



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 63/2023

In the matter between:

ADRIAAN WILLEM VAN ROOYEN N O

FIRST APPELLANT

MMABATHO SHELLY MOTIMELE N O

SECOND APPELLANT

and

MOKGADI FRANCINA MOKWENA N O

FIRST RESPONDENT

THE TRUSTEES FROM TIME TO TIME OF

THE DIKWENANYANA TRUST

SECOND RESPONDENT

Neutral citation: *Van Rooyen NO and Another v Mokwena NO and Another*
(63/2023) [2025] ZASCA 130 (12 September 2025)

Coram: DAMBUZA, MOKGOHLOA, WEINER and BAARTMAN JJA
and KUBUSHI AJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 12 September 2025

Summary: Insolvency and sequestration of a trust – settlement agreement concluded – clause providing for matter to proceed unopposed if settlement agreement breached – requisites for a provisional order of sequestration proven.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP sitting as a court of appeal):

- 1 The appeal is upheld
- 2 The order of the Limpopo Division of the High Court, Polokwane (the high court) is set aside and replaced with the following:
 - ‘a) A provisional sequestration order is issued returnable on 18 March 2026, in the high court, on which date the Trust, or any interested person, should show cause why the Trust should not be finally sequestrated;
 - b) The provisional order is to be published once in the *Government Gazette* and the *Citizen Newspaper*;
 - c) The provisional order is to be served upon the Trust (by service on the trustees) by e-mail to U[...]; on the Master of the high court and, the South African Revenue Service;
 - d) A rule *nisi* is issued in terms of which the Trust veneer be pierced and the assets allegedly vesting in the Trust, or the trustees of the Trust, vest in the Trust, the insolvent estate of Mr Mokwena, and the insolvent estate of Tumi Mokwena Incorporated (TMI), jointly, and be applied to the satisfaction of the debt of the Trust, Mr Mokwena and TMI;
 - e) The rule *nisi* is returnable on 18 March 2026, in the high court, on which date the Trust, or any interested person, should show cause why the rule *nisi* should not be confirmed;

- f) All known creditors, of the Trust are to be notified of the provisional order;
- g) The costs of the application be costs in the administration of the Trust;
- h) The costs of the appeal, including costs of two counsel on scale C and scale B respectively, be costs in the administration of the Trust.'

JUDGMENT

Weiner JA (Dambuza, Mokgohloa and Baartman JJA and Kubushi AJA concurring):

[1] The appellants, as duly appointed joint liquidators in the insolvent estate of Tumi Mokwena Incorporated (TMI), a firm of legal practitioners, applied as liquidators for the sequestration of the Dikwenanyana Trust (the Trust). They further applied to pierce the trust veneer because the trust was indebted to the TMI in the sum of R7 497 069; the Trust was insolvent; and the Trust was the alter ego of Mr Tumi Mokwena (Mr Mokwena) and TMI.

[2] Mr Mokwena was sequestrated at the hands of the appellants as a result of various cost orders obtained against him from obstructive and vexatious litigation aimed at stifling the insolvency process. Mr Mokwena was sequestrated because he was insolvent and had committed various acts of insolvency. The appellants' claim was based upon the theft of trust and business monies of TMI; alternatively, payments fraudulently made from TMI to the Trust. This appeared from the expert forensic report of a Mr Decker, which was not contested.

[3] The Trust, according to the appellants, was abused as a fraudulent vehicle to conceal assets and money of TMI pillaged by Mr Mokwena. The Trust was abused to achieve the exact result that now plays itself out. TMI has been liquidated for being unable to pay its debts. Mr Mokwena has been sequestrated. But if the assets remain within the Trust, the property purchased by the Trust with the funds unlawfully misappropriated from TMI and Mr Mokwena, will be protected from their creditors, because of the trust form.

[4] TMI is a creditor of the Trust, as the Trust was funded entirely and without any valid cause by TMI, at times indirectly by Mr Mokwena, with funds embezzled from TMI. The Trust's defence was that Mr Mokwena was entitled, as a director of TMI, to utilise the funds of TMI, including TMI trust money, which belonged to defrauded trust creditors, for whatever purpose he wished. The shortfall in the TMI trust account was in excess of R16 million.

[5] The Trust admitted that all payments were received from TMI funds, but failed to set out any valid reasons for such payments. No monies were owing to the Trust by Mr Mokwena or TMI. However, on the Trust's own version, it was funded by TMI and Mr Mokwena, who originally obtained all funds from the TMI trust account. Neither TMI nor Mr Mokwena are able to pay their own creditors. As stated, TMI was liquidated for being unable to pay its debts, which is concerning in that TMI was a firm of attorneys with trust creditors, and Mr Mokwena was sequestrated due to his insolvency.

[6] The Limpopo Division of the High Court, Polokwane (the high court) agreed with Mr Mokwena's defence and dismissed the application for the sequestration of the Trust and the concomitant relief. It also dismissed an application for leave to appeal, which was granted by this Court.

[7] After the appeal had been set down for 1 November 2024, the parties engaged in settlement negotiations, and the matter was removed from the roll. The settlement agreement was concluded on 29 October 2024. It contained the following material provisions:

‘...WHEREAS the Trust acknowledges that it received the funds [R3 544 601,88] from the trust and business accounts of TMI which funds must be reimbursed to the Applicants;
AND WHEREAS ... the Trust wishes to pay the Claim [the funds] to the Applicants as provided for in this agreement...’

[8] The Trust failed to comply with the agreement by failing to pay the appellants as agreed. What the appellants now seek is that clause 11 of the settlement agreement be enforced. This clause provides:

‘11.1 Should the Trust

11.1.1 ... breach any of the terms... [of the agreement] ...

...

before the Claim is paid in full, then... the remainder of the Claim and the remainder of the sequestration Claim [R7 497,069] calculated from the payments already made by the Trust, shall immediately become due and payable and the Applicants would be entitled to proceed with the current pending appeal without any opposition from the Trust.’

[9] The Trust was placed on terms to comply with its obligations. The trustees did not respond and the appellant accordingly wished to proceed, to re-enroll the appeal in terms of the settlement agreement and for the sequestration order and concomitant relief to be granted. As a result, the full amount became due and the applicants became entitled to proceed with the pending appeal without any opposition from the Trust, which they duly did. The matter was set down for hearing on the 15 August 2025. It was then dealt with in terms of

section 19(a) of the Superior Courts Act 10 of 2013,¹ without a hearing, and the parties were required to provide submissions in regard to the order sought.

[10] It is trite that, in terms of s 10 of the Insolvency Act 24 of 1936 (the Act), if a *prima facie* case is made out, the court may provisionally sequester the debtor.² The court must then issue a rule *nisi*, calling upon the debtor and all other interested parties to show cause on the return date why a final order should not be granted. The appellants have demonstrated that it is to the advantage of the trust's creditors that it be sequestered, and this was never disputed by the Trust. The Trust is the owner of several properties to the value of over R13 million. The creditors in relation to the immoveable properties amount to approximately R6, 9 million. There would therefore be a pecuniary benefit to the creditors of the Trust from the free residue. Furthermore, an enquiry under the Act may reveal additional assets available to be distributed to the creditors.

[11] In *Liberty Group Limited v Moosa*³ (*Liberty*) the KwaZulu-Natal Division of the High Court therein was receptive of the debtor's version and dismissed the sequestration application. This Court held in that case that '[a] proper conspectus of the evidence ought to have led it to the conclusion that a provisional sequestration was, in the circumstances, not just and appropriate, but indeed necessary. In the result, Liberty's application should have succeeded

¹ Section 19(a) of the Superior Courts Act 10 of 2013 provides: 'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-

(a) dispose of an appeal without the hearing of oral argument.'

² Section 10 of the Insolvency Act 24 of 1936: '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 sequestered,

it may make an order sequestering the estate of the debtor provisionally.'

³ *Liberty Group Limited v Moosa* [2023] ZASCA 52; 2023 (5) SA 126 (SCA).

before the high court.’⁴ Consequently, this Court upheld the appeal and issued a provisional sequestration order with the rule *nisi* in accordance with the provisions of the Act. Accordingly, this Court is empowered to order a provisional order with a return date.

[12] Accordingly, the following order is granted:

- 1 The appeal is upheld
- 2 The order of the Limpopo Division of the High Court, Polokwane (the high court) is set aside and replaced with the following:

- ‘a) A provisional sequestration order is issued returnable on 18 March 2026, in the high court, on which date the Trust, or any interested person, should show cause why the Trust should not be finally sequestrated;
- b) The provisional order is to be published once in the *Government Gazette* and the *Citizen Newspaper*;
- c) The provisional order is to be served upon the Trust (by service on the trustees) by e-mail to U[...]; on the Master of the high court and, the South African Revenue Service;
- d) A rule *nisi* is issued in terms of which the Trust veneer be pierced and the assets allegedly vesting in the Trust, or the trustees of the Trust, vest in the Trust, the insolvent estate of Mr Mokwena, and the insolvent estate of Tumi Mokwena Incorporated (TMI), jointly, and be applied to the satisfaction of the debt of the Trust, Mr Mokwena and TMI;
- e) The rule *nisi* is returnable on 18 March 2026, in the high court, on which date the Trust, or any interested person, should show cause why the rule *nisi* should not be confirmed;

⁴ Ibid para 28.

- f) All known creditors, of the Trust are to be notified of the provisional order;
- g) The costs of the application be costs in the administration of the Trust;
- h) The costs of the appeal, including costs of two counsel on scale C and scale B respectively, be costs in the administration of the Trust.'

S E WEINER
JUDGE OF APPEAL

Heads of argument prepared by:

For the appellant: R Raubenheimer with M Jacobs and G J Lötter

Instructed by: Van Der Merwe & Associates, Pretoria

Vermaas Rawson Inc, Bloemfontein.