



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 5896/22

In the matter between:

ANDRÉ JOHAN DE RIDDER

Applicant

and

ANDRÉ DAWID COETZER N.O

First Respondent

SHARON COETZER N.O.

Second Respondent

IGNATIUS WALTER WAIT N.O.

Third Respondent

*In their capacities as trustees for the time being of the
André Coetzer Familie Trust with IT Number: 2387/1995*

JUDGMENT

PARKER, AJ:

Introduction

[1] In this application for the provisional sequestration of the André Coetzer Familie Trust ("the Trust"), whereby:

1.1 The Applicant is a creditor of Trust, who has committed an act of insolvency

as contemplated in the Insolvency Act, 24 of 1936, when it admitted its inability to pay, after providing written guarantees to repay following the conclusion of loan agreements.

1.2 The Trust, has very little, if any, realizable assets.

1.3 It is just and equitable to sequester the Trust.

[2] On 3 June 2022, the First Respondent's resignation as trustee of the Trust were accepted by the remaining Respondents. All future reference to the Trustees shall be named Respondents.

Issues for determination

[3] 3.1 Whether the court does have jurisdiction to hear the application.

3.2. Whether the intervening parties, namely the joint liquidators of Sportscentre (Pty) Ltd who withdrew their application are to bear costs.

3.3 Whether the application for sequestration of the of the Trust has merit.

[4] It makes sense that the adjudication in respect of whether the applicant has jurisdiction for the court to hear this matter should be the first determination. If Respondents are successful, then the determination in respect of paragraph 3.3 falls away.

Intervening parties

[5] The joint liquidators of Sportscentre ("the intervening parties") brought an

application for leave to intervene in the sequestration application however they have not filed a replying affidavit, and eventually withdrew their application. This application was opposed by the Trust on the basis that;

- 5.1 The court does not have jurisdiction to hear the application.
- 5.2 The intervening parties do not have a direct and substantial interest in the sequestration.
- 5.3 The intervening parties lack locus standi.
- 5.4 The Trust has not committed an act of insolvency.
- 5.5 The Trust is not insolvent.

The application for sequestration

[6] Is opposed by the Respondents on the basis that:

- 6.1 The court does not have jurisdiction.
- 6.2 The Applicant does not have local standi.
- 6.3 The Trust has not committed an act of insolvency.
- 6.4 The Trust is not insolvent.

Background

Loans

[7] First Respondent approached the Applicant for funding of the business Sportscentre (Pty) Limited ("Sportscentre") to purchase sports gear and equipment to distribute to over 200 smaller retailers/ traders throughout Southern Africa. This resulted in several written loan agreements being concluded, including suretyships signed by First Respondent in respect of each loan.

7.1 An initial amount of R2 million and further amount of R500 000, repayable with a 10% interest on the 22 July 2021.

7.2 On the 8 July another loan in the amount of R1.5 million which was repayable with 10% interest on 8th of August 2021.

[8] In respect of these loans the First Respondent provided Applicant with a resolution by the trustees of the Trust in respect of a decision taken by the Trust on 5 July 2021 in respect of which the Trust owns an immovable property valued at R4.5 million and is unencumbered. Applicant contends this property was ceded to applicant for the debt owing to the value of R4 million which property, if sold, the proceeds thereof will first be applied to payment of the debt owing to the applicant.

Repayments

[9] Sportscentre made a payment on 20 September 2021 to the Applicant in the amounts of R400 000 and R100 000 respectively. The further payment arrangement for the period between October 2021 to December 2021 was not met. Subsequently, on 4 March 2022, First Respondent in an e-mail confirmed that he had decided to put the holiday house which is the property owned by the Trust on the market. Since the property was ceded to the Applicant no transaction could take place without Applicant's consent.

In the same e-mail the First Respondent acknowledges that he had a few challenges in the past few months, he had cash flow issues and unforeseen challenges which impacted on his business, and he sought a new repayment plan. This resulted in a new repayment plan for the period 15 March 2022 to the end of May 2022. It is this e-mail which applicant relies on as an act of insolvency in terms of Section 8(g) and (8 e) of the Insolvency Act,

[10] On 3 June 2022, a structural order was put in place. It was ordered that the Second and Third Respondents shall notify the fund manager of the Thabeng High Impact Fund of the First Respondent's resignation immediately.

[11] Furthermore, the assets and loan accounts of the Trust were spelled out in detail specifically the shareholding of the Trust in various companies including a 60% shares in Sports Culture (Pty) Ltd; 200 (5%) Shares in the Thabeng High Impact Fund (Pty) Ltd, a loan Account in Thabeng High Impact Fund (Pty) Ltd in the amount of approximately R3 224 629.00; a 60% Shareholding in Sportscentre (Pty) Ltd and a Loan Account in Sportcentre (Pty) Ltd, to be verified.

[12] Pending the finalization of this Application, the order further provided for;

"5.4 Second and Third Respondents shall provide Applicant with all resolutions and power of attorneys signed by the trustees authorizing the sale of shares of the property in Keurboom Bluewater Chalets, previously held in Shareblock by the Trust in the Bluewater Chalets (Pty) Ltd, contemplated in the resolution adopted by the First- and Second Respondents dated 5th July 2021.

5.5 Second- and Third Respondents shall disclose to Applicant all funds received by the Trust in respect of the sale of shares in of paragraph 15.1

above and fully disclose how and to who such proceeds were distributed, alternatively the whereabouts thereof, by no later than Wednesday, 15th June 2022.

5.6 Second and Third Respondents shall terminate First Respondent's access and authority to any bank account held by the Trust by no later than Friday, 10th June 2022.

5.7 Applicant shall be entitled to re-enroll this application on the fast lane should the outcome of the investigation by Third Respondent or any new facts which may arise hereafter warrant the urgent disposal of this matter.

5.8 The costs shall stand over for later determination."

[13] According to the Applicant the Respondents have refused and/or failed to comply with the above Order, and despite being ordered to provide all the financial statements of the Trust, the Respondents initially asserted to (in October 2022) that they were in the process of finalizing the 2020, 2021 and 2022 financial statements. Applicant's attorneys addressed a letter on 15 December 2022, to the Respondents Attorney calling for the financial statements which the Respondents failed to do, thus causing the Applicant to file a supplementary affidavit on 15th September 2022 after material information came to light.

[14] Second and Third Respondents opposition was filed on 24 May 2022, and later they filed an answering affidavit on 19th October 2022, being the day before the matter was to be heard again.

[15] The matter was postponed by agreement to the 8 March 2023 and thereafter postponed on the semi urgent roll on the 6 November 2023, following a postponement to the 30 April 2024 with the Applicant and the intervening parties to pay such costs. On the 30 April 2024 the matter was removed from the roll for settlement purposes, which were unsuccessful and thereafter the Applicant failed to re-enroll the application. The Respondents then did so to bring finality to the matter.

Jurisdiction

[16] The core issue for determination is that of jurisdiction. The Respondents contends that this Court lacks jurisdiction to hear the application on the grounds that the trust deed is registered at the Master's Office located in the Eastern Cape. In his founding affidavit, the Applicant contends that "*The Trust is registered with the office of the Master of the High Court, Cape Town*" which was denied by the Trust in the answering affidavit. It is now common case that the Trust is registered with the Master of the Makhanda High Court which was conceded in argument by the Applicant. It would, however, have been open to the Makhanda High Court to postpone the application and/or transfer it to another division, should it have deemed it equitable or convenient.

[17] The Respondents opposed the application because the First and Second Respondent conducted their business from East London for many years. These averments were not countered by the Applicant in the replying affidavit. Third Respondent resides within the jurisdiction of the Eastern Cape. Additionally, the Respondents submit that the Trust did not hold any immovable property within the jurisdiction of this Court.

[18] In the supplementary heads of argument, the applicant relies on Section 149 of the Insolvency Act, 24 of 1936 ("the Insolvency Act") as well as Section 21 of the Superior Courts of 2013 ("the Superior Courts Act") for jurisdiction. In this regard the Respondents argue that Applicant's reliance on the Superior Courts Act is misplaced. The law relating to insolvency, including jurisdiction of the Court, has been codified in the Insolvency Act. Where the Act is not a complete statement of the law, recourse must be had to the common law.

[19] In the circumstances, Section 149 of the Insolvency Act governs which Court has jurisdiction over the Trust. The supplementary heads of argument then refer to the repealed Supreme Court Act, for reasons unknown, as same has been replaced by Section 21 of the Superior Courts Act.

[20] Applicant cites from *Gallo African Ltd v Sting Music (Pty) Ltd*,¹ and appears to be an attempt at relying on the common law (which is as misplaced as the reliance on the Superior Courts Act.)

[21] Respondents argued that in *Goode, Durant & Murray (SA) Ltd & Another v Lawrence*,² the Court held that the question of convenience does not relate to which Court may conveniently hear the application, but to what happens after the order is granted. Reliance on this section is not available to the Applicant as this Court does not have jurisdiction over the Trust.

¹ 2010(6) SA 329 (SCA)

² 1961(4) SA 329 (W)

[22] Notwithstanding the misplaced reliance on the common law and the Superior Courts Act, the Applicant concludes that it is “axiomatic” or self-evident that this Court has jurisdiction. The Respondents strongly argued that the Master of the High Court, Cape Town has no authority over a Trust registered in a different province. In addition, the first Master’s report had the incorrect Trust registration number and referred to the liquidation of a company. The second report had two Trust registration numbers (the Master apparently being willing to liquidate (not sequesterate) either Trust. Furthermore, the Master relied on the Close Corporations Act and the Companies Act, for a sequestration of the Trust. Both Master’s reports cited the incorrect trustees as Respondents.

[23] Accordingly, the Applicant has failed to establish that this Court has jurisdiction on any basis prescribed by Section 149 of the Insolvency Act.

[24] To show that the applicant has jurisdiction for this court to hear the application it was argued that the jurisdiction of a Court in liquidation and/or sequestration proceedings are determined by Section 149 of the Insolvency Act, 24 of 1936:

"The Court shall have jurisdiction under this Act over every debtor and in regard to the Estate of every debtor who -

(a) On the date on which a petition of the acceptance of the surrender or for the sequestration of his estate is lodged with the Registrar of the Court, is domiciled or owns or is entitled to property situated within the jurisdiction of the Court;"

[25] Furthermore Section 21 of the Superior Court’s Act 10 of 2013 provides for persons over whom and matters in relation to which divisions of the High Court has jurisdiction.

"1. A division has jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-

(a) ...;

(b) ...;

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

2. A division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such Court has jurisdiction or who in terms of a third-party notice becomes a party to such cause, if the said person resides or is within the area of jurisdiction of any other division."

[26] In terms of Section 9(4) of the Insolvency Act, an application for the sequestration of a person shall be lodged with the Master, or, if there is no Master at the seat of the Court, with an Officer in the public service designated for that purpose by the Master by notice in the Gazette, and the Master or such Officer may report to the Court any facts ascertained by him which would appear to him to justify the Court in postponing the hearing or dismissing the petition.

[27] In terms of Section 2 of the Insolvency Act, a "Master" in relation to any matter, means the Master of the Supreme Court within whose area of jurisdiction that matter is to be dealt with and includes an Assistant-Master.

[28] Jurisdiction means the power vested in a Court to adjudicate upon, determine and dispose of a matter. Importantly, it is territorial. The disposal of a jurisdictional challenge on acceptance entails no more than the factual enquiry, with reference (in application proceedings) to the Applicant's Founding Affidavit, to establish the nature of the right that is being asserted in support of the claim. In other words, jurisdiction depends on either the nature of the proceedings or the nature of the relief claimed or, in some cases, on both. It does not depend on the substantive merits of the case or defence relied upon by a Defendant.

[29] In its argument advanced by the Respondents in respect of the jurisdictional issue contends, that the Trust held shares in Sportscentre and Sports Culture (Pty) Ltd, both are within the court's jurisdiction. At the time of the petition both Sportscentre and Sports Culture have been liquidated and therefore the shareholding does not found jurisdiction. The liquidators of these entities practice within the jurisdiction of the court, however it does not serve as a basis to find jurisdiction. The liquidators were not granted leave to intervene and withdrew the intervention application and accordingly are not a party to these proceedings. Nothing stops the liquidators of those entities to institute action against the Trust where the Trust is registered on where the cause of action arose as set out in section 21 of the Superior Courts Act, as the relief would not fall within the ambit of section 149 of the Insolvency Act.

[30] Secondly the Trust had loan accounts in these liquidated entities which means that the Trust is a creditor in the liquidated entities and the Trust could lodge a claim with the respective liquidators.

[31] The Applicant also relied on the Second and Third Respondents domicile as being within the court's jurisdiction. This the Respondent argued is denied as the third respondent resides in East London in the Eastern Cape. Furthermore, the Second and the Third Respondent are cited in their *nomine officio* capacities, rather than the domicile of the Trust.

[32] The Applicant's reliance on the report of the Master of the High Court Cape Town, could not assist it any further in finding jurisdiction. It was shown that the Master of the High Court of Cape Town has filed more than one report fraught with errors. The Master of the High Court of Cape Town has no authority over the Trust registered in a different province. Insofar as the errors contained in the Master's reports are concerned not only were the incorrect trustees cited as respondents, the first Masters report had the incorrect trust registration number and referred to the liquidation of a company. The second Master's report had two trust remote registration numbers with the Master apparently being willing to liquidate and not sequestrate the Trust. Lastly the Master of the High Court of Cape Town incorrectly relied on the Close Corporations Act and the Companies Act for a sequestration of the Trust.

[33] In eschewing the jurisdictional issue this court does not have jurisdiction to hear the application for sequestration of the Trust. For the foregoing reasons the Applicant's reliance on the common law and Superior Courts Act is misplaced.

[34] The Applicant has failed to establish that this court has jurisdiction in respect of the provisional order for sequestration of the Respondents on any basis prescribed by section 149 of the Insolvency Act.

Costs

[35] Given the long history of this matter and the importance of it to all the parties, it was Respondents who took the reins to re-enroll this matter for it to reach finality. I see no reason why the Respondents should not be awarded costs. Although, the Second and Third Respondents presented the court with a draft order asking for costs on an attorney-client scale alternatively on the party and party scale C. In my view it was not a complex matter and therefore I am reluctant to award an attorney and client scale for fees and I am of the view that scale B would be appropriate.

[36] Accordingly it is ordered:

- a) The intervention application brought by the joint liquidators of Sportscentre Pty Ltd (the intervention application) is withdrawn with the leave of the court.
- b) The cost of the intervention application shall be borne by the intervening parties on a party and party scale on scale B, including the cost of counsel where so employed.
- c) The sequestration application of the Applicant against the Second and Third Respondents, in their capacities of the André Coetzer Familie Trust ("the trust") is dismissed.
- d) The Applicant shall bear the costs of the sequestration application on a party and party scale B, including the cost of counsel where so employed.


PARKER AJ
Acting Judge of the High Court

Appearances

Counsel for the Applicant: Adv W J Bezuidenhout, Sandton Chambers
Instructed by: Van Wyk Van Heerden Inc.

Counsel for the Respondents: Adv M A McChesney
Instructed by: Strydom & Bredenkamp Inc.

Date of Hearing: 18 October 2024
Date of Judgment: 27 February 2025

This judgment was handed down electronically by circulation to the parties' representatives by email.