consider whether the contents thereof shall be accepted as evidence or whether it should be struck out as inadmissible.

[27] The rule of legal professional privilege pertaining to without prejudice statements is well-known. Statements and even admissions of liability made in an attempt to settle disputes between parties are generally inadmissible in subsequent litigation between them. Over the years exceptions to the general rule were recognised. The latest decision on the topic is *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA). The court dealt with competing interests, *i.e.* the policy underlying the without prejudice rule and the policy underlying s 14 of the Prescription Act, 68 of 1969, but eventually found that where a debtor acknowledged liability, thereby removing any uncertainty, the reasons for providing the protection of prescription fell away. See paragraphs [13], [16], [23] and [36].

[28] A judgment more to the point is *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA). The court found at paragraph [13] that, as a general rule, negotiations between parties with a view to a

settlement of their disputes are privileged from disclosure. One exception to this rule is evidence of an act of insolvency. In such a case public policy dictates that an admission of insolvency should not be precluded in sequestration or winding up proceedings even if made without prejudice. The *ratio* for such exception is that these proceedings are not a matter between the parties to the litigation only, but by its very nature involves the public interest. The court also held at paragraph [15] that as a consequence of the admission of liability the plea of prescription could not be sustained.

[29] The letter of 31 May 2018 is significant and contains relevant evidence of *inter alia* a compromise being negotiated insofar as the Trust was prepared to accept liability towards applicant in the lesser amount of R40m, subject to an amount to be deducted and still to be calculated pertaining to the value of game and their offspring. It was furthermore recorded that the Trust would be able to settle the outstanding amount due to applicant once it managed to sell its immovable properties which were placed in the market. No doubt, the Trust did not have any means to settle applicant's claim in whichever amount, unless it managed to sell its immovable assets. The undertaking in this letter was not complied with insofar as two valuable immovable properties were sold whilst the proceeds were paid over to Standard Bank. Applicant established this in October 2018 only and this led to the application to file a further affidavit to place this evidence on record. This will be dealt with further at a later stage. I am satisfied that the letter of

31 May 2018 contains admissible evidence and it is therefore allowed as part of the factual matrix to be considered.

XI APPLICANT'S *LOCUS STANDI*

[30] The Trust's main focus in opposing the application and during the oral submissions of its counsel is the alleged lack of applicant's *locus standi* as creditor.

[31] I mentioned *supra* that B & B is a debtor of applicant in an amount in excess of R245m. *Ex facie* applicant's replying affidavit the debt has increased to over R290m.

[32] The bone of contention is the legal effect of the two notarial bonds registered by B & B in favour of applicant mentioned *supra*. As stated, B & B consented to perfection of the notarial bonds and to applicant exercising all its rights in the bonds. However, the parties are at loggerheads as to whether applicant became a creditor of the Trust with the right to execute against the Trust and/or to apply for its sequestration. The attachment of B & B's right, title and interest is not in dispute, although the applicant's entitlement thereto is the subject matter of dispute.

[33] The Trust admitted that applicant is a creditor of B & B and that B & B is a creditor of the Trust, but it is denied that there is a legal *nexus* between applicant and the Trust. Its case is that the B & B debt is not a movable asset, but a right of action and that it was not intended to be secured in terms of the notarial bonds. Applicant should have obtained a cession *in securitatem debiti* if it wanted security in respect of the loan account (book debt). Mr Zietsman conceded during oral argument that the parties to the notarial bonds could have contracted for such cession in the same documents and it would not necessarily be required to enter into separate documents, but he submitted that the bonds do not favour the conclusion arrived at by applicant. In this regard he referred to several passages in the bonds which are indicative of hypothecation of movable property and not book debts and/or rights of action. He mentioned, to refer to just one example, the obligation to insure the movables. According to him book debts cannot be insured against fire.

[34] The bonds specifically refer to the following.

In clause 2 we read: "…verbind en verhipotikeer die Verbandgewer hiermee oor die algemeen al sy roerende goedere, war dit ookal geleë is, wat die Verbandgewer tans of op enige tydstip in die toekoms, ook na die registrasie van die verband, besit, <u>hetsy liggaamlik of onliggaamlik ("die goedere")</u> welke almal hiermee tot die beskikking van die Bank geplaas word…" (emphasis added – English translation: whether corporeal or incorporeal ("the goods").

Clause 7 stipulates that in the event of non-payment of any amount due under the bond, the bank shall be entitled to foreclose the bond and to take possession of the goods hypothecated.

In terms of clause 7.8 the bond serves *in rem suam* as authority to the Bank to follow a variety of steps, *inter alia* in terms of clause 7.6.2.8 "… om alle goedere, skulde en bedrae hoegenaamd wat wel verskuldig of betaalbaar is of aan die Verbandgewer behoort, hetsy op naam van die Verbandgewer of op naam van die Bank, te ontvang, te eis, op te eis en terug te kry." In English, the bank shall be entitled to receive, claim and collect all goods, debts and amounts due or payable to the mortgagee or which belong to it.

[35] I was referred to a plethora of authorities by both counsel and although I considered same, I do not intend to deal with all of them in any detail or at all.

[36] In the first place it is emphasised that general notarial bonds like the two *in casu* do not fall within the purview of the Security by Means of Movable Property Act, 57 of 1993. This is clear from s 1 of this Act and *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and others* [2003] 1 All SA 267 (SCA) at para [3]. Harms JA confirmed in paragraph [4] of the judgment the following:

> "A perfection clause entitles the holder of the bond to take possession of the movables over which the bond has been registered. Such a clause amounts to an agreement to constitute a pledge and will be enforced at the instance of the bondholder, whereupon the creditor obtains a real right of security."

[37] In *Stratgro Capital v Lombaard* (417/2018) [2009] ZASCA 142 (23 November 2009) the SCA in no uncertain terms held "….a litigant's <u>right, title and interest in a claim constituted incorporeal property</u> which may be attached at the instance of a judgement creditor and sold in execution." (emphasis added.) See also *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 398 (SCA) at 399E.

[38] Clause 2 of the notarial bonds clearly and in no uncertain terms contemplates the securitisation of B & B's debt owed to applicant and particularly including for such purpose B and B's incorporeal rights. In my view applicant is a creditor of the Trust within the meaning of s 9(1) insofar as it, in pursuance of perfecting its notarial bonds and the subsequent attachment, acquired the right, title and interest in B & B's claim for payment against the Trust.

[39] I reiterate that it is common cause that corporeal and incorporeal assets/rights were hypothecated under the notarial bonds. Both parties to the bond, *i.e.* applicant and B & B, through its board of directors *ex facie* the financial statements are *ad idem* that a cession of the Trust's loan account was agreed upon and that the bonds were perfected by agreement. It does not lie in the mouth of Mr JG Troskie who co-signed B & B's financial statements with his father, they duly mandated by the board of directors to submit the contrary whilst wearing a different hat as trustee of the Trust. There can be no doubt that applicant has factually proven that a cession of the loan account has been effected.

[40] In *LAWSA* 2nd ed, vol 17, part 2 at p 403 the authors explain that notarial bonds may be registered over corporeal and incorporeal movables/assets, including *inter alia* book debts, liquor licences and the goodwill of a business. The authors emphasise that only corporeal movables may be hypothecated in terms of the Security by Means of Movable Property Act which is not applicable in this instance.

[41] In *Solomon v Registrar of Deeds* 1944 CPD 319 the court ordered the registration of a notarial bond over a liquor licence, stating at p 326 that a right of commercial value that can be separately held, alienated and sold such as a liquor licence, can also by hypothecated. The court relied on Gaius who stated that "(w)hatever admits of purchase and sale also admits of pledge." This judgment was cited with approval in *Nkwana v Hirsh* 1956 (4) SA 450 (AD) and more recently in *A-Team Drankwinkel BK an 'n ander v Botha en 'n ander NNO* 1994 (1) SA 1 (AA).

[42] In *Lynn & Main Inc v Brits Community Sandworks CC* 2009 (1) SA 308 (SCA) the court held at paragraph [6] that cession is a method by which incorporeal rights are transferred, e.g from a creditor as cedent to a cessionary in respect of a right to recover a debt from the debtor. In *GN v JN* 2017 (1) SA 342 (SCA) at 356A the court held that "(b)y its very nature movable property comprises both corporeal and incorporeal things."

[43] Finally, on the law, it is prudent to refer to *Netherlands Bank of SA v Yull's Trustees and the United Building Society* 1914 WLD 133, the court held at p 137 as follows:

> "A book debt being a right of action, the pledgor by giving the pledgee the right to collect it in fulfilment of his agreement of pledge must be taken to have intended to cede his right of action to the pledgee, or to whomsoever the pledgee may have ceded the bond to. By our law no particular form of words is necessary to constitute a cession, provided the intention to cede is clear." (emphasis added.)

[44] Mr Zietsman's submission that it is not clear from the notarial bonds that a cession has taken place and that third parties considering the bonds would be totally in the dark is not correct in light of the common cause facts and the legal position.

[45] At the meeting of 12 October 2017 referred to *supra* Mr CA (Boet) Troskie, referred to as Mr Troskie snr in the letter of Lovius Block dated 16 October 2017, annexure FA 7.4, mentioned in response to applicant's statement that B & B had a claim against the Trust in the amount of R75 962 148.00, that B & B owed the Trust an amount for game purchased by B & B for which the Trust paid. Reliance was then placed on set off to be effected. In the answering affidavit reference is made to a resolution taken as late as 17 October 2017 that the loan from MRP be transferred and "netted off the loan to the trust." The following strange comment is made immediately hereafter in paragraph 14.1: "As far as we know this was a ratification of an earlier decision." It is not said who the

deponent referred to but the vagueness of the explanation is evident.

[46] I am satisfied that a proper case has been made out for purposes of the standard of proof required in s 10 in respect of the *quantum* of applicant's claim. I mentioned *supra* that applicant relies on the report of a forensic accountant and auditor, while the Trust failed to present any countervailing evidence. In his answering affidavit Mr JG Troskie stated that due to time constraints it was not possible to obtain expert evidence to deal with Robinson's report. A further sixty day were provided for filing of a supplementary affidavit, but no further word was said to countervail applicant's case in this regard. The trustees should have been warned that they could not rely on bare, general or ambiguous denials and that they should have grappled with all relevant factual averments relied upon by applicant. See: *Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008 (3) SA 372 (SCA) at para [13].*

[47] I agree with applicant's counsel that Robinson's expert report is not meaningfully disputed or countervailed with any evidence, but more importantly, the paucity of the Trust's defence is exacerbated by the commonality of individuals who are directors of B & B and MRP and trustees of the Trust. The two main role players are Mr CA (Boet) Troskie and his son, Mr JG (Jaco) Troskie. These entities and persons were all intimately involved in the reduction of the loan account. The concurring, common and contracting minds of the three entities do not stand at arms' length from one another

given their family and/or close ties. Although the exact facts which resulted in the reduction of the loan account must be within the peculiar knowledge of the *dramatis personae,* the trustees failed to take the court in their confidence. The *dictum* of Marais JA in *My Heavy Metal; Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) at paragraph [17] comes to mind and may equally apply *in casu.* A commonality of control by Messrs Troskie is evident and one is struck by the evasiveness which permeates it.

[48] It is noteworthy to mention the following to show the above mentioned directors' and trustees' lack of *bona fides*. On 13 October 2017 applicant's attorneys informed the directors of B & B that applicant has attached the loan account and that they should refrain from dealing with it. A similar letter was written to the auditors and trustees of the Trust on 16 October 2017. Notwithstanding this knowledge B & B's directors resolved on 17 October 2017 to reduce the loan account and two days later the 2017 financial statements were approved and the same day a resolution taken to place B & B in business rescue. As strange as it may sound and prior to the aforesaid resolution of 17 October 2017, the Trust's 2017 financial statements, reflecting the reduction in the loan account, were issued as long ago as 31 August 2017. The same partner of Newtons Chartered Accountants, one L Greyling, is responsible for compilation of the financial statements of both entities.

[49] Applicant's claim is not *bona fide* disputed on reasonable grounds. The Trust conceded its liability to B & B in the amount of R44 446 334.00. I am satisfied that applicant has proven from both a factual and legal perspective that the Trust is liable to it. Therefore, at best for the Trust it owes applicant R44 446 334.00 and at worst, R74 443 113.00. I again refer to Robinson's report, read with the applicable financial statements.

XII <u>INSOLVENCY / ACTS OF INSOLVENCY</u>

[50] The next aspect to consider is whether or not the Trust is insolvent. I am convinced that the Trust is not a trading trust in the true sense of the word notwithstanding allegations that it purchased game in its own name. I refer to its financial statements and in particular the statement of comprehensive income on page 279, read with the relevant note 12 on page 288. It is in essence an investment entity, the owner of shares in several companies and luxury immovable assets situated in well-known affluent areas such as Constantia, Fancourt and St Francis Bay. The million dollar question is whether its assets, fairly valued, exceed its liabilities. This will be discussed in the following paragraphs, but before I do that, I shall firstly consider whether it is possible to find insolvency on the basis of inference.

[51] Over a century ago Innes CJ made the following remark in the well-known case of *De Waard v Andrew and Thienhaus Ltd* 1907 TS 727 at p 733*:*

> "Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says:
>
> "I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities."
>
> To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in critical spirit the case of a man who does not pay what he owes."

[52] In *Court v Standard Bank of South Africa* 1995 (3) SA 123 (AD) at 134C-D and 135 I- 136B Vivier, JA dealt with the position of a debtor who failed to pay her debts notwithstanding several letters of demand and then made the following remark:

> "The appellant had sufficient time to realise her assets and to pay her creditors. She had not done so and had failed to pay the interest on the capital amounts."

The Trust did not receive several letters of demand prior to launching of the application *in casu* as was the case in the above judgment, but a period of seven months has expired since receipt of the application and still no payment has been forthcoming.

[53] The court is also entitled to consider the further averments pertaining to other creditors of the Trust and I quote the following from *Fedco Cape (Pty) Ltd v Meyer 1988 (4) SA 207 (ECD) at 212C - F*:

> "In addition it appears from the evidence that respondent is also heavily indebted to various other creditors in substantial amounts and that also in those instances he had failed to meet his due commitments to pay his debts in any manner or form. …
>
> In the final analysis the Court is faced with direct evidence with regard to respondent's assets and liabilities which is, as I have stated, inconclusive either way; it is more or less evenly balanced. <u>The Court also has before it the indirect and inferential evidence concerning the respondent's behaviour and machinations which should, I believe, be added to and considered in conjunction with the direct evidence.</u>
> Once that is done the scales are clearly in my judgment preponderantly tipped in favour of a finding of respondent's insolvency." (emphasis added.)

It is apparent from the facilities letter issued by Standard Bank on 19 July 2017, attached to the Trust's affidavit in the interlocutory application, that even Standard Bank is much concerned with its financial position. It insisted that the Constantia property be sold by 10 August 2017, failing which a mortgage bond be registered over the property. This eventually transpired as indicated *supra.* I noted from the Deeds Registry's records of this property that it was purchased in 2010 and that it was not hypothecated for more than seven years until registration of the Standard Bank bond. The two properties in St Francis Bay that have been sold recently were not mortgaged, but Standard Bank insisted in its letter of 19

July 2017 that they be sold forthwith in order to repay the banking facility. No doubt, a major creditor like Standard Bank may do everything lawful within its power to obtain payment of what is due to it and/or to arrange for further security. That Bank is so conscious of the Trust's financial predicament that it extended overdraft facilities *ex facie* the above letter to 25 August 2018 only, which is unheard of in the commercial world insofar as overdraft facilities are generally reviewed on an annual basis.

[54] In *Realizations Ltd v Ager* 1961 (4) SA 10 (D &CLD) at pp 11C-12G Williamson, JP stated the following:

" … whether in fact the respondent is insolvent. …. is not a material consideration in considering an application for sequestration based upon an act of insolvency except upon the final approach, … The question of actual insolvency is not in issue at the stage of the enquiry as to whether the petitioner has proved his case. He has to establish the act of insolvency…. An advantage to creditors is shown generally when the petitioning creditor establishes that the debtor has a substantial estate to sequestrate and that the creditors cannot get payment except through sequestration. … In considering whether it is to the advantage of creditors the Court does not consider whether other alternative methods of obtaining payment might not bring better results. … The Court in a sequestration matter is not entitled to give a debtor a moratorium if the result would be to deprive the creditors of the prospect of an early dividend. A discretion, of course, must be exercised in the light of all the circumstances and the fact that there may be no prejudice to creditors if an order is not granted, because there is a substantial prospect of early payment, is a matter which is relevant and a matter which I should and have considered in this case. … *Prima facie*, on papers, this respondent is a man of considerable assets who should be able to pay his debts but the fact remains that he has not paid his debts, and he has considerable debts now which are not being met." (emphasis added.)

Williamson JP also relied upon the well-known *dictum* of Innes, CJ quoted *supra*.

[55] A debtor who has committed an act of insolvency may be sequestrated even if he is technically solvent. See: *DP Du Plessis Prokureurs v Van Aarde* 1999 (4) SA 1333 (TPD) at 1335E - G. A debtor confronted with a sequestration application shall reveal his financial position with clarity in the answering affidavit. See: *Absa Bank Ltd v Rheboksklоof (Pty) Ltd and Others* 1993 (4) SA 436 (CPD) at 447B – H. Berman, J commented as follows pertaining to the inaction of the debtor:

> "He did not avail himself of the opportunity afforded him to set out precisely what his asset position was (and is) nor did he state specifically what his liabilities were (and are). It seems to me that he was deliberately evasive in regard to providing details of his assets … although contending that his assets were worth more than this amount, he failed to set out precisely what his assets were and what their fair value was."

[56] Mr Zietsman criticised applicant for relying on a so-called skeleton founding affidavit and then trying to make out a case in a voluminous replying affidavit. The alleged insolvency of the Trust is set out in three or four paragraphs of the founding affidavit whilst applicant elaborated extensively in reply. Usually there is merit in such criticism, but in my view the nature of the

proceedings and particularly the dealings between the Trust and other entities within the Troskie group of companies required a more detailed reply than is normally expected.

[57] According to applicant the Trust is factually insolvent based on the following facts. In the founding affidavit it is alleged that the total amount of its liabilities is R124 443 113.14 and although Deeds Registry records of eight immovable properties were attached, no valuations thereof were presented. It was merely alleged that the market value of the properties did not exceed the total debts.

[58] The Trust denies actual insolvency. I accept that the Trust provided a clear picture of the extent and values of its immovable properties. It presented sworn valuations and admissible evidence in respect of its immovable properties in the total amount of R107 900 000.00. This figure shall be accepted without questioning. I disregard the fact that the Constantia property has been in the market for many months and the highest offer received was R35m. Although I take judicial cognisance that the property market, even in the previously booming Western Cape, is depressed at the moment and there is no light in the tunnel, I shall except the value placed on this property as its fair market value. However, in my view the Trust failed to give a complete picture of all its assets and liabilities and also its ability to pay what is due by it. A court is entitled to look at the undisputed and unexplained indications of a debtor's inability to pay his debts and his failure to make an open and honest disclosure of his financial position. See: *Uys and Another v Du Plessis* 2001 (3) SA 250 (CPD) at 255B - G.

[59] Averments were made in respect of immovable properties registered in the names of the Elna Troskie Trust and the Jaco Troskie Trust on the supposition that these trusts are indebted to the Trust and that the loan accounts form part of the Trust's estate. Several further allegations are made in respect of other loan accounts in favour of the Trust, the value of its shareholding in other companies and other investments. In reply applicant showed the evasiveness and lack of proper proof in this regard as well as the fact that none of these investments and/or shares and/or loans will apparently bear any fruit for the Trust. When Mr Zietsman made his submissions to me, he insisted that the Trust had proved total assets to the value of R171 147 769.00 and total liabilities in the amount of R97 788 623.00 based on the so-called minimum assets deposed to by the deponent, JG Troskie. He maintained that the assets exceeded the liabilities by more than R73m. Mr Troskie is not an auditor and could not present admissible evidence in respect of the valuations of listed shares or shares in private companies, the values of unidentified motor vehicles or the chances of collecting any money in respect of the loan accounts of his and his sister's trusts. The value of the game is also seriously contested. The claim of B & B (which is lawfully applicant's claim) was accepted in the lesser amount of R44m in total disregard of the report of Robinson. If the valuations of the immovable properties are accepted, it must not be forgotten that two properties to the value of about R15m have been disposed of in the meantime. Although the status of the debtor is generally

adjudicated as at the date of the application – in April 2018 in this case – the fact that a debtor disposed of assets since then - cannot be disregarded. If the R15m is subtracted from R107 900 000.00, the total immovable assets amount to R93m. On its own version the Trust's liabilities, based on a concession of the B & B claim in the lesser amount of R44m, exceed its assets. I have not taken into account the value of the game which on applicant's version is worth just over R1.4m. In reply applicant has set out in detail why much of the assets relied upon by the Trust shall not be taken into consideration and this probably prompted Mr Zietsman to rely on the so-called bare minimum of assets. However applicant also showed with reference to the Trust's own financial statements that its liabilities are much more than reflected in the Trust's two answering affidavits. I do not deem it apposite to repeat those, save to confirm that I am in agreement that the Trust has not played open cards by not providing detailed information of its liabilities as at the time of the application. The liabilities exceed the assets by much more than I calculated *supra.*

[60] Factual insolvency may be established indirectly as stated in *Mars supra.* See also: *Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd intervening)* [1998] 2 All SA 433 (W) at para [51]. *Absa Bank Ltd v Rhebokskloof supra* is also a typical case in point in order to rely on insolvency by way of inference. Much weight should be attached to a respondent's unexplained failure to pay his debts. The learned judge dealt with this aspect at 446H – 447D, relying on the *dictum* of Innes CJ, mentioned *supra*. In conclusion on this topic, respondent had sufficient time to settle his admitted debt, but

failed to do so. The best proof of solvency is to settle one's debts. Applicant has proven factual insolvency, or at least insolvency by inference.

[61] Applicant relies on several acts of insolvency committed by respondent in terms of s 8 (c) and/or 8 (d) and/or 8 (e) of the Act. Subsections (c) and (d) read as follows:

> "8. A debtor commits an act of insolvency-
>
> *(c)* if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;
>
> *(d)* if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;"

[62] In the case of s 8 (c) the act of insolvency is committed when the debtor disposes of or attempts to dispose of his property which has or would have the effect of prejudicing his creditors or preferring one above another. In the case of s 8(d) the removal or attempted removal of his property by a debtor with the intent to prejudice creditors or prefer one above the other is an act of insolvency. In the first instance intent is not relevant and in the second instance a disposition does not have to be proven, although the debtor's intent must be proven.

[63] I am of the view that the Trust has committed acts of insolvency in terms of s 8 (c) by disposing of two immovable properties and paying the proceeds to Standard Bank as an unsecured creditor.

Standard Bank was preferred above and to the detriment of applicant and any other creditors. It may even be argued that the extension sought in the letter of 31 May 2018 is akin to an act of insolvency in terms of s 8 (g). The Trust made it clear that it could not pay its debt unless some of its properties were to be sold. I do not make any finding in this regard. It also entered into a compromise with applicant as its creditor. This falls within the ambit of s 8 (e).

[64] The registration of the Standard Bank bond which applicant relied upon in the founding affidavit as an act of insolvency must be considered now. “Disposition” is defined in s 2 of the Act to include “mortgage”. See also *Mars loc cit* at paragraph 4.4 and *Schlemmer v Mehnert* 25 SC 870 referred to by the authors pertaining to registration of mortgage bonds outside the jurisdiction of the court. I therefore agree with applicant that a disposition has taken place within the ambit of s 8 (c). There is sufficient indication that the Trust was insolvent at the stage when the disposition was made.

XIII <u>ADVANTAGE TO CREDITORS</u>

[65] Applicant is a major, perhaps the largest, creditor of the Trust. It has shown that the Trust is prepared to dispose of valuable immovable properties to its and also other creditors’ prejudice. This has been done during pending sequestration proceedings and in the face of an undertaking that proceeds of the sale would be

paid to applicant. Mr Zietsman's suggestion that applicant may sue the Trust is not valid in the circumstances. The Trust will on all probabilities carry on during such litigation to dispose of its assets and applicant may eventually find an empty shell.

[66] The court must be satisfied that there is reason to believe that sequestration of a debtor will be to the advantage of his creditors. Generally, creditors' views are important and they know what is in their best interests. *In casu* applicant, as the largest or one of the largest creditors, insists that the third requirement for a final order of sequestration has been proven.

[67] Williamson JP said the following in *Realizations Ltd supra* at 14H in respect of the advantages attached to an investigation of the insolvent's affairs: "The best judges of their interest in this regard are the creditors."

[68] Trustees to be appointed will have to investigate the Trust's affairs. There are several unexplained issues and/or indications of suspicious conduct (to put it mildly) that may have to be dealt with in accordance with ss 26 and 29 -31 of the Act. I mentioned the disposition of the two St Francis Bay properties and the transactions in respect of the loan account.

XIV **DISCRETION**

[69] Mr Zietsman submitted that applicant's motive in bringing the application on an urgent basis was clear. It wanted to ensure that reliance could be placed on the provisions of s 88 of the Act in terms whereof the Standard Bank bond over the Constantia property could be declared invalid. Although the debt was incurred more than two months prior to the lodging of the bond, the registration thereof could never be hit by s 88 as the bond was lodged – not registered – outside the period of six months from any possible date of sequestration. By the time applicant intended to apply for sequestration, the period of six months has expired.

[70] Bertelsmann *et al, Mars: The Law of Insolvency in South Africa*, 9th ed at p 141 and further deal with the discretion of the court in adjudicating applications for sequestration. The authors *inter alia* state the following, relying on case law:

> "Where it is clear that … the creditor has some other ulterior object in making application and not the benefit of creditors, the court will refuse a sequestration order, but the *onus* of establishing that such is the case rests on the person asserting it."

The authors continued at p 143 in submitting that a sequestration order will also not be granted if the application is made "predominantly to embarrass and harass the debtor and to prevent him from obtaining judgment of debts due to him, or to put pressure on him to compromise a claim then being investigated in arbitration proceedings or if very special considerations seem to require such refusal."

If one considers all the circumstances *in casu* and in particular the manner in which the *dramatis personae* arranged for B & B to be placed under business rescue when threatened with winding up, the suspicious dealings relating to the loan accounts and the reneging on the agreement with applicant to settle the debt from the sale of immovable properties, applicant cannot be faulted for taking steps to apply for sequestration of the Trust.

[71] The Act was promulgated for the benefit of creditors and not for the relief of harassed debtors as Holmes J, as he then was, said in *R v Meer and others* 1957 (3) SA 641 (N) at 619A. A debtor seeking to persuade a court to exercise its discretion in his/her favour must place evidence before the court that clearly establishes that the debts will be paid if a sequestration order is not granted. I refer to the full bench decision in *Nedbank Ltd v JH Potgieter* 2013 GDR 2290 (GSJ) at para [19].

[72] *In casu* we have a situation where the Trust in the first place undertook to sell its immovable properties to pay applicant, only to renege on that agreement by paying another creditor, Standard Bank, and secondly, in denying its indebtedness or the extent thereof, and thirdly in dealing with the loan account to the prejudice of creditors.

XV CONCLUSION

[73] I conclude in confirming that I am of the opinion that, *prima facie,* applicant has proven the three requisites of s 10. Furthermore, in exercising my discretion I am not convinced that a provisional sequestration order should not be issued.

[74] In coming to the above conclusions, the Trust should be provisionally sequestrated. The normal return date in this Division is four weeks from the granting of the provisional order. The festive season is around the corner and problems may be experienced to comply with the order. Therefore, a later than normal return date appears to be apposite and this will be reflected in my order.

[75] Mr Zietsman asked in the alternative to his main argument that the application be dismissed, and in the event of a provisional order being granted, that an order be made that the Trust's costs in opposing the application, consequent upon the employment of two counsel, shall form part of the sequestration costs in terms of s 97(3) of the Act. In my view this is a reasonable approach. I did not find that applicant had an ulterior motive to bring the application, but the application was brought with a degree of high-handedness and I am satisfied that the opposition was not unreasonable.

XVI <u>ORDERS</u>

[76]

1. The estate of the Boet Troskie Kinders Trust, registration number TMP 1447, as represented by first, second, third and fourth respondents (“the Trust”) is placed under provisional sequestration in the hands of the Master of the Free State High Court, Bloemfontein.

2. A provisional order is hereby issued calling upon the Trust and any other interested parties to show cause, if any, to the court on 17 January 2019 at 9h30 why a final order of sequestration should not be granted against the Trust.

3. This order, together with a copy of the notice of motion and annexures thereto, shall be served upon the Trust.

4. A copy of this order shall be served on:

   4.1 any registered trade union that as far as the sheriff can reasonably ascertain represents any of the employees of the Trust;

   4.2 the Trust’s 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 Trust premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which, to the front door of the premises from which the Trust conducts any business; and

4.3 the South African Revenue Service.

5. The sheriff shall ascertain whether the employees of the Trust are represented by a trade union and whether there is a notice board on the premises to which employees have access.

6. Applicant's costs of this application, including the costs consequent upon the employment of two counsel and the applicant's costs of the interlocutory application, together with the Trust's costs of opposition of the main application consequent upon the employment of two counsel, shall be costs in the administration of the insolvent estate of the Trust.

J P DAFFUE, J

On behalf of Applicant: Advv KW Lüderitz SC and S Tsangarakis
Instructed by:
c/o Symington & De Kok
Bloemfontein

On behalf of 1ST to 4TH Respondents: Advv P Zietsman SC and JC Coetzer
Instructed by: Lovius Block

Bloemfontein