IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

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

Case number: 4606/2016

In the matter between:

JACOBUS JOHANNES TRIEGAARDT N.O. 1st Applicant

RUDOLPH PHILIP BOTHA N.O. 2nd Applicant

(In their capacities as the Trustees of the

JJ TRIEGAARDT FAMILY TRUST IT105/96)

and

ANDRE BAZZETT JANSEN KNIPE Respondent

(Unmarried, ID: [6...] ,

Residing at [...] G. C.,

H. H., BLOEMFONTEIN, 9301)

OTLLIE ANTON NOORDMAN 1st Intervening Applicant

CHAVONNES BADENHORST

ST CLAIR COOPER 2nd Intervening Applicant

SIMON MALEBO RAMPOPORO 3rd Intervening Applicant

HEARD ON: 11 MAY 2017

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 22 JUNE 2017

I. INTRODUCTION

[1] Before me are five applications, to wit a main application for the provisional sequestration of the respondent's estate; secondly, an intervening application by the liquidators of two companies in liquidation, also seeking the provisional sequestration of respondent's estate; thirdly, an application for the extension of the liquidators powers; fourthly, an application in terms of rule 7(1) of the Uniform Rules of Court; and lastly, a counter-application by the respondent seeking in essence a declaratory order to the effect that the applicants' and intervening creditors' attorneys, Matsepes Inc, were not validly appointed by the intervening applicants and also that the appointment was in contravention of s 384(3) of the Companies Act, 61 of 1973.

[2] Applications for condonation for failing to file the replying affidavits in the main and intervening applications timeously were granted at the onset of the proceedings, there having been no opposition.

II. THE PARTIES

[3] The applicants in the main application, Jacobus Johannes Triegaardt and Rudolph Philip Botha, are the trustees of the JJ Triegaardt Family Trust. It is their case that the trust is a creditor of the respondent. I shall herein later refer to the applicants as the Triegaardt Family Trust to avoid confusion.

[4] The respondent is Andre Bazzett Jansen Knipe (herein later referred to as “Knipe” without intending to be derogatory), an unmarried businessman residing in Bloemfontein.

[5] The applicants in the intervening application is Otllie Anton Noordman, Chavonnes Badenhorst St Clair Cooper and Simon Malebo Rampoporo in there capacities as provisional liquidators in the estates of *Kameelhoek (Pty) Ltd and Schaapplaats 978 (Pty) Ltd* (in liquidation). I shall refer to them herein as “the liquidators”.

[6] Knipe is not only the respondent in the intervening application, but also the applicant in a counter-application filed in the intervening application. The counter-application is not formally opposed, apparently in the belief that the applicants have made out such a strong case for the provisional sequestration of the respondent that it was not necessary to oppose.

[7] Adv L Halgryn SC appeared before me for the applicants in the main and the intervening applications, he having been instructed by Matsepes Inc.

[8] Adv F Janse Van Rensburg appeared on behalf of respondent on instructions of Stuart Van der Merwe Inc of Pretoria.

III. HISTORY OF THE LITIGATION

[9] On 28 September 2016 the Triegaardt Family Trust issued its application in terms whereof an order for the provisional sequestration of respondent's estate is sought.

[10] The Triegaardt Family Trust is not an original creditor of respondent, but obtained cession of the claim of respondent's sister, Carol Jessie Kathleen Lotz (later referred to as "Carol Lotz"). She, both in her personal capacity as well as in her capacity as co-executrix in the estate of their late father, Mr Knipe Snr, ceded her claim for taxed costs to the Triegaardt Family Trust. Therefore it is alleged that the respondent is indebted to the Triegaardt Family Trust as cessionary the amount of R562 217.52 (interest excluded) which amount was taxed and allowed by the Taxing Master of the Northern Cape High Court in case number 37/2015. That application was launched by Knipe and his brother John Douglas Jansen Knipe against the liquidators, their two sisters (including Carol Lotz in her aforesaid two capacities), their other brother, Tobie Myburgh Afslaers CC and The Master of the High Court, Bloemfontein. That application was one of a number of

applications brought in the Northern Cape as well as the Free State High Court by or against Knipe, involving his family members.

[11] In terms of a written cession the cedent (Carol Lotz) and the cessionary (the Triegaardt Family Trust) agreed that in the event of payment in respect of the claim not being obtained by 30 September 2016, the cession would lapse with immediate effect. On 24 September 2016 the parties extended the deadline in writing to 31 March 2017. On 30 March 2017 the deadline was again extended in writing to 31 May 2017, i.e. prior to the hearing of this application which occurred on 11 May 2017.

[12] I cannot establish from the court file what happened on 20 October 2016, but it is apparent that respondent's answering affidavit was filed on 25 October 2016 only.

[13] On 4 November 2016 the Triegaardt Family Trust served notices in terms of sub-rules 35(12) and (14) on respondent to which he replied on 11 November 2016.

[14] The Triegaardt Family Trust's replying affidavit in the main application was filed out of time on 12 January 2017. On 19 January 2017 Rampai, J removed the matter from the roll, costs to stand over for later adjudication. As mentioned *supra*, condonation for non-compliance was eventually granted by me.

[15] On 25 January 2017 the intervening application was issued. Respondent gave notice of his intention to oppose that application on 1 February 2017 and duly filed his answering affidavit as well

as the counter-application. The liquidators filed their replying affidavit late and had to bring a condonation application. As mentioned earlier that application was granted by me at the start of the proceedings on 11 May 2017.

[16] On 9 March 2017 Lekale, J made certain orders by agreement and on 16 March 2017 Loubser, AJ made the following orders by agreement:

"1. The main application for sequestration is postponed to **11 MAY 2017**.

2. The respondent will be afforded the opportunity to pay to the applicants an amount of R562 217.52, together with interest at 9% per annum, calculated from 17 September 2015, on or before 20 April 2017.

3. In the event that the respondent fails to pay the amount as contained in prayer 2 herein above, the applicants are hereby granted leave to supplement their papers.

4. The respondent to pay the wasted costs occasioned by the postponement of this application on the scale as between attorney and own client.

5. The costs of the application are reserved."

[17] I note from the court file that two draft orders were issued by Loubser, AJ on 16 March 2017 although I could not find the order postponing the intervening application to 11 May 2017. Nothing turns on this as all matters were heard by me simultaneously.

IV. THE ISSUES

[18] The papers filed in these proceedings are prolix, an aspect properly conceded by Mr Halgryn. The total number of pages is in excess of 1 200. The Triegaardt Family Trust must take responsibility for the fact that over 330 pages were unnecessary added to the papers and didn't contribute anything at all to the adjudication of the application. There are several disputes between the parties, but in my view the following are the material disputes to be adjudicated:

1. The *locus standi* of the trustees of the Triegaardt Family Trust;
2. Whether the Triegaardt Family Trust is a creditor of respondent;
3. Whether the Triegaardt Family Trust is entitled to rely on the *nulla bona* return as a deed of insolvency in accordance with the provisions of s 8(b) of the Insolvency Act, 24 of 1936 ("the Insolvency Act").
4. Whether the respondent is actually insolvent insofar as his assets are exceeded by his liabilities;
5. Whether sequestration will be to the advantage of creditors;
6. Whether the court should in the exercise of its discretion issue an order of provisional sequestration;
7. In the event of the main application being unsuccessful, whether respondent should be provisionally sequestrated based on the claim of the intervening creditors;
8. Whether any order should be made as requested in respondent's counter-application in the intervening application.
9. Whether relief should be granted in respect of the rule 7 application;

10. Whether the liquidators' powers should be extended;
11. The costs of the applications.

V. RELEVANT PROVISIONS OF THE INSOLVENCY ACT, 24 OF 1936

[19] At this stage of the proceedings s 10 of the Insolvency Act is applicable. If the court is *prima facie* of the opinion that

"(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." (emphasis added).

The amount of the creditor's claim shall not be less than R100 and even if all three above-mentioned requirements have been met, the court still has a discretion whether or not to grant an order for provisional sequestration. 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."

[20] Section 8(b) of the Insolvency Act reads as follows:

"A debtor commits an act of insolvency –

(a) …

(b) if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;……… "

The Insolvency Act provides for eight deeds of insolvency in s 8. Two further deeds of insolvency are relied upon in the applicants' papers – in terms of ss 8 (c) and (d) - and I shall briefly refer thereto during the evaluation of the evidence.

[21] Section 97(3) the Insolvency Act reads as follows:

"(3) In paragraph (c) of subsection (2) the expression 'taxed costs of sequestration' means the costs (as taxed by the registrar of the court) incurred in connection with the petition of the debtor for acceptance of the surrender of his estate or of a creditor for the sequestration of the debtor's estate, but it does not include the costs of opposition to such a petition, unless the court directs that they shall be included."

VI. SOME AUTHORITIES PERTAINING TO SEQUESTRATION

[22] One hundred and ten year 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."

[23] 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 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."

[24] In addition to the *nulla bona* return of service relied upon by the Triegaardt Family Trust in *casu*, the court is also entitled to

consider the further averments pertaining to other creditors of respondent 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. 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.
Once that is done the scales are clearly in my judgment preponderantly tipped in favour of a finding of respondent's insolvency."

[25] 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."

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

[26] The debtor, being the best situated to know what property he has and the whereabouts thereof, is duty-bound to point out to the sheriff presenting him with a writ of execution his disposable property or indicate its whereabouts and description in order to demonstrate its sufficiency to satisfy the judgment. See: *Wilken and Others NNO v Reichenberg* 1999 (1) SA 852 (WLD) at 855E - F and *Nedbank Ltd v Norton* 1987 (3) SA 619 (NPD) at 621I.

[27] A debtor who has committed a deed 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 Rhebokskloof (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."

[28] 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*.*

VII. THE APPLICANTS' *LOCUS STANDI*

[29] The *locus standi* of the Triegaardt Family Trust is derived from a costs order made against the respondent in favour of Carol Lotz, which claim she ceded to the trust. The costs order is not in dispute, but the cession is attacked on the basis that it constituted champerty "which this Court should not condone." Champerty envisages an illegal agreement in which a person with no previous interest in a law suit finances it with the view to sharing the disputed property if the suit succeeds. It is not clear what the respondent's precise submission is insofar as the cession is not attacked on the basis of illegality. In his heads of argument Mr Janse Van Rensburg submitted that *ex facie* the cession Carol Lotz' co-executrix did not sign the cession and she also did not rely on any authority given by the co-executrix to sign it on her behalf and therefore no valid cession could have been entered into. I shall deal with this aspect further during my evaluation of the evidence *infra.*

VIII. EVALUATION OF THE EVIDENCE IN THE MAIN APPLICATION

[30] I do not intend to deal with any allegations contained in the intervening application for the reasons that will appear *infra*.

[31] On 23 May 2013, more than four years ago, I made the following remark:

> "These proceedings, formidable as they are, are but a skirmish in a full-blown campaign - a family war - being fought on several fronts."

See: *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) at para [7].

[32] The family war did not cease after this judgment. Several further battles have been fought since then and are even continuing today. See *inter alia: Knipe & Another v Noordman NO and Others* 2015 (4) SA 338 (NCK) wherein Mamosebo, AJ made the following order in respect of case number 37/2015 from which the claim in this application emanates:

> "The applicants (Andre and John Knipe) are further ordered to pay the costs of Carol Jesse Kathleen Lotz in her personal and representative capacities as executrix (respondents 8 and 10) on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved."

Carol Lotz' co-executrix in the estate of her late father, Mr Henry Knipe, being her mother, Mrs Moira Elizabeth Knipe, passed away in the meantime and it does not appear from any of the papers that another co-executrix has been appointed.

[33] In Carol Lotz' affidavit in support of the replying affidavit in the main application she stated the following:

"3. I specifically deny being in cahoots with Mr Senekal, the applicant or its trustees. I have been involved in litigation against my siblings for the past 10 years. I have been successful in all this litigation and my siblings (including the respondent) owe me millions of rands in respect of costs orders which I've obtained against them.

4. They, including the respondent, have not paid any of these costs orders. The respondent is indebted to me in respect of costs orders to the tune of more than R2 million, which he makes no attempt to pay.

5. Furthermore it must be noted that the litigation is ongoing and takes up a lot of my time. However I fully intent to recover all the legal costs I have expended in this litigation but I confess that it has not been priority in my life due to the present litigation which requires all my attention.

6. When I was approached by the applicant, represented by its trustees and made the offer of purchasing my claim against the respondent in respect of the costs order which forms the subject matter of applicant's claim, this presented as a welcome relief and I agreed to cede my claim to the applicant.

7. I submit that this transaction is *bona fide* and above board and does not constitute champerty. I furthermore deny that I colluded with Mr Senekal or the applicant or its trustees in any manner."

[34] I am satisfied that Carol Lotz has given a truthful and satisfying reason for ceding her claim to the Triegaardt Family Trust. Mr Janse Van Rensburg's argument that the cession was void insofar as it had not been entered into by Carol Lotz' co-executrix does not hold water and is without a factual foundation. As mentioned, Mrs

Moira Knipe, the late Mr Henry Knipe widow, passed away. It is also apparent from the judgment of Mamosebo, AJ that Carol Lotz was the only executrix cited in those proceedings. In the absence of an appointment of another executor or executrix to substitute Mrs Moira Knipe, Carol Lotz was fully entitled to cede the claim for costs obtained in her personal and representative capacity. For sake of clarity I repeat that the claim in respect of the costs order ceded to the Triegaardt Family Trust emanates from the taxation of the bill of costs in case number 37/2015 referred to *supra*.

[35] When the matter was postponed on 16 March 2017 to enable respondent to settle the debt, leave was granted to the Triegaardt Family Trust to supplement its papers, obviously in the event of no payment forthcoming. When the matter was called on 11 May 2017 Mr Halgryn on behalf of applicant begged leave to hand up from the bar supplementary affidavits. A written extension of the deadline mentioned in clause 10 of the cession agreement referred to *supra,* which extension was agreed upon in writing on 31 March 2017 and in terms whereof the date of lapsing was extended to 31 May 2017 is attached to the supplementary affidavits. Therefore, at the stage when the application was heard, the cession agreement was in full force and effect. The court order of 16 March 2017 did not specify a deadline for the filing of supplementary affidavits. Mr Janse van Rensburg objected to the procedure, but did not indicate whether he wanted time or a postponement to consider his position. I regarded the reliance on an extension of the deadline in the cession agreement as a formality and accepted the documentation. Based on the evidence presented to me I am satisfied that the Triegaardt Family Trust is a creditor of respondent

for purposes of s 10(a) read with s 9(1) of the Insolvency Act. The first requirement has been met.

[36] I am also satisfied that respondent not only committed at least one deed of insolvency, but is factually insolvent as well. My reasons appear in the next few paragraphs.

[37] A sheriff's return is *prima facie* proof of its contents by virtue of s 43(2) of the Superior Courts Act, 10 of 2013 which provides that:

> "the return of the sheriff or deputy sheriff of what has been done upon any process of court shall be *prima facie* evidence of the matters stated therein."

[38] *Prima facie* evidence calls for an answer and places an evidential burden on the respondent. Therefore, if a respondent seeks to impeach a return of the sheriff, it must be done on "the clearest and most satisfactory evidence". See: *Deputy Sheriff, Witwatersrand District v Goldberg* 1905 TS 680 at 684, cited with approval in *Absa Bank v Collier* 2015 (4) SA 364 (WCC) at para [37].

[39] On 16 March 2016 and prior to the aforesaid cession a writ of execution was served on respondent at the instance of Carol Lotz. Respondent informed the sheriff of Bloemfontein West that it was impossible to pay the amount claimed or any sum. He claimed not to own any disposable property in the Bloemfontein district, but that he owned substantial assets in the Kimberley district, being a shareholding in several Eland antelope roaming on the farms Kameelhoek and Langberg, Kimberley district. The writ of execution was re-issued once the claim was ceded and again

served by the sheriff for Bloemfontein West on 27 July 2016. It appears from the return of service that the respondent indicated that he had no disposable property, money or negotiable property in the Bloemfontein district to satisfy the said warrant or a portion thereof, but that he was the owner of Eland antelope valued at R757 500 and furniture to the value of R150 000 in the Kimberley district.

[40] On 16 August 2016 the sheriff of Bloemfontein West served another writ of execution issued in case number 4817/2014 on respondent, claiming payment of the amount of R264 092.20. Again, respondent responded as above, but also added that he owned 27 Kudu bulls and 6 more Eland bulls which were roaming on the farm Senegal on the Botswana border.

[41] It is the Triegaardt Family Trust's case that respondent is aware of the fact that the first-mentioned Eland are the subject of a lien in favour of the liquidators and not available to liquidate unless the administration costs pertaining to them are being deducted. There is a dispute pertaining to the values of the Eland and Kudu. It is the Triegaardt Family Trust's case that respondent greatly exaggerated the values of these antelope, but although I find respondent's version less convincing it is not necessary to make any finding in this regard.

[42] Over and above the ceded debt, respondent owes hundreds of thousands if not millions of rands to various firms of attorneys in respect of legal fees. In fact, the Triegaardt Family Trust alleges that the total liabilities as far as its attorneys could ascertain

amounts to no less than R4 258 682.67. Respondent's response in paragraph 30 of the answering affidavit is a bare denial. Some of the taxed bills of costs have been taken on review, but the end result remains that enormous amounts are still due, owing and payable by respondent. In paragraph 309 of the founding affidavit a summary is provided of respondent's undisputed debts. The total amounts to R3 084 372.67. The respondent's assets are indicated, based on his inflated values and excluding the aforesaid shareholding to be R3 391 000.00. Again, in paragraph 46 of his answer respondent merely rejects the allegations without explaining why the amounts and or other allegations are not correct.

[43] The respondent told different versions to the sheriff of Bloemfontein West in respect of the assets available in the Kimberley district. It is unnecessary to evaluate these different versions as it cannot take the matter any further. It appears from a return of service pertaining to a writ of execution issued under case number 5081/2014 that the Eland and Kudu bulls were removed from the farm Senegal and taken to an unknown destination in the Kimberley district. If these antelope really existed, respondent committed a further deed of insolvency in accordance with s 8(d). Under case number 4817/2014 Matsepes issued a writ of execution for the amount of R504 288.07. Respondent did not attend at the farm Langeberg, Kimberley as arranged with the sheriff, indicating that he was ill. To date hereof respondent has not pointed out any of these animals to the sheriff. Not only are the values placed on the animals by respondent fiercely contested as mentioned *supra*, but irrespective of the inflated values, it is

submitted on behalf of the Triegaardt Family Trust that it is "now clear that these Kudu and Eland do not exist".

[44] The Triegaardt Family Trust indicated that respondent failed to disclose other assets. Also, respondent's inability to pay small claims from various other creditors is apparent. Standard Bank has issued summons out of the Northern Cape High Court in its capacity as mortgagee over immovable property of which respondent is a 50% owner. The arrears according to the summons as on 17 August 2015 was the amount of R23 643.23, effectively meaning that respondent and his co-owner were not in a position to pay the monthly instalment of R3 940.54 as stated in the summons. Evidence was also presented that respondent is in arrears with the payment of his municipal accounts in the amount of R35 348.41. According to a deed search done on behalf of applicants, respondent is the owner of several immovable properties, *inter alia* in Kathu, Bloemfontein, Pretoria and Kei Mouth. He has business interests in at these two close corporations and two private companies.

[45] Respondent has begun selling some of his properties in order to pay his enormous legal costs. Mr Conradie of Rossouw & Conradie Inc, trading as Rossouws Attorneys in Bloemfontein, recorded the following as long ago as September 2015 (with reference to respondent):

"Hy het bygevoeg dat hy sy vaste eiendomme, "behalwe vir een of twee" reeds verkoop het om al sy regskostes te delg en dat daar ook ander prokureurs is wie se rekening hy nog moet betaal ... Die rede waarom ons Mnr André Knipe uitgenooi het om die teendeel aan te toon, is voor die handliggend, naamlik dat ons van voorneme is om aansoek te doen vir sy sekwestrasie."

The amount owing to Rossouws Attorneys is R389 033.74. If the version referred to by Mr Conradie is accepted, which I do not have to for purposes of my ultimate conclusion, a further deed of insolvency in accordance with s 8(c) has been or is being committed.

[46] The Triegaardt Family trust has shown *prima facie* that the total amount of the claims of respondent's known creditors is in excess of R3million. Although respondent insists that he is solvent and that the value of his estate is in excess of R3.3million, it is applicant's case that the values of respondent's assets have been grossly inflated. Respondent was challenged, not only to prove the very existence of these assets (the antelope and furniture), but also their values, which he failed to do. I am satisfied that respondent's estate is worth far less then mentioned by him. On all probabilities he is commercially and factually insolvent.

[47] Respondent was invited in writing on more than one occasion prior to the launch of the sequestration proceedings to play open cards and inform his creditors of his financial position, but he did not accept these invitations.

[49] One such letter addressed to respondent's attorneys is dated 25 July 2016 and I quote:

> "From all information handed to the sheriff by your client, it is clear that your client's liabilities by far exceed his assets. If you disagree with this, then this letter serves as an open invitation for your client to disclose any other assets which he has. We do not want to bring an application to court if your client is solvent, but it is clear that your client's creditors is (sic) severely prejudiced by the fact that he is just incurring further debt and is in no position to honour this. From our information your client is insolvent."

[50] Neither respondent, nor his attorneys that acted on his behalf at that stage (and who are still acting on his behalf) made any effort to present a balance sheet stating respondent's assets and liabilities. More importantly, notwithstanding the further invitation to respondent as set out in the founding affidavit, he elected not to respond and take the court in his confidence by informing us of his present financial position, including his assets and liabilities. I am satisfied as to the inherent credibility of the factual averments made on behalf of the Triegaardt Family Trust. Respondent's averments and denials are far-fetched and so clearly untenable that they can safely be rejected. Instead of setting out his financial position and/or attacking the veracity of the sheriff's return of service and/or paying the debt reflected in the writ of execution issued at the instance of the Triegaardt Family Trust as required by the authorities referred to, he elected to seriously attack Mr Senekal. Whether or not there is no love lost between them is, save as mentioned herein, immaterial to the real dispute.

[51] Respondent accuses Mr Senekal of being on a fishing expedition to try and obtain more information of his assets instead of executing against the assets provided which on his version constitutes

sufficient security. I reject respondent's version as untenable. The facts which I accept as indicated *supra* speak for themselves. Respondent also relies on a value of his shareholding in the two companies in liquidation in the amount of between R8 million and R12 million. According to him that was a valuation placed on the shareholding by Mr Senekal. Clearly, he is wrong in this regard, but respondent is opportunistic to say the least. Too many costs have been incurred in the meantime and the administration costs in the two estates which will have a direct impact on the value of the shares are enormous as confirmed under oath by Mr Cooper, one of the provisional liquidators. I do not think that any reasonable, logically sound thinking investor would be prepared to buy the shares which are worthless, notwithstanding the value of the farms owned by the two companies, if the ongoing litigation is considered. The winding-up process has been ongoing for five years. No finality is anticipated. Two business rescue application were brought, but dismissed. There might be an appeal against the dismissal of the second application. No one knows when the liquidation process will be finalised and all the time administration costs are increasing.

[52] In considering the respondent's bare denials it is apposite to refer to the following *dictum* by Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)*, quoting from para [13]:

> "[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in

> his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter." (emphasis added.)

Respondent failed to answer the allegations of the Triegaardt Family Trust in the manner required by the law as emphatically set out in *Wightman supra.* Mr Janse van Rensburg's submission that there was no duty on respondent to disclose all his assets is wrong. He was supposed to make full and candid disclosure of his assets and liabilities. I refer to the authorities quoted *supra, inter alia Absa v Rhebokskloof* and *Uys v De Plessis.* The second requirement as mentioned in s 10 has been proven.

[53] Respondent has already disposed of property and is in the process of disposing further property *ex facie* the founding affidavit. He has removed animals in which he allegedly has an interest to unknown destinations. He is a businessman of note and on his own version mentioned in letters to *inter alia* applicant's attorneys, he is solvent and therefore in possession of sufficient assets to settle his debts. He has an interest in a piggery just outside of Bloemfontein and is known to speculate in cattle, sheep, goats and pigs. He conducts a funeral parlour under the trade name Jacks Funeral, as well as a butchery now known as Pork City and Butchery as depicted in a photograph attached to the founding affidavit. It is in the interest of justice and creditors in particular that respondent be sequestrated. A trustee or trustees should be appointed to take control of his estate and to do the necessary investigation. There is sufficient reason to believe that sequestration will be to the advantage of respondent's creditors. The third requirement of s 10 has been met.

[54] Although I am *prima facie* satisfied – even on a balance of probabilities - that the three requirements of s 10 have been met, I must also consider whether I should exercise my discretion in favour of the Triegaardt Family Trust. I am really concerned about the involvement of Mr Senekal of Matsepes Inc in this matter. He and respondent have personal vendettas against each other. I find it strange that Carol Lotz of the Northern Cape could find willing and able buyers of her claim in the Eastern Cape, being the trustees of the Triegaardt Family Trust. I have reason to believe that it can be attributed to the intervention of Mr Senekal. These trustees are apparently outsiders and knew nothing of the acrimonious history.

No doubt, Mr Triegaardt's evidence is to a great extent hearsay, obviously relying on what Mr Senekal told him. Mr Senekal, who is the real driving force behind the present litigation, is also the attorney for the liquidators, the intervening creditors, in circumstances which I find highly questionable. One of them, Mr Noordman, is an employee of Matsepes Inc of which Mr Senekal is a director.

[55] One merely has to read the first twelve pages of the answering affidavit of respondent and the affidavit of Mr Senekal attached to the replying affidavit – which Mr Halgryn conceded was irrelevant for purposes of the adjudication of the application – in order to get some idea of the hatred and lack of respect between Mr Senekal and respondent. The paper war is so serious and despicable that respondent seeks an order that the matter be referred to the local Law Society and the NDPP. Anyone considering criticising my observations is invited to take the trouble of reading the various accusations made by respondent in the answering affidavit and Mr Senekal's response thereto. The intervening application was brought unnecessary as I shall explain *infra*, but the intention was clearly to ensure that respondent was sequestrated, come what may.

[56] Although I have my doubts about the *bona fides* of Mr Senekal in the litigation, I am not persuaded of *mala fides,* an ulterior object or an abuse of process, particularly not insofar as Carol Lotz and the Triegaardt Family Trust are concerned. Respondent mentioned that Mr Senekal orchestrated the application for a sequestration and I am prepared to accept that to be the case. Such acceptance is not

sufficient to make an adverse finding against the Triegaardt Family Trust. The objective and undisputed facts illustrate that respondent owes substantial amounts to various firms of attorneys in respect of taxed bills of costs. This is an indication of his *modus operandi* and the manner he elected to embark upon frivolous litigation over a period of several years. His counsel, Mr Janse Van Rensburg, submitted when I asked why respondent did not pay the amount due to the applicant bearing in mind the opportunity provided to him by order of court, that if that would have been done, the next creditor in line would have applied for respondent's sequestration. Such submission hit the nail on the head, bearing in mind the enormous amounts due to so many creditors. There is no merit in Mr Janse van Rensburg's further submission that the proceedings are simply debt collection proceedings and should not be countenanced as they are disguised as sequestration proceedings. It is trite that a creditor may apply for compulsory sequestration of the debtor's estate as a debt collection mechanism. The best proof of solvency is a man that pays his debts as they fall due. See: *De Waard supra.*

[57] In the final analysis respondent's criticism of Mr Senekal did not come to his rescue. He has committed at least one deed of insolvency, is hopelessly insolvent and unable to pay his debts whilst carrying on with his life without paying or endeavouring to settle his enormous debts. Therefore I exercise my discretion in favour of granting a provisional sequestration order.

IX. THE INTERVENING APPLICATION

[58] The intervening application has been instituted by Messrs Noordman, Cooper & Rampoporo, provisional liquidators of the two companies Kameelhoek (Pty) Ltd en Schaapplaats (Pty) Ltd (in liquidation). It is their case that the costs order obtained in application 4817/2014 does not form an asset in the estates of the companies in liquidation. The order granted by Wright, AJ in favour of them in their capacities as provisional liquidators of the two companies reads as follows:

> "3. The applicants, jointly and severely, are to pay the costs of the application, including the costs of opposition, on the scale as between attorney and client."

[59] It is the case of the liquidators that "costs in the wide sense of the word are the expenses incurred by a litigant in legal proceedings and they consist of monies due to an attorney for his fees and expenses." The costs order falls within "this category and was granted to indemnify the intervening parties from our attorney's fees and expenses".

[60] Bertelsmann *et al, loc cit* at pp 129 and 130 comment as follows regarding intervening applications:

> "If the application (for the sequestration of a debtor) is withdrawn the court will usually discharge the provisional order, but any other creditor may intervene at any stage. The position has been summarised as follows: a creditor may intervene in order to have a provisional order of sequestration set aside or, where the applicant fails to proceed, or drags his feet, he may apply for a fresh sequestration order in his own right and name. Where the applicant does not proceed, the existing sequestration order cannot be confirmed at the instance of an intervening creditor; it must be set aside and a fresh order can be issued with the creditor as applicant and not as co-applicant. The intervening creditor

thus becomes the *dominus litis* and the original applicant drops out altogether. The intervening creditor must make out a case for sequestration, furnish security, etc as though he had originally been the applicant, but he can rely on facts which appear from the record in the existing proceedings. The court further 'takes a practical view in these matters and also bears in mind the interest of the general body of creditors.' It has been decided that this intervention is not a conventional intervention; it is neither a pure intervention nor substitution of applicants. It is rather an independent application, differing from the usual one."

[61] There was no need to bring the intervening application. I do not agree with the averments that it made logical sense to join issue with the applicant in the main application in order to avoid a multiplicity of applications. If that is the aim of intervention in these kind of proceedings, other creditors in sequestration proceedings will as of right seek to intervene and thereby causing unnecessary costs. Such an approach is contrary to what is stated in the passage quoted from *Bertelsmann et al,* supra and the several authorities relied upon by the authors. The intervening application may have the effect that the respondent's estate is mulcted in costs if an appropriate order is not made.

[62] The same attorney, Mr Senekal of Matsepes Inc, acts for the intervening creditors as well as for the applicants in the main application. Surely he would be the first to know if the Triegaardt Family Trust decided not to proceed with the main application for whatever reason. He could see to it that the applicant did not drag its feet in getting finality for whatever reason.

[63] I accept that the court order granted by Wright, AJ is final and that the appeal process against that order has been exhausted. The bill of costs was taxed; the taxation was taken on review; whereafter the bill of costs was re-taxed and a final figure has been arrived at. The only relevant aspect to establish is whether the liquidators have *locus standi* in the proceedings and entitled to claim the taxed costs in their personal capacities although the order was granted in favour of them, cited in their capacities as provisional liquidators.

[64] In view of my finding that a provisional sequestration order should be issued, the only order that may possibly be made at this stage is to grant the liquidators leave to intervene in the proceedings. It would be wrong to grant a provisional sequestration order at the request of the intervening creditors as well as the further orders as set out in paragraphs 3 – 8 of the notice of motion. This would amount to duplication which cannot be countenanced.

[65] Bearing in mind the conclusion to which I have arrived, it is unnecessary to deal with the provisions of s 386(3) of the Companies Act, 61 of 1973. However I wish to make the following remarks. Liquidators litigating without the prescribed authority may find themselves in a position that the court may refuse to allow them their costs out of the company's assets and they may have to pay such costs themselves. However, the litigation is not a nullity. The further issue raised, i.e. whether the appointment of Matsepes Inc contravened s 384(3) of the Companies Act must be addressed briefly. Even if it may be found that Matsepes Inc could not have acted as attorneys of

record for and on behalf of the provisional liquidators – an aspect that does not have to be decided - the fact of the matter is that that issue was never raised before Wright, AJ and her orders were never rescinded. They need to be complied with until set aside. Furthermore, the liquidators do not rely on an entitlement to funds out of the assets of the companies in liquidation. The Master may consider the issue afresh if the liquidators do not succeed in receiving payment of the taxed costs and then seek to obtain payment from the estates. As mentioned, this is a side-issue and not a material issue to be adjudicated *in casu.* Therefore I refrain from making any findings in this regard.

X. THE COUNTER-APPLICATION

[66] I have expressed my views pertaining to s 384(3) and the appointment of Matsepes Inc *supra.* I have not been persuaded that respondent has made out a case for the relief contained in prayers 1 and 2. Although I have strong views about the conduct of Mr Senekal as a practising attorney as well as that of respondent and the manner in which they declared their personal vendettas against each other, I am not prepared to make the further orders as set out in the counter-application. If respondent and/or his legal team want to refer the conduct of the intervening applicants and Mr Senekal to the National Prosecuting Authority or the Law Society of the Free State Province, they are free to do so.

XI. EXTENSION OF PROVISIONAL LIQUIDATORS' POWERS

[67] There is also an application by the liquidators for leave to approach the court in terms of s 386(5) of the Companies Act, 61 of 1973 to bring the application and for further relief that their powers be extended to empower them with the powers as set out in ss 386(4)(a) & (h) of the aforesaid Act. This application was not fully argued before me and Mr Halgryn even suggested that the application was unnecessary insofar as the liquidators did not claim on behalf of the companies in liquidation, but in their personal or representative capacities. In fact, in reply he was adamant that the costs order accrued to them personally. I am not prepared to grant any orders as sought in the notice of motion. In any event, Mr Rampoporo neither deposed to an affidavit in support of the application, nor did he authorise the other co-liquidators to act on his behalf. There is also no proof that the application was served upon shareholders of the two companies in liquidation and those creditors that have proved claims. Messrs Noordman and Cooper acted without the authority of their co-liquidator, Mr Rampoporo, notwithstanding Mr Noordman's suggestion under oath. Mr Rampoporo did not depose to a confirmatory affidavit. The costs should not be recovered from the companies in liquidation and Messrs Noordman and Cooper must be held liable *de bonis propriis* for the costs of the abortive application.

XII. THE RULE 7 APPLICATION

[68] The rule 7 application brought on behalf of respondent in terms whereof the intervening applicants be ordered to provide written and sufficient proof for the authority of Mr Senekal to represent

them and to act as their attorney in the application for intervention has become moot insofar as I have decided not to grant relief to the intervening parties. However it needs to be said that I am of the opinion that the application is ill-founded. In the circumstances it should be dismissed with costs.

XIII. COSTS OF THE SEQUESTRATION AND INTERVENING APPLICATIONS

[69] The successful party is as a general rule entitled to his costs. However, the general rule is subject to the overriding principle that a court has a judicial discretion in awarding costs. I am fully aware of the provisions of s 97 of the Insolvency Act quoted *supra.* Moral and ethical considerations may play a role in the exercise of a court's discretion. The conduct of Mr Senekal referred to *supra* must be considered in particular. A reasonably uncomplicated sequestration application was transformed into an eight hundred and seventy page application. Over two hundred pages of bills of costs and unnecessary documents were attached to the founding affidavit. A further hundred pages were unnecessary attached to the replying affidavit, although the accusations of respondent against Mr Senekal may be blamed for this to an extent. Mr Senekal caused the intervening application and the application to extend the powers of the provisional liquidators to be launched in circumstances where these were not called for. To mark my disapproval of the attorney's conduct I shall allow only 50% of applicants' taxed costs to be regarded as costs of sequestration for purposes of ss 97(2) and (3).

[70] The question to be answered is who shall be burdened with the costs of the intervening application. The liquidators are experienced practitioners in insolvency law. They cannot hide behind their positions as provisional liquidators. The costs of the application shall not be paid by the estates of these companies and consequently, the liquidators shall pay such costs in their personal capacities *de bonis propriis.*

XIV. THE ORDERS

[71] Therefore the following orders are made:

1. At the instance of the Triegaardt Family Trust in the main application the estate of the respondent is placed under a provisional order of sequestration in the hands of the Master of the High Court.
2. A rule *nisi* is issued calling upon respondent and all interested persons to show cause on Thursday, 3 August 2017 at 09:30 or as soon thereafter as counsel for the Triegaardt Family Trust may be heard as to why the estate of the respondent should not be placed under a final order of sequestration.
3. The rule *nisi* shall be served by the sheriff of this court on the respondent personally.
4. The sheriff shall establish whether the employees of the respondent are represented by a trade union and whether there is a notice board on the respondent's premises and/or farms to which the respondent's employees have access.
5. The sheriff shall serve a copy of this rule *nisi* on any registered trade union(s) representing the respondent's employees.

6. The sheriff shall serve a copy of the rule *nisi* on the respondent's employees by placing a copy of the rule *nisi* on any notice board on the respondent's premises and/or farms to which the respondent's employees have access, or should such employees not have access to such premises and/or farms, by attaching a copy of the rule *nisi* to the main gate, where applicable or otherwise on the front door of the premises from which the respondent conducts any business at the time of such service.
7. The sheriff shall serve a copy of the rule *nisi* on the South African Revenues Services.
8. 50% percent only of the applicants' costs shall be costs in the insolvent estate and the costs of opposition shall not form part of the sequestration costs in accordance with the provisions of subsections 97(2) and (3) of the Insolvency Act, 24 of1936.
9. The intervening application of Messrs Noordman, Cooper and Rampoporo is dismissed with costs, such costs to be paid by Messrs Noordman, Cooper and Rampoporo jointly and severally *de bonis propriis,* the one to pay the others to be absolved.
10. The counter-application of respondent filed in the intervening application proceedings is dismissed with costs.
11. The application of Messrs Noordman, Cooper and Rampoporo for the extension of their powers as provisional liquidators is dismissed with costs, the costs to be paid by Messrs Noordman and Cooper jointly and severally *de bonis propriis,* the one to pay the other to be absolved.
12. Respondent's application in terms of Rule 7 of the High Court Rules is dismissed with costs.

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JP DAFFUE, J

On behalf of the applicants in the main	
and intervening applications:	Adv L Halgryn SC
Instructed by:	Matsepes Inc
	BLOEMFONTEIN
On behalf of respondent in the main	
and intervening applications:	Adv F Janse Van Rensburg
Instructed by:	Stuart Van der Merwe Inc
	c/o Horn & Van Rensburg
	BLOEMFONTEIN