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: 971/2016

In the matter between:

IZAK DIDERICK JOHANNES BELL — Applicant

and

NICOLAAS JOHANNES BRUWER N.O. — 1st Respondent
(in his capacity as trustee of the BETHLEHEM FARMERS' TRUST – Master's reference no: IT392/99)

PIETER WILLEM VAN HELDSLAND FOURIE N.O. — 2nd Respondent
(in his capacity as trustee of the BETHLEHEM FARMERS' TRUST – Master's reference no: IT392/99)

TENDANI COLLEN NEL WAMONDO N.O. — 3rd Respondent
(in his capacity as trustee of the BETHLEHEM FARMERS' TRUST – Master's reference no: IT392/99)

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD — 1st Intervening Creditor

UNIGRO FINANCIAL SERVICES (PTY) LTD — 2nd Intervening Creditor

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CORAM: DAFFUE, J

HEARD ON: 1 DECEMBER 2016

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 15 DECEMBER 2016

I **INTRODUCTION**

[1] This is the extended return date of a rule *nisi* granted in sequestration proceedings on 3 March 2016. The future of an apple orchard project established as long ago as 1998 for the ultimate benefit of some one hundred and nine farmers in the Bethlehem district, selected from the previously disadvantaged community, and their families is at stake. Many aspects were in dispute in these prolonged proceedings and voluminous papers were filed, but in the final analysis the only real dispute and pivotal question to be adjudicated is whether sufficient evidence has been provided to satisfy the requirement of s 12(1)(c) of the Insolvency Act, 24 of 1936 ("the Act"), providing that at the final sequestration stage the court must be satisfied that there is "reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated."

II **THE PARTIES**

[2] Mr IDJ Bell, a private person who delivered transportation services for the debtor *in casu,* is a creditor with a concurrent claim in the amount of R176 791,20. Initially the debt was in dispute, but the applicant's *locus standi* as creditor has been conceded eventually.

[3] The debtor is the Bethlehem Farmers' Trust, IT392/1999, (herein later referred to as "BFT"), it being represented by three trustees, to wit Messrs Bruwer, Fourie and Wamondo.

[4] The first intervening creditor is the Industrial Development Corporation of South Africa Ltd (herein later referred to as "IDC"). Leave was granted to it on 12 May 2016 by Mocumie J (as she then was) to intervene as creditor.

[5] The second intervening creditor is Unigro Financial Services (Pty) Ltd (herein later referred to as "Unigro"). On 1 December 2016 its opposed application for leave to intervene served before me. However, the opposition was withdrawn as informed from the bar by IDC's counsel, Ms Dippenaar, who conceded that Unigro could be given leave to intervene. I granted such leave and Unigro's status as the second intervening creditor was thus confirmed.

III **<u>THE RELIEF SOUGHT</u>**

[6] Applicant seeks confirmation of the rule *nisi* issued on 3 March 2016, some nine months earlier. Unigro supports the relief sought, seeking not only a final order of sequestration, but a further order that applicant and Unigro's costs of the sequestration application (including the costs of the second intervention application) be paid by IDC on an attorney and client scale, including the costs consequent upon the employment of two counsel. Alternatively, Unigro seeks a provisional sequestration order against BFT, IDC to pay its costs on a similar basis as mentioned *supra*.

[7] IDC seeks the discharge of the provisional sequestration order and a further order in terms whereof its costs be borne jointly and severely by applicant and Unigro. In the event that a final sequestration order is to be granted, it requests that its costs be costs in the administration of BFT's insolvent estate in accordance with the provisions of s 97(3) of the Act.

IV HISTORY OF THE LITIGATION

[8] Applicant sought and obtained a provisional sequestration order against BFT on 3 March 2016. Prior thereto and on 2 March 2016 the sheriff attempted service of the notice of motion with annexures on the farm at Wolhuterskop, district Bethlehem, being the business address of BFT. According to his return of service no trustees or workers could be found and the main place of business was abandoned.

[9] On 10 March 2006 service was effected on third respondent in Sandton, first respondent in Centurion and second respondent in Bethlehem. Mr Fourie, the second respondent, also accepted service on behalf of the employees and reported that the employees did not belong to any trade union. On 10 March 2016 and in an attempt to serve the provisional order, the sheriff could again not find anybody on the farm at Wolhuterskop which was in line with second respondent's communication to him.

[10] On 21 April 2016 IDC applied for leave to intervene as creditor which application was opposed by applicant. On 12 May 2016 Mocumie J delivered judgment as indicated *supra*. She ordered, as requested by IDC, that the costs of the intervention application

be costs in the main application, i.e. the sequestration proceedings. Leave was also granted to IDC to file a supplementary affidavit in respect of the main application and consequently the rule *nisi* was extended to 9 June 2016.

[11] Hereafter the rule *nisi* was extended on several occasions. On 16 September 2016 Unigro filed its application for leave to intervene as second intervening creditor. As mentioned, this application was initially opposed by IDC, causing the rule *nisi* to be extended again in order for the intervention application to be adjudicated as well.

[12] On 1 December 2016 I heard argument in respect of the application for sequestration after having granted leave to Unigro to intervene as indicated *supra*. In order to consider the matter and to present a fully reasoned judgment I extended the rule *nisi* to 15 December 2016 and indicated that judgment would be delivered then.

V THE VIABILITY OF THE APPLE ORCHARD PROJECT AND SOME HISTORICAL BACKGROUND

[13] The apple orchard project was initiated in 1998, i.e. eighteen years ago. A co-operation agreement was entered into on 23 December 1998 between IDC and the Development Bank of South Africa Ltd ("DBSA") (the initial financiers) and Sentraal Oos Corporate Ltd (SOC)). The BFT was created and the trust entered into a management agreement with SOC in order to manage the apple orchard project. The idea with the agreements was *inter alia* to establish an apple orchard on 109 hectares of

land on a farm at Wolhuterskop, district Bethlehem which was obtained and registered in the names of the trustees for the time being of BFT. SOC had to manage the project as project manager for and on behalf of BFT. SOC was also obliged to provide training and development to selected farmers, such farmers to be selected by SOC in co-operation with the former Bethlehem transitional local council from the previously disadvantaged community.

[14] On 14 November 2008 DBSA informed BFT of its decision not to advance any further funding for the project and I quote the following from the letter:

> "The Trust was established in 1997 by the IDC, Sentraal Oos Koöperasie (now Afgri) to fund the Bethlehem apple's project. The funders are also beneficiaries of the project. The intention was that the nominated farmers would buy-out the funders interests at orchard maturity which was initially scheduled to occur in 2005. As the appointment management agent, Afgri was to manage the project until the buy-out date. The main objective of the project was "to further land reform in the Eastern Free State through the settlement of 109 farmers to produce apples in the Bethlehem district and to provide financial assistance for orchard establishment, production, pre-harvesting, harvesting, packing and marketing through a Trust for a period of 7 years." The long term objective was "to develop a model that will mobilise private sector involvement in capital intensive agricultural projects aimed at the empowerment of emerging farmers and re-distribution of land". The long term objective of the farmers owning the land has not yet been achieved."

In the year 2009 DBSA wrote off the BFT's exposure to it in the amount of R39 970 430,20.

[15] Grants were made and loans provided to BFT over the years to such an extent that BFT is indebted to IDC in the aggregate amount of R24 778 538,73 (as at the date of IDC's answering affidavit). Loans were regularly made as follows: R7.2m in 1999, R2.7m in 2002, R6m in 2006, R2.3m in 2007, R3.5m in 2010 and R3.1m in 2012. In January 2015 a grant of R3m was approved, but only R1m paid out. Notwithstanding BFT's critical financial position the balance of R2m has not been paid to it.

[16] BFT's indebtedness to Unigro as at 2 March 2016 amounted to R29 691 618,07. The claim is partially secured by first mortgage bonds over two immovable properties of the trust in the total amount of R14 800 000,00. Smaller amounts are due and payable to the employees and concurrent creditors. Even though there may be a dispute as to the exact amount owing to Unigro, IDC admits that BFT's liabilities in the amount of R56 216 978,12 according to it is about double the market value of BFT's assets of approximately R28 529 849,03.

[17] IDC's deponent alleges that BFT was experiencing liquidity challenges in February 2016 (as if it was a once-off and new situation), but submits that these challenges could be overcome and resolved with funding from IDC and additional financial support from the Department of Rural Development and Land Reform (DRDLR).

[18] Although applicant's claim was disputed in the answering affidavit and in IDC's heads of argument, it was eventually conceded that applicant was a creditor for purposes of the Insolvency Act. It is

apparent from the papers and concessions made by IDC's counsel during argument that the only and real dispute is whether sequestration would be to the benefit of the general body of creditors. It is alleged that Unigro as secured creditor would be the only creditor that would conceivably benefit by the granting of a final sequestration order, whilst the general body of creditors, including employees and the neighbouring communities of Bethlehem/Bothlokong would be severely prejudiced.

[19] Several meetings took place between various stakeholders during the last few years, especially since 2014. Unigro was even prepared to write off a huge amount of its claim in order to assist IDC and BFT to solve BFT's financial problems, but this was all to no avail. IDC's deponent alleges that BFT could trade on its own and sustain itself. According to her BFT has been farming successfully since the 1990's under the management of Afgri, but in the same breath it is submitted that any failures in BFT's business model can be ascribed directly to the management functions performed by Afgri.

[20] If the figures referred to *supra* are considered, approximately R100 million was spent over a period of less than two decades in order to ensure BFT's financial sustainability, but figuratively speaking the enormous financial aid did not bear any fruit.

[21] BFT did not conduct any business at all at the time when the sequestration proceedings were initiated. The farm was abandoned and no farmers and/or employees could be found on the property. Electricity supply was cut although it is in dispute

whether it was done just before or just after the provisional sequestration order.

[22] A severe hailstorm damaged a substantial portion – about 25% - of the apple orchard after the provisional sequestration order was granted, but fortunately, the provisional liquidators took out insurance and it is common cause that an amount of approximately R7 million will be paid out by the insurer for the benefit of BFT's estate.

[23] Nine months since the issue of the provisional sequestration order have lapsed, but notwithstanding this and all the previous undertakings and promises, no financial assistance has been forthcoming. IDC went so far to allege under oath that a certain Mr Maartens, an experienced business rescue practitioner, had been appointed as a business turn-around specialist by it in order to try and save BFT. It appeared later that although talks were entered into with Maartens, he was never appointed to act in that capacity.

[24] It is ironic that neither the sequestration application, nor the intervention application of Unigro is opposed by the trustees of BFT. Their attitude is however clear from the evidence to be discussed *infra.* They also believe that sequestration is the only option.

[25] I shall deal with the requirements for a final sequestration order, including the relevant authorities and material facts, in separate paragraphs *infra*.

[26] Section 12 of the Act reads as follows:

> "**Final sequestration or dismissal of petition for sequestration**
>
> (1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied 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 sequestrate the estate of the debtor.
>
> (2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die."

VI APPLICANT'S *LOCUS STANDI* AS CREDITOR

[27] Section 9(2) of the Act provides as follows:

> "A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition, shall be reckoned as a liquidated claim for the purposes of subsection (1)."

[28] In paragraph 31 of her heads of argument IDC's counsel makes the following submission:

> "The central focus of debate in this matter pertains to: (1) whether there is a reason to believe that a final sequestration order would be to the advantage of creditors; and (2) how this Honourable Court is to exercise the discretion afforded to it."

Counsel then proceeded in her heads of argument to deal extensively with the advantage of creditors as well as the court's discretion and reiterated these aspects during oral argument. She claimed that sequestration would not be to the advantage of creditors and submitted that in the ultimate analysis I should exercise my discretion against the applicant and discharge the rule *nisi*. As an afterthought and in a few paragraphs in her heads of argument reference is made to the fact that applicant's claim was reasonably contested on *bona fide* and valid grounds. It is faintly submitted in the heads of argument that the provisions of s 9(2) of the Act does not assist applicant insofar as his claim has not yet accrued. This line of argument was not proceeded with during oral argument.

[29] It is evident that the invoices relied upon by applicant, attached to his founding affidavit, differ from the invoices sent to BFT which were attached to IDC's answering affidavit pertaining *inter alia* to the date of the invoices. Applicant explained the difference in his replying affidavit. According to him the carbon copies of the invoices in his invoice book were illegible and in order to prepare for the sequestration application he "wrote over the faint manuscript of the carbon copy in his possession so as to make the contents thereof clear and legible". This caused the difference between the date of 22 February 2016, the correct date, and the date of 20 February 2016 reflected in the invoices attached to the founding affidavit.

The allegation that applicant's claim was only payable thirty days after invoice is denied by him and he showed in the replying affidavit that an invoice presented to BFT in January 2016 was paid within days.

[30] Applicant was at all relevant times regarded as a creditor of BFT. This appears from applicant's version, read with annexure "FA4" to the founding affidavit, being BFT's letter dated 25 February 2016 written by Mr Fourie and addressed to "all creditors, service providers and or people monies are owed to." This letter reads as follows:

> "Due to the bad weather conditions and heavy heat, as well as no rain, Bethlehem Farmers Trust has almost lost 70% of their crop. Therefore Bethlehem Farmers Trust is unfortunately not in the position to honour all outstanding debts. The trustees have taken the decision to apply for provisional sequestration."

This letter is highly contested by IDC on the basis that the trustees, and Mr Fourie in particular, did not have authority to write such a letter and also on the basis that it was not meant for distribution. In a dramatic turn-around Mr Fourie deposed to a confirmatory affidavit in support of IDC's version in an attempt to distance himself from the version put forward by applicant. I reject this new version as being highly suspicious, untenable and false insofar as it is in direct conflict with applicant's version as well as the objective facts. The logic of IDC's reasoning escapes me, especially if the trustees' resolution to apply for sequestration referred to *infra* and the various letters written in February 2016 are considered.

[31] Applicant's status as creditor could not and should never have been disputed by IDC. A list of BFT's liabilities, including the claim of Sakkie Bell Vervoer in the amount of R176 791,20, is attached to IDC's answering affidavit and the claim is clearly acknowledged. This is in line with a letter of Mr Fourie on behalf of BFT dated 11 February 2016 from which I quote two paragraphs:

> "Mr Sakkie Bell of Bell Transport does the transporting of apples from the farm to the packhouse and packhouse to Crispy for the past 14 years…
>
> BFT has contracted Mr Bell for the transport for the 2016 season."

[32] The papers before me are voluminous and consist of over one thousand pages. A simple sequestration application was transformed into an expensive paper war. If IDC were so keen to assist BFT by preventing its sequestration, it could have settled applicant's claim on receipt of the news pertaining to the provisional sequestration order and that would have been the end of the matter as applicant's *locus standi* as creditor would have fallen away. Instead it elected to proceed with an expensive exercise, making use of two sets of attorneys and senior counsel. Notwithstanding its attitude that it had the interests of employees at heart, it persuaded Mocumie J to order that the costs of its intervention application be costs in the sequestration proceedings. They did this well-knowing that the free residue in the estate might be insufficient to settle the claims of preferent creditors without security such as the employees as well as all other concurrent creditors.

[33] I find, as effectively conceded by IDC's counsel during oral argument, that applicant is indeed a concurrent creditor of BFT with the necessary *locus standi* in this application.

VII **DEED OF INSOLVENCY OR ACTUAL INSOLVENCY**

[34] Applicant relies on the letter of 25 February 2016 attached as annexure "FA4" to the founding affidavit which I quoted above as a deed of insolvency in accordance with the provisions of section 8(g) of the Act. As mentioned, IDC's attitude is that BFT's trustees, and Mr Fourie in particular, did not have any authority to write this letter and furthermore, that it was not intended to be distributed to creditors. It is apparent from the papers, read as a whole, that BFT's trustees, i.e. the management of the trust, were left with their hands in their hair and did not know how to handle their predicament. On 18 February 2016 the three trustees, Mr Fourie as chairperson, Mr Bruwer, appointed as the DBSA trustee and Mr Wamondo, appointed as the IDC trustee, held a meeting in Johannesburg and resolved as follows:

> "1. Bethlehem Farmers Trust are experiencing a serious cash shortage and therefore are unable to pay salaries, wages and creditor accounts; and they do not foresee any improvement in the financial situation any time soon;
>
> 2. The Trustees of Bethlehem Farmers Trust requested that Pieter Fourie in his capacity as Trustee and Manager of BFT, request the lodging of an application at the High Court for urgent Sequestration."

As mentioned it is IDC's unsubstantiated version that the trustees were never authorised to resolve to sequestrate the trust.

[35] IDC's version is that the purpose of annexure FA4 was merely to place pressure on the financiers to release additional funding already approved by IDC to alleviate the cash flow difficulties which they were experiencing and which became critical during February 2016. Also, the resolution to sequestrate was taken by the trustees in order to protect their own positions and at a time when they were concerned about their personal interests as trustees. Whatever IDC's deponent wants to communicate does not change the facts before me. It is clear that the trustees, the actual people in charge with fiduciary responsibilities towards the trust and its beneficiaries found themselves in a dead end. They knew that there was no real opportunity for BFT to solve its financial predicament. They could not continue with business and could not even pay salaries. I am satisfied that a deed of insolvency has been committed, but as indicated *supra,* this is really neither here nor there insofar as it is common cause that BFT is hopelessly, factually and commercially insolvent.

VIII **ADVANTAGE TO CREDITORS**

[36] It is true that Unigro, it being a secured creditor with mortgage bonds registered over BFT's immovable properties, will probably receive a substantial dividend. This is a privilege afforded to secured creditors. I do not have to find that there is a real likelihood that concurrent creditors will receive dividends, but merely that there is a reasonable prospect that some pecuniary benefit will result to creditors.

[37] In **Stratford & Others v Investec Bank Ltd and Others** 2015 (3) SA 1 (CC) at 19E-G the Constitutional Court held as follows:

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

[38] There is a reasonable possibility that the immovable properties of BFT may be sold for more than the amounts due in respect of the mortgage bonds and costs of administration related thereto, bearing in mind the valuations placed before me. I accept that the apple orchard has been damaged, but I also accept that the farm has been improved with an infrastructure such as a well-developed apple orchard and that any potential purchaser would be prepared to pay an amount in excess of the amount of the bond, even though a purchase price close to the market value referred to in the papers is not obtained. The other bond is registered over a property on which the "pack-house" is erected. There is also reason to believe that it would obtain a purchase price in excess of the amount of the bond.

[39] The insurance claim of approximately R7 million will in normal circumstances accrue to Unigro as the secured creditor, bearing in mind the terms of the mortgage bond. Mr Terblanche on behalf of Unigro conveyed to me in open court and after obtaining

instructions, that Unigro would, in the circumstances, not lay claim to this amount, the effect being that it would then form part of the free residue and available to preferent creditors such as the employees and concurrent creditors. Over and above this, it appears from the inventory provided by the sheriff in terms of s 19 of the Act that BFT owns numerous moveable assets such as vehicles and farming equipment which may yield quite a substantial amount. It is alleged by IDC that it is the holder of a general notarial bond over the movables. It attached a great many voluminous documents to the answering affidavit, but failed to attach the notarial bond. Such bond, if it exists indeed, will not afford any security to IDC. There is no evidence or even a suggestion that it obtained a court order perfecting the bond.

[40] Before me the majority of creditors in value and in number, i.e. Unigro and applicant, seek the final sequestration of BFT. It is only the IDC who seeks the discharge of the provisional sequestration order. The numerous promises by IDC and others to inject cash into the apple orchard project remain just empty promises and real substantial financial aid is a pie in the sky. I am not prepared to accept that any of the entities mentioned would be prepared to make any further financial contributions in the event that the provisional order is discharged, bearing in mind that R100 million has already been wasted whilst there is no reasonable hope that the project will ever reach its ultimate goal. Notwithstanding IDC's version under oath that the apple orchard project was sustainable and making profits, the contrary is true. BFT is unable to trade profitably or to become self-sustainable. There is no hope of its miraculous resuscitation, notwithstanding

the fact that all relevant parties over the last eighteen months made efforts to come to a solution. It may be asked how ethical can it be to pour extra millions of Rands into the project to assist a few people whilst the money could be spent much more wisely on other sustainable projects.

[41] IDC wants to hold Unigro and other creditors at ransom. It is submitted that sequestration would not be to the advantage of creditors and to bolster this submission reliance is placed on the financial assistance to be provided to BFT by IDC and Government as well as money to be paid in accordance with a plan prepared for BFT to which I shall refer *infra*. Nothing has been forthcoming, although vague promises based on inadmissible hearsay evidence are relied upon.

[42] The longer the matter is dragged out, the more interest will accrue to the claims of creditors and especially the two biggest creditors, IDC and Unigro. This will be to the disadvantage of the small concurrent creditors as well as the employees. Any advantage that there may be at this stage will disappear like mist before the rising sun if a final sequestration order is not issued now.

IX DISCRETION OF THE COURT

[43] One consideration to be taken into account in exercising discretion is the possibility that the debtor's debts will be paid if a sequestration order is not granted. I quote the following from the unreported judgment of **Nedbank Ltd v Johan Hendrik Potgieter** 2013 JDR 2290 (GSJ) at paras [19] and [20]:

"[19] If the debtor is to persuade the court to exercise its discretion in his or her favour, he or she must place evidence before the court that clearly establishes that the debts will be paid if a sequestration order is not granted. If that contention is based on a claim that the debtor is in fact solvent then that should be shown by acceptable evidence. In this regard the often quoted words of Innes CJ in De Waard v Andrew & Thienhaus Limited are pertinent:

"Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him … Of course; the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. 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 a critical spirit the case of a man who does not pay what he owes."

[20] In R v Meer and Others Holmes J observed as follows:

"I have stressed that the Insolvency Act was passed for the benefit of creditors and not for the relief of harassed debtors."

This statement remains apposite today as it was then. In Hill House v Scott, Leveson J stated as follows:

"… A debtor knows his own business and can adduce facts to show advantage to creditors. A creditor, on the other hand, is seldom in the happy position of being in possession of sufficient facts relating to the debtor's assets as to be able to furnish details to the Court."

I should be satisfied that BFT's debts will be paid if a sequestration order is not granted in order for me to exercise my discretion in favour of BFT.

[44] The vagueness and careful choice of words of IDC's deponent is a feature of the affidavits placed before me. At one stage the following is stated: "The IDC has sufficiently demonstrated that in light of the funding it and the DRDLR have already approved, it is not impossible for the BFT to return to normal trading status." The double negative is telling. In any event, reliance is placed on inadmissible hearsay. DRDLR is a national department. It allegedly approved financial support as far back as 2012, but on condition that Unigro (not Afgri as alleged) relinquish its mortgage bonds over the immovable properties. I cannot see how it could be expected from a commercial lender like Unigro with shareholders to consider to act accordingly. IDC's version that Unigro's refusal to relinquish its bonds is a stumbling block is unfortunate. In fact, it is arrogant to state that a secured creditor should waive its rights as suggested. Although the national DRDLR appears to be involved, the Provincial Head of the Free State DRDLR stated the following in a letter dated 20 April 2016 in support of its opposition of the sequestration application: "Whilst we all wonder what could have gone so wrong with such a project with massive potential, we have demanded a change of shareholding to ensure majority-shareholding by house-holds, as part of the turnaround strategy, and only after such change can we see how we can assist the project further in whatever possible way, contributing to our overall strategy thrust." There is not an iota of evidence that this department has got any funds which it could make available to the project or that it may obtain funds from national treasury in this regard. It is one thing for a public official

to state that money may be provided by his/her department, but it is a totally different kettle of fish to say under oath that the department has gone through all its approval processes, that a particular amount has been earmarked, that the funds are indeed available and more specifically, when exactly will the funds be paid over. IDC and its Government partners must provide funds to settle Unigro's claims for it to consent to cancellation of the mortgage bonds, but it appears as if they are of the view that Unigro must write off its claim. No entity and no court can direct it to consent to cancellation without payment of the secured debt.

[45] In the exercise of my discretion I must in particular consider the plight of the employees and/or farmers and their families, all being members of the previously disadvantaged community. These people and their families are supposed to be the eventual beneficiaries of the apple orchard project as it was indeed anticipated that they would become owners of the immovable property. This should have happened as long ago as 2005. The primary objectives of the apple orchard project were land reform, job creation and poverty eradication by ensuring the ultimate settlement of small scale farmers on the land. Unfortunately these could not be achieved and I cannot see that there is a reasonable prospect or possibility that it can be achieved with the facts presented to me.

[46] A turnaround plan is relied upon by IDC. The plan is premised on inadmissible hearsay evidence and extremely vague allegations. In terms hereof Distell, apparently the well-known public and listed company, is prepared to inject R20m into the apple orchard project. National Treasury's so-called Jobs Fund National

Programme will inject a similar amount. There is no evidence that these entities are indeed willing to come on board, and if so, on what conditions. I am not prepared to accept that a proper case has been made out for payment of BFT's creditors within a reasonable period. In fact, I regard the plan as speculative and presumptive at best and nothing more than a pie in the sky, not worthy of consideration by any of the creditors. It has been rejected by applicant and Unigro and they cannot be blamed. It appears that Unigro has heard these stories many times in the past and as its deponent correctly states, there is no proof that these two entities are prepared to assist.

[47] If DRDLR and/or IDC are so assertive that they would at all cost ensure that the employees/farmers and their families are properly cared for in future, the better exercise appears to be for these parties to ensure that the immovable properties are purchased on the auction to be held by making use of a proper vehicle such as a trust or company and to ensure participation by all these farmers and their families. It might be a much cheaper option, bearing in mind the present condition of the farm and the huge debts already incurred. Hopefully they may salvage a project that was many years ago doomed to be a failure.

[48] Whoever purchases the farm will obviously need employees, especially bearing in mind the labour intensive nature of an apple orchard. The present employees/farmers have accrued experience over time and they would be ideally suited to be appointed by the new purchaser, although employment opportunities may be lost in the process. I am mindful of the fact that the right of employees is not the only or predominant right to

be considered in the exercise of my discretion, but IDC's attitude is akin to that of the proverbial "tail wagging the dog." I also take cognisance of the alleged altruistic goals of IDC that motivated opposition of the application, but have serious doubts in this regard bearing in mind the cost order already sought and obtained from Mocumie J referred to *supra*, as well as the cost order sought in the event of a final sequestration order being granted.

[49] BFT's farm has been abandoned, it has been subjected to a severe drought over some time and a recent hailstorm has damaged about 25% of the orchard. There is no hope of any harvest during the 2017 season for the reasons set out in the papers, but there may be a glimmer of hope of a harvest in 2018 if an affluent person or entity with the necessary skills is prepared to come on board immediately. IDC has not proven to me that it can achieve this. I refer to the well-known *dictum* of Selke J in **Trust Wholesalers and Woollens (Pty) Ltd v Mackan** 1954 (2) SA 109 (N) at 115A-B:

> "In substance the respondent here says to his creditors: 'I cannot pay you, but give me time, let me go on trading, and let me collect the debts which are owed to me, and I hope to be able, and I believe I shall be able, over a number of years to pay you in full by way of instalments.' In the meantime, of course, the creditors are laying out much of their capital, and they will never get any interest and they are asked to allow the respondent to continue to trade on terms which many of them regard as precarious, and some as impossible, and over the conduct of which trading all of them have no, or very little, control.

> In my opinion, I ought not, in these circumstances, to exercise the discretion against making a final order of sequestration. Accordingly the provisional order is made final."

[50] A trust is not an entity that can be placed under business rescue. However, it is instructive to consider Brand JA's explanation in **Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others** 2013 (4) SA 539 (SCA) at para [29]. According to the learned judge the words "reasonable prospect" in section 131(4)(a) of the Companies Act, 71 of 2008 constitute a lesser requirement than a "reasonable probability" contained in the old Companies Act, but the new requirement requires more than a mere *prima facie* case or an arguable possibility. Reasonable prospect must be based upon reasonable grounds. *In casu,* and although I do not deal with a business rescue application, I am entitled to consider all alternatives to final sequestration, but any alternative suggestion to prevent sequestration must be based on fact and not speculation to make it worthy of consideration.

[51] I am not prepared to exercise my discretion in favour of BFT based on speculation, inadmissible evidence and vague promises, especially insofar as it has not even opposed the application,

X SECOND INTERVENTION APPLICATION AND COSTS OF SEQUESTRATION

[52] I have already granted leave to Unigro to intervene and the only issue that needs to be considered now is the costs of the

sequestration application as well as the costs of the second intervention application. Mocumie J ordered that the costs of the first intervention application shall be costs in the main application. IDC should never have asked for the costs of the intervention application to be costs in the sequestration proceedings, especially bearing mind the alleged altruistic purpose for which it intervened in these proceedings. Unigro seeks an order in terms whereof IDC be ordered to pay applicant and Unigro's costs in the sequestration application, including its costs of the second intervention application on an attorney and client basis. Unigro's intervention assisted me considerably to understand the background and history of the apple orchard project. Its deponent has personal knowledge of all negotiations between the various parties since at least 2014, whilst all documents relating to the apple orchard project and BFT's indebtedness are in his possession and under his control. The insight provided by Unigro could not have been provided by applicant as an outsider and therefore Unigro's intervention and the evidence tendered by it bolstered applicant's case. It is entitled to its costs.

[53] IDC's deponent alleges that Unigro failed to prove that it is a creditor, let alone secured creditor of BFT, notwithstanding the fact that the two mortgage bonds, clearly showing that Unigro is a registered cessionary, are attached to Unigro's founding affidavit in the second intervention application. IDC's counsel submitted that it only became evident from Unigro's replying affidavit that it is a creditor. This submission is unfortunate and probably made without considering the undeniable documentary evidence presented by Unigro. Relying on wrong assumptions, the

intervention application was opposed initially. IDC shall bear the costs of this application.

[54] IDC's opposition of the sequestration application was unreasonable for the reasons set out *supra.* I have considered the various submissions and in the exercise of my discretion I believe that BFT's insolvent estate should not be burdened with any cost orders. I am not prepared to grant an order in terms of s 97(3) of the Act as requested by IDC.

[55] IDC should be ordered to pay applicant and Unigro's costs pertaining to the sequestration application, as well as Unigro's costs of the second intervention application, in both instances including the costs consequent upon the employment of two counsel in respect of Unigro.

[56] Although I was requested to grant costs on an attorney and client scale, I am not prepared to do that as I am satisfied that, although a borderline case, IDC should not be penalised with punitive costs.

XI **<u>ORDERS</u>**

[57] The following orders are made:

1. The rule *nisi* is confirmed and a final sequestration order is issued.
2. Applicant and Unigro's costs of the sequestration proceedings, as well as Unigro's costs of the second intervention application, shall be paid by Industrial Development Corporation of South Africa Ltd, such costs to

include the costs occasioned upon the employment of two counsel where applicable.

J.P. DAFFUE, J

On behalf of applicant:	Adv. S. Tsangarakis Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of the first intervening creditor:	Adv. E. F. Dippenaar SC Instructed by: Hofmeyer Incorporated JOHANNESBURG
On behalf of the second intervening creditor:	Adv. F. H. Terblanche SC with Adv. A. J. Wessels Instructed by: E G Cooper Majiedt Inc BLOEMFONTEIN

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