

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2020/19564

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED YES
	26 July 2024
SIGNATURE	DATE

In the matter between

K2015353139 SOUTH AFRICA (PTY) LIMITED

Applicant

And

KGOMOTSO MOTSOANE

First Respondent

MANDLA ARCHYBALD NIKHATA

Second Respondent

JUDGMENT

WANLESS J

Introduction

- [1] In this application K2015353139 South Africa (Pty) Limited (*"the Applicant"*) seeks the final sequestration of the joint estate existing between Kgomotso Motsoane, adult female (*"the First Respondent"*) and Mandla Archybald Nikhata, adult male (*"the Second Respondent"*). For ease of reference the First Respondent and the Second Respondent will be referred to herein as *"the Respondents"* unless it is necessary to refer to either one of them in their individual capacity.
- [2] The joint estate of the Respondents was placed under provisional sequestration by this Court on 27 October 2022. This order (*"the Provisional Order"*) was not opposed by the Respondents. The Respondents opposed the granting of a final order of sequestration. Arising therefrom, this Court heard the matter on 30 August 2023 as an Opposed Motion.
- [3] During the course of argument before this Court on 30 August 2023, this Court questioned the fact as to whether a joint estate truly existed between the Respondents and, if not, whether the Provisional Order had been correctly granted on 27 October 2022. Arising therefrom the application was postponed *sine die* (the *Rule Nisi* extended until it was either confirmed or discharged) pending written submissions from both Counsel in respect thereof. These written submissions were uploaded onto CaseLines on 14 and 18 September 2023. Regrettably, neither Counsel or those instructing them notified this Court thereof and the said written submissions only came to the attention of this Court, by chance, on 11 October 2023. In the premises, judgment in this matter was reserved on 11 October 2023 (and *not* on 30 August 2023).
- [4] Both Counsel for the Applicant and Counsel for the Respondents were of the opinion that there exists a joint estate between the Respondents. This judgment will not be burdened unnecessarily by setting out the grounds upon which the aforesaid submissions were based. Suffice it to say, this Court essentially agrees therewith and, based on the common cause facts of this matter, agrees that the Respondents share a joint estate for the purposes of these sequestration proceedings. In the premises, the Provisional Order should remain intact and

this Court is entitled (*indeed enjoined*) to consider the present application for the final sequestration of that joint estate.

- [5] It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be "*converted*" or more correctly "*transformed*", into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an *ex-tempore* basis.

The facts

- [6] The relevant facts which are either common cause or cannot be seriously disputed by either party in this matter are, *inter alia*, the following:
- 6.1 the applicant instituted an action ("*the action*") in terms of which it claimed, *inter alia*, payment from the respondents in the total sum of R300 000.00;
 - 6.2 the Respondents defended the action;
 - 6.3 subsequent thereto the action was settled between the parties and on or about 14 September 2021 the parties entered into a written settlement agreement ("*the agreement*");
 - 6.4 the agreement was made an order of Court on 4 October 2021;
 - 6.5 the Respondents breached the agreement by failing to pay to the Applicant the first instalment due in terms thereof;
 - 6.6 the Applicant then issued a writ of execution to attach the movable assets of the Respondents;
 - 6.7 the Sheriff served the said writ and attached certain movable property at

the Respondents' residence;

- 6.8 thereafter, a third party filed an affidavit claiming all of the aforesaid movable property attached by the Sheriff to be his;
- 6.9 as a result of the foregoing the Sheriff attempted to attach further movable property belonging to the Respondents. On or about 5 May 2002 the Sheriff rendered a *nulla bona* return. Included therein was a reference to the fact that he had been advised that the Respondents had no money or assets which could be attached;
- 6.10 on or about 3 June 2022 the Applicant issued this application for the sequestration of the Respondents' joint estate;
- 6.11 on or about when the Application was issued the Respondents were indebted to the Applicant in the sum of R300 000.00;
- 6.12 the Respondents then approached the Applicant with further settlement proposals;
- 6.13 arising therefrom and during or about the period 22 July 2022 to 14 October 2022 the Respondents made three (3) payments to the Applicant in the total sum of R150 000.00;
- 6.14 on 27 October 2022 the Provisional Order was granted by this Court;
- 6.15 on or about 22 February 2023 the Respondents made a further payment to the Applicant in the sum of R20 000.00;
- 6.16 a "*skirmish*" then arose between the parties relating to, *inter alia*, an application by the Applicant to supplement its application papers by means of a supplementary affidavit. This was opposed by the Respondents who filed a notice in terms of Rule 30 averring an irregular step had been taken by the Applicant giving rise to an application in terms of Rule 30. These interlocutory applications will be dealt with (*briefly*) in this judgment;

6.17 the Applicant elected not to file a Replying Affidavit in the sequestration application and the matter was set down for hearing on the Opposed Motion Roll.

The interlocutory applications pertaining to, *inter alia*, leave for the Applicant to file a supplementary affidavit and the Respondents' application in terms of Rule 30

[7] This Court has, on many previous occasions, expressed its displeasure of having to deal with numerous interlocutory applications which arise during the course of an opposed application and which this Court is expected to entertain. In the opinion of this Court, such interlocutory applications should be dealt with on the Special Interlocutory Roll prior to an application being heard on the Opposed Motion Roll. In the event of this procedure not having been followed, the legal representatives should adopt a more "*practical*" approach towards the litigation and arrive at a sensible manner in which to dispose of same. In this way the interests of justice would be properly served. Not only would the litigants have avoided incurring further and, most often, unnecessary legal costs but the already onerous workload of this Court (*particularly in respect of the Opposed Motion Roll*) would not be placed under greater pressure.

[8] That said, this Court has taken due cognisance of the various Notices of Motions; affidavits and argument placed before this Court with regard thereto. Having done so, it is the opinion of this Court that it would be just and equitable if the Applicant was given leave to file its supplementary affidavit. This is due primarily to the fact that the Respondents have already filed an affidavit in answer thereto. Arising from the foregoing the second interlocutory application, by its very nature, must be dismissed. The Respondents can suffer no real prejudice if this avenue is followed. As to the issue of costs, this Court finds that it would be just and equitable if each party paid their own costs in respect of both interlocutory applications. In this regard, this Court does not intend to burden this judgment unnecessarily. It suffices to say that this Court, exercising its general discretion with regard to costs, finds that both parties are, to an extent, not completely blameless in the manner in which these applications arose and were handled

thereafter. In the premises, costs should not follow the result but be borne equally by the parties. An appropriate order in that regard is to be found at the conclusion of this judgment.

The issues

- [9] It was common cause between the parties that the Respondents had committed an act of insolvency and that the Applicant has the requisite *locus standi* in terms of the Insolvency Act 24 of 1936 ("*the Act*") to institute the application for the sequestration of the Respondents' joint estate. The only issue which it is necessary for this Court to decide, is whether there will be an advantage to creditors as envisaged in terms of subsection 12(1)(c) of the Act if that joint estate is finally sequestrated.

The law

- [10] At the very beginning of her address, Adv Isaaks, who appeared on behalf of the Applicant, drew the attention of this Court to the judgment of Twala J, in this Division, in the matter of *Mercantile Bank Limited, A division of Capitec Bank Limited v Ross and Another (Mercantile)*.¹ It was submitted by Adv Isaaks that the judgment in *Mercantile* had effectively changed the law of insolvency in that Twala J had held that there is no onus on an applicant in sequestration proceedings to prove an advantage or benefit to creditors. In that regard, Adv Isaaks relied upon the *dicta* of Twala J, namely²:

"I find myself in disagreement with the contentions of the respondent in this regard. There is no onus on the applicant to prove that it is to the advantage or benefit of the creditors and what dividend, in rand and cents, would be paid to the creditors of the applicant (sic) if the estate of the respondent is sequestrated. I understand the authorities quoted above to be saying that it is sufficient for the applicant to reasonably believe that it will be to the advantage or benefit of the creditors that the estate of the respondent be sequestrated. In this regard, each case must be considered on its own

¹ [2023] JOL 58951 (GJ)

² At paragraph [21]

merits. Although there is no onus upon the respondents to show that the order is resisted on bona fide and reasonable grounds, he bears the evidentiary burden to do so. It is for the respondent to demonstrate that he is not insolvent and that his assets far exceed the amount he is owing to his creditors".

- [11] During the course of argument, this Court put it to Adv Isaaks that the judgment of Twala J was, with respect, whilst an extremely useful summation of the applicable principles of law and a confirmation of those principles, hardly "*groundbreaking*" and, certainly, did not create new law. Having had a further opportunity to consider the aforesaid judgment the *prima facie* views expressed by this Court at that stage have been confirmed.
- [12] In that regard, whilst this Court is largely in agreement with Twala J where it is stated that "*There is no onus on the applicant to prove that it is to the advantage or benefit of the creditors and what dividend, in rand and cents, would be paid to the creditors of the applicant (sic) if the estate of the respondent is sequestrated*" the aforesaid *dicta* does, with respect, require some clarification. It is clear, in the first instance, that whilst there is no onus, in the traditional or accepted meaning thereof, on an applicant in sequestration proceedings to prove, either at the provisional or final stage, that it will be to the advantage of creditors if the estate of a respondent is sequestrated the *evidentiary burden* which an applicant has to discharge should never be discounted or "*under-emphasised*".
- [13] Having regard, *inter alia*, to the drastic effect which sequestration has on the status of a respondent (*with the exception of a Trust, always a natural person*), our law has always (*correctly in the opinion of this Court*) expected the petitioning creditor to place before the court sufficient facts and evidence which would satisfy the court that there is reason to believe that it will be to the advantage of creditors of the debtor if his or her or its, estate is sequestrated. This is why, with due deference to the Constitutional Court³, the practice has evolved in most Divisions that in a "*friendly*" sequestration the applicant is required to set out the respondent's assets and liabilities in some detail, even to the extent of setting out

³ *Stratford and Others versus Investec Bank Limited and Others 2015 (3) SA 1 (CC)*

in the Founding Affidavit the approximate dividend (*after the costs of sequestration*) that will accrue to the creditors.

[14] Of course, the same exacting standard could never be expected of an applicant in a *"hostile"* sequestration application. This has always been accepted by our courts. Nevertheless, it remains incumbent upon an applicant to set out facts and, where available, cogent evidence to satisfy the court that there is reason to believe that it will be to the advantage of creditors if the estate of a respondent is sequestrated. A petitioning creditor (*particularly in the case where that petitioning creditor is a single creditor and no other creditors are set out in the application papers*) cannot expect the court to come to that creditor's assistance in a case where such an applicant merely pays *"lip service"* to the provisions of the Act and has not taken any real steps to ascertain whether or not there is a genuine likelihood that there will be an advantage to creditors. Simply relying on the fact that a Trustee will be able to carry out investigations with the possibility of unearthing realizable assets of value, is insufficient⁴. Our law does not allow same, not only to protect the status of respondents (*as set out above*) but, also, to avoid an abuse of sequestration proceedings whereby a creditor seeks to extract payment from a debtor under the guise of sequestration and the drastic effects thereof.

[15] In light of the foregoing the dicta of Twala J in *Mercantile* that *"I understand the authorities quoted above to be saying that it is sufficient for the applicant to reasonably believe that it will be to the advantage or benefit of the creditors that the estate of the respondent be sequestrated"* must be read and understood with some circumspection. This statement (*correctly in this Court's respectful opinion*) is qualified by the very next sentence in the judgment where the learned Judge states: *"In this regard, each case must be considered on its own merits."*

[16] It is the statement which follows that (*once again respectfully*) is, in the opinion of this Court, problematic. The learned Judge states: *"Although there is no onus upon the respondents (sic) to show that the order is resisted on bona fide and reasonable grounds, he bears the evidentiary burden to do so."* This Court is

⁴ *Dunlop Tyres (Pty) Ltd v Brewit 1999 (2) SA 580 (WLD)*

unaware of any provision, either in terms of the common law or in terms of statute, where in sequestration proceedings it is incumbent upon a respondent, when opposing a sequestration application, to place evidence before the court that this opposition is "*bona fides*" and based on "*reasonable grounds*".

[17] The learned Judge cites no authority or makes no reference to any statutory provision in support of this statement. This is an observation and *not* a criticism. That said, this Court is in agreement with the finding that, with regard to the question of an advantage to creditors, a respondent bears an "*evidentiary burden*". However, the fact that a respondent in sequestration proceedings bears an "*evidentiary burden*" with regard to advantage to creditors, should not be seen as somehow placing an extra burden upon a respondent to the detriment of that respondent and placing an applicant in a more advantageous position in sequestration proceedings.

[18] There is no shift in any onus with regard to the issue as to whether or not there is an advantage to creditors (*as incorrectly relied upon by Adv Isaaks in the present matter before this Court*). This is simply because there is no true onus in the first place. In order to grant a sequestration order the Court must be satisfied that there will be an advantage to the creditors of a respondent. As is clear from that already stated in this judgment, both an applicant and a respondent have an "*evidentiary burden*" to place before the court facts, supported by evidence, to show that there is either an advantage to creditors or no such advantage to creditors exists.

[19] In the premises, this Court must respectfully disagree with the statement by Twala J that: "*It is for the respondent to demonstrate that it (sic) is not insolvent and that his assets far exceed the amount he is owing to his creditors*".⁵ Once again, this statement is (*with respect*) somewhat misleading in that it appears to support the general principle that the evidentiary burden rests solely on a respondent in sequestration proceedings. In addition, the statement by the learned Judge cannot (*with respect*) be correct insofar as it is stated that not only is it incumbent upon a respondent in sequestration

⁵ *Emphasis added*

proceedings to demonstrate that such a respondent is not insolvent but, when doing so, that respondent must satisfy the Court "... *that his assets far exceed the amount he is owing to his creditors.*" Accepting, for the sake of argument, that insolvency is subject only to liabilities exceeding assets and that the only way a respondent can show solvency is by showing that his or her (*or in the case of a Trust, "its"*) assets exceed liabilities, this Court is unaware of the requirement (*either in terms of the common law or statutory law*) that assets must exceed liabilities "*by far*".

[20] Once again, the learned Judge cites no authority in support of this proposition as a general principle of insolvency law and makes no reference to any statutory provision in respect thereof. It cannot (*with respect*) be correct. This is so, for if it was, this would impose a standard of "*proof*" (in the sense of an evidentiary burden and not a true onus) which would be difficult, if not impossible, to measure. In the premises, it is the opinion of this Court that not only is such a proposition incorrect but that it should clearly not be followed, since it can only give rise to unnecessary confusion in the application of the correct principles of insolvency law. This confusion is illustrated by the submissions made by Adv Isaaks in the present matter that, in light of the judgment in *Mercantile*, there has been "*a shift in the onus*".

[21] In order to grant a provisional order of sequestration in terms of section 10 of the Act, a court has to be satisfied, *prima facie*, that apart from the other requirements as set out therein "*there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated.*"⁶ For a court to grant a final order of sequestration it must be satisfied, *on a balance of probabilities*, that there will be an advantage to creditors⁷. The foregoing is trite and this judgment will not be burdened unnecessarily by citing numerous authorities in support thereof.

⁶ Section 10(C) of the Act.

⁷ Section 12(1)(c) of the Act.

The case for the Applicant

[22] It was submitted by the Applicant that the Respondents had failed to place before this Court sufficient evidence to satisfy this Court that there would not be an advantage to creditors if the joint estate of the Respondents was finally sequestrated. Further, it was submitted that it would be to the advantage of the Respondents' creditors if their estate was sequestrated and a Trustee appointed, inasmuch as a Trustee would be able to:

22.1 investigate the nature of the relationship between the Respondents and the various companies and close corporations in which the Respondents have an interest;

22.2 investigate whether any payments or dispositions were made by the Respondents to the companies and close corporations in which the Respondents have an interest that could be set aside and utilised towards the Respondents' indebtedness to the Applicant and other creditors;

22.3 investigate the banking accounts of the Respondents and the companies and close corporations in which the Respondents have an interest;

22.4 investigate whether there are any assets owned by the Respondents which can be realised for the benefit of their creditors;

22.5 investigate whether the Respondents have received any monies or assets from the close corporations and companies in which the Respondents have an interest which can be realised for the benefit of their creditors;

22.6 investigate whether any of the close corporations and companies in which the Respondents have an interest are their *alter egos*.

[23] In addition, it was submitted by the Applicant that the Respondents are members of numerous close corporations and directors of numerous companies, which is

illustrative of the fact that, *inter alia*, not only are the Respondents "*business people*" capable of earning incomes but that there are realisable assets in the form of members' interests/shares that could be realised for the benefit of the Respondents' creditors.

The case for the Respondents

[24] By way of broad summary the case for the Respondents can best be described as being that the application for sequestration is an abuse of process. In this regard, Adv Khumalo, who appeared for the Respondents, submitted that the application was made by a single creditor and that the Applicant was being paid by the Respondents in respect of their indebtedness to the Applicant. Arising therefrom, it was submitted that this Court should, in the exercise of its discretion, dismiss the application and discharge the provisional order.

Discussion

[25] Having regard to the application papers before this Court the submissions of the Applicant that, *inter alia*, the Respondents had placed no evidence before this Court upon which this Court could find that there would be no advantage to creditors, is a good one. Faced with the averments made on behalf of the Applicant and the annexures put up in respect thereof in the Founding Affidavit the Respondents' failure to specifically deal therewith (*if at all*) is striking. In addition thereto the Respondents have failed to place before this Court any *real* facts, supported where necessary with documentary proof, in terms of which this Court could find that there would be no advantage to creditors and, in the exercise of its discretion, refuse to grant a final order of sequestration.

[26] With regard to the foregoing the Respondents have failed to effectively deal with, *inter alia*, the fact that the Respondents have business interests in various close corporations and companies, together with the First Respondent's ownership of an immovable property purchased on 11 February 2019 for a purchase price of R2 450 000.00. On the other hand, the Applicant has placed

before this Court evidence thereof despite the fact that this application is clearly a "*hostile*" and not a "*friendly*" sequestration application.

- [27] In addition to the foregoing the Respondents have failed to take this Court into their confidence by failing to disclose (*at all*) their present assets and liabilities, or their monthly joint income/expenditure.
- [28] Rather than setting out the information as aforesaid, the Respondents have confined their opposition to the granting of a final order of sequestration essentially to the averments that the sequestration application is an abuse of process and the application has been brought by a single creditor. This was confirmed by the approach taken by Adv Khumalo before this Court, in that Counsel for the Respondents confined his argument to the foregoing and did not deal with the facts (*and evidence in support thereof*) pertaining to the advantage to creditors. In this regard, Adv Khumalo was clearly restricted by the contents of the Respondents' Answering Affidavit. What is clear from the foregoing is that there appears to have been a fundamental misunderstanding on behalf of the Respondents as to the true meaning of "*advantage to creditors*".
- [29] It is trite that an advantage to creditors upon sequestration is that, after the costs thereof and the payment of preferent creditors, a not-negligible dividend will accrue to a debtor's body of general creditors. An advantage to creditors (*or the lack thereof*) is *not* based upon, *inter alia*, whether the application is an abuse of process or the facts that the application has been instituted by a single creditor.
- [30] Whilst these latter issues were not, as set out earlier in this judgment, placed before this Court for determination at the hearing of this matter and the sole issue which it was necessary for this Court to decide was whether there was an advantage to creditors, it is expedient, in light of the approach adopted by the Respondents, for this Court to deal briefly therewith.
- [31] With regard to the application being an abuse of process, it is true that the Applicant has received certain payments from the Respondents. This can never be described as an abuse of the sequestration proceedings. It is common cause

that, *inter alia*, the Applicant has obtained a judgment against the Respondents and has been unable to satisfy that judgment (*evidenced by a nulla bona return when attempting to execute against movable property of the Respondents*). Despite erratic payments having been made by the Respondents in reduction of their indebtedness the debt has not been discharged for a lengthy period of time. The Applicant has proved a claim well in excess of R100.00, which gives the Applicant the requisite *locus standi*, as a creditor of the Respondents, to institute this application.

[32] Having regard to the foregoing the payment of certain payments by the Respondents and the acceptance thereof by the Applicant, does not give rise to any inference that the application for the sequestration of the joint estate of the Respondents is (*as alleged by the Respondents*) an abuse of process. Whilst the Trustee of the Respondents may elect to recover those payments on the basis that they constitute voidable preferences⁸ and/or undue preferences to a creditor,⁹ this does not effect, in any manner whatsoever, the merits of the present application. In the premises, whilst it may have been unwise for the Applicant to accept these payments, this is a separate issue to determining whether or not this Court should grant a final sequestration order.

[33] With regard to the fact that the Applicant is a single creditor, regard must be had, in the first instance, to the fact that the present application is a "*hostile*" sequestration application and not a "*friendly*" one. In the premises, the Applicant is not privy to all of the information in respect of the Respondents' financial affairs which are within the Respondents' personal knowledge. Therefore, the Applicant is unable to provide details as to the existence or otherwise of any other creditors of the Respondents (*which the Respondents have declined to divulge in the present application*).

[34] Further, it is fairly trite (*and once again this judgment will not be burdened unnecessarily by reference to any authorities in respect thereof*) that the fact that an application is instituted by a single creditor is not necessarily a bar thereto.

⁸ Section 29 of the Act

⁹ Section 30 of the Act

Each case must be examined separately and decided on its own facts. Having regard to all of the foregoing, it is clear that, in the present matter, the fact that the Applicant is a single creditor and that it has no knowledge of any of the Respondents' other creditors, is not fatal to this application.

Conclusion

[35] The Applicant has placed before this Court sufficient facts, supported by documentary evidence, to satisfy this Court that there is reason to believe, on a balance of probabilities, that it will be to the advantage of creditors of the Respondents if their joint estate is finally sequestrated. In light of the fact that it is common cause that the other requirements of section 12 of the Act have been satisfied, this Court, in the exercise of its discretion, holds that the joint estate of the Respondents should be finally sequestrated. It must also be mentioned that it was common cause at the hearing of this application that all of the formalities of the Act had been complied with.

[36] With regard to the issue of costs, there are no factors which would cause this Court to deviate from the normal costs order granted in sequestration proceedings whereby costs are ordered to be costs in the sequestration of the debtor's estate. In the premises, it shall be so ordered.

Order

[37] This Court makes the following Order:

1. Each party is to pay their own costs in respect of the application by the Applicant to file a supplementary affidavit and the application by the First Respondent and the Second Respondent (*"the Respondents"*) in terms of Rule 30.
2. The joint estate of the Respondents is placed into final sequestration.
3. The costs of this application are to be costs in the sequestration of the

joint estate of the Respondents.


B. C. WANLESS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

APPEARANCES

On behalf of the Applicant:	Adv. W. Isaaks Instructed by Van Zyl Ebrahim Cook
On behalf of the Respondents:	Adv. N. Khumalo Instructed by Ngwane Mamod Incorporated
Date of Hearing:	30 August 2023
Judgment reserved:	11 October 2023
Date of <i>ex tempore</i> Judgment:	11 April 2024
Date of written judgment:	26 July 2024