

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 8603/2021

(1) REPORTABLE: YES/**NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

Date: 19 July 2024 JA Kok

In the matter between:

Lexshell 824 Investments Proprietary Limited

APPLICANT

and

Wiese, Pieter Jacobus

RESPONDENT

JUDGMENT

Kok AJ

Introduction

[1] The applicant applied for the provisional sequestration of the respondent. The respondent is married out of community of property. No relief is sought against the respondent's wife.

- [2] The applicant asserted that (a) the respondent is heavily indebted to the applicant pursuant to a money judgment, and accordingly the applicant is a creditor of the respondent, in a liquidated amount exceeding a sum of US\$12 million; (b) the respondent is in fact insolvent as envisaged in section 9(3)(a)(v) of the Insolvency Act 24 of 1936, alternatively, the respondent has committed an act of insolvency in the manner contemplated in section 8(a) of the Insolvency Act; and (c) the sequestration of the respondent's estate would be to the advantage of his creditors.
- [3] The respondent put in issue that the sequestration would not be to the advantage of his creditors. This is the only issue that I am called upon to adjudicate.
- [4] At the start of proceedings, I allowed both parties to submit further affidavits, in my discretion, on the basis that the matter should be adjudicated upon all the facts relevant to the issues in dispute. The parties did not oppose their respective applications for leave to file further affidavits.
- [5] I am indebted to both parties' counsel for their comprehensive heads of argument. Where appropriate I relied on their heads in crafting this judgment.

The applicant's case

- [6] The applicant made the following submissions in its written heads of arguments.
- [7] There is reason to believe that it will be to the advantage of creditors if the estate of the respondent is sequestrated for *inter alia* the following reasons: (1) the respondent has been involved in businesses both as a director and member over a substantial period in his life to reasonably have acquired assets, including both movable and immovable assets; and (2) upon sequestration of the respondent's estate, the insolvency mechanism will allow the appointed trustee to take charge of the respondent's estate, conduct an investigation and inquiry into the respondent's financial position and the respondent's actions regarding his estate with the view of reporting to the respondent's creditors, taking any appropriate action.

- [8] In the present case, the known facts concerning the indebtedness of the respondent and his extensive business dealings provides the basis for concluding that there is a reasonable prospect that there will be an advantage to creditors, even if the extent of the pecuniary advantage is not capable of being positively determined. There is, therefore, reason to believe that there may be a further advantage to creditors resulting from the inquiry to follow in the sense that further assets may be revealed.
- [9] Through paragraph 5.3.1 and 5.3.2 of the Schedule to the 2017 English Consent Order, the respondent and the other defendants acknowledged that they in July 2017 owned all of the shares in the share capital of two international companies: (i) CallAll, and (ii) Sao Tome Investments. The litigation that led to the 2017 English Consent Order emanated from the defendants having secured proceeds from a multimillion US Dollar transaction (US\$120 million) and failing to honour their contractual commitments to, *inter alia*, pay over a portion of those proceeds to the applicant.
- [10] The extent of the business affairs of the respondent and the existence of assets acquired by and/or disposed of by the respondent, can be investigated by a trustee. In particular, a trustee can investigate how someone like the respondent who clearly had massive financial investments in mining operations throughout his professional career has been unable to satisfy any part of the 2017 English Consent Order since July 2017.
- [11] It does not appear that there exists a means for the applicant (and any other creditors of the respondent) to obtain payment other than through sequestration, given the respondent's silence about the extent of his assets and whether or not he is gainfully employed currently.
- [12] The facts of this case bear a striking resemblance to those adjudicated in *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C). There, the court had to rule whether the estate of a heavily indebted individual who had been 'sketchy' in

presenting the extent of his assets and liabilities in a sequestration application pursued by a financial institution against his estate was a candidate for provisional sequestration.

- [13] During the hearing, the applicant's counsel fleshed out the written heads to make the case that the respondent had been economical with the truth and had not taken the court into his confidence. The respondent is a chartered accountant, not the typical indigent litigant. The applicant alleges that he and his family will be prejudiced if he is sequestrated, but he does not set out his family's financial position. The respondent did not provide his bank statements to show how he is generating a monthly income. He did not provide any information on his wife's financial position and her contribution to the income of the family. The respondent had been involved in financial transactions involving millions of rands. He is quiet on whether and in which amounts he received proceeds from these transactions. The respondent's debt on the home loan that he obtained in 2007 is still at a significant level (R2.4 million) and he does not explain why this debt is still at this level. The respondent does not explain how he was able to raise the short-term debts listed in his liabilities. No property evaluation of his residential home was provided. The respondent did not file an affidavit from his employer to confirm that he will no longer be employed if he loses his membership of the South African Institute of Chartered Accountants (see paragraphs 28-30 below). He did not provide his contract of employment.

The respondent's case

- [14] The respondent made the following submissions.
- [15] The respondent's full financial affairs have already been placed before this Honourable Court under oath. Further investigations into the affairs of the respondent will not reveal a reasonable prospect that some pecuniary benefit will result to his creditors.

- [16] In terms of *Body Corporate of Empire Gardens v Sithole* 2017 (4) SA 161 (SCA), the applicant must prove that the sequestration of the respondent's estate would be a benefit to the creditors of the respondent as a whole and not to the benefit of a single creditor.
- [17] The applicant submitted that none of the defendants to the English Consent Order, which includes the respondent, has fulfilled their payment obligations to the applicant. The respondent does not know the financial circumstances of the fourth and fifth judgment debtor, being Mr van Niekerk and the Avalon Trust. The other judgment debtors are Mikakor and Mr Christo Floris Wiese.
- [18] The respondent is the sole director of Mikakor, the first judgment debtor of the English Consent Order. Mikakor's only potential income is a loan to the respondent of R964 000.00. Mikakor is currently indebted to SARS for R3 034 405.68. Mikakor does not hold shares and/or interests in any third party and is currently not trading.¹ Mikakor does not have the necessary assets to satisfy any portion of the English Consent Order. The respondent's father, Mr Christo Floris Wiese and the third judgment debtor of the English Consent Order, had been sequestered.
- [19] The approximate value of the respondent's personal effects (movable property) is R300 000.00. The respondent is the owner of an immovable property with an estimated force sale value of R3 300 000.00. ABSA Bank Limited has two registered bonds in their favour over the respondent's immovable property, to the cumulative value of approximately R2 450 000.00. The bond agreements commenced on March 2007 and will continue for a period of 20 years. The respondent's combined total assets amount to approximately R3 850 000.00.
- [20] The respondent's approximate liabilities are as follows:

Applicant's claim

R303 694 607.53

¹ In his oral argument, counsel for the applicant argued that the terms and the circumstances in which the loan was made, was not explained by the respondent.

ABSA home loan	R2 879 932
Mikakor loan	R964 000
Standard Bank vehicle finance	R192 307
Afrikaans Hoër Seunskool	R85 080
City of Tshwane municipal account	R33 242
ABSA credit card	R63 542
FNB credit card	R121 485
FNB revolving loan	R37 126
SARS	R470 470.56

- [21] The respondent is actively negotiating with ABSA Bank Limited on a repayment plan of his home loan debts pursuant to summons being issued by the bank. He has current monthly payment arrangements in place with a number of creditors:

SARS	R5 000
Standard Bank vehicle finance	R6 799.34
Afrikaans Hoër Seunskool	R7 500
ABSA credit card	R2 869
FNB credit card	R7 485.30
FNB revolving loan	R1 500

- [22] There is no evidence before the court as to the value of payments made by the other judgment debtors to the applicant since the filing of the applicant's heads of argument, nor any evidence to suggest that the applicant is attempting to enforce the judgment award against Mr van Niekerk and the Avalon Trust. Therefore, given the uncertainty in this regard, together with the knowledge that Mikakor has not made any payments towards the judgment debt and the assumption that Mr Wiese's estate has not made any contributions either, the respondent has for calculation purposes, took the value of the entire English Consent Order into account when calculating the potential dividends.

- [23] Having regard to the respondent's assets and liabilities, if the respondent is sequestrated, the concurrent creditors would at best receive a dividend of less than one cent to the rand.
- [24] A provisional or final sequestration order may realise the risk of having the respondent removed as a registered chartered accountant from the South African Institute of Chartered Accountants and if that happens his employment will be terminated.
- [25] The respondent is a chartered accountant by trade, registered with the South African Institute of Chartered Accountants. Being a member of the South African Institute of Chartered Accountants, he is bound by the By-Laws and Appendices of the South African Institute of Chartered Accountants. The relevant part of these rules provides that:
- "26. Cancellation of membership
- 26.3 A member whose estate has been provisionally or finally sequestrated, subsequent to admission to membership, shall within 21(twenty one) days, satisfy PCC that there were either exceptional or legitimate business related circumstances regarding the sequestration which would justify the PCC not to exercise its discretion to order the cancellation of his/her membership.
- 26.6 When the membership of a person is cancelled in terms of By-law 26.1, 26.2 or 26.3 the Board shall remove his or her name from the register immediately, advising the Regional Councils of the action taken and demand from the ex-member the return of his certificate".
- [26] The respondent is currently employed as a chartered accountant at Precious Metals Tshwane. If the respondent is provisionally sequestrated, he may be removed as a registered chartered accountant from the South African Institute of Chartered Accountants and if that happens, the respondent's employment will be terminated.

- [27] If the respondent is provisionally sequestrated and thus ultimately dismissed, he would not be able to keep up with his monthly obligations to his creditors which would be to the detriment of the creditors as a whole.
- [28] The sequestration will furthermore be prejudicial to ABSA Bank as it would bring about the end of the bond agreements between the respondent and ABSA Bank, which would have the effect of depriving ABSA Bank Limited of the accrued interest on the bonded amount for the duration of the bond agreements.
- [29] The sequestration will also prejudice the creditors as it would bring about the end of the repayment agreements in place with them. This in turn will have the effect that instead of having been paid in full in a short period of time, those identified creditors will only receive a pittance of the amounts owed to them, if anything at all, and only after a lengthy sequestration process. Furthermore, and assuming the said creditors lodge a claim against the insolvent estate, they would bear the risk that they may be liable to contribute to the administration costs incurred as there will not be sufficient residue to cover the costs of sequestration and administration of the insolvent estate.
- [30] In addition to the authorities referred to above, both parties relied on *Meskin v Friedman* 1948 (2) SA 555 (W) and *Stratford v Investec Bank Limited* 2015 (3) SA 1 (CC) in support of their submissions.

Analysis

- [31] As I read *Meskin v Friedman* 1948 (2) SA 555 (W) 559, the "advantage to creditors" criterion is not met by only asserting that sequestration will allow for the inquisitory powers in the Insolvency Act to take its full effect. There has to be a case made for some pecuniary benefit for the creditors. *Stratford v Investec Bank Limited* 2015 (3) SA 1 (CC) para 44 held that the "advantage" criterion and the "not-negligible pecuniary benefit" that flows from this advantage, are broad concepts that should not be rigidified.

- [32] The benefit to creditors does not have to exist as an immediate financial benefit - there must be a not too remote prospect that as a result of the inquiry process in terms of the Insolvency Act, some assets will be uncovered.²
- [33] As I interpret the caselaw on this point, the papers have to lay the basis for this "not too remote" prospect. I mention a few applicable cases. In *Stratford* (para 46), the applicant detailed potentially impeachable transactions of R37 million. In *Hawker Air Services* para 30, the papers showed that the partnership what was sequestrated was involved in a suspicious transaction when an aircraft of which it was the beneficial owner was transferred to a new partnership for new discernible return. *Lynn & Main Inc v Naidoo and another* 2006 (1) SA 59 (N) para 36, on the papers and the respondents' financial statements, involved suspicious transactions with a family trust controlled by the respondents. *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) 584-585 likewise on the papers showed various dubious transactions involving two companies and a children's trust, sufficient for the court to conclude that the respondent had something to hide.
- [34] *Lotzof v Raubenheimer* 1959 (1) SA 90 (O) 94A-B is explicit about this requirement - a reasonable case must be made out on the papers for an inquiry into the debtor's finances which may be of benefit to the creditors.
- [35] The applicant submitted that *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) is comparable to the current matter. On my reading of *Rhebokskloof*, it is distinguishable. The judge in *Rhebokskloof* referred to the "muddy" and "murky" picture of the respondent's assets and liabilities presented on the papers. The papers also contained a *prima facie* indication of serious irregularities of the respondent in relation to certain commercial transactions. In *Rhebokskloof* the facts therefore indicated that there was a prospect that an investigation by the trustee of

² *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership and others* 2006 (4) SA 292 (SCA) para 29.

the insolvent estate would uncover assets. In the present matter, the respondent listed his assets and liabilities. On the papers there is no suggestion of irregular or dubious financial transactions or impeachable transactions other than the assertion that based on the size of previous commercial transactions that the respondent had been involved in, there must be assets available somewhere.

- [36] *Body Corporate of Empire Gardens v Sithole* 2017 (4) SA 161 (SCA) does not create new law. The SCA helpfully restates the current South African insolvency law in para 10 of the judgment:

The phrase 'advantage to creditors' is not defined in the Insolvency Act, but if the principle of *concursum creditorum* is taken into account, it means that there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole. (See *Lynn & Main Inc v Naidoo and Another* 2006 (1) SA 59 (N) paras 33-35; *Ex parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP) para 13.) This requirement is fulfilled where it is established that there is reason to believe that there will be advantage to a 'substantial proportion' or the majority of the creditors reckoned by value. (See *Fesi and Another v Absa Bank Ltd* 2000 (1) SA 499 (C) at 505-506; *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N); *Samsudin v De Villiers Berrange NO* [2006] SCA 79 (RSA).) Although advantage to creditors is not a rigid concept (*Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC) para 44), it requires proof of a tangible benefit to the general body of creditors.

- [37] *Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin; Botha v Botha* 1990 (4) SA 580 (W) 586, all matters concerning sequestration applications where it was clear that there were no further assets, held that a very small dividend in the rand amounts to a negligible benefit to creditors. *Stratford* para 44, referencing *Meskin*, seems to hold that any payment to creditors, however small it may be, will suffice, "unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment".

- [38] As I read the papers, the respondent was involved in commercial transactions that went disastrously wrong for him and the other judgment debtors in the dealings that lead to the applicant obtaining the 2017 English Consent Order. It is telling that the

applicant has not pursued enforcement of the Consent Order against the other judgment debtors.

[39] There is a considerable risk that no dividend will be realised and that debtors who proved their claims will be obliged to contribute to the sequestration costs.

[40] The respondent puts it too strongly when he asserts that should he be sequestrated, that he "will" lose his employment. In terms of the By-Laws and Appendices of the South African Institute of Chartered Accountants that he relies on, on sequestration the respondent will have to make a case to the relevant governing body why he should not be removed from the register of chartered accountants. It is in the governing body's discretion to keep him on the register or not. The respondent did not attach an affidavit from this employer as to why he "will" of necessity lose his employment if he is removed from the register of chartered accountants.

[41] The respondent has made repayment arrangements with most of his creditors. He is in salaried employment and there is a reasonable prospect that he will continue to make these repayments. If he is sequestrated, there is a significant risk that most of the creditors, including the applicant, will not recoup any of their claims. The respondent's creditors have the usual debt enforcement mechanisms at their disposal, which will likely lead to a larger payment to them than having the respondent sequestrated.

ORDER

In the result, the following order is granted:

- 1. The application is dismissed.**
- 2. Each party to bear its own costs.**



JA Kok
Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:	TR Seroto
Instructed by:	Fasken incorporated in South Africa as Bell Dewar Inc
For the respondent:	DP Viller
Instructed by:	Julian Knight & Associates Inc
Date of the hearing:	21 February 2024
Date of judgment:	19 July 2024