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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case numbers: 2024-073198 and
2024-073203

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED: NO

SIGNATURE

DATE: 10 November 2025

In the matter between:

BIDVEST BANK LIMITED

Applicant

and

SHAHED SURTEE

(Identity Number: 7[...])

Respondent

and, in the matter between:

BIDVEST BANK LIMITED

Applicant

and

SOYAB SULIMAN SURTEE

(Identity Number: 5[...])

Respondent

JUDGMENT

PULLINGER AJ

INTRODUCTION

[1] Before me are two applications for the confirmation of provisional sequestration orders granted against the respondents by Theron AJ on 21 August 2025.

[2] The two applications were enrolled and heard together because the facts in each matter are, for all intents and purposes, identical. It is convenient that the two matters be dealt with in one judgment.

[3] There are two issues for determination.

[3.1] First, the respondents seek an extension of provisional orders granted against them. The basis for the extension is set out in

supplementary affidavits delivered on the evening before the hearing of these applications. The supplementary affidavits are identical in content. The respondents identify two matters which they seek an opportunity to investigate. The contention is that the outcome of these investigations may result in the discharge of the provisional orders.

- [3.2] Second, and should provisional orders not be extended, whether the sequestration of the respondents' estates will be to the benefit of their creditors.

THE FACTS

- [4] Each of the respondents is a guarantor, in terms of a written guarantee ("**the Guarantee**"), executed in favour of the applicant as security for a credit facility granted by the applicant to an entity known as S Surtee Esquire (Pty) Ltd ("**the Company**"). Each of the respondents is a director of the Company.
- [5] I understand from the respondents' supplementary affidavits that the credit facility was, initially a revolving trade facility that was later converted into a 24 month loan facility.
- [6] On 18 April 2022, judgment was entered against the respondents (and another), jointly and severally, in an amount of R 9 013 629.06 plus interest on account of the respondents' failure to have paid the applicant in

accordance with the Guarantee, on first written demand, the amount so demanded to.

[7] Pursuant to the judgment, and in June 2023, the Sheriff rendered *nulla bona* returns as contemplated in section 8(b) of the Insolvency Act, 1936 ("**the Act**") in respect of each respondent. The *nulla bona* returns were rendered in circumstances where

[7.1] Mr Shahed Surtee had represented to the applicant on 12 April 2019 that he owned assets to the value of some R 168 million comprising an immovable property, motor vehicles, shares in private companies, interests in close corporations, Kentucky Fried Chicken franchises, furniture and art, jewellery and various investments, "loans receivable" and cash. He disclosed, further, liabilities to the sum of some R 5,5 million;

[7.2] Mr Soyab Suliman Surtee had represented to the applicant on 12 April 2019 that he owned assets to the value of some R155 million including an immovable property, motor vehicles, shares in private companies, interests in close corporations, furniture and art, jewellery, "loans receivable" and cash. He disclosed no liabilities;

[7.3] the Sheriff had attached movable property at the respondents' residential addresses and certain shares which attachment was met by affidavits deposed to by their respective spouses, and one Mr

Muhammed Surtee, stating that the respondents were not the owners of the movable property that had been attached; and

[7.4] the respondents, in relation to the assets identified in their disclosures to the applicant of 12 April 2019, made the identical statement that

"30. I deny that I have disposed of or alienated my assets and that my actions have been detrimental to my creditors or [the Company's] creditors."

[8] The Company entered into voluntary business rescue on 17 February 2023.

EXTENSION OF THE PROVISIONAL ORDER

[9] The respondents delivered their answering affidavits on 22 April 2025. These affidavits were delivered out of time, ostensibly, on account of international travels and family responsibility duties.

[9.1] Mr Shahed Surtee, in his answering affidavit, states:

"6. I respectfully seek condonation from this Honourable Court for any procedural non-compliance, including but not limited to the late filing of this answering affidavit and/or any prior failure to respond within the prescribed time periods.

7. The delay and/or non-compliance was not deliberate, nor intended to show disregard for the rules of court or the applicant's claim. The cause of the non-compliance is substantially due to the fact that I have been travelling in between South African and Dubai exploring new business

ventures and carrying out family responsibility duties towards other members of my family who are resident in Dubai.

8. This caused difficulties for my legal representatives of record, in that they found it difficult to consult and obtain information from me in order to abate the matter before this court or formulate a substantive responsive to the Applicants [sic] papers.
9. As a result of my protracted transit between South African and Dubai, I encountered considerable logistical difficulties in obtaining and, assessing documentation and communicating with my local legal representatives within the limited timeframes afforded for opposing the application.
10. Upon becoming aware of the set down for the proceedings and understanding the urgency thereof, I acted without undue delay to re-engage legal representation and to prepare this affidavit."

[9.2] Mr Soyab Suliman Surtee's answering affidavit makes all but identical statements in relation to his delay in filing an answering affidavit.

[10] The main thrust of the answering affidavits is that the Company is making payment to its creditors in accordance with the business rescue plan, that the debt owed to the applicant is disputed and that, given the applicant's reliance on outdated information concerning their financial position, that the applicant has failed to establish that the sequestration of their estates would benefit their creditors.

[11] The supplementary answering affidavits now raise two further issues.

[11.1] First, the authority of those acting on behalf of the Company to have concluded the converted loan facility agreement with the applicant which was guaranteed by the respondents.

[11.2] Second, the possibility that the applicant *may* have taken credit risk insurance with Lombard Trade Insurance ("**Lombard**") and that Lombard *may* have paid the amount owing by the Company to the applicant. So the argument went, the respondents' indebtedness to the applicant in terms of the judgment may be reduced, possibly to nil.

[11.3] The respondents contend that they need an opportunity to investigate these issues and seek a short extension of the provisional order in which to do so.

[12] In circumstances where there is a cogent motivation for an extension of a provisional order that sets out facts material to the proper adjudication of a sequestration application, it seems to me that a court should incline toward granting such an extension. Stegman J, in **Escom**,¹ collected the relevant authorities and encapsulated the test as follows:

"The approach which I have to adopt is that the respondent has no right to a postponement. He is asking an indulgence and he must satisfy certain requirements before it can be extended to him. Mr *Cilliers*, on behalf of the applicant, referred me to

¹ **Escom v Rademayer** 1985 (2) SA 654 (T) at 656 B to H/I

the tests laid down in two cases. The first is the case of *Manufacturers Development Co (Pty) Ltd v Diesel & Auto Engineering Co and Others* 1975 (2) SA 776 (W). At 777E, NICHOLAS J pointed out that a respondent in proceedings of this kind is not entitled to a postponement as a matter of right; and that an important consideration as to whether or not a postponement should be granted is whether the respondent applying for the postponement is able to show *prima facie* that if a postponement is granted he will be able to place facts before the Court which will constitute a ground of opposition to the relief claimed. The other case referred to, and which was also referred to by Mr Berg on behalf of the respondent, was that of *Motaung v Mukubela and Another NNO; Motaung v Mothiba* NO 1975 (1) SA 618 (O). At 624E of that report, M T STEYN J identified two requirements for the grant of a postponement to a respondent who, like the respondent in the present case, has failed to take a particular procedural step within the time allowed therefor. The first is that the applicant for a postponement should provide a reasonable explanation for the delay which necessitated his application for a postponement. The second is that he should show that *prima facie* he has a *bona fide* defence which he will be able to advance if the postponement is granted.

On behalf of the respondent, Mr Berg also referred to the proposition in the case of *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) to the effect that a Court should be slow to refuse to grant a postponement where three prerequisites have been satisfied. They are (a) where the true reason for a party's non-preparedness has been fully explained; (b) where his unreadiness to proceed is not due to delaying tactics; and (c) where justice demands that he should have further time for the purpose of presenting his case."

[13] I begin with an examination of the principal in **Manufacturers Development**.²

[14] Nicholas J held that an important consideration in deciding whether an extension (or postponement) of a provisional order should be granted is the existence of a *prima facie* case that the indulgence "will" lead to facts being adduced that "will" give rise to a ground of opposition.

² **Manufacturers Development Co (Pty) Ltd v Diesel & Auto Engineering Co and Others** 1975 (2) SA 776 (W) at 777E

- [15] The learned judge appears to have contemplated something other than speculation or conjecture as to the existence of those facts which the litigant will seek to adduce and the effect of those facts on the sequestration application concerned. This makes immanent sense because, as said by M T Steyn J, in **Motaung**:

"A Court will usually grant a postponement such as that asked for in the present case only if it is satisfied that some worthwhile purpose could be served by doing so. Where a respondent seeking such a postponement has in fact no defence in law to the applicant's claim, it would be purposeless to grant the postponement asked for. In such a case the postponement would result in a needless waste of time and money. The Rules of Court are intended to expedite the administration of justice and to avoid incurring unnecessary costs. To grant such a postponement, where the Court is left entirely in the dark as to whether the respondent asking therefor has any defence at all to the applicant's claim, would, to my mind, be entirely subversive of the Rules of Court and would be tantamount to "driving through them with a carriage and four"."

- [16] I would add to that said by M T Steyn J; the provisional order brought about a *concursum creditorum*. The *concursum* has an interest finality being achieved and in avoiding unnecessary legal costs, being administration costs, diluting any dividend that may be received and in the expeditious undertaking of an enquiry that may recover assets that may be realised for their benefit. Then, as the Constitutional Court observed in **Eke**:³

"Under our constitutional dispensation the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice."

³ **Eke v Parsons** 2016 (3) SA 37 (CC) at [40]

[17] As I understand these authorities, a request for the extension of a return date in a sequestration application must lead, with some degree of certainty, to material evidence being adduced which has the effect of disturbing the *prima facie* case before the court. If that is not the result, unnecessary costs will be occasioned and the proper administration of justice will be brought into disrepute. That being so, the request ought to be declined.

[18] In relation to the converted loan facility, Mr Shahed Surtee states, in his supplementary affidavits, that:

"18 A 24 month loan term facility [I assume this is a reference to revolving trade facility referred to in paragraph 15] was negotiated between the applicant and [the Company], which agreement was thereafter converted into a 24 month loan facility.

19 Critically, it has recently come to my attention that this conversion was effected without the requisite authority of the board of [the Company], not did I consult with the rest of the board nor did they ratify.

20 It is on the advice of my attorneys and my understanding that the agreements entered into without proper authority are invalid and unenforceable.

21 I have only recently become aware of these irregularities and submit that they warrant investigation as the conversion [a reference to the switch between the revolving trade facility and the 24 month loan facility] ought never have occurred."

[19] Mr Soyab Suliman Surtee's supplementary affidavit makes similar statements and confirms that he was not consulted when the 24 month loan facility agreement was concluded and nor did he ratify the conclusion of such an agreement with the applicant.

[20] My reading of the supplementary affidavits leads me to a conclusion that the respondents have construed the nature of the Guarantee as being a suretyship. And, if it is a suretyship, an attack on the underlying debt could result in the respective sequestration applications being defeated because a suretyship is an accessory obligation and the liability of a surety is inextricably linked the validity of the principal agreement and to the amount, if any, owed by the principal debtor. Thus, if the converted loan facility agreement is invalid, or another party has discharged the Company's debt to the applicant, the respondents, if the Company's sureties, would not owe a debt to the applicant. *Ex hypothesi*, this would mean the writs of execution leading to the *nulla bona* returns are not enforceable.

[21] So as to test this thesis, the terms of the Guarantee must be interrogated.

[22] In terms of the Guarantee:

[22.1] the word "Debtor" means the Company;

[22.2] "Secured Obligations" mean "any and all indebtedness or obligations of any nature whatsoever of the Debtor (whether actual or contingent, present or future) to the Creditor from time to time including in respect of the principal amount, interest, costs, expenses, fees and the like"; and

[22.3] the applicant is defined as the "Creditor" and, as pointed out above, the respondents are the "Guarantors";

[22.4] clause 2 states:

"2.1. The Debtor is indebted to the Creditor under the Secured Obligations.

2.2 The Guarantor has agreed to guarantee the due and punctual performance of the Secured Obligations."

[22.5] clause 3 sets out the obligations undertaken by the respondents to the applicant. It provides:

"With effect from the Signature Date the **Guarantor hereby irrevocably and unconditionally guarantees as a primary obligation**, in favour of the Creditor the due and punctual performance of the Secured Obligations **and further undertakes to pay the Creditor on first written demand all sums which are now or at any time or times in the future shall become due, owing or incurred by the Debtor to the Creditor pursuant to the Secured Obligations**. The liability of the Guarantor to the Creditor shall be limited to the amount of R30,000,000 (thirty million rand) plus interest and costs that may arise due to the indebtedness of the Debtor to the Bank." (emphasis added)

[22.6] clause 5.2 is a waiver of any benefit of excussion and provides:

"The Guarantor waives any rights that it may have to first require the Creditor to make any demand of the Debtor, to proceed against or claim payment from the Debtor or any third party, to take action or obtain judgment in any court against the Debtor, or make, file or prove any claim in the winding-up or dissolution of the Debtor or to enforce or seek to enforce any guarantee or security granted by the Debtor or any third party, before making payment under this Agreement."

[22.7] it provides, further, in clause 5.4 that:

"Notwithstanding any indication to the contrary herein, **this Agreement shall not constitute a suretyship and shall be construed as a primary undertaking** giving rise to a **principal obligation by the Guarantor.**"
(emphasis added)

[22.8] under the heading "*Binding Nature*", the Guarantee provides:

"8.1 **The Guarantor acknowledges and agrees that its obligations under this Agreement are absolute** and, without in anyway limiting or derogating from any other provisions of this Agreement, **the Guarantor shall on the Signature Date be, and shall remain, bound to the full extent of this Agreement, which shall at all times be fully and immediately enforceable in accordance with its terms,** notwithstanding:

8.1.1 **any dispute or defence which may be raised by the Guarantor in regard to any amounts** or other performance claimed from it by the Creditor in terms of and pursuant to the provisions of this Agreement;

8.1.2 any insolvency, administration, judicial management, reorganisation, arrangement, readjustment of debt, dissolution, liquidation or similar proceedings by or against the Creditor or the Debtor or the Guarantor;

8.1.3 **any invalidity or unenforceability or lack of due authorisation of, or either defect in this Agreement or any other agreement to which the Creditor or the Guarantor is a party relating to the subject matter hereof;**

8.1.4 any failure or delay on the part of the Guarantor duly to perform or comply with any of its obligations under this Agreement;

8.1.5 ...

8.1.6 ...

8.1.7 ...

8.1.8 **any other cause which, but for this clause, would or might have the effect of terminating, discharging or in any other manner whatsoever affecting any of the Guarantor's obligations under this Agreement** or any of the rights, powers or remedies conferred upon the Creditor by law." (emphasis added)

[22.9] Clause 10 concerns warranties. The relevant portions of this clause provide:

"10.2 The Guarantor acknowledges that it makes the representations and gives the warranties and undertakings in this Agreement with the intention of inducing the Creditor to accept the benefits under this Agreement and that the Creditor enters into this Agreement on the basis of, and in full reliance on, each of such warranties, representations and undertakings.

10.3 The warranties, representations and undertakings set out below shall be continuing and shall be deemed to be repeated for so long as this Agreement remains of any force and effect.

10.4 Where applicable, the Guarantor hereby warrants to, and in favour of the Creditor that –

....

10.4.7. the assets of the Guarantor, fairly valued, exceed its liabilities."

- [23] As is evident from clause 3, the Guarantee is a "demand guarantee".⁴ It obliges the respondents to pay the applicant, on first written demand all sums then due, or which will become due by the Company to the applicant that are secured by the Guarantee.
- [24] The Guarantee creates a primary obligation on the respondents, distinct from the credit facility granted by the applicant to the Company. It is binding on the respondents irrespective of the validity of, or a challenge to the validity of, the underlying agreement.
- [25] As a matter of substantive law, it is only fraud that would excuse a guarantor from making payment under such a guarantee.⁵
- [26] In the circumstances, a challenge to the Company's authority to enter into a credit facility with the applicant does not avail itself to the respondents as this is immaterial to the independent existence of and the obligations the Guarantee creates.⁶
- [27] In relation to the credit risk insurance, the respondents say:

⁴ For a discussion on the difference between "demand" or "unconditional guarantees and "surety" or "conditional guarantees" see **Joint Venture Comprising Gorogang Plant Razz Civils and Others v Infiniti Insurance Company** [2024] ZAGPJHC (15 October 2024) at [23] to [34]

⁵ at [38] and [39]

⁶ **Firststrand Bank Ltd v Brera Investments CC** 2013 (5) SA 446 (SCA) at [10]

- "22 During or about early 2020 [the Company] was approached by what is known as Lombard Trade Insurance ("**Lombard**"), pertaining to the servicing of the facility.
- 23 According to my understanding, Lombard underwrote the insurance policy pertaining to the trade facility agreement. It axiomatically flows that Lombard would provide coverage in the event of default.
- 24 The terms of the insurance policy remain unknown to me. It is unclear whether Lombard settled any portion of the debt. The applicant has failed to disclose this material information to the court, which may be relevant to the extent of my liability which may be reduced to nil.
- 25 It is on the aforementioned grounds that I respectfully submit it is necessary that the rule nisi be extended to a later date to afford me an opportunity to investigate this aspect with a view to ascertain the necessary facts to establish a defence and the extent of my liability."

[28] It is unclear whether either of the respondents have any knowledge of the existence of the alleged policy they refer to. The inference is that they do not – otherwise they would have stated that they had engaged with Lombard or identified to individual at the Company that dealt with Lombard and provided some kind of evidence as to the ambit of that engagement.

[29] Even if I were to accept the speculative nature of the respondents' contentions, this does not change the separate, and primary nature of the obligations undertaken by the respondents to the applicant in the Guarantee and, in respect of which, judgment was entered when they failed to honour the obligations undertaken in the Guarantee. Any payment that may have been made to the applicant by Lombard is *res inter alios acta* as it has no bearing

on the discrete rights and obligations between the applicant and respondents respectively arising out of the Guarantee.

[30] On the requirement of a reasonable explanation as to why the extension of the provisional order is sought, the respondents say:

- "11. After the granting of the provisional sequestration order I attended to consult with my attorneys of record on the 10th October 2025. Whilst I admit that this was sometime after the date of the provisional sequestration order, the delay in bringing this affidavit was neither wilful nor calculated to delay the matter further.
- 12. My attorneys of record have indicated that they have been inundated. A confirmatory affidavit of Mr Mapudi Rapudi of my attorneys is annexed hereto.
- 13. We were only ever able to consequently have a further consultation on the 10th October 2025. Upon such consultation it transpired that there may indeed be further defences available in the opposition to the sequestration order.
- 14. These defences, although not yet fully interrogated, are potentially dispositive and warrant further investigation before a final order is considered. The principle of *audi alteram partem* requires that I be afforded a fair opportunity to present my case in full... ."

[31] Mr Rapudi's affidavit, in turn, states:

- "3. I have perused the supplementary affidavit deposed to by the Respondent in this matter. Insofar as the contents therein pertain to myself, I can confirm the accuracy, particularly the explanation regarding the delay in filing the affidavit. The delay was occasioned by the fact that our offices were inundated and were consequently unable to secure a consultation with the Respondent - our client, due to conflicting schedules and limited availability.

4. I accordingly submit that the account provided in the Respondent's affidavit is a true and accurate reflection of the events, and I confirm the correctness thereof."

[32] The explanation why the extension is sought in an affidavit delivered on the evening before the hearing is unsatisfactory. The explanation, such as there is, is as scant and lacking in detail as the explanation for the late filing of the answering affidavit.

[33] The probative value of Mr Rapudi's affidavit is dubious; the content is little more than a restatement of the, otherwise, hearsay evidence concerning state of Mr Rapudi's dairy (apparently in the period from the end of August 2025 to 10 October 2025). Mr Rapudi is the person with knowledge of the material facts. These facts were not placed into evidence. The criticism levelled by the Supreme Court of Appeal in respect of an affidavit such as Mr Rapudi's applies with equal force here.⁷

[34] One would imagine that a businessman, faced with the spectre of his estate being sequestrated, would pay proper attention to the matter and afford the requisite time and effort to deal with a matter of the seriousness of a sequestration application.⁸ The respondents did not do so; the vague, fact free, statements in both their answering affidavits and supplementary

⁷ **Drift Supersand (Pty) Ltd v Mogale City and Another** [2017] 4 All SA 626 (SCA) at 640 D - D

⁸ *Consider: Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others* 2017 (6) SA 90 (SCA) at [25] to [33]

affidavits are bald conclusions that do not establish any cogent excuse for what must, in the circumstances, be described as dilatoriness.⁹

[35] Accordingly, the respondents have not made out a case for the extension of the provisional order.

BENEFIT TO CREDITORS

[36] Mr Hollander, who appeared for the respondents, stressed, vociferously, that the sequestration of the respondents' estates would not be to the benefit of their creditors.

[37] The respondents' evidence is that:

- "31. The Applicant has failed to satisfy the requirement in Section 10(c) of the Insolvency Act.
- 32. The Applicant relies on outdated information.
- 33. The immovable property at ..., is subject to a mortgage bond hereto marked "AA3".
- 34. The Applicant has not provided any basis to conclude that there will be a pecuniary benefit to the concurrent creditors. In its own version at paragraph 14 of the founding affidavit, the Applicant states that it has no integral knowledge of my financial affairs. The Applicant has simply made assumptions.
- 35. I deny the remaining allegations."

⁹ **Marima and Another v Mafokane and Another** [2025] ZAGPJHC 1010 (2 October 2025) at [50] to [52]

[38] The passage of evidence to which I have referred provides no elucidation as to the existence of any other concurrent creditors.

[39] The annexure purporting to be a mortgage bond is not a mortgage bond.

[40] *Ex facie* the document purporting to be a mortgage bond,

[40.1] it is styled as an "*out-and-out cession of right, title and interest*" entered into between Chopfam International (Pty) Ltd, Farouk Ismail and Amith Mohanlal Kara, as cedents and Faizel Surtee as the cessionary and purports to be in respect of the Company, Soyab Sulliman Surtee, Shaid Surtee, Aasif Surtee, Sulliman Surtee and Suhail Surtee; and

[40.2] was apparently concluded on 6 February 2023, being after judgment was entered against the respondents and the Company being placed in business rescue.

[41] The document records that the cedents and the Company entered into various loan agreements in respect of which there is a cumulative capital balance of R25,151,785.71 owed by the Company and which the cedents wish to cede to the cessionary.

[42] The document provides, further, that the cessionary shall pay an amount of R11 million to the cedents in compensation for the rights acquired in terms of the Cession.

[43] Clause 6 of the document provides:

"6.1 The Cedents shall upon the compensation referred to in clause 5.3 being cleared into the nominated bank account of the Cedents release the Security held by them by:

6.1.1 providing the Cessionary with the original mortgage bonds and title deeds held by the Cedent;

6.1.2 attending to sign any and/or all documents to confirm the Cession and to cede the mortgage bond held over the mortgage bond over Erf 1824, Houghton Estate Township to the Cessionary;

6.1.3 cancelling the Suretyships referred to in clause 2.15 above."

[44] The applicant makes the point, in its replying affidavit, that:

"19.6 ... to the extent and on the hypothesis, that the Cession, as alleged, is and/or is to be construed as evidence of an existing mortgage bond (which is denied) the Respondent fails to aver or produce any evidence as to what amounts (if any) remain outstanding and due pursuant to such alleged mortgage bond."

[45] The point is well taken. There is no evidence as to what the value of the properties are and what the extent of any mortgage bond may be (even if one were to accept that such mortgage bonds have in fact been registered). I take the approach of Heher JA in **Whiteman**¹⁰ as echoed by Majiedt JA in **Wright**¹¹ in respect of this issue. The registration of any mortgage bond is something

¹⁰ **Whiteman t/a JW Construction v Headfour Pty Limited and Another** 2008 (3) SA 371 (SCA) at [13]

¹¹ **Wright v Wright and Another** 2015 (1) SA 262 (SCA) at [15]

that falls within the peculiar knowledge of the respondents. They bore a duty to adduce evidence of those mortgage bonds if they existed.

[46] It is in the context, then, of the respondents' failure to have advanced any evidence as to their current financial position or explain the basis upon which a *nulla bona* return was rendered in the face of their earlier financial disclosures. This leads to the irresistible conclusion the assets disclosed by the respondents were either disposed of or are being hidden from the applicant. In this context, I consider the authorities on benefit to creditors.

[47] The learned authors of *Mars*¹² state:

"Creditors who stand at arm's length from their debtor may often lack detailed knowledge of the debtor's affairs, but may be able to adduce sufficient facts to indicate that the debtor may be possessed of substantial assets that have been squirreled away and that may be discovered by an insolvency enquiry. If this is the case, advantage to creditors has normally been established."

[48] In support of that proposition, the authors of *Mars* refer to **Dunlop Tyres**¹³ where Leveson J cites the earlier judgment in **Meskin**¹⁴ which holds that:

"In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, there are reasons for thinking that

¹² Bertelsmann *et al*, *Mars The Law of Insolvency in South Africa*, 5th Edition, at 155

¹³ **Dunlop Tyres (Pty) Ltd v Brewitt** 1999 (2) SA 580 (W) at 583 D

¹⁴ **Meskin & Co v Friedman** 1948 (2) SA 555 (W) at 559

as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient."

[49] The learned Judge went on to state:

"Taking that passage as my starting point, it will be seen that in the case of an arm's length transaction a sequestrating creditor does not have to set out in its founding affidavits the detail and intensity of averments required when the nature of the claim is under scrutiny as required by Nicholas J in the *Klemrock* case, although a proper case should always be made out. It will be sufficient if the creditor in an overall view on the papers can show, for example, that there is reasonable ground for coming to the conclusion that upon a proper investigation by way of an equity under s 65 of the Act a trustee may be able to unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors."¹⁵

[50] In his earlier judgment in **Hill House**,¹⁶ Leveson J explained the **Meskin** principal thus:

"To return to the proposition made by Roper J in the *Meskin* case supra, the Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that that will be so. That in turn, in my opinion, leads to the conclusion that the expression 'reason to believe' means 'good reason to believe'. The belief itself must be rational or reasonable and, in my opinion, to come to such a belief, the Court must be furnished with sufficient facts to support it. Cf *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) at 592 - 3; *United Democratic Front and Another v Acting Chief Magistrate, Johannesburg* 1987 (1) SA 413 (W) at 421; *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A). In a broad sense it seems proper to say, on the basis of the cases, that 'advantage to creditors' ought to have some bearing on the question as to whether the granting of the application would secure some useful purpose. I express it thus because, as Roper J has shown in the *Meskin* case, there

¹⁵ At 583 E/F to G

¹⁶ **Hillhouse v Stott; Fereban Investments (Pty) Ltd v Itzkin; Botha v Botha** 1990 (4) SA 580 (W) at 585C - F

need not always be immediate financial benefit. It is sufficient if it be shown that investigation and inquiry under the relevant provisions of the Act might unearth assets, thereby benefiting creditors. But for cases such as the present where the only question is to what extent creditors can benefit from the moneys known to be available (there being no other assets), I think it proper to adopt the test of Seligson AJ in *Epstein v Epstein* 1987 (4) SA 606 (C) at 609:

'The correct test to be applied is whether the facts placed before the Court show that there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some not negligible pecuniary benefit will result to creditors'."

[51] The principle in **Meskin** and followed in **Hillhouse** and **Dunlop Tyres** was approved the Supreme Court of Appeal in **Hawker Aviation**¹⁷ and thereafter by the Constitutional Court in **Stratford**¹⁸ and more recently applied, in **Liberty Group**¹⁹ where the principle was succinctly stated by Ponnann ADP and Meyer JA as follows:

[27] Advantage to creditors may lie in the prospect of finding assets falling into the insolvent estate, which may have been concealed or improperly disposed of. It will be sufficient if the creditor, on an overall view on the papers, can show, for example, that there are reasonable grounds for coming to the conclusion that upon investigation and inquiry a trustee may be able to unearth assets that might then be attached, sold and the proceeds disposed of for distribution amongst creditors. The test to be applied in such a case, as was formulated in *Meskin & Co v Friedman ...*" (footnotes omitted)

[52] The facts of the cases before me leave me with a sense of discomfort. The respondents have not been forthcoming about their assets or liabilities. They

¹⁷ **Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others** 2006 (4) SA 292 (SCA) at [29]

¹⁸ **Stratford and Others v Investec Bank Limited and Others** 2015 (3) SA 1 (CC) at [43]

¹⁹ **Liberty Group Limited v Moosa** 2023 (5) SA 126 (SCA)

deny having disposed of their assets, but a *nulla bona* return of service was rendered by the sheriff. These facts, when coupled with the cession and the striking absence of evidence concerning mortgage bonds over their respective properties, demands, as I see it, an investigation into the respondents affairs in terms of the Act.

[53] It is these factors which convince me that the prospects of a recovery of assets being made or, the existence of hidden assets being uncovered is not remote. Every aspect of the respondents' evidence points towards some or other kind of malfeasance on their part to escape their obligations to the applicant in terms of the Guarantee.

[54] There is then, one, final aspect that I must address.

[55] The answering affidavits delivered by the respondents are replete with conclusions. There are next to no primary facts adduced by them. Then, they annex the lengthy business rescue plan to their answering affidavits without making any reference thereto. There is no apparent reason for having burdened these papers to such an extent. Having then trawled through the business rescue plan and having, eventually, found the document said to be a mortgage bond, it does not support what the respondents contend, *ex facie*, the document itself. This sort of conduct must be strongly discouraged as it is an anathema to the proper conduct of application proceedings.

[56] In the result:

in case number 2024-073198 the following order is made:

1. The rule *nisi* granted on 21 August 2025 is confirmed;
2. The respondent's estate is hereby placed under final sequestration;
3. The costs of this application are to be costs in the administration of the respondent's estate.

in case number 2024-073203 the following order is made:

4. The rule *nisi* granted on 21 August 2025 is confirmed;
5. The respondent's estate is hereby placed under final sequestration;
6. The costs of this application are to be costs in the administration of the respondent's estate.

A W PULLINGER

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 10 November 2025.

DATE OF HEARING: 13 October 2025

DATE OF JUDGMENT: 10 November 2025

APPEARANCES:

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