IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 1583/2013

In the matter between:

INTERNATIONAL FINANCIAL ADVISORS KSCC	**FIRST APPLICANT**
KUWAIT INVESTMENT COMPANY KSCC	**SECOND APPLICANT**

and

STRATH McBARRON WOOD	**FIRST RESPONDENT**
KATHELEEN ELIZABETH WOOD	**SECOND RESPONDENT**

JUDGMENT

Delivered: 26 November 2013

MBATHA, J

[1] The applicants applied for an order provisionally sequestrating the joint estate of the respondents who are married in community of property. It is common cause on the papers that the respondents either committed an act or acts of insolvency or are in fact insolvent and that the applicants have *locus standi* as creditors to bring this application. The extent of the debts of the respondents is approximately R8million and the only issue in dispute between the parties is whether or not the

provisional sequestration of the respondents would be to the advantage of creditors like the applicants who are owed approximately R4million by the respondents by way of a judgment in favour of the applicants against the respondents dating back to October 2010.

[2] The applicants are adamant that the sequestration will benefit creditors while the respondents contend otherwise.

[3] The test for a provisional sequestration is whether the balance of probabilities *prima facie* favours the applicants and in this case in particular whether there is reason to believe that the provisional sequestration will benefit not only the applicants but the body of creditors as a whole. I am mindful of the fact that the onus is on the applicants to prove this aspect in order for the application for the provisional sequestration of the respondents to be granted.

[4] The applicants purported to make out a case that the sequestration of the respondents would benefit creditors by referring to a number of entities and trusts in which particularly the first respondent had and may still have a viable interest and that a duly appointed trustee armed with the insolvency legislation will uncover assets which will yield a not negligible dividend to the general body of creditors and it is claimed that the prospect of such a result is by no means a remote prospect.

[5] The respondents and their children emigrated to the United States of America and the respondents are the holders of what was referred to as “green cards” to enable them to secure employment in that country and eventually full citizenship. They deny that they have any tangible assets in the Republic of South Africa capable of being converted into any tangible means of contributing to their admitted debts to creditors. If they had such assets capable of being attached, so they argue, the applicants could have used the process of execution to locate such assets and in that way have sought to recover what was due to them.

[6] The applicants in both the founding affidavit and further in the replying affidavit itemised various assets in which the first respondent may have a financial interest and to this must be added the fact that these assets were not uncovered with the assistance of the respondents as this application is decidedly an acrimonious one and not a “friendly sequestration” where a court would be anxious even without opposition to the application, to carefully examine the papers to determine whether the sequestration would benefit creditors.

[7] The fact that the respondents oppose the application and base the opposition solely on the basis that their sequestration will not benefit creditors (and being represented by senior counsel) would in ordinary circumstances have seemed somewhat peculiar, but since the

respondents are in the process of applying for citizenship in the United States of America I will assume that their sequestration will not be helpful in their ambitions to become citizens of that country.

[8] The applicants makes a case that the first respondent was the controlling mind of a trust, The Strath Wood Family Trust, and that the trust is a shareholder of Chemspec Holdings Limited owning 5861 shares and that in addition the first respondent was a high profile director of this company prior to him leaving the country. This company is a public listed company named Chemspec Limited. In addition to being a director of Chemspec Limited first respondent is alleged to have been a director or member of some twenty eight (28) other companies of which I need to refer only to one namely Zevoli 243 (Pty) Ltd.(Zevoli). Zevoli allegedly acquired substantial immovable properties by itself and through the other companies mentioned with an alleged value of R141million. The case for the applicants is that the first respondent effectively uses the trust and the companies mentioned to insulate his wealth from his creditors and it is only a trustee armed with the powers conferred upon him or her by the Insolvency Act who will be able to fully investigate the business affairs of the first respondent and effectively pierce the veil of the trust and the affairs of the companies mentioned to locate assets which in reality belongs to the first respondent.

[9] I mentioned only the involvement of the first respondent in this one trust as I do not think any purpose will be served to deal with each and every alleged involvement by him in a business entity and his response to suggestions that he is shielding himself from his creditors.

[10] The question of what constitutes a benefit to creditors has been authoritatively interpreted and in the leading case on this topic, **Meskin & Co v Friedman**[1], Roper J identified indirect advantages to creditors such as the opportunity to have a full investigation of the insolvent's affairs where the complexity of the insolvent's involvement in the business world warrants such an investigation. I was handed an unreported judgment by Levinsohn DJP of this Division in the case of **Nedbank Limited v R P Thorpe** (Case No: 7392/2007) in which he was faced with a case involving various trusts from which it was said that creditors of the insolvent may benefit and I found his judgment from pages 15 to 28 both instructive and helpful.

[11] In the answering affidavit the first respondent set out to explain why any investigation into his business affairs will not avail his creditors. It was argued on behalf of the respondents that the applicants went no further in the papers than to identify a *spes* that assets may be

[1] 1948 (2) SA 555 W at 558-559

recovered and in reality nothing will materialise making the sequestration of the respondents a futility.

[12] I disagree with this submission. The applicants, in my view, established a strong *prima facie c*ase why it would benefit the general body of creditors to have the respondents provisionally sequestrated. I am persuaded that the efforts made by the first respondent to explain away the realistic expectations of the applicants that a material benefit may result in his and the 2nd applicant's sequestration fortifies a genuine expectation that a proper investigation into his affairs would lead to a substantial windfall for the benefit of his creditors.

[13] I therefore grant an order in terms of paragraphs 2 and 3 of the Notice of Motion with the return date in paragraph 2 to read the 7th day of January 2014.

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MBATHA J

Date of hearing:	27 September 2013
Date of Judgment:	26 November 2013
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