



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 571/2019

Not reportable

In the matter between:

**CROSSMED HEALTH
CENTRE (PTY) LTD**

FIRST APPLICANT

ZAHEER CASSIM N.O.

SECOND APPLICANT

AVIWE NDYAMARA N.O.

THIRD APPLICANT

and

**CHWAYITA ONGAMA
YONGAMA YAKO**

RESPONDENT

IN RE:

CASE NO. 4374/2022

In the matter between:

NOSIKHUMBUZO NOZIMANKHULU

FIRST APPLICANT

CHWAYITA ONGAMA YONGAMA YAKO

SECOND APPLICANT

and

CROSSMED HEALTH CENTRE (PTY) LTD

RESPONDENT

**And other matters for reconsideration with
case numbers 357/2018; 694/2018; 1243/2020;
554/2022; and 5982/2022.**

JUDGMENT

Rugunanan J

[1] This is the return day of a rule *nisi* in an application for the sequestration of the estate of the respondent, Dr C O Y Yako for a debt of R5 942 184.12. The application was issued on 22 October 2018 out of the High Court, Mthatha under case number 571/2019. It served before this Court by order of the Judge President¹. The rule has been extended on various occasions to coincide with the simultaneous hearing of the matters for reconsideration identified in the heading of this judgment.

[2] Crossmed Health is a juristic entity that operates the business of a private hospital in Mthatha. Dr Yako, a medical doctor and practitioner, is a former director of Crossmed Health Centre (Pty) Ltd ('Crossmed Health') and is the sole shareholder of Crossmed Mthatha Private Hospital (Pty) Ltd ('Crossmed Mthatha') and Crossmed Property Holdings (Pty) Ltd ('Crossmed Property').

[3] The reconsideration matters were all launched at the instance of Dr Yako, except for case number 4374/2022 in which Ms Nozimankulu sought leave to

¹ Transferred from the Mthatha Division by order of the Judge President on 11 October 2022.

intervene in the sequestration proceedings purportedly under section 11(3) of the Insolvency Act².

[4] In summarising the nature of these proceedings, copies of the notices of motion issued by Dr Yako together with that of Ms Nozimankulu are attached as annexures to this judgment (Annexures A to G), this to avoid repeating their contents.

Case number 357/2018

[5] The matter was launched by Crossmed Health and its business rescue practitioners Mr Zaheer Cassim and Mr Aviwe Ndyamara, essentially for relief:

- 5.1 That Dr Yako and Crossmed Mthatha be interdicted from conducting any form of medical practice from the premises of Crossmed Health in Mthatha; from submitting to any medical aid societies accounts for the provision of medical services; and from removing any documents, accounts and statements of any type from the premises;
- 5.2 Interdicting and restraining Dr Yako from entering the premises at all;
- 5.3 Removing him as a director of Crossmed Health; ordering him to render a full and proper accounting in respect of all income generated by Crossmed Health which may have been invoiced in his name or in the name of Crossmed Mthatha and submitted to medical aid societies for payment; and that he and Crossmed Mthatha pay the costs of the application.

[6] The application was launched on the basis that Dr Yako and Crossmed Mthatha, unlawfully and fraudulently diverted to the account of Crossmed Mthatha, funds owing by medical aid societies to Crossmed Health. The payments were owed to Crossmed Health for hospital services rendered. In the latter part of 2016, the Industrial Development Corporation of Southern Africa (the IDC), a shareholder and creditor of Crossmed Health, instituted litigation against Crossmed Health. Due to its

² Act 24 of 1936 as amended.

distressed financial state Crossmed Health was placed under business rescue. Mr Cassim and Mr Ndyamara were appointed as business rescue practitioners (BRPs) of Crossmed Health in terms of an order of the Mthatha division of this court under case number 1252/2017 on 12 September 2017.

[7] Dr Yako and Crossmed Mthatha opposed the application under case number 357/2018 but did not, in answering papers, raise any objection to the appointment or the authority of the BRPs.

[8] On 29 March 2018, Roberson J, before whom the application was heard, delivered a judgment in which substantial findings were made against Dr Yako and the relief sought by Crossmed Health against him was granted.

[9] In a notice of motion (Annexure A) issued on 21 September 2023, Dr Yako presently seeks declaratory relief essentially on the basis that the order by Roberson J is unlawful, null and void. He also seeks an order that the appointment and the ratification of the BRPs be declared unlawful, null and void. In addition, the notice of motion evinces further relief for declaring unlawful, null and void the appointment of the board members of Crossmed Health by the BRPs.³ As with most matters included in the consolidated hearing which matters are summarised below, declaratory relief is sought on a substantially similar basis. In the said application (Annexure A), Dr Yako also purports to represent Crossmed Mthatha which was finally wound up on 17 November 2022 (under case number 572/2019). The basis for the reconsideration application in which Dr Yako seeks declaratory relief is that insufficient notice was given to creditors of a meeting that occurred on 19 September 2017 and as a result, the ratification of the appointment of the BRPs is null and void. Of significance is that the business rescue of Crossmed Health was successfully finalised in 2019.

Case number 694/2018

³ Annexure A notice of motion case number 357/2018 paragraphs 1.4, 1.5, and 1.6.

[10] This was an application in which Crossmed Health, represented at the time by the BRPs, sought an order against Dr Yako and his companies (Crossmed Mthatha and Crossmed Property) jointly and severally for payment of the amount of R5 942 184.12. The amount represented medical aid payments diverted from Crossmed Health. Judgment was granted in the matter on 24 April 2018 (the money judgment). On essentially the same basis in terms of which he seeks declaratory relief as above, Dr Yako seeks to have the order declared unlawful, null and void and set aside.⁴

Case number 571/2019

[11] This is an application by Crossmed Health for the sequestration of Dr Yako. It arises from his non-payment of the money judgment. A provisional sequestration order was granted by this Court on 17 November 2022. The return date was extended on various occasions to coincide with the reconsideration matters. Conveyed in an application purportedly made under section 11(3) of the Insolvency Act (Annexure C), Dr Yako's stance is that the money judgment in case number 694/2018 is unlawful, null and void, and consequently he is not indebted to Crossmed Health.

[12] He takes the same point that the appointment and ratification of the BRPs is unlawful and that the order from which the judgment debt emanates (including all other applications in terms of which court orders were granted), is tainted by unlawfulness. It bears mentioning that there is no (standalone) application to rescind the order under case number 694/2018.

Case number 572/2019

[13] In an address by Mr Dollie, who, together with Mr Raubenheimer, appeared on behalf of Crossmed Health, I was informed from the bar that there is no reconsideration application by Dr Yako in this matter.

⁴ Annexure B notice of motion case number 694/2018 paragraph 1.4.

[14] It involved an application for the winding up of Crossmed Mthatha. The application was finally adjudicated and a final winding-up order was granted on 17 November 2022. The liquidators appointed were Mr Mustafa Mohammed and Mr Gonasagree Govender.

Case number 1243/2020

[15] In this matter Dr Yako sought to review and set aside the decision of the Department of Health, Eastern Cape, to transfer to Crossmed Health the hospital licence initially held in his name and in terms of which Crossmed Mthatha was operated. The application was opposed by Crossmed Health and dismissed by Smith J (as he then was) on 17 November 2022.

[16] Dr Yako did not appeal the dismissal but now seeks to have the order reconsidered and declared null and void on essentially the same basis as the other matters aforementioned (Annexure D).

Case number 554/2022

[17] Crossmed Health (being obliged to do so apparently on a previous occasion) sought an interdict against Dr Yako upon discovering that he attempted to change the banking details utilised by medical aids to make payments to Crossmed Health to that of his personal banking details, or the banking details of Crossmed Mthatha. Dr Yako opposed the application contending that he is entitled to the income from medical aids despite Crossmed Health having rendered services. The basis for his contentions were that he is the rightful owner of the hospital licence. The Board of Health Care Funders deposed to an affidavit confirming that Crossmed Health, and not Dr Yako or Crossmed Mthatha, is the rightful owner of the practice number to which payments are allocated and that the payment details of Crossmed Health ought to be utilised for payments to Crossmed Health for hospital services rendered.

[18] The interdictory relief was granted on an interim basis and subsequently granted finally on 17 November 2022.

[19] Dr Yako presently seeks to have the order reconsidered or set aside on the same grounds as with the other matters (Annexure E).

Case number 5982/2022

[20] In a notice of motion issued out of the High Court, Mthatha on 9 December 2022, Dr Yako (together with co-applicants Crossmed Mthatha and Osteon Health Group (Pty) Ltd) sought an order that Crossmed Mthatha be placed under supervision for commencing business rescue proceedings, notwithstanding that Crossmed Mthatha was finally wound up by order of this court on 17 November 2022 (case number 572/2019). Crossmed Mthatha does not trade and it appears that there is no prospect that it may be rescued. Although included amongst the others for reconsideration, this matter was not addressed in argument. The order at the conclusion of this judgment speaks for itself.

Case number 4374/2022

[21] This application (Annexure F), also purporting to be made under section 11(3) was instanced by Ms Nozimankulu and is addressed later in this judgment where the sequestration is dealt with. The relief claimed is couched in substantially similar terms to that contained in the notice of motion by Dr Yako (Annexure C).

The procedural context of the hearing and the issues raised

[22] Except for the sequestration application in case number 571/2019 (the sequestration), each of the other matters were identified for reconsideration (the reconsideration matters) in which Dr Yako and Ms Nozimankulu seek declaratory relief. It has already been mentioned that the business rescue application pertaining to Crossmed Mthatha (case number 5982/2022) was not addressed in argument. For the rest Dr Yako seeks relief on the basis that the orders obtained against him were tainted by fraud perpetrated by the BRPs and were therefore unlawful, null and void. He does not say that he is a victim who suffered harm at in the hands of the BRPs. Parenthetically the wording 'the reconsideration matters' is deployed as a term of convenience without reference to rule 6(12)(c) of the Uniform Rules of Court.

[23] What served before this Court on 26 August 2024 were the reconsideration matters and the return date for the rule *nisi* in the sequestration proceedings. The rationale for the reconsideration matters was to avoid discrete hearings before different judges with the inherent potential for conflicting factual findings on similar facts. The matters were allocated a full week for argument. This stemmed from directives primarily aimed at streamlining the reconsideration matters. Foremost was an order made by agreement between the parties on 24 April 2024, in terms of which they were required to agree to and to sign a joint practice note no later than 10 May 2024, dealing with the main issues for determination in the reconsideration matters and their proposed sequence for hearing. The parties did not jointly agree on the issues for determination and each prepared their own practice notes and heads of argument. They set their own agendas.

[24] On 26 August 2024 during a brief meeting in chambers, counsel for Crossmed Health, Mr Raubenheimer, indicated that the non-joinder of interested parties in the reconsideration matters is at issue. He dispatched to all concerned the previous day an email attaching the Supreme Court of Appeal judgment in *Golden Dividend 339 (Pty) Ltd and Another v Absa Bank Limited*⁵. In passing, I must point out that short on a few minutes before the meeting with counsel for the parties, a bundle of authorities preceded by an index indicating the name of Dr Yako's counsel was delivered at chambers. The judgment in *Golden Dividend* was among the case authorities included therein. Mr Mzileni explained the delay in filing the bundle. The point however is that the inclusion of the judgment in the bundle signified anticipation of the non-joinder being dealt with in argument.

[25] Following the meeting all concerned proceeded directly to court. Absent agreement on who ought to have commenced with argument and on what issue/s, or a request for the Court to make a ruling, the reconsideration parties proceeded directly to argue their matters. They did so with initial reference to the merits of the interlocutory applications without any prior indication that the applications signified

⁵ [2016] ZASCA 78.

their chosen starting point in the proceedings. The status of these applications is dealt with later in this judgment where the sequestration application is addressed.

[26] Thereafter on 28 August 2024, Mr Raubenheimer addressed the Court on the application for sequestration. His argument on the matters for reconsideration was not directed at the merits but limited to non-joinder.

[27] Despite protestations of litigating by ambush and the issue not being raised during case management conferences nor in the obligatory practice note, he pointed out that the issue was foreshadowed in various affidavits by Crossmed Health filed in opposition to the relief claimed by Dr Yako, in particular an affidavit by Mr Stephen Baker, the Chief Executive Officer of Crossmed Health.

[28] To my mind the protestations were misdirected – they were manifestly the result of the course adopted by opposing counsel who did not at the very outset make it clear that they chose to deal with the merits of the interlocutory applications at first instance.

[29] In countering the charge of litigating by ambush Mr Raubenheimer submitted that the objection of non-joinder may be taken at any stage of argument in these proceedings, even on appeal. Contending that the issue is dispositive of the reconsideration matters, he emphasised that it was necessarily desirable for this Court to hear argument thereon to curtail any delay in disposing of the proceedings⁶ particularly when regard is had to the extensive declaratory relief claimed by Dr Yako in the various notices of motion⁷ that would otherwise necessitate protracted argument on the merits.

[30] The opposing protestations stem fundamentally from the objecting parties' overlooking the implications of the email (albeit that the issue was anticipated by inclusion of the relevant judgment in the bundle of authorities). They were in any

⁶ Compare *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* [2002] ZACC 22 para 21.

⁷ Compare also *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* [2015] ZASCA 35 para 18, and *Maharaj and Others v Mandag Centre of Investigative Journalism NPC and Others* [2017] ZASCA 138 para 26.

event afforded opportunity to deal with the point raised and to advance their opposing contentions in that regard, which they did.

[31] For purposes of the decision on non-joinder it is considered unnecessary to deal with the merits of the matters for reconsideration⁸. This judgment is confined to the sequestration proceedings and the non-joinder objection.

[32] In demonstrating that there are interested parties whose joinder in the reconsideration matters is of necessity, Mr Raubenheimer referenced the relief set out in the notices of motion issued by Dr Yako. As indicated earlier, the relief is not repeated – the notices of motion are attached to this judgment for convenience (Annexures A to G).

[33] The affected parties who have an interest in the relief claimed in the reconsideration matters can be gleaned from the additional material annexed hereto, namely: Annexure H (the creditors of Crossmed Health), Annexure I (the employees of Crossmed Health), and Annexure J (the shareholders of Crossmed Health indicated at 4.8.1). These annexures are extracts from the business rescue plan prepared by the BRPs on 8 November 2018 and were specifically mentioned by Mr Raubenheimer as indicative of persons having a direct and substantial interest in the relief presently claimed by Dr Yako. The nature of the relief affecting such persons is evident from the following matters:

- 33.1 Case number 357/2018 (notice of motion issued 21 September 2023) – paragraphs 1.1, 1.2, 1.3, 1.4, 1.5 and 1.6.
- 33.2 Case number 694/2018 (notice of motion issued 9 June 2023) – paragraphs 1.1 to 1.5.
- 33.3 Case number 571/2019 (unsigned notice of motion dated 22 May 2023) – paragraphs 1 to 9.
- 33.4 Case number 1243/2020 (notice of motion issued 13 June 2023) – paragraphs 1 to 6.

⁸ An approach adopted in *Molaoa v Molaoa and Others* [2023] ZAFSHC 211 para 3 and see also *Pretoria FM NPC v Chairman of ICASA* [2023] ZAGPJHC 1241 para 6.

- 33.5 Case number 554/2022 (notice of motion issued 13 June 2023) – paragraphs 1 to 7.
- 33.6 Case number 4374/2022 (unsigned notice of motion dated 15 May 2023) – paragraphs 1 to 11.
- 33.7 Case number 5982/2022 (notice of motion dated 6 December 2022) – paragraphs 1 to 3.

[34] In broad summary the relief that Dr Yako desires – and of course, with whom Ms Nozimankulu makes common cause, entails:

- 34.1 Orders declaring and setting aside the first meeting of the creditors of Crossmed Health on 27 September 2017, and the notice convening that meeting as well as setting aside the appointment of Mr Cassim and Mr Ndyamara as BRPs and setting aside the process of ratifying their appointments as such, including declaring as unlawful and setting aside the appointment by the BRPs of the board members of Crossmed Health.
- 34.2 Orders declaring that all meetings, decisions and resolutions including ratification processes by the BRP's during the business rescue proceedings be declared unlawful.
- 34.3 Orders declaring the legal proceedings instituted by the BRPs in case number 694/2018 (the money judgment) and in case number 357/2018 (interdict by Roberson J) unlawful and a nullity and that all decisions taken by the BRPs on behalf of Crossmed Health be declared unlawful and fraudulent, in particular the institution of the sequestration proceedings in case number 571/2019.
- 34.4 Orders declaring the BRPs to be found guilty of various contraventions of the Companies Act and that they each be imposed with sentences of 10 years' imprisonment or fines ranging from R10 million to R20 million for such contraventions, and furthermore that their licences as BRPs be withdrawn and that they be declared liable to pay Dr Yako an amount of R11.4 million due to him as a salary.
- 34.5 Orders declaring unlawful the transfer of the hospital licence dealt with in the review before Smith J in case number 1243/2020, and

furthermore that the process attendant on the licence transferred and issued to Crossmed Health be reviewed and set aside and that Dr Yako be declared the sole proprietor and holder of the licence in favour of Crossmed Mthatha. Attendant on the transfer of the licence back into his name, Dr Yako craves additional relief that he be restored all the property interests and rights attendant on such licence holding and that Crossmed Health be interdicted and prohibited from utilising the licence.

[35] Evidently, the relief claimed is far-reaching. In its sweep, it seeks to undo or erase all steps taken and processes initiated by the BRPs since 2017 that eventually culminated in the finalisation in 2019 of the business rescue of Crossmed Health. Contrary to the submission made by counsel for Dr Yako that the setting aside of the business rescue proceedings is not what is before court, it is abundantly clear that the relief claimed is intended to undo the business rescue process, effectively setting aside the money judgment and ultimately dousing the sequestration. It is common cause that Crossmed Health was financially distressed and was successfully turned around in business rescue. It is mind-boggling and perhaps speculative that undoing the entire process would result in Crossmed Health reverting to its previous financially distressed state impacting negatively on creditors, shareholders and employees (dependent on their salaries) – all in regard to whom the business rescue plan (Annexure K) has been implemented. Undeniably, there are constitutional implications in so far as Crossmed Health provides access to health-care and treatment to members of the public. The opposing contention that creditors who have long been paid are unaffected by the relief Dr Yako claims, is unpersuasive and only serves to underscore the inherent imprecision in the gamut of the relief set out in the various notices of motion, this on the asserted premise that fraud unravels everything. The scope of the relief also affects the current implementation of the business rescue plan which still remains operative as regards a deferred payment in favour of the IDC. This is dealt with later.

[36] In the assortment of Dr Yako's relief it may be gathered from the notices of motion that administrative conduct was set in motion and decisions taken by organs of state (and directors of companies). What appears to have been ignored is that

administrative conduct and the orders or decisions that follow have legal effect until set aside by an order of court. It is also not clear whether the relief directed against such administrative acts and/decisions is brought under the common law or the Promotion of Administrative Justice Act⁹. This should be seen against the fact that the series of applications triggered by Dr Yako have been initiated several years after the business rescue had been successfully completed without a reasonable and satisfactory explanation being put up for the delay in each instance.

[37] Turning to the affidavit by Mr Baker. It was filed in opposition to case number 3542/2019. The matter concerned a second application by Dr Yako issued out of the High Court, Makhanda during December 2019 to have Crossmed Health placed in supervision under business rescue. He initiated the first application during August 2017 in the High Court, Mthatha (case number 1252/2017) where a court order issued on 12 September 2017 for the appointment of Mr Cassim and Mr Ndyamara as BRPs of Crossmed Health. Subsequent to Mr Baker's opposing affidavit being filed, Dr Yako withdrew the application in case number 3542/2019.

[38] In his affidavit, Mr Baker pertinently raises the issue of non-joinder. Quoting where relevant he stated:

‘19.1 The applicants failed to join the IDC, a shareholder, Copperzone and the ECDC.

...

19.2 The applicants have also failed to join the employees of [Crossmed Health], a mandatory requirement of the provisions of the Companies Act of 2008. They have also failed to join known creditors.

...

19.3 The applicants have also failed to join the individual directors of [Crossmed Health], whose identities and citations they know full well. In the face of them seeking far reaching relief against such directors, relating to them being declared to be delinquent and to have acted recklessly in accordance with the provisions of the Companies Act, one would have

⁹ Act 3 of 2000.

thought it prudent to join these individuals. The applicants have failed to do so.'

[39] The contents of Mr Baker's affidavit have been incorporated by reference in an opposing affidavit filed by Mr Mustafa Mohamed (case number 5982/2022) in the application by Dr Yako that Crossmed Mthatha be placed under business rescue. Mr Mohammed deposed to that affidavit in his capacity as one of the duly appointed liquidators of Crossmed Mthatha. Referring to Crossmed Health and himself respectively as the first and second respondents, and seemingly with emphasis on the history of all the litigation by Dr Yako, Mr Mohamed commented on the inherent abuse of process and stated:

'51. It is necessary for this court, with respect, to have regard to all of the applications which have been filed to date by [Dr] Yako and the first and second respondents will accordingly ensure that all of the application papers... are available at the hearing... for consideration by the judge allocated to hear [the] matter.'

[40] In the opposing affidavit deposed by Mr Baker on behalf of Crossmed Health in case 4374/2022 (the application by Mr Nozimankulu as first applicant and Dr Yako as second applicant) he mentions:

'41.10 I will cause to be made available to the court at the hearing of this application the pleadings in case number 5982/2022 and pray that the content of the answering affidavit be read as if herein specifically set out.'

[41] Mr Baker also states the following with reference to case number 4374/2022:

'19 It is necessary that this court has regard to the history of the litigation between Crossmed Health and [Dr] Yako. That history is materially relevant. The history is set out in previous applications which previous applications are referred to below and will all be indexed, paginated and will be made available to the court at the hearing of this application.'

[42] The opposing parties contended that the two last-mentioned affidavits do not explicitly say anything about non-joinder. Even if the point has not been explicitly mentioned it is not exceptional for non-joinder issues to be raised at peculiar stages of proceedings and in non-conventional ways.¹⁰

[43] In argument, Mr Raubenheimer, addressed the Court on the identification of interested parties. His submissions in that regard appear from what follows hereafter.

[44] In the reconsideration of the review in case number 1243/2020 pertaining *inter alia* to the transfer of the hospital licence, it is imperative that the actual administrative decision-maker be joined as a party to the suit particularly where that functionary has been appointed to perform certain functions. The notice of motion identifies the Superintendent General of the Eastern Cape Department of Health. The relief is essentially for a review of an administrative decision pertaining to the transfer of the licence. There is no indication that the reconsideration application has been served on the relevant incumbent of the department.

[45] Reference was also made during argument to an extract from the business rescue plan. It incorporated payment proposals to creditors (Annexure K). To be noted is that the structured payment plan in favour of the IDC is still operative with a final payment to be made on 28 February 2025 (Annexure K paragraph 5.3.2.2 n). Provision has also been made for the IDC shareholder loan, the IDC security costs claim, with further provision made for creditors such as the South African Revenue Services, the local municipality, concurrent creditors, and other shareholder loans (excluding the IDC). Provision was also made for the sale of property of Crossmed Health, the proceeds of which were to be made available to pay creditors (Annexure K paragraph 5.4).

[46] As for the BRPs, it was argued that the coercive relief directed against them necessitates that they be joined in their personal capacities and ought to be given opportunity of defending themselves against allegations that they are each criminally liable for breach of statutory obligations. The affidavits they have filed on behalf of

¹⁰ *Metsimahololo Local Municipality v Muller N.O. and Others* [2021] ZAFSHC 33 para 16 and the cases referred to.

Crossmed Health were deposed in their official capacities as duly appointed business rescue practitioners. As they have since been discharged of their duties, their joinder is necessitated in the light of the claims made against them.

[47] It was contended by counsel for Dr Yako that the right of a party to validly raise the objection of non-joinder is a limited one. The submission was made without reference to the scope of the relief claimed by Dr Yako, nor with reference to the particular individuals identified by Mr Raubenheimer during argument. In short, no facts were mentioned for demonstrating the limitation contended for notwithstanding the concession that the nature of the relief claimed by itself would have a domino effect on a number of individuals.

[48] The reconsideration relief claimed by Dr Yako unquestionably affects a vast array of individuals such as shareholders, directors (including Mr Baker), creditors, employees and of course the BRPs themselves. In each of the matters for reconsideration Dr Yako is *dominus litus* and it was after all fundamentally his duty to ensure that the persons aforementioned are joined in these proceedings. As contended by Mr Raubenheimer, their joinder is of necessity irrespective of the belated manner in which the issue was raised during the course of these proceedings. No court may allow orders to stand against persons who may be interested but who have had no opportunity to be notified and to present their case.

[49] There is justifiable refuge for each of the aforementioned persons in the *dictum* articulated by the Supreme Court of Appeal in *Absa Bank Ltd v Naude NO and Others*¹¹ and unanimously affirmed in *Golden Dividend*¹²:

‘The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, Kwazulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those

¹¹ [2015] ZASCA 97 para 10.

¹² para 19.

third parties have a legal interest in the matter and must be joined. That is the position here. If the creditors are not joined their position would be prejudicially affected: a business rescue plan that they had voted for would be set aside; money that they had anticipated they would receive for the following 10 years to extinguish debts owing to them, would not be paid; the money that they had received, for a period of 30 months, would have to be repaid; and according to the adopted business rescue plan the benefit that concurrent creditors would have received namely a proposed dividend of 100 percent of the debts owing to them, might be slashed to a 5.5 percent dividend if the company is liquidated'

[50] In my view the reconsideration relief cannot be sustained without necessarily prejudicing the interests of the third parties aforementioned who have not been joined in these proceedings. They have a legal interest in the matter and must be joined. It follows therefore that their non-joinder is fatal to these proceedings. In the circumstances the appropriate order is that the reconsideration matters be dismissed as indicated in the order more fully set out at the conclusion of this judgment.

The sequestration

[51] The proceedings against Dr Yako arose from the money judgment. Underscored in the founding affidavit deposed by Mr Cassim, are acts of insolvency alleging that Dr Yako failed to satisfy the judgment debt and failed to indicate to the sheriff disposable property sufficient for the purpose of satisfying the judgment debt, and factually that he is in a state of actual insolvency in that his liabilities exceed his assets which, in the aggregate, are significantly less in value than the judgment debt.

[52] The provisional sequestration order issued on 17 November 2022 was coupled with a rule *nisi* (the rule) that was extended to 24 January 2023. The rule has since been extended on various occasions (with costs reserved) until 2 July 2024 whereafter it was extended to 26 August 2024 to coincide with the hearing of the reconsideration matters.

[53] Crossmed Health moved for the confirmation of the rule *nisi*, contending that the non-joinder of interested parties was dispositive of the reconsideration matters, in effect leaving the sequestration proceedings uncontested.

[54] It is no misnomer that the proceedings are uncontested. Some history requires recapitulating to appreciate that deduction. In notices of motion dated 15 May and 22 May 2023 (Annexures C and F), Ms Nozimankulu, (an employee receptionist and supposedly also creditor of Crossmed Health) and Dr Yako, as applicants respectively in case numbers 4374/2022 and 571/2019, launched applications purportedly under section 11(3) of the Insolvency Act¹³ for discharging the provisional order.

[55] The notice of motion by Dr Yako was in the long form. Ms Nozimankulu utilised the truncated short form albeit that her application had a self-standing case number of its own. None of the matters were set down or case managed for hearing on 26 August 2024.

[56] This situation appears to have arisen from the parties' neglect to comply with case management directives issued on 27 and 28 July 2023 (handed in as Exhibits A and B respectively). The directives relate to several matters, notably case numbers 571/2019 and 4374/2022. Exhibit B included a directive to the effect that the future case flow management of the matters, including the need for interlocutory applications to be fast tracked, shall be dealt with in a further case management conference on a date and time directed by the judge concerned at the request of the parties. The proposed case flow management conference did not materialise, hence the interlocutory matters and their further conduct were never dealt with or addressed by the all parties concerned, nor a judge subsequently approached or requested to address these issues. Inexplicably, copies of the directives aforementioned were not in the relevant court files or had presumably gone astray.

¹³ The section reads: 'Upon the application of the debtor the court may anticipate the return day for the purpose of discharging the order of provisional sequestration if twenty-four hours' notice of such application has been given to the petitioning creditor.'

[57] Unaware of the interlocutory applications, I case managed the matters identified for reconsideration on 1 July 2024 and on 8 August 2024. The status of the interlocutory matters did not arise – none of the parties mentioned them or raised them subsequent to the conferences that were held on those occasions.

[58] During the reconsideration proceedings considerable debate emerged on whether the applications by Dr Yako and Ms Nozimankulu were to be regarded as self-standing substantive applications or interlocutories. On reflection, the question is irrelevant given the approach adopted in this judgment.

[59] On the assumption that the applications are interlocutory, the question that arises is whether they are properly before this Court. Put straightforwardly, they are not.

[60] Both notices of motion are unsigned. *Ex facie* proof of issue, service and filing are conspicuously absent. No condonation was sought to beg the Court's indulgence to entertain the matters. None of the applications were set down for hearing on 26 August 2024 and indeed there is no indication that the registrar was notified to have them enrolled for hearing.

[61] Notwithstanding the above the interlocutory applicants' persistence in seeking relief stemmed from entreating the Court to exercise its inherent powers to determine the merits of the applications (without them being properly accounted for).

[62] It must be borne in mind that the return day for the rule issued on 2 July 2024 was extended to 26 August 2024. A rule *nisi* is a court order calling upon a party to show cause before the court, on a particular day, why the relief applied for by an applicant should not be finally granted.¹⁴ One observes that the relief claimed in each notice of motion is substantially similar, and is in certain respects identical. While that is so, it is striking that neither of the affidavits by Ms Nozimankulu or Dr Yako addresses the material averments underlying the factual and/or legal basis upon which the sequestration order is sought – nor did they attempt to put forward a

¹⁴ *Kriel N.O. v Born Free Investments 247 (Pty) Ltd* [2017] ZAWCHC 122 para 26.

seriatim response to the averments made by the deponent in the founding affidavit to that application. Both applications misfired because the sequestration was approached in a manner completely at odds with section 11(3) of the Insolvency Act. To have contended that the affidavits gainsaid the material in the affidavit deposed by Mr Cassim, was misleading. It was also attempted to bring into question the *locus standi* of the deponent and the authority for the institution of the proceedings – this without proper recourse to the notice procedure in uniform rule 6(5)(d)(iii).

[63] The net result is that Dr Yako (with whom Ms Nozimankulu makes common cause) has not shown cause why final relief should not be granted. The case made out in the affidavit founding the sequestration is uncontested and there is, consequently, no factual dispute. The non-joinder of interested parties was a point well taken and disposes of the reconsideration matters, including the interlocutory applications, without the need to determine the merits of the arguments advanced for Dr Yako and Ms Nozimankulu.

Costs

[64] It is unnecessary to address this issue in any detail other than to say what follows.

[65] The unwieldy volume of paperwork in the entire series of matters is of titanic proportion comprising in excess of 7 000 pages (inclusive of approximately 1 000 pages of additional material in the court files) preceded by a meticulously detailed 97 page index comprising of 790 items. The address by Mr Dollie assisted in identifying and navigating through the material.

[66] The applicants in the reconsideration matters played no part in compiling the index, or in paginating the court papers. Counsel for the applicants in the matters, well appreciating that neither of the parties had dealt with the interlocutory matters in accordance with case managed directives proceeded headfirst into the merits of the section 11(3) interlocutories without giving the Court any clear indication that this was their starting point.

[67] To a manifest degree, without having properly identified the interlocutory applications as the starting point for the reconsideration proceedings, this fuelled perplexity and precluded a smooth commencement of the proceedings. The proceedings only assumed shape once Mr Dollie volunteered his address and it then emerged that none of the parties dealt with the status of the section 11(3) applications. While the reconsideration proceedings did not involve the determination of unusual or novel aspects of the law or the interpretation of new legislation, this was not a run-of-the-mill matter.¹⁵ I take the view that a costs award on scale C is justified.

[68] Accordingly the following order issues:

1. Under case number 571/2019 the rule *nisi* issued on 17 November 2022 is confirmed and the estate of the respondent is placed under final sequestration.
2. The costs in the application for sequestration shall be costs in the administration of the estate of the respondent.
3. The application under case number 357/2018 dated 21 September 2023, is dismissed with costs including all reserved costs orders, to be paid by the applicants therein, jointly and severally (where applicable) to be taxed on scale C.
4. The application under case number 694/2018 dated 31 May 2023, is dismissed with costs including all reserved costs orders, to be paid by the applicants therein, jointly and severally (where applicable) to be taxed on scale C.
5. The application under case number 1243/2020 dated 12 June 2023, is dismissed with costs including all reserved costs orders, to be paid by the applicants therein, jointly and severally (where applicable) to be taxed on scale C.
6. The application under case number 554/2022 dated 12 June 2023, is dismissed with costs including all reserved costs orders, to be paid by the

¹⁵ Compare the comments in *Umhlaba Erf 1 Properties CC v Shell Downstream South Africa (Pty) Ltd* [2025] ZAGPHC 13 para 116.

applicants therein, jointly and severally (where applicable) to be taxed on scale C.

7. The application in terms of section 11 (3) of the Insolvency Act 34 of 1936, under case number 571/2019, dated 22 May 2023 is dismissed with costs, including all reserved costs orders, to be paid by the applicants therein, jointly and severally (where applicable) to be taxed on scale C.
8. The applications under case number 4374/2022 are dismissed with costs, including all reserved costs orders, to be paid by the applicants therein, jointly and severally (where applicable) to be taxed on scale C.
9. The application under case number 5982/2022, dated 6 December 2022 is dismissed with costs, including all reserved costs orders, to be paid by the applicants therein, jointly and severally (where applicable) to be taxed on scale C.

S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For Crossmed Health Centre (Pty) Ltd: *R Raubenheimer*, Instructed by *S Dollie* of Shaheed Dollie Incorporated (Tel 082 853 2440 or 011-482 9933) c/o Netteltons Attorneys, Makhanda, (Ref: Mr Hart; Tel: 046-622 7149).

For Ms Nosikhumbuzo Nozimankulu and Osteon Health Group (Pty) Ltd: *S Mzileni*, Instructed by Koswana Attorneys, East London (Ref: A Koswana; Tel: 073 648 2231) c/o Mgangatho Attorneys, Makhanda (Tel 073 524 3586 / 073 761 7751).

For Dr C O Y Yako: *N Zilwa*, Instructed by Koswana Attorneys, East London (Ref: A Koswana; Tel: 073 648 2231) c/o Mgangatho Attorneys, Makhanda (Tel: 073 524 3586 / 073 761 7751).

Dates heard: 26 – 29 August 2024.

Date delivered 28 January 2025.