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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2024-071301

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

Date 31 January 2025

K. La M Manamela

In the matter between:

HERMANUS JOHANNES VAUGHN VICTOR NO

First Applicant

JOHANNA NINI MAHANYELE NO

Second

Applicant

CAROLINE MMAKGOKOLO LEDWABA NO

Third Applicant

(in their capacities as the duly appointed joint provisional liquidators
of Tariomix (Pty) Ltd t/a Forever Diamonds and Gold (in liquidation))

and

LOUIS PETRUS LIEBENBERG

Respondent

(Identity Number: 6[...])

DATE OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of the judgment is deemed to be 31 January 2025.

SUMMARY: Compulsory sequestration – requirements for a liquidated claim in terms of s 9(1) of the Insolvency Act 24 of 1936 restated – an untaxed bill of costs or costs order may constitute a liquidated claim to afford an applicant *locus standi* to launch sequestration proceedings, provided the bill of costs is taxed or agreed as at the hearing of the application – statements or utterances, such as social media posts, by a debtor regarding existence of assets, without more, cannot establish liability on the part of the debtor and be deemed a liquidated claim to afford an applicant *locus standi* to apply for sequestration - completion of prescription of a debt may be delayed in terms of s 13(1)(e) of the Prescription Act 68 of 1969 where the debtor is a director of a company until joint provisional liquidators are appointed – restatement of requirements for proof of advantage to creditors, where the value of assets are overwhelmingly exceeded by the estimation of liabilities in a debtor's estate - requirements for sequestration met on a *prima facie* basis – provisional sequestration granted.

JUDGMENT

Khashane Manamela, AJ

Introduction

[1] Mr Louis Petrus Liebenberg, the respondent, is one of the two directors¹ of a private company, now in liquidation, known as Tariomix (Pty) Ltd t/a Forever Diamonds and Gold ('Tariomix'). The applicants are the joint provisional liquidators of Tariomix. Tariomix was placed in final liquidation on 12 April 2024. The applicants contend that the respondent misappropriated funds of Tariomix and, thus, is indebted to its estate now under their administration. They initially approached this Court by way of an urgent application² in July 2024 seeking provisional sequestration of the respondent's estate on the basis of his alleged indebtedness to Tariomix in the amount of R200 153 637, 04.

[2] The respondent opposes the application on multiple grounds. He disputes the alleged debt or claim in its nature and extent, and even considers part of it to have

¹ Ms Magdalena Petronella Kleynhans is the other director of Tariomix (Pty) Ltd (in liquidation).

² Par [19] below for more details on the order of the urgent court.

prescribed. In the main, he attributes the debt or part of it to have resulted from a misunderstanding of the diamond-dealing industry or its practices. According to the respondent, Tariomix conducted business as a facilitator and financier in the diamond industry. Its core business, as explained by the respondent, was providing finance for the purchase and beneficiation of diamonds by licensed individuals.³ Overall, the respondent is of the strong view that this application has no merit and forms part of the applicants' quest to hold him liable for the debts of Tariomix without first, appropriately, piercing its corporate veil.

[3] The matter came before me in the third motion court on 13 November 2024. Mr J Hershensohn SC, together with Mr R de Leeuw, appeared for the applicants and Mr A J Daniels SC, together with Ms L Acker, appeared for the respondent. This judgment was reserved. The judgment, gratefully, benefitted from the comprehensive heads of argument filed by counsel.

[4] The special enrolment of the matter in the third motion court, facilitated by a directive of the Deputy Judge President of this Division ('the DJP'), followed an order of the urgent court to this effect on 18 July 2024.⁴ The matter did not proceed in the urgent court, mainly, due to high volume of the paperwork. Although the order granted by the urgent court allowed supplementation of the answering and replying affidavits, the parties and their legal representatives – with respect - seem to have taken this to be a licence to file additional material, at will. Some of the additional material only served to upgrade earlier products with little or no additional value added. Special allocations or enrolment of a matter in the third motion court is not a licence for prolixity or cutting loose the checks and balances in the rules of practice applicable to motion proceedings. It is purely a recognition that the varying interests in and the complexities of the factual landscape in a matter may be better served by a hearing outside of the normal rolls of the Court. Indeed volume of the paperwork in a matter is the primary consideration, but to add more material to what would have prompted the allocation in the first place defeats the objective.

³ Footnote 47 below for a full description of the business model of Tariomix courtesy of the respondent.

⁴ Pars [19]-[20] below.

[5] I have been urged – tentatively it mostly appears - to pronounce on the admittance of some of the additional affidavits filed, but no purpose would be served by this when both parties appear to have equally strayed beyond the restraints. I have had regard to all material filed – despite my lamentations, above. The interests of justice shall be served by this approach, given what is at stake here.

Respondent's application to strike out

[6] The applicants say that Tariomix was run like a *ponzi*⁵ scheme. The respondent vehemently objects to this description or insinuation that Tariomix was involved in unlawful activities. He says that there is no such finding by any court of law. He also finds objectionable the notion that he and, the other director of Tariomix, Ms Magdalena Petronella Kleynhans ('Ms Kleynhans') siphoned off millions of rands invested in Tariomix by third party investors.

[7] Some of the financial activities of Tariomix were investigated by Adams and Adams Forensics ('the Forensic Investigators') at the instance of the applicants. The Forensic Investigators partly relied on the ledgers and/or financial statements by Dr Gert Cornelius 'Corrie' Cloete ('Dr Cloete'). Dr Cloete was the auditor of Tariomix at all material times. He also testified at an enquiry in terms of the section 417 of the Companies Act 61 of 1973 ('the CA 1973') convened at the instance of the applicants. The respondent finds the inclusion of the material by the Forensic Investigators and Dr Cloete prejudicial and, thus, objectionable. He launched a strike-out application in respect of the impugned material.

[8] The respondent's application in terms of Uniform Rule 6(15)⁶ to strike out some specified passages and paragraphs in the applicants' founding affidavit, including the report by the Forensic Investigators and material relating to Dr Cloete, formed part of the hearing of this matter. The grounds for the strike-out are that,

⁵ *Prinsloo v S* [2016] 1 All SA 390 (SCA); 2016 (2) SACR 25 (SCA) (4 December 2015) [1], [11], [146] for the hallmarks of a *ponzi* scheme. See also footnote 7 below for more details on the respondent's strike-out application, including references to the business of Tariomix as a *ponzi* scheme. The description of the business of Tariomix according to the respondent is reflected in footnote 47 below.

⁶ Uniform Rule 6(15) reads as follows: '[t]he court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.'

primarily, the impugned material is scandalous, vexatious and constituted inadmissible hearsay and/or irrelevant opinions.⁷

[9] At the hearing of this matter, Mr Daniels SC, appearing for the respondent, explained upon an enquiry by the Court that his client would not be insisting of a full-blown hearing of the strike-out application. Instead, he suggested that the Court bear in mind the arguments for and against the striking out of the impugned material when determining the issues in the matter (i.e. the main application). The approach was found sensible and pursued in the absence of a contrary view by Mr Hershensohn SC, for the applicants.

[10] The approach intimated above will also be adopted in this judgment regarding the objection relating to the report by the Forensic Investigators⁸ and the material relating to Dr Cloete.⁹ But, for brief reasons appearing in parentheses, I immediately strike out the following material from the founding affidavit, as I deem same to be prejudicial to the respondent: (a) paragraphs 4.1, 4.3 and 4.4 (for being vexatious); paragraph 8.8 in respect of the whole sentence with the word 'ponzi' with the rest of the paragraph remaining intact (for being scandalous); paragraph 8.10 in respect of only the specified part (for being vexatious); paragraph 8.11 (for being scandalous); paragraph 9.11 and annexure 'FA12' (for being irrelevant); paragraph 16.3 (for being inadmissible), and paragraph 19.11 in respect of only the specified part (for being vexatious). I also instantaneously dismiss all other grounds of the strike-out application not referred to above including the one relating to paragraph 8.9 for lack of merit. I will rule on the issue of costs in the strike-out application towards the end of this judgment.

⁷ The strike-out was directed at the following paragraphs and passages in the applicants' Founding Affidavit: (1) first sentence of paragraph 4.1; (2) the whole of paragraphs 4.3 and 4.4; (3) the whole of paragraphs 8.8 and 8.9; (4) the following word in par 8.10: "...*true to Ponzi scheme nature*..." (5) the whole of paragraph 8.11; (6) the whole of paragraph 9.11 and FA12; (7) the interim forensic report compiled by Adams and Adams referred to in paragraph 13.5 and attached as annexures FA19.1 and FA19.2; (8) the whole of paragraphs 14.1.5 and 14.1.6; (9) the whole of paragraphs 14.1.8 and 14.1.10; (10) the following words in paragraph 15.1: "...*as set out in the Adams and Adams report attached as annexure 19.1*..."; (11) the whole of paragraph 16.3, and (12) the following words in paragraph 19.11: "...*unlawful Ponzi scheme perpetrated by the respondent*...".

⁸ Respondent's objection against the inclusion of the report by the Forensic Investigators (i.e. annexures 'FA19.1' and 'FA19.2') in the Founding Affidavit ('FA') at par 13.5.

⁹ Respondent's objection against the inclusion of Dr Cloete's testimony at the insolvency enquiry referred to in FA pars 14.1.5 and 14.1.6.

Brief background

General

[11] The legal skirmishes between the parties have been raging in this Division and elsewhere for some time already. Those battles involved other aspects which – in most instances – do not have a bearing on these proceedings. But a brief narration of the issues in the background including those relating to the liquidation of Tariomix and the alleged indebtedness of the respondent to Tariomix, is necessary to place some of the issues in proper context.

[12] I am grateful to the legal representatives of the parties for the joint chronology of events filed. Most of the material appearing below, by way of background to the matter, is derived from that document and, therefore, is common cause between the parties. I leaned more to the side of brevity, but there will still be more material adding to the background under the parties' respective cases and submissions later in the discussion, below.

Liquidation of Tariomix

[13] On 23 February 2023, Tariomix was placed in provisional liquidation by an order of the High Court of South Africa North West (Mahikeng) Division, *per* Djaje DJP ('the provisional order'). The application was at the instance of two investors of Tariomix. Tariomix is said to have been found commercially and factually insolvent.

[14] On 8 March 2023, the applicants were appointed by the Master of the North West Division ('the Master') as joint provisional liquidators of Tariomix pursuant to the provisional order. Their powers as provisional liquidators were extended by the Master on 10 March 2023. The extended powers include authority to bring legal proceedings, such as the current application, on behalf of Tariomix.

[15] The provisional order was made final on 12 April 2024, *per* Morgan AJ. The learned judge - with respect - handed down a written comprehensive judgment.

Subsequent attempt by the respondent to obtain leave to appeal that outcome was unsuccessful.¹⁰

[16] On 16 April 2024, the provisional liquidators requested the respondent to submit a statement of affairs of Tariomix (i.e. 'Form CM100'), envisaged in section 363 of the CA 1973. The respondent had not yet acceded to the request by the date of hearing of this application. The applicants accuse him of stalling, but the respondent denies that. He does not see the relevance of the document to this provisional sequestration application. But, he also explained that he was prevented from completing the form by his participation in the national or regional elections last year. He was an independent candidate during those elections. He also blames the delay on him having to fend off warrants of execution against his and his wife's assets by the applicants. Later on, in his supplementary answering affidavit he blames the non-completion of the form on the complication of Tariomix being under curatorship.¹¹

[17] On 5 May 2024, the respondent posted on his Facebook account that security personnel had disappeared with approximately R50 million worth of his gold and diamonds. This theft was reported to the police on 8 May 2024. On 7 May 2024, the respondent had made another Facebook post to the effect that gold and diamonds were removed after the sheriff attended to remove the assets from the property in Durbanville, Cape Town.

[18] On 28 June 2024, the applicants launched the current application for the compulsory sequestration of the respondent's estate. On the same date, the respondent lodged with the Master a complaint against the applicants in terms of section 381 of the CA 1973. The Master, on 9 July 2024, requested the applicants to respond to the complaint. In subsequent affidavits it is indicated that the Master had received the applicants' written representations and was engaging further with the respondent, through legal representatives.

¹⁰ Application for leave to appeal was dismissed extemporaneously on 29 May 2024, followed by written reasons for that outcome on 11 June 2024. However in terms of the chronology of events supplied by counsel the leave to appeal was dismissed on 27 May 2024.

¹¹ Supplementary Answering Affidavit (SAA'), par 100, CaseLines 27-573.

[19] The urgent application came before my colleague Strydom AJ on 18 July 2024. The hearing of the matter did not proceed on that date, as the Court – in terms of an agreement reached between the parties – directed, that the matter is referred to the DJP for allocation on the third motion court roll. In addition to setting out the timeframes for exchange of further papers, the consensual order made by the Court stated that no finding was made in respect of urgency and also reserved costs in respect of that enrolment. The latter two issues would - to the extent necessary - get the attention of this Court, below.

[20] Following a case management meeting before the DJP, the matter was allocated for hearing on 13 and 14 November 2024 in the third motion court. The hearing, before me, was finalised in one day on 13 November 2024.

Issues for determination

[21] As already stated above, this is an application for the compulsory sequestration of the estate of the respondent. The order currently sought is of a provisional nature. The compulsory sequestration of the respondent's estate was initially sought only on the basis that the respondent is factually insolvent in that his assets are exceeded by his liabilities. But, this was later expanded to include that the respondent had committed an act of insolvency.

[22] The provisional sequestration order sought is couched in the form of a *rule nisi* in terms of the provisions of the Insolvency Act 24 of 1936. To grant such an order this Court ought to be satisfied, on a *prima facie* basis, that: (a) the applicant is a creditor who has against the respondent, as a debtor, a liquidated claim of not less than R100;¹² (b) the respondent-debtor is insolvent or has committed an act of insolvency,¹³ and (c) there is reason to believe that sequestration will be to the advantage of creditors of the debtor.¹⁴ This is common cause between the parties. These issues are the main or primary issues - potentially - dispositive of this matter.

¹² Section 10(a), read with s 9(1) of the Insolvency Act 1936, quoted in pars [28] and [26] above, respectively.

¹³ Section 10(b), read with s 8 of the Insolvency Act 1936, quoted in pars [28] and [73] above, respectively.

¹⁴ Section 10(c) of the Insolvency Act 1936, quoted in par [28] above.

[23] There are more issues, of an ancillary nature, requiring determination in addition to the main or primary issues, above. The respondent requires this Court to determine the lack of urgency and alleged abuse of the process of this Court. These two issues are labelled points *in limine* by the respondent. But, I consider the issue of urgency to have lost its glow due to the events in the urgent court on 18 July 2024. The applicants approached the Court on an urgent basis, mainly, on the alleged apprehension of dissipation of assets by the respondent, whilst the respondent asserted – in service to the interests of justice - for the hearing of the matter in the ordinary course due to the complex nature of the allegations made against him and the dire consequences of sequestration. The Court, as stated above, sanctioned an agreement between the parties which included a term that no finding is made on the issue of urgency and reservation of the argument on the issue of costs. I understand this to mean that the issue of urgency was disposed of without a ruling by the court. Should this not be the case I will also not make any ruling on same, as it is, clearly, moot and constitute the proverbial water under the bridge. The other so-called preliminary issue or objection, namely, abuse of the process of this Court is capable of determination once the outcome of the matter is known, being after the determination of the primary issues.

[24] Also, at the back of my mind is the remaining material attacked in terms of the respondent's strike-out application: the Forensic Investigators' report and the material relating to Dr Cloete. As indicated, these issues will be ruled upon when they surface in the discussion.¹⁵ But, first the legal principles applicable to the issues in the discussion.

Applicable legal principles

[25] The primary legal principles in a sequestration application are those derived from the Insolvency Act 24 of 1936 ('the IA 1936') and the common law.¹⁶ There will, no doubt, be other legal principles – of a secondary nature, relevant to the issues to be determined in this matter. Therefore, what follows does not pretend to be codification of all applicable legal principles.

¹⁵ Par [10] above.

¹⁶ André Boraine, Jennifer A Kunst and David A Burdette (eds), *Meskin's Insolvency Law* (LexisNexis, November 2024) par 1.2.

[26] Section 9(1)-(3) of the IA 1936 deals with a petition (i.e. application)¹⁷ to be presented for sequestration and what is to be contained in such application, including *locus standi in judicio* (i.e. 'standing in court')¹⁸ of an applicant-creditor. It reads as follows in the material part:

(1) A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.

(2) 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).

(3) (a) Such a petition shall, subject to the provisions of paragraph (c), contain the following information, namely—

(i) the full names and date of birth of the debtor and, if an identity number has been assigned to him, his identity number;

(ii) the marital status of the debtor and, if he is married, the full names and date of birth of his spouse and, if an identity number has been assigned to his spouse, the identity number of such spouse;

(iii) the amount, cause and nature of the claim in question;

(iv) whether the claim is or is not secured and, if it is, the nature and value of the security; and

(v) the debtor's act of insolvency upon which the petition is based or otherwise allege that the debtor is in fact insolvent.

(b) ...

(c) The particulars contemplated in paragraph (a) (i) and (ii) shall also be set out in the heading to the petition, and if the creditor is unable to

¹⁷ The petition procedure was abolished and replaced - as a mode to institute proceedings - with notice of motion in terms of Petition Proceedings Replacement Act 35 of 1976 with effect from 1 July 1976. See DE van Loggerenberg, *Erasmus: Superior Court Practice* (Revision Service 24, 2024, Jutastat e-publications October 2024) ('*Erasmus: Superior Court Practice*') RS 24, 2024, D1 Rule 6-60.

¹⁸ VG Hiemstra and HL Gonin, *Trilingual Legal Dictionary* (3rd edn, Juta 1992).

set out all such particulars he shall state the reason why he is unable to do so...

[27] The gatekeeping provisions on standing or *locus standi* to bring an application for sequestration are located in section 9(1) of the IA 1936. Essentially, these provisions are to the effect that a creditor with a liquidated claim¹⁹ of at least R100 against a debtor who is insolvent or has committed an act of insolvency (as envisaged in section 8²⁰ of the IA 1936) may apply for sequestration of the estate of such debtor. *Locus standi* is also availed in respect of a contingent liquidated claim. This is a liquidated claim which has accrued, but not yet due on the date of hearing.²¹

[28] Section 10 of the IA 1936 sets out the requirements, more of a substantial nature, to be met in an application for provisional sequestration. It reads in the material part:

If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie*

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section *nine*; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may make an order sequestrating the estate of the debtor provisionally.

¹⁹ In Borraine, Kunst and Burdette (eds), Meskin's Insolvency Law (at par 2.1) a liquidated claim is explained in the context of s 9(1) as 'a claim for an amount which is fixed, either by agreement or by an order of the Court or otherwise'. See also *Kleynhans v Van der Westhuizen NO* [1970] 3 All SA 105 (A) 107-108, 1970 (2) SA 742 (AD) 748-749, cited in *Hassan and another v De Villiers Berrange NO* 2012 (6) SA 329 (SCA) [35] and *Premier FMCG (Pty) Ltd v ABC Fire Projects Proprietary Limited* (4712/2021) [2021] ZAGPPHC 151 (12 March 2021) [30].

²⁰ Par [73] below, for a reading of the material part of s 8 of the IA 1936.

²¹ Section 9(2) of the IA 1936, quoted in par [26] above. See also *Investec Bank Ltd and another v Mutemeri and another* 2010 (1) SA 265 (GSJ) [31].

[29] To obtain a provisional sequestration order, the Court ought to be of the opinion that, the material requirements have been met on a *prima facie* basis.²² A durable holding of the Appellate Division (now the Supreme Court of Appeal, the 'SCA') in this regard in *Kalil v Decotex (Pty) Ltd and another*²³ was to the effect that a provisional order of sequestration does no lasting injustice to a respondent-debtor as, on the return day, he or she would be afforded an opportunity to contest the application for final relief.²⁴ The granting or refusal of a final sequestration order is governed by section 12 of the IA 1936, but this bears no direct relevance to the current issues before the Court.

[30] The applicants emphatically and – with respect, correctly so - point out that, for purposes of a provisional order, the onus - pegged at the *prima facie* level of proof or satisfaction of the requirements for sequestration - is lower than when a final sequestration order is sought as the latter is purely on a balance of probabilities.²⁵

[31] Section 8 of the IA 1936, as indicated above, provides for the acts of insolvency which may be committed by a debtor to warrant sequestration of his or her estate. The statutory provisions for the acts of insolvency relied upon by the applicants are reflected in the discussion below.²⁶ I now turn my attention to the issues, identified above,²⁷ as requiring determination by the Court.

Is Tariomix or the applicants, a creditor with locus standi?

General

²² *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) 979 where the court observed that 'prima facie case' entails that the balance of probabilities on all affidavits favour the making of provisional sequestration or liquidation order. See also *Afgri Operations Limited v Hamba Fleet (Pty) Limited* (542/2016) [2017] ZASCA 24; 2022 (1) SA 91 (SCA) (24 March 2017) [9]; *Valerio Engineering CC v Designatech (Pty) Ltd* (36816/2021) [2022] ZAGPPHC 706 (21 September 2022) [18]. See further Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, p 125.

²³ *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A).

²⁴ *Kalil v Decotex* 1988 (1) SA 943 (A) 979.

²⁵ *Braithwaite v Gilbert (Volkskas Bpk intervening)* 1984 (4) SA 717 (W) 718B-C. See also Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, p 148. In *Mercantile Bank (A Division of Capitec Bank Limited) v Ross* (2020/19791) [2021] ZAGPJHC 149 (13 August 2021) [41] the court pointed out the distinct standard of proof for a provisional sequestration order and a final sequestration order.

²⁶ Pars [73]-[75] above.

²⁷ Pars [21]-[24] above.

[32] According to the applicants, as the joint provisional liquidators of Tariomix, the respondent owes Tariomix, a total amount of R200 153 637, 04.²⁸ This amount is made up of the following individual debts: (a) R144 382 805, for Tariomix's monies allegedly gambled out by the respondent at various casinos;²⁹ (b) R5 034 231, 95, for funds paid directly to the respondent or for his specific benefit;³⁰ (c) R50 000 000, for cash, diamonds and gold purportedly stolen whilst in the respondent's possession,³¹ and (d) R736 600, 09, for cost orders granted by the court against, among others, the respondent in favour of the applicants.³² These claims or debts are discussed, individually, next.

[33] But it is important to also record here that the applicants' alleged claims or debts against the respondent are disputed by the respondent. The respondent disagrees with the nature and extent of the applicants' claims. I would reflect the respondent's points of dispute in the discussion of each of the claims.

Gambling debt or claim

[34] The applicants accuse the respondent of gambling vast amounts of Tariomix's money at various casinos.

[35] Proof of this debt is partially based on the testimony by Dr Cloete tendered at the section 417 enquiry, referred to above. Dr Cloete, among others, confirmed that the respondent used funds belonging to Tariomix to gamble at casinos. Dr Cloete confirmed that the respondent is indebted to Tariomix in the amount of R144 382 805, arising from gambling activities.³³ Dr Cloete is or was, at all material times, the auditor of Tariomix.

[36] The respondent's strike-out application also concerns the evidence given by Dr Cloete at the enquiry. It is argued on behalf of the respondent that the evidence is

²⁸ FA pars 18.1-18.2, CaseLines 05-43.

²⁹ FA par 14.1.10.4.1, CaseLines 05-38. See pars [34]-[49] below, on this claim or indebtedness.

³⁰ FA par 15.5, CaseLines 05-40. See par [50] below, on this claim or indebtedness.

³¹ FA par 16, CaseLines 05-40 to 05-42. See pars [60]-[62] below, on this claim or indebtedness.

³² FA par 17, CaseLines 05-42 to 05-43. See pars [51]-[59] below, on this claim or indebtedness.

³³ Testimony of Dr Cloete, FA, para 14.1.5 to 14.1.14.1.7, 05-33 to 05-35.

inadmissible in this application and ought to be struck out. The respondent heavily relies – for his assertion - on the decision of the SCA in *O’Shea NO v Van Zyl and others*.³⁴ The observation in the decision was echoed by the SCA in its other decision in *Roering NO and another v Mahlangu and others*³⁵ including as follows:

The second factor is that the evidence obtained from a witness at an enquiry will, in many instances, be inadmissible in later civil proceedings. That will not necessarily be so where those proceedings are brought against the witness personally, as may be the case in a claim against a former director, but, where those proceedings are brought against an entity such as a company, a close corporation or a trust, the evidence given at an enquiry will usually be inadmissible against them. That is a considerable safeguard against abuse where the use to which the evidence may be put is limited to assisting the liquidator to form a picture of what occurred and investigating a possible claim.³⁶

[footnote omitted]

[37] No doubt, the testimony of Dr Cloete at the enquiry is the type of evidence envisaged in *O’Shea v Van Zyl* and *Roering v Mahlangu*, partly quoted above. I agree with the respondent that same is inadmissible in these proceedings on the basis of these authorities. Consequently, the impugned material is hereby struck out from the founding affidavit.

[38] But Dr Cloete’s involvement in this matter is not limited to the impugned activities at the insolvency enquiry. He also prepared financial documents and deposed to affidavits, in which he confirmed the use of bank accounts of the respondent and, his fellow director, Ms Kleynhans to receive some of the funds - intended as investment in Tariomix - deposited by the investors.³⁷ He was also instrumental in finalising the financial statements of Tariomix, including those for the

³⁴ *O’Shea NO v Van Zyl and others* NNO 2012 (1) SA 90 (SCA) [19]-[25].

³⁵ *Roering NO and another v Mahlangu and others* 2016 (5) SA 455 (SCA)

³⁶ *Roering v Mahlangu* 2016 (5) SA 455 (SCA) [40].

³⁷ FA par 10.9, CaseLines 05-21; annexures ‘FA15’ and ‘FA16’, CaseLines 05-172 to 05-192 and 05-193 to 05-120, respectively.

year ending 28 February 2021. The respondent all-frontier attack is also directed at these. I do not agree. There is nothing prejudicial from the inclusion of this evidence, even if some of the material may have served before the enquiry. It is only the testimony (which, in most instances is oral, but could be also in written form), especially admissions made by a witness at such enquiry, which is inadmissible in respect of the company, in this instance Tariomix. I have – on the facts of this matter - applied the rule of law in this regard to exclude the testimony of Dr Cloete in respect of the respondent, even though the respondent is not the company.

[39] From about the first quarter of 2021, an online wallet system or facility called All Encompassing Switching (Pty) Ltd ('AE Switch') was used for transactions in respect of Tariomix. It appears, at this stage, the respondent and/or Tariomix may have had problems in directly operating bank accounts. AE Switch was used to receive and disburse money received as investments for Tariomix. According to the respondent, this system was used for financial transactions in terms of which clients registered on the online platform and created e-wallets to participate in funding diamond transactions. But, after the relationship between Tariomix and AE Switch somewhat soured, the latter cut all ties and communications with Tariomix. There was even a lawsuit at the instance of Tariomix and another entity called Forever Zircon (Pty) Ltd against AE Switch. Ultimately, AE Switch was placed in provisional liquidation on 17 May 2024 by an order of this Division at the instance of other parties and for reasons irrelevant to this matter.³⁸

[40] The allegations regarding the gambling debt or claim were also investigated by Adams and Adams Forensics (i.e. the Forensic Investigators).³⁹ The Forensic Investigators reported on the flow of funds from Tariomix into the casinos and ultimate use by the respondent. Their report also includes specific references to video footage (depicted in photos in the report) relating to the alleged gambling activities by the respondent. The Forensic Investigators, after calculation of the amount, arrived at the conclusion that the respondent is indebted to the insolvent

³⁸ *SA Concerts (Pty) Ltd and others v All Encompassing Switching (Pty) Ltd* (045881/2024) [2024] ZAGPPHC 449 (17 May 2024).

³⁹ FA, annexure 'FA19.1', CaseLines 05-235 to 05-360.

estate of Tariomix in the amount of R144 382 805 in this regard.⁴⁰ The report is also compiled with information from AE Switch, financial statements and bank accounts.⁴¹

[41] The respondent's strike-out application, dealt with above, is also directed at the Forensic Investigators' report of June 2024, attached to the founding affidavit.⁴² The respondent wants the entire report excluded from the material before the court as, in his view, it constituted inadmissible hearsay. He also complains that the report was compiled without his input and commissioned by and paid for by the applicants and, thus, lacked independence. He merely, out of caution, felt compelled to consult with his own forensic accountants to deal with the report.

[42] In fact, the respondent had hinted at the urgent court in July 2024 that he would consider retaining his own expert to assist in the response to the Forensic Investigators' report. He did not follow through with this, as he considered it a futile exercise. The respondent criticises the forensic investigation report for, among others, the following: (a) it is an 'interim' report subject to change; (b) it is based on financial data as at 28 February 2021, being two years prior to liquidation of Tariomix and, thus, inaccurate in reflecting a true financial position; (c) forensic investigators strayed beyond their mandate, as they were not mandated to investigate the respondent's indebtedness instead of the flow of funds between Tariomix and the respondent or Ms Kleynhans; (d) reliance in the report on the 'unaudited' financial statements prepared by Dr Cloete for the year ending 28 February 2021, despite the Forensic Investigators identifying 'various inaccuracies' in the financial statements; (e) the methodology used and reasoning in the report for calculating the 'gambling debt' owed by the respondent, and (f) personal expenses being based on ledgers by Dr Cloete, potentially flawed data.⁴³ The respondent for similar and additional reasons criticised the prior reports by the Forensic Investigators to the one of June 2024.⁴⁴ It is not necessary to delve deeper into the reasons, although it is important to point out that the respondent relied on some of these reasons to criticise the other debts or claims, discussed below. But I don't think there is merit in these criticisms,

⁴⁰ FA, annexure 'FA19.1', CaseLines 05-360.

⁴¹ FA par 13.7, CaseLines 05-31.

⁴² FA, annexures FA19.1 and FA19.2; (8) dated 26 June 2024.

⁴³ SAA pars 36-72, CaseLines 27-551 to 27-565.

⁴⁴ SAA pars 89-92, CaseLines 27-570 to 27-571.

especially given that the material relied upon by the applicants ought to only tilt the *prima facie* scales justifying a provisional order.⁴⁵

[43] Back to the alleged gambling debt. The respondent denies that there is proof or details of the gambling activities to establish the alleged claim of over R144 million. But, nevertheless, the respondent goes on to say that cash transactions are the norm and large sums are frequently required in the diamond trading business. This may seem unusual to those unfamiliar with the diamond trade, but the practice served practical and entirely lawful solution to a real problem in the diamond industry. He often met diamond sellers at casinos. He used casinos to meet the cash requirements of diamond-dealing as traditional banks were unable to assist. He was allowed to use casinos as 'a high-volume ATM' (i.e. 'automated teller machine') without incurring withdrawal fees provided he did 'a certain amount of gambling activity'.⁴⁶ He blames the applicants for not approaching him for clarity on this to avoid their misunderstanding of the industry and business model of Tariomix.⁴⁷ But, the respondent did not provide the details of the activities he alleges were lawful and explain how they differed with ordinary gambling. I agree with the applicants that the respondent failed to furnish proof of his own assertions that the gambling activities were legitimate for purposes of the business of Tariomix. There is also no proof of the transactions and entries in the Tariomix's financial statements. All these abound, despite the respondent's assertions that all gambling transactions were recorded in the books of Tariomix.

[44] Another point of dispute raised by the respondent against the alleged gambling debt is that the gambling activities and monies alleged to have been

⁴⁵ Pars [29]-[30] above, on proof at *prima facie* level.

⁴⁶ Answering Affidavit ('AA') par 81, CaseLines 27-27.

⁴⁷ The respondent describes the business model of Tariomix, among others, as follows: '57. Tariomix operated in the diamond industry, solely as a facilitator and financier. Its core business involved providing finance for the lawful purchase and beneficiation of diamonds by licensed individuals. Acting as a "middleman" or broker, Tariomix brought together buyers and sellers in diamond transactions. Importantly, the company did not directly purchase or sell diamonds (of any kind) but rather focused on facilitating these transactions. To be clear, despite being in possession of diamonds, Tariomix did not, at any stage, own diamonds. 58. The business model of Tariomix relied on a network of sellers, including independent mines, dealers and intermediaries. It provided financial assistance to producers miners, effectively bridging the period between the mining of stones and their eventual sale at tenders. Tariomix worked exclusively with sellers licensed under the Diamonds Act 56 of 1986. Tariomix concluded joint venture agreements with members of the public who wished to participate in financing diamond purchases. Profits from these transactions were then shared between Tariomix and the participating clients/investors.' See AA pars 57-58, CaseLines 27-21 to 27-22.

disbursed from the coffers of Tariomix were prior to February 2021.⁴⁸ Any debt in this regard has prescribed and, thus, incapable of enforcement against him. It is further pointed out that the applicants did not react to this in their reply to the effect that there was interruption or delay of prescription. But, in my view, whilst this may be so, before the applicants join the fray the onus is clearly on the respondent to establish the prescription defence raised.⁴⁹

[45] As a point of departure, the respondent is correct in his assertion that a creditor cannot apply for a sequestration order on a prescribed debt.⁵⁰ The general law governing extinction of debts by prescription is the Prescription Act 68 of 1969. The periods of prescription in this legislation would generally apply where no period is prescribed by other law.⁵¹ Periods of prescription of debts are set out in section 11 of the Prescription Act. Unless, the Prescription Act or another 'Act of Parliament' provides otherwise, the period of prescription of debts is three years.⁵²

[46] The Prescription Act appears applicable to the gambling debt for purposes of the sequestration application.⁵³ In terms of section 12 of the Prescription Act prescription begins to run, barring the other provisions of this legislation,⁵⁴ 'as soon as the debt is due'.⁵⁵ Section 12(2) of the Prescription Act states that '[i]f the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt'. And section 12(3) of the Prescription Act provides that a 'debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'.

⁴⁸ SAA pars 14.1.2-14.1.3, CaseLines 27-543.

⁴⁹ *Absa Bank Bpk v De Villiers* 2001 (1) SA 481 (SCA) 486F-G.

⁵⁰ Bertelsmann and others, *Mars: The Law of Insolvency* 5.3.5.

⁵¹ Section 10(1) of the Prescription Act.

⁵² Section 11(d) of the Prescription Act.

⁵³ Bertelsmann and others, *Mars: The Law of Insolvency* 5.3.5.

⁵⁴ Section 12(2)-(4) of the Prescription Act.

⁵⁵ Section 12(1) of the Prescription Act.

[47] Completion of prescription may be delayed in certain circumstances, including where ‘the creditor is a juristic person and the debtor is a member of the governing body of such juristic person’.⁵⁶ It is common cause that before the joint provisional liquidators came on board on 23 February 2023, pursuant to the provisional liquidation order, the respondent and Ms Kleynhans were solely responsible for the management or direction of the ‘business and affairs’ of Tariomix.⁵⁷ They were members of the ‘governing body’ of Tariomix, a juristic person, to adopt the parlance in the Prescription Act.⁵⁸ Therefore, the running of prescription would have been impeded until a year after the respondent ceased to be jointly in charge of the governance of Tariomix.⁵⁹ I understand this to mean that the period of three years would have started to run only when the applicants, as joint provisional liquidators, were substituted for the respondent and Ms Kleynhans and they took charge of the affairs and governance of Tariomix. This would have been on 23 February 2023 when the provisional order was granted.⁶⁰ This, in my view, puts paid to the prescription argument.

[48] The respondent, as appearing above, does not deny that large amounts of money belonging to Tariomix were disbursed at casinos. As what appears to be a ground of justification, the respondent says that all these were not for his own personal benefit, but for legitimate business transactions of diamond dealing for the benefit of Tariomix. But this does not accord with his other statement that Tariomix ‘never owned diamonds or property or any other substantial assets’.⁶¹ Surely, unless the money was wasted there will be something by way of assets to show for it. No wonder the applicants found no proof or record of a single transaction made with the impugned funds alleged to have purchased diamonds. Also, no actual diamonds were found by the applicants when they took over the reins at Tariomix. It is impossible to imagine what became of the funds of Tariomix than to agree with the applicants that the respondent indeed ruthlessly gambled away Tariomix’s funds

⁵⁶ Section 13(1)(e) of the Prescription Act.

⁵⁷ Section 66(1), CA 2008. See further Piet Delport, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis, October 2024) 250(3).

⁵⁸ Section 13(1)(e) of the Prescription Act.

⁵⁹ Section 13(1)(i) of the Prescription Act.

⁶⁰ I do not view the deeming provision under s 348 of the CA 1973 to be applicable under the circumstances.

⁶¹ AA par 75, CaseLines 27-26.

sourced from the third party investors. The investors genuinely believed they were investing in a legitimate business of Tariomix, but only to have their monies misappropriated through gambling by the respondent.

[49] Considering what appears above, I find that the applicants, as the joint provisional liquidators of Tariomix, have – *prima facie* – established a liquidated claim against the respondent in the amount of R144 382 805 arising from the gambling debt. Although, there is no need to establish more than R100 liquidated claim to gain standing to apply for sequestration, I look at the other debts alleged by the applicants to be owing by the respondent. This, also, serves to address the requirement of factual insolvency (as borne by comparison of the fair value of assets with the fair estimate of liabilities), necessary to meet for purposes of the relief sought by the applicants, dealt with below.⁶²

Amounts paid to or for the benefit of the respondent from Tariomix

[50] The respondent, according to the applicants, is also indebted to them or Tariomix in respect of monies paid over to him or from which he unduly benefitted, as follows: (a) R133 699,94 (for contributions to his medical aid); (b) R359 314,16 (for personal expenses); (c) R4 368 798,65 (for various transfers allocated to him); (d) R40 000,00 (for a donation); (e) R115 690,80 (for internet payments allocated to him), and (f) R16 728,40 (for entertainment expenses). These payments amount to R5 034 231,95. They are derived from a general ledger account prepared by Dr Cloete⁶³ and also reflected in the Forensic Investigators' report.⁶⁴ I have already ruled favourably on the admissibility of both these sources, above.⁶⁵ Reliance on this type of evidence is also supported by the authorities.⁶⁶ Therefore, I accept that this claim is - *prima facie*, established as a liquidated claim in the amount to R5 034 231,95.

⁶² Pars [66]-[71] below, for a discussion on whether the respondent is insolvent or not.

⁶³ FA pars 15.1-15.5, CaseLines 05-39 to 05-40.

⁶⁴ *Ibid.*

⁶⁵ Pars [38], [41]-[43] above.

⁶⁶ *VBS Mutual Bank (in liquidation) v Ramavhunga and another* (25062/2018) [2019] ZAGPJHC 295 (23 August 2019) [29], [31] (i.r.o. an affidavit by an investigator or curator) and Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, p 123 (as authority for recognition of books of a company), as examples of liquidated claims.

The costs orders granted in favour of the applicants against the respondent

[51] I have indicated above that the legal skirmishes between the parties date a while back and started elsewhere. The applicants were awarded legal costs in respect of some of this litigation. They rely on two cost orders granted in their favour by the North West Division. Bills of costs were prepared and totalled an amount of R736 600,09.⁶⁷

[52] When the applicants first relied on the bill of costs – at the launch of this application - they were still untaxed. They were only subsequently taxed and allowed in the amount of R616 599,94, together with accumulating interest thereon. I agree with counsel for the respondent that whilst the bill of costs were still to be subjected to taxation, absent agreement thereon between the parties, the potential or prospective debt was far from constituting a liquidated claim.⁶⁸ The taxation process allows for objections to bill of costs before the taxing master determines the final amount and certifies same to render the amount legally due and payable.⁶⁹

[53] The respondent says he only became aware of the taxation of the bills when the sheriff attended at his Bronkhorstspuit property on 9 September 2024 with a warrant of execution. He tendered payment of the taxed amount of R616 599,94, but this was refused by the applicants. In the applicants' view acceptance of payment of the taxed bills would constitute an act of insolvency on the part of the respondent and voidable disposition, as the respondent is factually insolvent. The respondent considers this a 'systematic prevention of payment' to justify the applicants' reliance on his inability to make payment for their sequestration application.⁷⁰ But counsel for the respondent argues that, even if the debt or claim became liquidated after taxation, it cannot be relied upon for *locus standi* as at the launch of the application.

⁶⁷ FA annexures 'FA27'- 'FA28', CaseLines 05-412 to 05-426.

⁶⁸ Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, p 123. See also *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 (SCA) [18] although in the context of attorney and client fees. See further Uniform Rule 45(2) requiring taxation of costs by the taxing master or written agreement thereon by the parties, in a fixed amount, prior to process of execution, save where such costs were awarded for specified amount.

⁶⁹ Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* par 2.1. See also *Blakes Maphanga v Outsurance Insurance* 2010 (4) SA 232 (SCA) [16]-[18].

⁷⁰ Further supplementary answering affidavit ('FSAA') par 10-15, CaseLines 06-52 to 06-53.

[54] Consequently, there are two issues to be determined, namely, (a) whether a creditor may rely for purposes of bringing a sequestration application on a liquidated claim which did not exist at the time of launching of the application, and (b) whether a tender of payment of a liquidated claim may be refused on the basis that such may constitute an act of insolvency or voidable disposition. I deal with these issues, next.

[55] Naturally, I start with (a) of the two issues in the preceding paragraph. I immediately reject as misplaced the argument by counsel for the applicants that a costs order fits the mould of an accrued liquidated claim envisaged in section 9(2) of the IA 1936.⁷¹ A costs order is not a liquidated claim let alone one 'which has accrued but which is not yet due', to imbue a creditor with the requisite *locus standi*.⁷²

[56] Although, *locus standi* for purposes of applying for sequestration of an estate of a debtor is prescribed in the statutory provision, one may begin with a generic description of the concept. The learned authors of *Amler's Pleadings*⁷³ state that the issue of *locus standi* is both procedural and to do with substance of the matter.⁷⁴ *Locus standi* relates to 'the sufficiency and directness of a person's interest in the litigation to be accepted as a litigating party [and also] the capacity of a person to conclude a jural act'.⁷⁵ The SCA in *Four Wheel Drive Accessory Distributors CC v Rattan NO*⁷⁶ sets out the following as, generally, the requirements for *locus standi*: (a) the applicant or plaintiff ought to 'have an adequate interest in the subject matter of the litigation', namely, 'a direct interest in the relief sought'; (b) such interest ought not be too remote or far removed; (c) 'the interest must be actual, not abstract or academic', and (d) the interest 'must be a current interest and not a hypothetical one'.⁷⁷

⁷¹ Par [26] above for a reading of s 9 of the IA 1936 in the material part.

⁷² *Ibid.*

⁷³ LTC Harms and M Townsend, *Amler's Pleadings* (10th edn, LexisNexis 2024).

⁷⁴ Harms and Townsend, *Amler's Pleadings* 250.

⁷⁵ *Ibid.*

⁷⁶ *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA).

⁷⁷ *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) [7], relying on similar previous version of *Erasmus: Superior Court Practice* RS 23, 2024, D1 Rule 17-21 to 17-22.

[57] But the *locus standi* in section 9(1) of the IA 1936 is very specific: an applicant must be a creditor (or an agent of such creditor) 'who has a liquidated claim for not less than [R100] ... against a debtor'.⁷⁸ [underlining added] This means an applicant-creditor must have a liquidated claim to apply for compulsory sequestration of the estate of a debtor. The provision does not define 'petition' and therefore it is not clear whether the possession of a liquidated claim by an applicant-creditor ought to be when the application is issued or it can come along until when the application is heard. Section 9(2) of the IA 1936 allows a possessor of a 'liquidated claim which has accrued but which is not yet due on the date of hearing of the petition' to qualify for *locus standi* to apply for sequestration. [underlining added] Section 9(2) appears to be availing legal standing to a possessor of a liquidated claim of a lower threshold than the one in terms of section 9(1). It would undermine the purpose of the IA 1936 or the insolvency law in general, which is focussed on providing for the interests of creditors,⁷⁹ or even lead to 'insensible or unbusinesslike results' to consider section 9(1) to preclude a creditor to rely on a liquidated claim which is due by the time the application is heard when such is possible for a liquidated claim not yet due at the hearing of the matter.⁸⁰ I am mindful of the fact that section 9(2) concerns claims which are already 'liquidated', as opposed to the claim in my proposition. But my focus is on the timing of the consideration: the date of hearing. In my view the only main concern will be the possibility of prejudice to the debtor-respondent in such proceedings. Such prejudice is more imaginary than real as compulsory sequestration have other substantive requirements than only legal standing of the creditor-applicant, namely, proof of insolvency or act of insolvency and advantage to creditors.⁸¹ Therefore, the liquidated claim envisaged in section 9(1) of the IA 1936 ought to be established when the application is considered by the court seized with such matter.⁸² Of course, there is a risk for an applicant who may solely rely on this type of claim to pursue a sequestration application.⁸³ The hearing of the application

⁷⁸ Par [26] above.

⁷⁹ Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, p 123; 10th Ed, 2019, p 2.

⁸⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [18].

⁸¹ Section 10(c) of the IA 1936, quoted in par [28] above.

⁸² Section 10(a) of the IA 1936, quoted in par [28] above.

⁸³ There is partial support for my view in Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* (at par 2.1) where the standing of a creditor with a favourable cost order to bring sequestration proceedings is recognised even where the costs have not yet been taxed, although the Court may deem the claim not liquidated due to the amount not capable of speedy determination.

may arrive sooner than the consummation of the debt into a liquidated claim. But the possibility of risk does not detract from the fact that a creditor may have a good reason to launch the application now rather than later, for example, where there is threat of dissipation of assets by a clearly insolvent debtor. For these reasons, I find that the applicants were entitled to rely on the fixed amount of the taxed costs for this application.

[58] The second and final issue under this part is whether a tender of payment of a debt or claim which became liquidated, for example a bill of costs subjected to taxation by the taxing master, may be refused on the basis that the payment would amount to an act of insolvency or voidable disposition. Actually, a tender of payment of any debt. In as far as 'acts of insolvency' under section 8 of the IA 1936 are concerned, I can only think of the one under subsection (c) as being material for current purposes. This act of insolvency comes about when a debtor makes (or attempts to make) a disposition of property which prejudices or would prejudice such debtor's creditors or result in the preference of one creditor above another. Acts of insolvency are not linked to factual insolvency of a debtor, but represent another basis for seeking sequestration of a debtor's estate.⁸⁴ I don't think the applicants were unreasonable to refuse payment under the circumstances. Such payment – indeed - may have been ruled a voidable preference. And, also, it ought to be borne in mind that sequestration is not an enforcement or demand for payment of a particular debt, but a collective debt-collection mechanism.

[59] Therefore, on the basis of what appears above, the claim or debt in the amount of R616 599,94 - fixed by the taxing master post the issuing of this application, but prior to its hearing – is ruled a liquidated claim for purposes of this application.

Debt in respect of the stolen cash, diamonds and gold

[60] The respondent, as indicated above, reported to the police theft in the form of cash or currency, diamonds and gold worth R50 million allegedly perpetrated by a certain Mr Jooste. The applicants consider the stolen items to be the assets of

⁸⁴ Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* par 2.1.2.

Tariomix. According to them the assets were stolen whilst unlawfully possessed by the respondent. They also rely on the value placed by the respondent on the items (i.e. R50 million) to claim *locus standi* to bring this application.

[61] The respondent labels reliance on this claim or debt by the applicants for their standing, desperate and unsustainable. The claim emanates from Facebook posts by the respondent and news articles (with the latter ruled admissible above) attributed to the respondent on the theft incident.⁸⁵ The respondent denies that he admitted any wrongdoing or possession of the impugned assets. He says the stolen items did not belong to Tariomix, but stopped short of disclosing who they belonged to.⁸⁶ He provided an inventory of some of the items and mentioned that the paperwork for the remainder of the items was also taken during the theft. Overall, the respondent accuses the applicants of misunderstanding the social media posts and taking them out of context. His comments about hiding assets were only metaphorical and far from him admitting to concealing assets of Tariomix.⁸⁷ He also says that he made the comments due to his distrust of the applicants.⁸⁸ The logic of the latter averment escapes me, but nothing surely turns on this.

[62] Our law recognises a liquidated claim derived from an admission of the theft of a fixed amount of money by a debtor in certain circumstances.⁸⁹ In this matter the respondent whilst admitting theft by a third party, denies any wrongdoing and disputes title of the company (i.e. Tariomix) over the impugned assets. But even if title to the assets was not an issue, it is still doubtful whether the assets really exist or are only imaginary. The applicants couldn't trace any diamonds, actual or as reflected in the records of Tariomix. The inventory attached to the respondent's answer – with respect – does not alter my view. The respondent may have been chest-beating in the social media post for irrelevant reasons. The social media posts - under these circumstances - cannot serve as a basis to establish a debt equating to a liquidated claim, even on a *prima facie* basis. But the posts may be relevant when

⁸⁵ Par [17] above.

⁸⁶ AA pars 91-92, CaseLines 27-30; AA annexure 'AA11', CaseLines 27-484 to 27-499.

⁸⁷ AA par 166 at CaseLines 27-46.

⁸⁸ AA par 94 at CaseLines 27-30 to 27-31.

⁸⁹ Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, p 123.

urging the court to consider a possible advantage to creditors which may ensue from the discovery or recovery of assets through an investigation by the liquidators.

Conclusion (on whether Tariomix or the applicants, is a creditor with locus standi)

[63] On the basis of the above alleged debts or amounts, except for the debt relating to the R50 million worth of diamonds and gold, considered either jointly or severally, I am of the opinion that *prima facie* the applicants, as creditors, have established against the respondent, as the debtor, a claim of more than R100 in the composite amount of R150 033 637, as constituted above.⁹⁰

[64] The respondent has not shown that his indebtedness is disputed on *bona fide* and reasonable grounds.⁹¹ This does not amount to saddling the respondent with some form of an onus to establish the aforesaid.⁹²

Is the respondent factually insolvent or has he committed an act of insolvency?

General

[65] The second requirement for the granting of provisional sequestration is that the applicant-creditor, *prima facie*, must satisfy the court that the respondent-debtor is factually insolvent or has committed an act of insolvency.⁹³ The applicants relied on both instances and I look at both, next.

Factual insolvency

[66] Factual insolvency prevails when a debtor's assets – fairly valued – are exceeded by his liabilities – fairly estimated.⁹⁴ This requirement is purely about rands and cents in the form of fair value of assets and fair estimation of the liabilities. The

⁹⁰ Pars [32]-[50], [60]-[62] above.

⁹¹ *Kalil v Decotex* 1988 (1) SA 943 (A) 980B-D; *Helderberg Laboratories CC and others v Sola Technologies (Pty) Ltd* 2008 (2) SA 627 (C) [21]-[22]. See also Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* par 2.1.1 and the authorities relied upon by the learned authors.

⁹² *Braithwaite v Gilbert (Volkskas Bpk Intervening)* 1984 (4) SA 717 (W) 718. See also *Helderberg Laboratories v Sola Technologies* 2008 (2) SA 627 (C) [22] in the context of winding up of a company. See further Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* par 2.1.1, where the learned authors clearly refer to 'the onus .. on the respondent to rebut the inference by showing that he has sufficient assets to be able to settle his liabilities'.

⁹³ Section 10(b) of the IA 1936, quoted in par [28] above.

⁹⁴ Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, pp 2-3, partly relying on *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) 179; *Ex parte Harmse* 2005 (1) SA 323 (N) [8].

applicants have declared that they were unable to ascertain the exact extent of the respondent's financial affairs, particularly in respect of his assets.

[67] A creditor seeking sequestration of a debtor's estate on the basis of factual insolvency is not required to adduce evidence to a finite nature as determination of the debtor's assets and liabilities only in terms of rands and cents, lest the court is seized with a friendly sequestration.⁹⁵ All that is required to discharge the onus - on a *prima facie* basis - of factual insolvency is presenting to the court 'sufficient evidence to justify the inference as a matter of probability that the respondent is insolvent'.⁹⁶

[68] Starting with the liabilities, the applicants have so far been found to have established the respondent's liability towards Tariomix in the amount of R150 033 637. Regarding assets, the applicants allege that they were only able to ascertain that the respondent has indirect interest in immovable properties. Nothing was found in his personal name. The respondent holds all shares in private companies owning immovable properties in Rhodesfield, Johannesburg and Kungwini Country Estate, Bronkhorstspuit. The applicants have not provided values or valuation of the properties or of the respondent's shareholding in the companies. They only say the properties appear to be unencumbered.⁹⁷ But they doubt that the value of these properties or of the respondent's indirect interest in them could exceed the respondent's liability towards Tariomix. Therefore, even when considering only the debt owing by the respondent to Tariomix (i.e. without factoring in possible debts of other creditors), the respondent's debts or liabilities far exceeds his assets, as represented by the potential value of the properties held through the companies, it is submitted. Clearly, the respondent is insolvent, the submission concludes.

[69] The respondent's assets and liabilities have been considered for purposes of litigation or process in terms of the Tax Administration Act 28 of 2011. The South African Revenue Service ('SARS') obtained a preservation order in June 2021

⁹⁵ Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* par 2.1.1.

⁹⁶ Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* par 2.1.1 and the authorities cited there.

⁹⁷ FA pars 18.4-18.6, CaseLines 05-44.

against Tariomix, the respondent and Ms Kleynhans for unpaid taxes of Tariomix.⁹⁸ This led to the freezing of monies held in the bank accounts of Tariomix and appointment of a *curator bonis*. The curator's report (dated 20 March 2024)⁹⁹ reveals that the respondent has assets valued at R4 928 669,83 and liabilities estimated to be R4 657 299,87, and, thus, a surplus or positive amount of R271 369,96.¹⁰⁰ The assets include two motor vehicles owned by the respondent with the approximate value of R2 085 000 and cash in the amount of R2 842 169,83.¹⁰¹

[70] Reliant on the curator's report, the applicants contend that the respondent's financial position is a lot worse. And the so-called 'surplus' of R271 369,96 is no match to the large indebtedness owing to Tariomix, the contention concludes. The curator only considered the liability towards SARS, and no one else. Therefore, it is submitted, from this objective evidence, the respondent is undoubtedly factually insolvent and his estate ought to be sequestrated.

[71] The respondent says the above, as with this application itself, is based on a conflation of the affairs of Tariomix and his personal affairs. The application, according to the respondent, is riddled with references to the benefit or advantage that will accrue to the creditors of Tariomix whilst nothing is said about his personal creditors. Speaking of creditors, the respondent claims to owe no money to SARS as he has settled with SARS and he is adhering to the terms of settlement.¹⁰² I find this contradictory, to say the least. But I agree with the applicants that the only available evidence establishes that the respondent is factually insolvent. The curator's report, which does not appear to be disputed by the respondent, appears to provide objective evidence of the respondent's assets valued at R4 928 669,83. There is no reasonable basis upon which the respondent would have allowed some of his assets to be excluded from the arrangement with SARS. I agree with the applicants that the liabilities estimated at R4 657 299,87 do not include those of other creditors, particularly Tariomix, represented by the applicants.

⁹⁸ It is stated that SARS, subsequently, consented to the discharge of the order against Tariomix, save for the cost order still to be ruled upon.

⁹⁹ RA, annexure 'RA6', CaseLines 000-190 to 000-203.

¹⁰⁰ RA pars 35.3; 35.7-35.8, CaseLines 000-57 to 000-58; annexure 'RA6', CaseLines 000-197.

¹⁰¹ RA annexure 'RA6', CaseLines 000-197.

¹⁰² AA par 102, CaseLines 27-33.

Act of insolvency

[72] The applicants also raise the other basis envisaged in section 10¹⁰³ of the IA 1936 for pursuing this sequestration application than factual insolvency, dealt with above: act of insolvency. Acts of insolvency are a clear indication that the legislature recognised the inherent difficulty of establishing insolvency, on the basis of assets *versus* liabilities and put together specified types of conduct called ‘acts of insolvency’, which, when committed result in presumption of a state of insolvency.¹⁰⁴

[73] The applicants consider the respondent to have committed an act of insolvency by entering into a settlement arrangement with SARS to pay off his tax liability.¹⁰⁵ They rely on section 8(e)¹⁰⁶ of the IA 1936. Section 8(e) of the IA 1936 envisages an act of insolvency to have been committed by a debtor who arranges (or offers to arrange) with a creditor to be released either ‘wholly or partially from his or her debts’.¹⁰⁷

[74] But a debtor does not commit an act of insolvency envisaged in section 8(e) of the IA 1936 by merely making an arrangement to pay his or her creditors the full amount even where the full payment is partially postponed or an extension of time to pay is granted.¹⁰⁸ The act of insolvency under section 8(e) involves release of the debtor either ‘*wholly or partially from his debts*’ (my emphasis),¹⁰⁹ as clearly stated in the provision.¹¹⁰ Perhaps, such an arrangement may give rise to the scepticism said to have been expressed by Innes, CJ, over a century ago, in *de Waard v Andrew and Thienhaus*¹¹¹ concerning a *nulla bona* return, that ‘the best proof of solvency is that a man should pay his debts’.¹¹² But, such scepticism about the ability of a debtor

¹⁰³ Par [28] above for a reading of the provision.

¹⁰⁴ *Mackay v Cahi* 1962 (4) SA 193 (O) 196, a decision of the full court (comprising Hofmeyr J, Erasmus AJ and Smuts AJ) of the Orange Free State Provincial Division (the equivalent of the current Free State Division).

¹⁰⁵ RA par 35, CaseLines 000-57 to 000-58.

¹⁰⁶ Section 8(e) of the IA 1936 reads as follows: ‘A debtor commits an act of insolvency ... (e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts’.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Mackay v Cahi* 1962 (4) SA 193 (O) 202E-F, cited with approval in Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, p 8.

¹⁰⁹ Footnote 106 above.

¹¹⁰ Footnote 108 above.

¹¹¹ *De Waard v Andrew and Thienhaus* 1907 TS 727.

¹¹² *De Waard v Andrew and Thienhaus* 1907 TS 727 at 733, where Innes CJ is said to have held: “[s]peaking for myself I always look with suspicion upon and examine very narrowly, the position of a

to pay off his debts should not lead the court to consider any arrangement regarding payment entered into by a debtor with his or her creditor(s) to equate to an act of insolvency when there is no evidence of the debtor arranging to be fully or partially released from his debt(s), but arranging to pay the debt(s) in full.¹¹³ Otherwise, a mere commercial or business arrangement or even court-sanctioned settlement between persons not even near the realm of insolvency would be discouraged or hampered.

[75] Therefore, I do not consider the arrangement between the respondent and SARS, without more, to equate to an act of insolvency. My view does not waver even in the light of the respondent's assertions, including the admission to making 'regular settlement payments' to SARS.¹¹⁴ But, be that as it may, the respondent's insolvency has already been established above to pave the way for a consideration of the next requirement, namely, advantage to creditors.

Advantage to creditors

[76] An applicant in a sequestration application also ought to show that he, she or it is not pursuing a futile mission and that sequestration would avail some form of benefit to the creditors of the prospective insolvent-debtor. This confirms the collective nature of sequestration.¹¹⁵

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", as quoted in *Mackay v Cahi* 1962 (4) SA 193 (O) 195H.

¹¹³ *Mackay v Cahi* 1962 (4) SA 193 (O) 202E-F. See also Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, p 8.

¹¹⁴ SAA pars 97-98, CaseLines 27-572 to 27-573; annexure 'AA18', CaseLines 27-594 to 27-596 (i.e. SARS statement of account: assessed tax).

¹¹⁵ Bertelsmann and others, *Mars: The Law of Insolvency in South Africa* 10th Ed, 2019, p 2 where the learned authors point out that sequestration of an estate of a debtor is a 'collective debt-collecting procedure' and differs – in purpose with the 'individual debt-collecting procedures', such as obtaining judgment followed by a warrant of execution to attach and sell assets of a debtor. The authors, further (at p3), point out that the collective nature of sequestration ensures that the insufficient assets (i.e. proceeds thereof) of a debtor are distributed in an orderly and fair manner in order to satisfy the claims of all creditors. And this brings about *concursum creditorum* (i.e. 'the rights of the creditors as a group are preferred to the rights of individual creditors'). See also *Walker v Syfret* 1911 AD 141 at 166.

[77] The actual wording of the requirement (i.e. 'reason to believe that [sequestration] will be to the advantage of creditors')¹¹⁶ for compulsory sequestration appears to be at a lower threshold than that for voluntary surrender (i.e. '[sequestration] will be to the advantage of creditors')¹¹⁷ The latter appears to be requiring a definite set of facts, as it is the prospective insolvent who is required to make the assertion about his or her own affairs, whereas the former attests to - ordinarily - an arm's length relationship of a creditor and debtor where the former, often, lacks detailed knowledge or minute details of the affairs of a debtor (not discounting the possibility of the so-called friendly sequestrations). And, the 'reason to believe' required in compulsory sequestration 'predicates facts which engender belief, which must be proved by the applicant, *prima facie* at the stage when a provisional order is sought, and on a balance of probabilities when a final order is sought'.¹¹⁸

[78] Advantage to creditors is a relative concept and ought to be determined on the basis of the circumstances of each case.¹¹⁹ It may be established in many ways, but it is generally believed that the evidence ought to reveal a reasonable prospect of a not negligible dividend.¹²⁰ But the respondent, as appearing above, only has meagre personal assets to his name and a mountain of debt or liabilities. Therefore, any attempt to prove an advantage to creditors focussed on a pecuniary benefit would dismally fail. This is highlighted by the submission by counsel for the applicants that, the respondent's creditors have a reasonable prospect of receiving a dividend from the proceeds of the sale of the immovable properties (held in companies wholly-owned by the respondent) by trustees to be appointed should sequestration be granted. Obviously, in terms of our law the immovable properties do not belong to the respondent, as a shareholder, but the companies.¹²¹ The

¹¹⁶ Section 10(c) of the IA 1936, quoted in par [28] above. See also Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* 2.1.4.

¹¹⁷ Section 6(1) of the IA 1936.

¹¹⁸ Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* 2.1.4, partly relying on *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (N); [1957] 4 All SA 1 (N) 4; *Nedbank Ltd v Thorpe* [2009] JOL 24292 (KZP) [12]. See pars above [29]-[30] on the *prima facie* basis level of proof.

¹¹⁹ Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* 2.1.4.

¹²⁰ *Trust Wholesalers & Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) 111G-H; *Cyril Smiedt (Pty) Ltd v Lourens* 1966 (1) SA 150 (O) at 157C. See par [79] below, for criticism of the view that advantage to creditors ought to reveal a reasonable prospect of a not negligible dividend.

¹²¹ *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and another* 1962 (1) SA 458 (A) 471-472; *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) [9]; *Hlumisa Investment Holdings*

respondent's interest therein would only materialise after the debts of the companies have been met. But, for current purposes, these immovable properties have not been given any possible value and are not included in the figure of R4 928 669,83 stated in report of the curator appointed pursuant to SARS' preservation order, although they are referred to therein.¹²² It is not a complicated mathematical exercise to fathom that the possible values from the immovable properties and of those mentioned in the curators report (i.e. of R4 928 669,83) would definitely be overshadowed by the liabilities attributed to the respondent in the amount of R150 033 637, above, and the one to SARS pegged at R4 657 299,87. Therefore, I respectfully differ with counsel for the respondent by holding that the absence of valuation of the shares held by the respondent in the private companies defeats the alleged benefit to creditors. What I turn to next is also relevant in this regard.

[79] Counsel for the applicants, perhaps sharing the optimism of his client, submits that the situation may improve due to possible proceeds from assets allegedly hidden by the respondent under trees in the Northern Cape once those assets are uncovered for the benefit of the creditors. Despite my optimism, above, regarding the latter 'assets' falling short of giving rise to a liquidated claim, I agree that should the 'assets' materialise they would contribute towards an advantage to creditors. All these confirm the need to heed caution sounded by the Constitutional Court in *Stratford and Others v Investec Bank Limited and Others*¹²³ not to rigidify the broad meaning of the concept 'advantage' through employment of epithets, such as 'a not negligible dividend'.¹²⁴

RF Ltd and another v Kirkinis and Others 2020 (5) SA 419 (SCA) [17], [24]; *Pepkor Holdings Ltd and others v AJVH Holdings (Pty) Ltd and others* 2021 (5) SA 115 (SCA) [43]. See also Brighton M Mupangavanhu, 'The Lawfulness of a Memorandum of Incorporation Clause that Permits a Company Board to Refuse Transfer of Shares Without Reasons: Analysis of *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* (2017) 31:2 *Speculum Juris* 191, 193. See further s 19(1)(a)-(b), CA 2008 on the legal status of a company, including its separate legal personality, discussed in Delpont, *Henochsberg on the Companies Act 71 of 2008* at 86-92(2).

¹²² Pars [69]-[70] above.

¹²³ *Stratford and Others v Investec Bank Limited and Others* 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC). See also *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) [29].

¹²⁴ *Stratford v Investec Bank* 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC) [44]-[45]. See also *Dinath NO and others v Mukhawana* (85785/2017) [2019] ZAGPPHC 71 (7 March 2019) [36]; *VBS Mutual Bank (in liquidation) v Madzonga* (25057/2018) [2019] ZAGPJHC 273, [2019] JOL 45577 (GJ) (23 August 2019) [52]; *Wild & Marr (Pty) Limited v Yusuf* (27815/2018) [2019] ZAGPJHC 341 (20 May 2019), [2019] JOL 45630 (GJ) [5], where the principle from *Stratford* was applied. See further Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law 2.1.4* where the learned authors express doubt

[80] The applicants, also, urge this Court to consider the fact that a trustee appointed will be able to investigate the respondent's bank accounts and ascertain the flow of funds from bank statements with a view to recover assets that may have been disposed of by way of impeachable transactions, as envisaged by the provisions of sections 26 to 31 of the IA 1936.¹²⁵ This approach is borne by the authorities. It is held that the belief that sequestration would yield an advantage for creditors may not only be engendered by the debtor having property, but may also be indicated by facts to the effect that the estate administration process may lead to acquisition or recovery of property beneficial to creditors.¹²⁶ Assets may be unearthed or recovered through setting aside of voidable or undue preferences.¹²⁷

[81] On the facts of the matter, the respondent possess of very few assets in his name. Even, the fact that he has shareholding in property-owning companies, does not significantly alter the situation, when considering the liabilities towards Tariomix attributed to the respondent. Also, the respondent may have reduced his liability towards SARS, but his insolvency remains intact. But, this should not minimise the fact that an investigation may uncover more assets attached to the monies which flowed from Tariomix as discussed above. Some of these monies may have been dissipated through dispositions or transactions which our insolvency law allow to be set aside or impeached. Therefore, there is indeed reason to believe that sequestration will be to the advantage of the respondent's creditors.

Conclusion on the requirements for sequestration

[81] The conclusion reached on the requirement in the preceding paragraph denotes the fulfilment of all the requirements for provisional sequestration.¹²⁸ But, it is submitted on behalf of the respondent, correctly so I should say, that the Court

about the correctness of the view that advantage of sequestration ought to be a 'pecuniary benefit' which is 'not negligible dividend' as such approach confines the test to determination of only on the quantum of the pecuniary benefit, also reliance upon *Stratford*.

¹²⁵ See, generally, Boraïne, Kunst and Burdette (eds), Meskin's Insolvency Law 5.31 and Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, pp 273-319 (i.e. Chapter 13) on impeachable transactions.

¹²⁶ *Stratford v Investec Bank* 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC) [46]. See also Boraïne, Kunst and Burdette (eds), Meskin's Insolvency Law 2.1.4.

¹²⁷ *Ibid.*

¹²⁸ Pars [26]-[30] above.

retains the discretion to refuse the order sought even if it is satisfied that the requirements have been met.¹²⁹ The applicants ought to have avoided abusing the process of this Court by invoking insolvency proceedings when debt recovery by way of an action would have sufficed. Sequestration is a drastic measure and the applicants ought to have utilised their extant 'considerable and extensive powers' as liquidators of Tariomix to recover the assets of Tariomix, the submission concludes.

[82] I do not agree that there was an abuse of the process of this Court in the applicants choosing sequestration. The facts on this matter call for the use of the machinery of sequestration, especially given the fact that the respondent is clearly not forthcoming regarding his financial position. The mechanism of insolvency enquiry with all its trappings, such as interrogation and forensic investigation focussed on the affairs of the respondent, would, no doubt, prove valuable to the trustees in their quest to uncover assets, including those which may be hidden in the semi-arid Northern Cape. There is no viable less drastic alternative to sequestration on the facts of this matter.

[83] I am also satisfied that the service and notice requirements and other formalities have been complied with to allow the granting of an order for the provisional sequestration of the estate of the respondent, subject to what I turn my attention to, next.

Other issues

[84] In addition to opposing the application on the grounds dealt with above, the respondent urges the Court to refuse the application on other grounds to do with alleged non-compliance with the statutory and other requirements.

¹²⁹ *Body Corporate Palm Lane v Masinge* 2013 JDR 2332 (GNP) where the court exercised its discretion to refuse an order of sequestration, in order to afford the debtor an opportunity to repay the debt. Recently in *Body Corporate of Old Trafford v Muronzi* (016676/2023) [2024] ZAGPPHC 623 (21 June 2024) an order for final sequestration was not granted in the exercise of the court's discretion under s 12 of the IA 1936 and recognition of the right to have access to adequate housing in s 26 of the Constitution of the Republic of South Africa, 1996. See also a critical review in M Roestoff and A Boraine, 'Body Corporate Palm Lane v Masinge 2013 JDR 2332 (GNP)' [2015] De Jure 16. See, generally, Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* par 2.1.5 and Bertelsmann and others, *Mars: The Law of Insolvency* 10th Ed, 2019, pp 155-159, on abuse of the process for sequestration and the discretion of the Court, respectively.

[85] Counsel for the respondent submits that there is non-compliance with section 9(3) of the IA 1936.¹³⁰ The provision requires that a petition (read, notice of motion)¹³¹ sets out in its heading information in the form of the full names, date of birth and, if any, identity number, of the debtor-respondent.¹³² Further, the debtor's marital status should be stated and, should he or she be married, also, the full names, identity number and date of birth of his or her spouse.¹³³ Should an applicant-creditor be partially or wholly unable to comply with these statutory requirements, he or she must furnish reasons for such inability.¹³⁴ But there is clearly compliance in this regard save for the date of birth which appears in the identity number. I, also, do not find any merit in the respondent's assertion that there is non-compliance with section 9(3)(b) of the IA 1936. I am satisfied that all requisites relating to the deposition and condition of the founding affidavit have been met. This is so, even when clearly such type of challenge cannot be based on section 9(3)(b).

[86] The respondent also complains about non-compliance regarding the pre-litigation mediation requirements under Rule 41A. He says there was not even an attempt to deliver the required notice in terms of Rule 41A. The applicants simply contend that there is no procedural irregularity with regard to the compliance with the provisions of Rule 41A. But the respondent does not say that it complied with the rule either.¹³⁵

[87] Rule 41A of the Uniform Rules provides for a notice of agreement or opposition to mediation to be given by a party in every new application or action proceedings to the opposing party.¹³⁶ The Rule serves a crucial purpose in the facilitation of 'an expeditious and cost-effective resolution of a dispute between litigants'.¹³⁷ Rule 41A, also, applies to compulsory sequestration applications, but appears impossible to apply in voluntary surrender proceedings which involve only

¹³⁰ Par [26] above for a reading of the provision.

¹³¹ Footnote 17 above.

¹³² Section 9(3)(a) and (c) of the IA 1936.

¹³³ *Ibid.*

¹³⁴ Section 9(3)(c) of the IA 1936.

¹³⁵ *Nomandela and another v Nyandeni Local Municipality and others* 2021 (5) SA 619 (ECM) [9]-[11].

¹³⁶ Rule 41A(2).

¹³⁷ *Erasmus: Superior Court Practice* RS 23, 2024, D1 Rule 41A-3.

debtor-applicant(s) and no respondent.¹³⁸ Possible aspects of a sequestration-related dispute which parties may strive to agree or highlight issues they disagree on include the nature and extent of the debt; advantage to creditors, and compliance with statutory requirements.¹³⁹

[88] Compliance with the Court's Rules and practice directives by litigants and their representatives is paramount for the process and administration of justice by the Court. However, objections or argument based on non-compliance with Rules, such as Rule 41A, is best placed when preliminarily raised at the first opportunity before the Court, obviously after being taken up with the opposing party informally and formally on the papers. Barring agreement between the parties, the Court at the first sitting will have an opportunity to decide how to best address the situation without delving deeper into the issues in dispute, including postponement of the matter in order to direct the parties to a mediation process. In this case the parties missed that opportunity when they appeared before the urgent court on 18 July 2024 and agreed the order made by the Court without any indication of the implications of non-consideration of the mediation process. I should not be understood to be saying that mediation is impossible beyond that stage. But, where the parties have vigorously exchanged papers and intensely engaged each other on other issues, despite non-compliance with Rule 41A, any subsequent or continued argument on non-compliance may only serve tactical or procedural objectives, rather than being a genuine and steadfast quest to resolve the dispute or aspects thereof through the alternative dispute resolution mechanism of mediation. Also, it may well be that other issues, such as urgency which inherently involves relaxation of some aspects of compliance with the Rules as deemed fit by the Court;¹⁴⁰ nature of the dispute, such as voluntary surrender,¹⁴¹ and interests of justice calling for the determination of the dispute without delay,¹⁴² may actually render referral to mediation not the appropriate option.¹⁴³ Some of these issues are present in the current matter. But for current

¹³⁸ Boraine, Kunst and Burdette (eds), *Meskin's Insolvency Law* par 2.1.

¹³⁹ *Ibid.*

¹⁴⁰ *Ethypersadh v Minister of Police N.O and Others* (2023-064414) [2023] ZAGPPHC 595 (25 July 2023) [7].

¹⁴¹ Footnote 139 above.

¹⁴² *Nomandela v Nyandeni Local Municipality* 2021 (5) SA 619 (ECM) [9]-[11].

¹⁴³ *Erasmus: Superior Court Practice* RS 23, 2024, D1 Rule 41A-4 to D1 Rule 41A-4 for other cases dealing with (non)compliance with Rule 41A.

purposes I find that the non-consideration of referral to mediation by either of the parties, does not preclude this Court from determining the issues in the matter and granting the relief sought.

Conclusion and costs

[89] Evident from what appears above, the applicants have met the material requirements for the Court to grant an order for the provisional sequestration of the respondent's estate. This will be accompanied by an order for costs as envisaged in sections 14(2) and 97(3) of the IA 1936 which costs are to be taxed and include costs of opposition of this application. Naturally, the costs will be in the administration of the insolvent estate of the respondent.

[90] The respondent was partially successful in the application to strike out. But the costs relating to this part of the proceedings will be minimal. However, I will exclude the costs of the strike out application from costs of the main application to avoid saddling the respondent with liability for payment of the costs of the striking.

[91] What remains is the issue of costs reserved by the urgent court on 18 July 2024. I will order that those costs form part of the costs of the application, already awarded above. I cannot imagine any other sensible approach given the applicants substantial success.

[92] The provisional sequestration order will have a return date. In order to cater for the return date to be reflected in the body of the order, I will allow either of the parties to avail a draft order on the exact terms of the order appearing below save that a specific date obtained from the Registrar of this Court shall be substituted for the following words in paragraph 2) of the order below: 'a date to be determined by the Court'.

Order

[93] In the premises, I make the order (which may also appear in a signed draft order as stated in par [92] above), that:

- 1) the estate of the respondent, Louis Petrus Liebenberg (identity number: 6[...]) be and is hereby placed under provisional sequestration in the hands of the Master of the Gauteng Division, Pretoria;
- 2) the respondent and any other interested party are called upon to show cause why this Court should not order the final sequestration of the respondent at 10:00 or so soon thereafter as the matter may be heard;
- 3) a copy of this order shall be forthwith served on the respondent;
- 4) a copy of this order shall be published in the Government Gazette and Citizen Newspaper;
- 5) a copy of this order shall be served on:
 - 5.1) the South African Revenue Service, Pretoria; and
 - 5.2) the Master of the High Court, Pretoria;
- 6) costs of this application, subject to 7) hereof, are costs in the administration of the respondent's insolvent estate;
- 7) the costs in 6) hereof shall include costs associated with the hearing of the matter on 18 July 2024, but exclude costs associated with the respondent's application to strike out.

Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing : **13 November 2024**
Date of Judgment : **31 January 2025**

Appearances

For the Applicants : Mr J Hershensohn SC (with Mr R de
Leeuw)
Instructed by : Strydom Rabie Attorneys Inc, Pretoria

For the Respondent : Mr A J Daniels SC (with Ms L Acker)
Instructed by : Thomson Wilks Inc, Johannesburg