IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION: JOHANNESBURG

CASE NO: 2025-077960

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED: YES / ~~NO~~

15 June 2026 SIGNATURE
DATE

In the sequestration application:

In re:

INVESTEC BANK LTD Applicant

and

MAREE; DAWID CORNELIUS Respondent
(Born 16 March 1965)
(Identity No. 6[…]).
(Marital status: Married out of community of property to Adele Maree, born 29 May 1969, with identity no. 6[…])

ZATOPAX (PTY) LTD Intervening applicant

JUDGMENT

Summary: Return day of provisional sequestration order – Does a provisional sequestration order lapse if the matter is not heard on its return date but rather on another day in terms of the IMC's Continuous Roll? – A Court's ability to 'stay' a provisional sequestration order in terms of section 12(2) of the Insolvency Act, or otherwise – A Court ability to determine legal questions / disputes in sequestration proceedings – Can an individual providing a credit guarantee in respect of the debts of a juristic person / entity rely on Part D of the NCA? – *Semble*: Possible scope for extension of advantage to creditors consideration – The application of the *lis alibi pendens* doctrine in sequestration proceedings – Litigation is not a game.

AMM, AJ

Introduction

[1] This judgment concerns the 9 March 2026 return day of a provisional sequestration order. Investec Bank Limited, as applicant, is the petitioning creditor. Mr. Maree is the respondent.

[2] The sequestration application is dated 28 May 2025. Theron AJ granted a provisional sequestration order on 1 October 2025. The return day of the provisional sequestration order (i.e. the sequestration application) was set down, enrolled, and called for hearing, before me in the Dedicated Insolvency Motion Court ('IMC'). Investec moves for a final order of sequestration.

[3] While the facts informing the merits of this application are relatively simple and straightforward, there are many parts to the application and the return day proceedings before me.

[4] For the reasons set out in in this judgment, the provisional order for Mr. Maree's estate is confirmed and a final order of the sequestration is granted.

A synopsis of the sequestration application and parallel proceedings

[5] Investec asserts in its founding affidavit that it advanced an amount of R182,087,750.00 to Viturwell (Pty) Ltd ('Viturwell') during December 2020, and that it did so in terms of a written loan agreement concluded on 18 December 2020.

[6] At the same time (i.e. on 18 December 2020), Mr. Maree bound himself as guarantor for Viturwell's indebtedness to Investec. He did so in terms of a written 'Guarantee and Indemnity' ('the Maree Guarantee').

[7] Viturwell was required to repay the loan amount by no later than 1 May 2024. It failed to do so; owing Investec R177,099,578.93. Consequently, Investec claims that both Viturwell and Mr. Maree are indebted to it in the amount of R177,099,578.93.

[8] Despite an Investec demand dated 11 October 2024, Mr. Maree failed to pay the guaranteed indebtedness. Instead, Mr. Maree issued his below-mentioned action against Investec, seeking relief aimed at setting aside his obligations under the Maree Guarantee. He did so on 1 November 2024.

[9] Investec obtained an order on 6 December 2024 winding-up Viturwell.

[10] In addition to its claimed status as a creditor of Mr. Maree, Investec asserts in its founding papers that Mr. Maree has committed acts of insolvency and that Mr. Maree is, in any event, insolvent. Investec further asserts that Mr. Maree's sequestration will be for the benefit of creditors and, moreover, that the Court should exercise its discretion to sequestrate Mr. Maree's estate given Mr. Maree's alleged 'track-record of serial corporate insolvency', and his 'participation in the misappropriation of Viturwell funds'.

[11] Mr. Maree, invoking the *Badenhorst* rule,[1] disputes his liability to Investec. He denies Investec's *locus standi* as a creditor. He claims to do so on *bona fide* and reasonable grounds, anchored in his challenge to the validity of the Maree Guarantee. This challenge is made under the National Credit Act's[2] reckless credit provisions.

[12] Mr. Maree's reliance on the *Badenhorst* rule is imbricated with a plea of *lis alibi pendens.*[3] During November 2024, Mr. Maree instituted action proceedings in this Court under case no. 2024-125997 ('the Maree / Investec action'). In his action, Mr. Maree challenges the validity of the Maree Guarantee. He asks for orders (i) declaring that the Maree Guarantee 'constitutes a reckless credit agreement', and (ii) setting aside his

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1 As pronounced / articulated in the decision in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T), the *Badenhorst* rule emphasises that sequestration and liquidation proceedings are not designed to resolve disputes concerning the existence of a debt. Accordingly, the *Badenhorst* rule's essence is that where a respondent disputes the debt alleged to be owed to the petitioning creditor on *bona fide* and reasonable grounds, a sequestration or liquidation application (as the case may be) ought, as a general rule, to be dismissed.

2 Act, No. 34 of 2005, and its Part D.

3 *Lis alibi pendens* is a Latin legal phrase translated as "a (legal) suit pending elsewhere".

rights and obligations under the Maree Guarantee, alternatively for an order suspending 'the force and effect' of the Maree Guarantee for a period of two years.

[13] Mr. Maree also relies upon other pending parallel proceedings related directly or indirectly to the Viturwell indebtedness, the Maree Guarantee, or both. These proceedings include:

[13.1] Investec's application against Santam under case no. 2024-124964 in this Court, dated 30 October 2024 ('the Investec / Santam application'). Investec's cause of action is premised on a 2020 Santam guarantee issued in favour of Investec for the obligations owed to Investec by Viturwell ('the Santam Guarantee'). Investec seeks a money judgment against Santam in an amount of R177,879,379.00 plus interest at 11.5% per annum *a tempore morae* from 9 October 2004 to date of final payment, and costs. Santam opposes the Investec / Santam application on the basis that the Santam Guarantee is unenforceable.

[13.2] Santam's application proceedings against Mr. Maree (the third respondent therein) and others under case no. 2025-052338 also in this Court, dated 20 June 2025 ('the Santam / Maree application'). Santam proceeds against Mr. Maree in terms of a written deed of surety and indemnity. In his deed of surety and indemnity, Mr. Maree bound himself – together with others – as surety in favour of, and indemnified, Santam for the obligations owed by Viturwell as a consequence of the Santam Guarantee. Santam pursues Mr. Maree on the basis of an Investec demand against it and subsequently the Investec / Santam application. Santam thus seeks, amongst other relief, a money judgment against the defendants, jointly and severally, in an amount of R177,879,379.00 plus interest at 2% above the prime overdraft rate charged by Absa from date of demand / payment to Investec, and attorney and client costs. Santam alleges in its founding affidavit that Mr. Maree has purported to terminate and extricate himself from his deed of surety and indemnity.

[14] Mr. Maree's answering affidavit is accompanied by a counter-application (dated 21 August 2025). Therein, he essentially asks for an order that, if the sequestration application is to be heard on 22 August 2025, that it 'be postponed *sine die* and not again be enrolled without leave of the court', and then not until the finalisation of the (i) Investec / Santam application, (ii) the Santam / Maree application, and/or (iii) the Maree / Investec action.

[15] Mr. Maree's additional grounds of opposition to the sequestration application include *inter-alia* an unenthusiastic challenge to the personal knowledge of the deponent to Investec's founding and replying affidavits, and an alleged absence of an advantage to creditors should his estate be sequestrated.

The Theron AJ provisional sequestration order and the related sequestration proceedings

[16] The provisional sequestration order granted by Theron AJ is accompanied by Theron AJ's pithy judgment. Theron AJ's judgment reveals that the proceedings before him were hydra-headed and included, in addition to the sequestration application itself, the following:

[16.1] Mr. Maree's already mentioned 'counter-application' for postponement (dated 21 August 2025);[4]

[16.2] Mr. Maree's unsuccessful application for Theron AJ's recusal (dated 11 September 2025); and

4 The respondent's notice of counter-application is incorrectly dated 21 August 202<u>1</u>. The respondent's accompanying answering affidavit is correctly dated 21 August 202<u>5</u>.

[16.3] Mr. Maree's obtusely worded, but unsuccessful, application for leave to appeal (dated 23 September 2025) – this application is aimed at Theron AJ's dismissal of the recusal application, albeit Mr. Maree appears not to have prosecuted his leave to appeal application.

[17] Not content to leave matters there, Mr. Maree brought a further application. He did so 17 October 2025. In this (fourth) application, Mr. Maree seeks an order 'staying' the Theron AJ provisional sequestration order 'pending the final determination of the appeal against the order refusing [Mr. Maree's] recusal application'.

[18] Similarly, Mr. Maree does not appear to have prosecuted this particular 'stay' application. I say so because the last discernible CaseLines' event concerning this application is Mr. Maree's mid-December 2025 filing of his replying affidavit. Mr. Maree's October 2025 'stay' application was also not enrolled for hearing, nor was it pursued, before me.[5]

The provisional sequestration order's return day proceedings

[19] The (Monday) 9 March 2026 return day proceedings, like the provisional sequestration proceedings before Theron AJ, were eventful.

[20] In the exercise of my discretion, and in managing both the opposed and unopposed rolls of the Insolvency Motion Court, I had allocated the matter for hearing on Tuesday, 10 March 2026 (the allocation being communicated and subsequently confirmed on 6 March 2026).

[21] Despite the allocation, towards the end of my hearing of those unopposed matters allocated for hearing on 9 March 2026 in the Insolvency Motion Court, Mr. *Malherbe*, appearing for Mr. Maree and Mr. *Braga* appearing for Zatopax (Pty) Ltd ('Zatopax') rose,

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[5] There was however a reference thereto in a belated practice note within the context of the return day provided penned by Mr *Van Rensburg SC* for Mr. Maree.

and announced themselves and placed themselves on record in respect of the application. Mr. *Braga* advised me that Zatopax was a creditor seeking leave to intervene in the sequestration application.

[22] Messrs. *Malherbe* and *Braga* submitted that because I would not be dealing with the sequestration application on the 9 March 2026 return day of the provisional sequestration order (given its 10 March 2026 allocation), the provisional sequestration order would lapse.

[23] While I disallowed any argument on the issue given that there was no appearance for Investec - whose legal team were no doubt expecting that the matter would be called in accordance with its 10 March 2026 allocation - I nevertheless communicated my *prima facie* disagreement with their submission. I also advised them that even if my *prima facie* view was incorrect, the application had now, to all intents and purposes been called, and that it had now been stood down for argument to 10 March 2026, in line with its allocation.

The appearances on Tuesday, 10 March 2026

[24] When the application was (again) called before me in terms of its allocation on 10 March 2026 on the Insolvency Motion Court Roll, Mr. *Sawma SC* and Mr. *Hoffman* appeared for Investec. Mr. *Malherbe* again appeared for Mr. Maree. Mr. *Griesel* now appeared for Zatopax.

[25] Mr. *Griesel* referenced Zatopax's intervention application (dated 6 March 2026), in which Zatopax sought an order for its intervention in the sequestration application and an order that all pleadings filed of record be served upon his client within 10 (ten) days of the intervention order.

[26] Mr. Maree had, in the interim and in terms of a notice of motion dated 9 March 2026, delivered a further (fifth) application in the sequestration proceedings. Like his fourth application, Mr. Maree sought an order for the 'stay' of the provisional order, albeit he now sought a 'stay' pending the final determination of the Investec / Santam application.

[27] Despite Mr. Maree's request for what is essentially an indefinite 'stay' of the provisional order, Mr. *Malherbe*, at the commencement of the hearing and in response to my enquiry, advised that Mr. Maree in fact sought only a one month extension of the return day.

[28] Mr. *Sawma SC* advised me that Investec vigorously opposed Zatopax's intervention application, Mr. Maree's belated stay application, and Mr. Maree's request for a one month extension of the provisional sequestration order. Mr. *Sawma SC*, however, advised that if I was inclined to extend the return day of the provisional sequestration order, Investec would request an opportunity to file further papers.

Did the provisional sequestration order lapse on 9 March 2026?

[29] This judgment's first port of call is the question whether Theron AJ's provisional sequestration order had lapsed. Messrs *Malherbe* and *Griesel*[6] persisted, albeit faintly with the submission that this was the case.

[30] Section 11(1) of the Insolvency Act, No. 24 of 1936 is a convenient starting point for this topic, Section 11(1) expressly requires that if a provisional sequestration order is granted, it must take the form of a rule *nisi*. (There is no similar requirement in the relevant / remaining provisions of the Companies Act, No. 61 of 1973.)

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6 I permitted Mr. *Griesel* an opportunity to be heard on all issues subject to a pending and ultimate determination of his client's intervention application.

[31] The provisional sequestration order granted by Theron AJ accords with section 11(1)'s rule *nisi* requirement, but it importantly goes further. Theron AJ's order is cast in the following terms (italics added):

> 'The Respondent and other party wishes to avoid such an order being made final are called upon to advance reasons, if any, why the Court should not grant a final order of sequestration of the said estate *on the 9th day of March 2026 at 10:00 or so soon after this matter may be referred*.'

[32] I agree with Investec's submissions that the wording of the Theron AJ order is not coincidental but instead recognises that (i) the Insolvency Motion Court sits for the motion court week in question, and (ii) the return day hearing may be heard at any time after 10:00 on 9 March 2026.

[33] I have been referred to a number of authorities dealing with the non-extension, or lapsing, of rule *nisi* orders.[7] I have considered each of these and, so too, a number of others. Except for the decisions in (i) *National Director of Public Prosecutions v Mogotlane and Others*,[8] and (ii) in *Murray NO v Ramphele*,[9] none of these authorities assist or are particularly on point.

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[7] The referenced authorities *inter-alia* include: *South African Municipal Workers Union obo Khalamashe and Others v City of Ekurhuleni Metropolitan Municipality and Another* (J412/2021) [2023] ZALCJHB 120 (3 May 2023); *Victor and Another v Wonderhoek Farms (Pty) Ltd and Others* (5049/2014) [2022] ZAFSHC 153 (10 June 2022; *Ex parte S & U T V Services (Pty) Ltd: In re S & U T V Services (Pty) Ltd (In Provisional Liquidation)* 1990 (4) SA 88 (W); *Fisher v Fisher* 1965 (4) SA 644 (W); *Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC); *Manton v Croucamp NO and Others* 2001 (4) SA 374 (W); *Murray NO v Ramphele* (25067/2020) (2021) ZAGPPHC 615 (27 September 2021); *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA); *Nedbank Limited v Pacinamix (Pty) Ltd and Others* (107019/20234 (2023) ZAGPJHC 1383 27 November 2023; *Nzwalo Investments (Pty) Ltd v Infoguardian (Pty) Ltd* (6950/2020) [2021] ZAGPJHC 95 (23 July 2021); *Rota Investments CC v Full Score Trading 131 CC and Others* 16881/2022 ZAWCHC 97; *Sab Lines (Pty) Ltd v Cape T ex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (C); *South African Legal Practice Council v Motholo and Another* 37828-2022 ZAGPPHC 167; *V.M. v Z.M. and Another* ZAECGHC 117; *VLG Accounting CC and another v Koloni Consulting Enterprise CC and others* [2021] JOL 51789 (ECLD, East London); *Williams v Landmark Properties SA and Another* 1998 (2) SA 582 (W).

[8] *National Director of Public Prosecutions v Mogotlane and Others* 2025 JDR 3884 (GP).

[9] (25067/2020) [2021] ZAGPPHC 615 (27 September 2021) which places reliance, in turn, on the decisions in *Davenport John William v Platfields Limited* 2017 JDR 0334 (GJ). *The Body Corporate of Santa Fe v Bassonia Four 07 CC* 2019 JDR 0516 [GJ].

[34] The decision in *National Director of Public Prosecutions v Mogotlane*[10] pertains to a provisional restraint order obtained in terms of section 26 of the Prevention of Organised Crime Act, 121 of 1998 with an extended return day of Monday, 28 July 2025 but stood down for argument on Thursday, 31 July 2025. The Court held, on a question of what it labelled as 'procedure', that because the motion court roll was a continuous roll, and because the matter was not postponed but remained enrolled, there was no need to extend the provisional restraint order as it remained operative.

[35] In *Murray NO v Ramphele* it was similarly argued that the provisional sequestration order had lapsed because, while the rule *nisi* order was returnable on 2 August 2021, the matter was only called for argument at 10:00 on 4 August 2021.

[36] The following dicta in *Murray NO v Ramphele*, which resonates equally here and is also approved of in *Erasmus' Superior Court Practice's* commentary on uniform rule 6(8), and which neatly disposed of the 'lapsing' argument, reads (footnotes omitted):

> '[7] In accordance with the practice manual applicable to this division, all matters are enrolled for the first day of the week in which the matter is to be heard, the senior Judge allocating matters to Judges sitting in the Opposed Court at least 10 days in advance, and each particular Judge then preparing his/her own roll for the week in which the work is to be distributed. The opposed motion roll is a continuous roll that endures from 10:00 am on the Monday of the particular week until 16:00 pm on the Friday of that week.
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> …
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> [8] As is often the case with opposed motions, a matter may commence on one day and only conclude on the next day and, when that happens, opposed motion Courts do not postpone the matter to the following day but simply adjourn until the next day. So too, matters that are enrolled for the Monday of any particular week, but are allocated to any other day of that week, do not get postponed to that day, but simply stand down until the allocated date and time in that week. So too, in casu, the matter was on my roll and before me on the 2nd of August 2021 but, in accordance with the published roll, then stood down until Wednesday at

[10] *Supra* para 4.

10:00 am. In those circumstances I neither discharged the rule on Monday at 10:00 am, nor did the period of the validity of the rule expire. That is because the matter was not only properly enrolled, it was before me on the 2nd of August 2021 but then stood down for argument.

…

[13] … the provisional order was before me from the start of my roll on the 2nd of August 2021 and remained so until argument was disposed of on Wednesday the 4th of August 2021, all of this as part of 'one continuous judicial action.

…

[17] … as at the time of hearing argument on the matter, being a mere two days later as part of a continuous opposed motion roll, the matter in my view remained res integra. To the extent that it is necessary to pertinently revive the rule in those circumstances in order to render this judgement effective, I exercise that discretion. I take into account that there was no fault on the part of the applicant who had been directed to only appear at 10:00 am on Wednesday the 4th of August 2021. …'

[37] The aforesaid dicta and reasoning applies equally in these proceedings, except to say that what was being dealt with there was the (normal) opposed motion court. Consequently, I therefore disagree with Messrs *Malherbe's* and *Griesel's* submissions. The provisional sequestration order has not lapsed.

[38] I nevertheless wish to add the following additional considerations that separately confirm the non-lapsing of the provisional sequestration order:

[38.1] While the decision in *Murray NO v Ramphele* pre-dates the establishing of this Court, Rules 11 and 12 of Directives for the Insolvency Motion Court nevertheless contemplates the continuous nature of the Insolvency Motion Court roll by directing that:

'11. All matters shall, for formal purposes, be set down on the Monday of the [IMC] week.

12. The presiding judge shall … notify the parties of the date and time the matters will be heard [during that IMC week] … .'

[38.2] Additionally, it is not disputed that (i) this application (i.e. the return day hearing) was duly set down and enrolled for hearing on 9 March 2026 in the Insolvency Motion Court (ii) its set down and enrolment took place in accordance with the 9 March 2026 rule *nisi* return date in the Theron AJ order, (iii) that the application and its return day hearing was allocated by the Motion Court Roll Senior Judge to me, sitting in one of the two Insolvency Motion Courts that week, (iv) I had, in turn, allocated the matter on 6 March 2026for hearing on my opposed Insolvency Motion Courts roll to 10 March 2026, and (v) the hearing and argument in the application commenced, as allocated, on 10 March 2026.

[38.3] At no time subsequent to the allocation of this matter for hearing on 10 March 2026 was the rule *nisi* order not the subject matter of judicial supervision and control.

[38.4] The provisional sequestration order was, in any event, called late on Monday, 9 March 2026 and stood down to its 10 March 2026 allocated date.[11]

[38.5] Mr. Maree suffers no prejudice if the provisional sequestration order is to be revived (which accompanying discretion I exercise in favour of Investec, but only as a matter of abundant caution and only if necessary).

Zatopax's last minute intervention application

[39] I now deal with the Zatopax's intervention application. Mr. *Griesel* filed heads of argument in support of the application. I have considered them. They also traverse the question of whether the provisional sequestration order has lapsed.

[40] Zatopax asserts in its founding affidavit that it wishes to intervene in the sequestration application with a view to apply for the rescission of the provisional sequestration order,

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11 See *Ferreira v Magistrate, Mr Koopman NO.* 2020 JDR 1909 (ECG) para 39.

and, in the event of the order not been rescinded, to oppose the application for the final sequestration of Mr. Maree's estate. Mr. *Griesel* also asked for an extension of the return day so that Zatopax can consider the various documents filed of record so as to allow it to assess, in essence, its position.

[41] Zatopax claims that it is a creditor of Mr. Maree. It claims to be owed some R3.8 million. Other than bland conclusionary statements by its deponent, Mr. Muller, Zatopax ultimately relies on a '*letter*' by its accountants as evidence of this debt. A copy of this letter is annexed to Zatopax's founding affidavit.

[42] It is well-established that the views of creditors should be considered in sequestration and liquidation proceedings,[12] albeit a Court is not bound by their views.[13] It is equally well-established that a Court, at common law, has a discretion to permit a creditor to intervene in these types of proceedings. This is understandably so because every creditor has, at least a *prima facie* interest, in the fate of the application. That said, it is not our law that a creditor, merely as of right and without more, is automatically entitled to intervene.

[43] Zatopax's intervention application falls at its first hurdle, namely Zatopax's claimed status as a creditor of Mr. Maree. On this score, there are certain basic, fundamental and imbricated principles pertaining to application proceedings. These, among many others, include: (i) the affidavits filed in application proceedings assume the function of both the pleadings and the evidence in action proceedings;[14] (ii) the deponent to an affidavit must have the requisite personal knowledge of the facts deposed to in the affidavit (such that an affidavit, strictly speaking, must only contain matters of fact that

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12 *Levay and Another v Van den Heever NO and Others, In re: Van den Heever NO and Others v Waterfall Trout Properties (Pty) Ltd* 2018 (4) SA 473 (GJ) para 28.

13 *SAA Distributors (Pty)Ltd v Sport en Spel (Edms) Bpk* 1973 (3) SA 731 (C) at 373 and *Porterstraat 69 Eiendomme v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C).

14 See *inter-alia Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (W) at 323 H–I, *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D) 469, *Hano Trading v J R 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA).

fall within the personal knowledge of the deponent – where this is not the case, a confirmatory affidavit by the relevant individual holding such personal knowledge is to be provided);[15] and (iii) the rules of evidence apply, namely deponents can only depose to admissible evidence.[16]

[44] Zatopax does not provide any particularity regarding the terms of this alleged indebtedness, nor its calculation, nor any admissible documentary evidence of its existence. There is also no contemptuous documentary proof of any amounts being advanced to, or paid on behalf of, Mr. Maree.

[45] Instead, the only 'evidence' that Zatopax relies on in support of its claim that it is a creditor of Mr. Maree is a letter annexed to its founding affidavit. It is claimed to be a letter furnished by Zatopax's accountants. The letter is unsatisfactory in several respects. It also has no evidential value. The letter has no letterhead. It does not name nor identify Zatopax's accountants. Its assumed author and supposed signatory is Charney Smit. However, Ms. Smit's position, relationship or authority with Zatopax's accountants is undisclosed. The letter also does not appear to be the product of Ms. Smit's personal knowledge, given the letter's repeated use of pronoun plurals such as 'we", 'our', and "us". In any event, Ms. Smit has not provided a confirmatory affidavit. Despite the letter's obvious third-person hearsay character, Zatopax does not attempt to wrestle with the requirements of the Law of Evidence Amendment Act, No. 45 of 1988 in order to overcome its obvious inadmissibility.

[46] Zatopax's reliance on Ms. Smit's letter renders the following statements *in Sheffryk v MEC for Police, Roads and Transport: Free State Province*[17]especially apt:

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15 Van Blerk, *Precedents for Applications in Civil Proceedings*, Juta, 2018, page 15, para 3.24.

16 See *Pountas' Trustee v Lahanas* 1924 WLD 67 70; *Dennis v Garment Workers' Union Cape Peninsula* 1955 (3) SA 232 (C), and *Dennis v Garment Workers' Union, Cape Peninsula* 1955 (3) SA 232 (C).

17 2022 JDR 1629 (FB) para 1.

> ‘‘Two wrongs do not make a right.’ A document is a document and hearsay evidence is hearsay evidence; opinion evidence is opinion evidence. The Law of Evidence on the admissibility of the evidence prevails. It is said that a document only proves what is written in it, but not the truth of what is written. Before the contents of a document may be presented as the truth, the admissibility requirement must be fulfilled. The contents must not be irrelevant, the document must not contain an inadmissible confession, etc. Because a document usually reflects somebody’s knowledge and thoughts, particular care must be taken to ensure that it does not infringe the hearsay rule and perhaps the opinion rule.’

[47] Separately but equally, dispositive of the question of Zatopax’s status as a creditor of Mr. Maree is Mr. Maree’s own position on this score. Mr. Maree does not regard Zatopax as a creditor. Mr. Maree does not mention any Zatopax debts when listing his creditors and liabilities in his answering affidavit. Mr. Maree subsequently alleges that Investec is his only creditor in his 8 March 2026 ‘opposing’ affidavit. The probabilities are that, if the Zatopax debt (which is apparently significant) was genuine, Mr. Maree would have mentioned it; at least in support of his claim that the sequestration of his estate will not be to the advantage of his creditors. Additionally, Zatopax hoists itself up with its own petard.[18] Zatopax’s founding affidavit confirms and relies on the liabilities listed by Mr. Maree in his answering affidavit, despite Mr. Maree not mentioning a Zatopax debt. Zatopax does not qualify this confirmation by stating that the Zatopax debt must be added to this list.

[48] As Zatopax fails to establish, even on a *prima facie* basis, its *locus standi* as a creditor of Mr. Maree’ estate, it has no direct or substantial interest, or any interest for that matter, in the fate of the sequestration of Mr. Maree’s estate. Otherwise stated, it has no legal cognisable right which would be adversely affected by the grant of a sequestration

[18] "*Hoist with ones’ own petard*" is a phrase in William Shakespeare play Hamlet Act 3, Scene 4. Literally, the phrase means a bomb-maker is blown off the ground (hoist – to lift and remove) by his own bomb (petard – a small bomb used to blow in doors and breach walls). The phrase proverbially implies an ironic reversal in which one is taken down by one's own scheme.

order.[19] Consequently, Zatopax is not entitled to any of the relief it seeks in its notice of motion in its intervention application.

[49] Over and above its lack of *locus standi*, Zatopax's intervention application is burdened with several other difficulties. These, without being exhaustive, include (i) Zatopax's deponent's failure to set a basis for his personal knowledge of Mr. Maree's indebtedness and liability to Investec, (ii) so too his lack of personal knowledge as to the merits of the Maree / Investec action; (iii) the absence of any suitable particularity relevant to the proposed rescission application, or its basis; (iv) Zatopax's unparticularised and circular claim that 'an order sequestrating the estate of [Mr. Maree] will nullify Zatopax's claim' against Mr. Maree; (v) Zatopax fails to add anything new and of admissible value to the sequestration application's fate and determination, and (vi) the absence of any explanation for the inordinate delay in Zatopax's bringing of its application; despite it, by all accounts, having had knowledge for some time of the paginated papers, the provisional sequestration order and its return day.

[50] When asked about the absence of an explanation for the delay, Mr. *Griesel* submitted that the order of Theron AJ calls upon interested parties to advance reasons why a final sequestration order should not be granted 'on the return day'; and this is what his client seeks to do.

[51] While there is some initial merit in Mr. *Griesel's* submission, it become porous when measured against (i) the hearing and argument intended to take place on the provisional sequestration order's return day, (ii) the fact that the same attorneys represented Mr. Maree and Zatopax's deponent, Mr. Muller, until shortly before the bringing of the intervention application (iii) Mr. Muller is personally the third respondent in the Santam / Maree application, (iv) Zatopax's apparent long-standing knowledge of the fact of the provisional sequestration order and its return day, (v) the panoply of flaws in the

[19] *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC) para 10 to 12.

intervention application itself, and (vi) the last minute 'postponement' relief sought in Zatopax's notice of motion.

[52] In summary, any neutral reader of Zatopax's intervention application is left with the odious sense that the true purpose of the intervention application is twofold. First, delay and, second, to shore up Mr. Maree's opposition to the sequestration application. Zatopax's intervention application is therefore pursued with an ulterior purpose and is not brought in good faith.[20] I agree with Mr. *Sawma SC's* description of the intervention application as '*gamesmanship*'. Litigation is not a game; an issue I return to at the end of this judgment.

[53] In the result, Zatopax must fail in its intervention application. There is therefore no need to consider Zatopax's request for an extension of the return day. There is also no reason why costs should not follow the result, particularly because no true basis existed for the intervention, and it was unreasonable for Zatopax to seek to do so.[21]

Mr. Maree's last minute 'stay' application

[54] Like Zatopax's last minute intervention application, Mr. Maree also made application at the last minute (on 9 March 2026 at 2:24 pm) for an order 'staying' the provisional sequestration order pending the final determination of the proceedings in this court under case number 2024-124964. Mr. Maree's notice of motion seeking this relief is accompanied by an 'opposing affidavit' deposed to by Mr. Maree, similarly on 9 March 2026.

[55] Ignoring for a moment the question of the competency of the relief that Mr. Maree seeks under section 12(2) of the Insolvency Act, Mr. Maree's application and his opposing affidavit raised various (other) immediate concerns. These include:

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20 See *Levay supra* and *cf* R v Meer 1957 (3) SA at 618F/G - 618B/C.

21 *FirstRand Bank Ltd Wallace Pienaar Property CC (Absa Bank intervening)* 2002 (2) SA 758 (W).

[55.1] the disconnect between (a) the relief sought in Mr. Maree's notice of motion, (b) the 'opposing affidavit' label attached to the accompanying affidavit, and (c) the actual content of the opposing affidavit, which affidavit moves, in material and perceptible respects, beyond motivating the 'stay' relief sought in its accompanying notice of motion;

[55.2] the opposing affidavit's needless inclusion and regurgitation of lengthy legal argument;

[55.3] the not fully accurate claim that the 'factual and legal landscape has changed materially' since Theron AJ's granting of a provisional sequestration order – the only change of any moment is that Santam has now proceeded against Mr. Maree, albeit this was contemplated in the proceedings before Theron AJ; and

[55.4] Mr. Maree fails to explain the reasons for the last minute filing of his application and opposing affidavit.

[56] Accordingly, at the outset of the hearing, and in response to my request as to what relief Mr. Maree actually or specifically sought in respect of his application, Mr. Griesel stated, as mentioned above, that his client requested a 'one-month extension' of the provisional sequestration order.

[57] Before dealing with the competency of the relief sought by Mr. Maree, I first traverse the litigation traversed in the opposing affidavit, and the store Mr. Maree wishes to place thereon. Investec, as applicant in the referenced proceedings under case number 2024-124964, pursues judgment against Santam under a R185 million performance guarantee issued by Santam in favour of Investec for the debts owed by Viturwell to Investec. Mr. Maree's opposing affidavit also references suretyship and indemnity proceedings in amount of some R178 million brought by Santam against Mr. Maree and

others under case number 2025-052338. Mr. Maree also raises the fact of his existing pending action against Investec under case no. 2024-125997.

[58] In summary, Mr. Maree contends in his opposing affidavit that, because of this pending litigation, the final order for the sequestration of his estate should be held over 'to prevent a grave injustice' to him. This alleged 'justice' would result inter-alia because Mr. Maree asserts that (i) the Santam guarantee furnished in favour of Investec constitutes adequate security for the amount claimed by Investec from Mr. Maree, (ii) Santam is pursuing Mr. Maree in respect of his suretyship obligations before Santam has 'paid Investec a single rand [sic]', and (iii) until the Investec / Santam litigation is ' … resolved, no court can know whether, Santam, bears primary liability and pays Investec, in which event Investec's claim against [Mr. Maree] is dramatically reduced and the entire foundation of the sequestration shifts.'

[59] Moreover, Mr. Maree asserts that because none of this litigation has been resolved, he should, essentially, be afforded an indefinite stay of the provisional sequestration order in terms of section 12(2) of the Insolvency Act. But herein lies Mr. Maree's difficulty.

[60] On the question of the competency of the relief sought, Mr. Maree faces at least three hurdles and challenges.

[61] The first challenge is in the formulation and wording of the relief sought by the applicant in paragraph 1 of his notice of motion. Paragraph 1 asks for an order in the following terms:

> 'That the provisional sequestration order granted by Acting Justice Theron on 1 October 2025 ('the Provisional Order') be and is hereby stayed pending the final determination of case 2024-124964 in the Gauteng Local Division, Johannesburg.'

[62] Mr. Maree states in his opposing affidavit, as indicated, that the basis for this stay relief is section 12(2) of the Insolvency Act. It is appropriate at this juncture to pause to restate the terms of sections 12(1) and 12(2), which read (my italics for emphasis):

> '12(1) If at the hearing pursuant to the aforesaid rule *nisi* the Court is satisfied that :
>
> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in sub-section (1) of section nine; and
>
> (b) the debtor. has committed an act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
>
> it may sequestrate the estate of the debtor.
>
> (2) *If at such hearing the Court is not so satisfied*, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and *postpone the hearing* for any reasonable period *but not sine die*.'

[63] A sequestration application is indubitably a 'status' matter. This is so because a sequestration order (be it provisional or final) fundamentally changes a respondent's legal capacity and standing. A sequestration order alters and impinges not only upon the respondent's estate but also his or her capacity to contract, trade, deal with assets, manage their own affairs, litigate, engage with creditors / debtors, hold certain professional or public offices, etc.[22]

[64] It is thus understandable why section 12(2) contemplates only a reasonable postponement of the rule *nisi* return day hearing of the provisional sequestration order, not a 'staying' of the provisional sequestration order itself.

[65] For the same reasons, I do not believe that that any court can grant an order staying a provisional sequestration order – be it in terms of section 12(2) or otherwise. This is

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22 See *inter-alia Botes and Others v Tariomix (Pty) Ltd t/a Forever Diamonds and Gold and Others* 2024 (6) SA 203 (NWM) paras 48 to 52 and *Fischer v Wessel* & *Co (Pty) Ltd* 1943 TPD 71.

because the effect of such an order would be tantamount to staying the operation of the provisional sequestration order.

[66] While the (South African) *Dictionary of Legal Words and Phrases*[23] does not include a definition for 'stay', *Black's Law Dictionary*[24] defines '*stay*' in the following terms:

> 'stay, *n.* (16c) 1. The postponement or halting of a proceeding, judgment, or the like. 2. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding. - Also termed *stay of execution; suspension of judgment.* - stay, *vb.* - stayable, *adj.*'

[67] This definition accords with my understanding of what is intended by an order staying a proceeding, or the operation of an order.[25] What Mr. Maree asks for is an indefinite stay of the provisional sequestration order. What Mr. Maree does not ask for is an extension of the rule *nisi*.

[68] For reasons traversed elsewhere in this judgment, sequestration proceedings are not rank and file civil proceedings. As such, I am of the view that considerations of the power of a Court to 'stay' sequestration proceedings under the rubric of section 173 of the Constitution do not arise.[26]

[69] Even if I am wrong in the aforesaid regard, the nature and circumstances of this case, and the interests of justice, do not favour the grant of an order 'staying' the provisional sequestration order. This is because such an order would place Mr. Maree, his status, and his estate in an abhorrent sequestration twilight-zone. Moreover, such an order would be pernicious for Mr. Maree's creditors. Mr. Maree, on the face of it, cannot pay his debts. His creditors, because of the extant *concursus creditorum*, are however

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23 Claassen and Claassen, Lexis Nexis, 2nd Edition.

24 *Black's Law Dictionary* (Rev Ed) by Bryan A. Garner, Thomson Reuters Legal, 2019, 11th Edition, page 1709.

25 *See also J.P.R.D v L.S.D* (20916/2018) [2023] ZAWCHC 296 (23 November 2023).

26 *Mokone v Tassos Properties* 2017 (5) SA 456 (CC) paras 67-8.

barred indefinitely from exercising their rights against Mr. Maree. All the while interest will continue to accumulate on debts that Mr. Maree already cannot pay.

[70] It, moreover, cannot be that an order of Court could competently result in Mr. Maree's estate not being subject to the operation and consequences of a provisional sequestration order, notwithstanding the fact and continued existence of such order. I find support for this impossibility in *inter-alia* sections 20(1)(a) and 150(3) of the Insolvency Act.

[71] Section 20(1)(a) provides that a sequestrated estate vests in the Master and thereafter the appointed trustee.[27] Section 150(3) provides that the lodging of an appeal against a final sequestration order does not suspend the operation of the provisions of the Insolvency Act (i.e. the sequestration order continues to operate notwithstanding pending appeal proceedings, provided that no property belonging to the sequestrated estate can be realised without the written consent of the insolvent). *Visser v Coetzer; GTR Investments and Others v Coetzer*,[28] where it was held that the insolvent remained immediately divested of his assets despite the noting of an appeal, confirms this *status quo*. I also mention that litigating parties, even by agreement amongst themselves, cannot extend the return day of a provisional sequestration order without out a Court's imprimatur.[29]

[72] The second challenge is a jurisdictional hurdle arising within section 12(2) of the Insolvency Act itself. The reference in section 12(2) to the Court not being '*so satisfied*' is tied to that required in terms of sections 12(1)(a) to (c). It is this judicial dissatisfaction which serves as a jurisdictional requirement permitting a Court to act in terms of section 12(2). Section 12(2) only permits a non-*sine die* postponement for purposes of the furnishing of 'further proof of the matter set forth in the petition' and, in this sense, being

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27 The vesting takes place automatically and operates as a transfer of *dominium* to the trustees.

28 1982 (4) SA 805 (W) 809D-H.

29 *Maudsley v Dunton* 1905 TS 557.

further proof in respect of section 12(1)'s requirements as canvassed in the application.[30]

[73] The third challenge for Mr. Maree also resides within section 12(2). The sub-section expressly precludes a court from granting an order postponing a provisional sequestration order *sine die*.[31] This statutory bar would also include, by necessary inference, any *sine die* staying of the provisional sequestration order (i.e. postponing or staying to an indeterminate date pending the final determination of other substantial proceedings).

[74] Entrenching the aforesaid, while section 11(1) of the Insolvency Act requires a provisional sequestration order to be accompanied by a rule *nisi*, section 12(2) of the Insolvency Act expressly precludes a *sine die* postponement of a provisional sequestration order.

[75] No doubt appreciating the competency difficulties faced by Mr. Maree *vis-à-vis* the section 12(2) relief he seeks, Mr. *Malherbe's* on-the-hoof altering of the relief sought to a month long extension of the rule *nisi* does not assist Mr. Maree. This is because there is no such formal application before me, and also nothing that suggests that any of the pending litigation will be concluded within a month.

[76] In fact, a reading of Mr. Maree's opposing affidavit indubitably points in the opposite direction; a position buttressed by the following considerations: (i) Santam has raised 'substantive defences' (Mr. Maree's words) in the Investec / Santam proceedings - Santam contends, for example, that the Santam Guarantee is void, and (ii) Mr. Maree, in turn, has sought to withdraw from and disputes his suretyship obligations and liability

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30 See *Enter-Centre Enterprises (Pty) Ltd v Bongneri* 1972 (1) SA 117 (C) and the other cases collected in Bertelsmann et al, *Mars, The Law of Insolvency in South Africa,* Juta & Co., 2008, 9th Edition, 135, footnote 319 and LexisNexis, *Insolvency Law*, Looseleaf Binder, Issue 63, 2-59.

31 *Mostert v Jagger & Co (Pty) Ltd* 1938 CPD 518 at 523.

to Santam within the context of the Santam / Maree proceedings. As Theron AJ found, Mr. Maree cannot simultaneously contend that he has a contingent liability to Santam, and at the same time dispute this liability. Nevertheless, given the vagaries of litigation, the nature of the disputes and quantum in issue in the Investec / Santam proceedings and Santam / Maree proceedings, the prospect of subsequent lengthy appeal proceedings should not be ignored. Simply stated, experience dictates that there is no reasonable prospect that any of the aforesaid litigation will be finally determined in the reasonably foreseeable future, let alone in the next couple of years.

[77] Moreover, a sequestration application, like a liquidation application, strikes at a respondent's existing inability to pay his or her current, day-to-day demands and debts,[32] In *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*, Caney J held (while dealing with this question in a liquidation application but nevertheless equally applicable to a sequestration proceedings - my italics):

> '… the proper approach in deciding the question whether a company should be wound up … appears to me. to be that, if it is established that a company is unable to pay its debts, in a sense of being unable to meet *current* demands upon it, its day-to-day liabilities in the ordinary course of business, it is in a state of commercial insolvency.'

[78] For its part, the Supreme Court of Appeal similarly held in *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* (again my italics):[33]

> '[31] The argument about timing misconceived the nature of commercial insolvency. It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company 'is able to meet its current liabilities, including contingent and prospective liabilities as they come due' …
>
> Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine

32 *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) 597.

33 2020 (2) SA 93 (SCA) para 31.

> whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading.'

[79] There is no substantial, if any, difference between a company's inability to pay its debts (as contemplated under the Companies Act, 1973) and a respondent's insolvency (as contemplated under sections 10(b) and 12(1)(b) of the Insolvency Act). They both essentially turn on an inability to pay debts. As Innes CJ held in *De Waard v Andrew and Thienaus Ltd*: [34]

> '… I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities'. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.'

[80] As such, consideration of the respondent's insolvency requires a contemporaneous judicial evaluation of Mr. Maree's ability to pay his present or current debts and so too those arising in the immediate future. This contemporaneous judicial evaluation precludes crystal-ball speculation that, at some unforeseen date in the future, Mr. Maree's financial position may possibly change.

[81] As matters presently stand, (i) Viturwell's undisputed and substantial indebtedness to Investec remains undischarged; be it by Viturwell, Santam, Mr. Maree, or anyone else, (ii) Mr. Maree confirms in his action against Investec that he will not be able to satisfy the debt as per the terms of the Maree Guarantee, and (iii) Mr. Maree accepts that he is insolvent; so much so that he claims there will be no advantage to creditors if his estate were to be sequestrated.

[82] In any event, I am unpersuaded that a favourable outcome for Mr. Maree in the Investec / Santam litigation will move Mr. Maree from an insolvent to a solvent position, let alone

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[34] 1907 TS - TH 727 at 733.

eliminate Investec's status as Mr. Maree's creditor of having regard to the differing applicable interest rate considerations.

[83] All things considered, in the exercise of my judicial discretion and even if I am wrong in all of the aforesaid regards, it is not in the interest of justice, nor that of Mr. Maree's *concursus creditorum*, to accede to Mr. Maree's request for relief under section 12(2) of the Insolvency Act or otherwise, nor for an extension of the provisional sequestration order. Investec has a right to a fair and expeditious determination of its application – a right bound up in section 34 of the Constitution.

[84] As an add-on, whilst not dealing with the stay application specifically, Mr. Maree's opposing affidavit claims that the '*investigations*' referenced in the judgment of Theron AJ can take place within the bailiwick of the Viturwell liquidation wherein there is a pending enquiry sanctioned and convened under the auspices of section 417 of the Companies Act, No. 61 of 1973. Accordingly, Mr. Maree claims that there is no need for Mr. Maree's estate to be sequestrated to proceed with these investigations.

[85] Mr. Maree however misconstrues the purpose of the investigations referenced by Theron AJ and promoted by Investec within the context of this sequestration application. Investec motivates the need for such investigations under the rubric of section 12(1)(c)of the Insolvency Act (i.e. the advantage to creditors consideration).

[86] The purpose and context of a section 417 enquiry is fundamentally different to that of an enquiry pursued within the ambit of section 12(1)(c)of the Insolvency Act. A section 417 enquiry allows liquidators and creditors to summon directors, accountants, and officers to testify under oath to *inter-alia* reconstruct the financial history of the company in liquidation, to uncover any hidden assets of such company, to identify corporate misconduct etc. For its part, an investigation foreshadowed in terms of section 12(1)(c) is raised within the context of the consideration that the machinery of the Insolvency Act may unearth or recover assets which will yield a pecuniary benefit for creditors. In any

event, Mr. Maree by all accounts refuses to participate in the Viturwell section 417 enquiry.

[87] Additionally, Mr. Maree's opposing affidavit asserts that Investec has an 'improper motive' in the sequestration application, namely the 'destruction' or 'elimination' (Mr. Maree's words) of Mr. Maree's action against Investec. For the reasons set out elsewhere in this judgment, there is nothing that precludes me from determining the legal questions / disputes that stand at the heart of Maree / Investec action. Accordingly, there can be no 'improper motive'.

[88] Accompanying the claimed 'improper motive' is a disquieting and speculative claim that a trustee would (i) act only in the interests of Investec, and (ii) not challenge Investec's claim again Mr. Maree. While it is possibly an open question whether trustees and liquidators are officers of court,[35] it is beyond doubt that they are obliged to act independently, honestly, transparently, reasonably, and fairly.[36] The insinuation is not based in fact, nor supported by any no evidence. This claim is similarly rejected.

[89] In the result, there is no merit in Mr. Maree's stay application, and it is dismissed.

The 'further affidavit' status, if any, of Mr. Maree's opposing affidavit

[90] Mr. Maree did not deliver a supplementary answering affidavit subsequent to the granting of the provisional sequestration order.

[91] It was however suggested in the argument before me that Mr. Maree's opposing affidavit is also to be regarded or treated as a supplementary or further affidavit. The

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35 Joubert & J Calitz, *To be or not to be? The role of private enquiries in the South African insolvency law*, Potchefstroom Electronic Law Journal, Vol. 17, No. 3, Potchefstroom Sep. 2014. For the position in the United Kingdom see *Re Oasis Merchandising Ltd* [1998] Ch 170.

36 See for example *Standard Bank of South Africa v The Master of the High Court and Others* 2010 (4) SA 405 (SCA) para 1, *Hudson and Others NNO v Wilkins NO and Others* 2003 (6) SA 234 (T) para 13 and *Motala v Master, North Gauteng High Court* 2019 (6) SA 68 (SCA) paras 83 and 84.

document is also uploaded onto CaseLines under the nomenclature of a 'further affidavit'. While this may have been loose language or loose labelling, if Mr. Maree intends to introduce the opposing affidavit as a self-standing supplementary or further affidavit, he requires the Court's permission to do so.[37]

[92] I am mindful that (i) a sequestration application impacts on a respondent's status, and (ii) this consequence may warrant a less rigid approach when it comes to the filing of further affidavits.[38] That said, Mr. Maree does not seek such relief before me (formally or form the Bar) and, even if he did, I am not satisfied, in the exercise of my direction, that a proper case exists for permitting the filing of his opposing affidavit as a further affidavit. For example, there is no explanation for its late filing.[39] Mr. Maree's opposing affidavit also suffers, in various aspects, from the same ulterior motivates afflictions that contaminate Zatopax's intervention application. As such, no further regard is to be had to Mr. Maree's opposing affidavit.

Mr. Maree's central ground of opposition to the sequestration application

[93] Mr. Maree's opposition to the sequestration application is set out in his answering affidavit dated 21 August 2025. (I have already dealt with his accompanying counter-application for a postponement of the 22 August 2025 hearing.)

[94] There is a large amount of endeavour and ink spent in Mr. Maree's answering affidavit explaining, and complaining about, the procedure then adopted by Theron AJ. These complaints include (i) Mr. Maree's legal team and him not being 'afforded a suitable

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37 See uniform rule 6(5)(e) and *Sealed Africa (Pty) Ltd v Kelly and Another* 2006 (3) SA 65 (W) para 4.

38 See *Body Corporate of Ceres v Ntukwana* (2023-070163) [2026] ZAGPPHC 499 (5 May 2026) paras 5 to 7.

39 See *Bangtoo Bros and Others v National Transport Commission and Others* 1973 (4) SA 667 (N), as quoted in *Body Corporate of Ceres v Ntukwana supra*, which held that a litigant who seeks to serve an additional affidavit is under a duty to provide an explanation that negates *mala fides* or culpable remissness as the cause of the facts and/or information not being put before the court at an earlier stage.

opportunity to fully deal with all the relevant matters that a full hearing on the opposed role', and (ii) his legal representatives have not been afforded 'a full opportunity to prepare heads of argument to fully address' the matter.[40]

[95] Despite his complaints, Mr. Maree's answering affidavit, annexures and counter-application run to some 436 pages. Moreover, since Theron AJ's granting of the provisional sequestration order on 1 October 2025, Mr. Maree has had more than ample opportunity to remedy his previously claimed lack of opportunities. He has not done so.

[96] Be that as it may, paragraph 10 of Mr. Maree's answering affidavit articulates the central focus or high watermark of Mr. Maree's opposition to the sequestration application. It does so in the following terms:

> '…, I oppose the application on the basis that the Applicant is not a lawful creditor and does not have the requisite *locus standi in iudicio* to bring the application concerned. The grounds on which I dispute the existence of the debt on which the Applicant relies are that the Credit Guarantee is not a lawful and enforceable contract and that all or part of my rights and obligations under that agreement should be set aside.'

[97] In an endeavour to bolster and expand the ambit of his challenge to the applicant's *locus standi*, Mr. Maree references his pending action against Investec in support of a *lis alibi pendens* defence. Mr. Maree asserts in paragraph 13 of his answering affidavit:

> 'I am further advised that the dispute concerned does not serve before this honourable Court and that the honourable Court cannot assume jurisdiction in regard thereto. In this regard, I also rely on the principle of *lis alibi pendens*. Full legal argument in this regard will be addressed to the honourable Court at the hearing of the matter.'

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[40] I also mention that the focus of heads of argument for Mr. Maree traverse the background to the application, the Investec / Santam application, and authorities relevant to a postponement.

[98] In summary, Mr. Maree argues that the Maree Guarantee is a self-contained contract which creates a principal obligation by Investec. On this platform, he argues that because the Maree Guarantee is not an accessory obligation, the exclusion contained in section 4(2)(c) of the NCA[41] does not apply to the Maree Guarantee, but that Part D of the NCA does apply (i.e. dealing with 'Over-indebtedness and reckless credit'). Mr. Maree then states that his opposition resides within the NCA's section 81 ('Prevention of reckless credit'), and on Investec's alleged non-compliance with the relevant statutory and regulation requirements. Mr. Maree concludes this opposition on the basis that the Maree Guarantee is consequently unlawful and invalid, with the accompanying extinction of his alleged indebtedness to Investec.

[99] Investec denies that Mr. Maree has any claim to asylum under section 81. Investec argues that the NCA does not apply to the Maree Guarantee. This, in turn, is because: (i) Viturwell is a 'juristic person' as contemplated under the NCA, (ii) the Viturwell loan agreement is a 'large agreement' as contemplated under the NCA, (iii) the Maree Guarantee is in respect of Viturwell loan agreement.

[100] Distilling the parties' aforesaid competing claims positions, the 'legal questions / disputes' that fall to be determined can be framed in following succinct terms: Does the Maree Guarantee stand be set aside, alternatively is Mr. Maree's liability suspended because the Maree Guarantee constitutes reckless credit of the type contemplated in the NCA? (There are other ancillary legal questions / disputes but they do not feature as prominently as the aforesaid.)

[101] Additionally, as already indicated, Mr. Maree argues this Court in these sequestration proceeding should not determine the merits of the legal questions / disputes because

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[41] The section reads: 'this Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted;'.

they are already the subject matter of his pending action against Investec (invoking the *lis alibi pendens* principle).

This Court's ability to determine the legal questions / disputes

[102] During argument, both Messrs *Malherbe* and *Griesel*[42] correctly conceded that I was suitably placed to determine the legal questions and disputes. Their concession is in line with established precedent that the mere existence of a legal dispute, without more, does not constitute a *bona fide* dispute of the kind contemplated by the *Badenhorst* rule.

[103] That said, the application of the *Badenhorst* rule is neither absolute nor inflexible. It must be applied with due regard to its underlying rationale. Its primary concern is to prevent the abuse of insolvency or liquidation proceedings where factual disputes on the existence, or not, of an indebtedness cannot properly be resolved on affidavit in motion proceedings.

[104] With its underlying rationale in mind, the Constitutional Court in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*[43] held that the *Badenhorst* rule does not preclude a court from deciding a straight-forward legal issue based on common cause facts. The Constitutional Court moreover held in *Trinity Asset Management*[44] (my italics):

> 'Liquidation proceedings are designed to bring about a concurrence of creditors to ensure an equal distribution of the insolvent estate between them, and are inappropriate to resolve a dispute as to the existence of a debt. In order to prevent the possible abuse of the liquidation process, the rule was developed to the effect that where there is a genuine and good faith *factual* dispute concerning an alleged insolvent debtor's indebtedness to a creditor, the application for provisional liquidation should normally be dismissed.'

42 I reiterate that I permitted Mr. *Griesel* an opportunity to be heard on all issues subject to a pending and ultimate determination of his client's intervention application.

43 2018 (1) SA 94 (CC) para 92.

44 *Supra* para 145.

[105] In finding as it did, the Constitutional Court endorsed the earlier decision of Rogers J. *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another*[45] held:

> 'Even where the facts are undisputed, there may be a genuine and reasonable argument whether in law those facts give rise to a claim. I have not found any case in which the Badenhorst role has been applied, either at the provisional or final stage, to purely legal disputes. If the Badenhorst rule's foundation is abuse of process, it might be said that it is as much an abuse to resort to liquidation where there is a genuine legal dispute as where there is a genuine factual dispute. But if the Badenhorst rule extends to purely legal disputes, I venture to suggest that the rule, which is not inflexible, would not generally be an obstacle to liquidation if the court felt no real difficulty in deciding the legal point. ... The equivalent rule in England finds application where the dispute is shown to be one 'whose resolution will require the sort of investigation that is normally within the province of a conventional trial. A purely legal question would not have that character ...'

[106] The recent decision in *Investec Bank Ltd v NSN and Another*[46] restated and applied the principle that the *Badenhorst* rule does not preclude a sequestrating court from deciding legal questions; even where there may be genuine and reasonable argument as to whether, in law, facts give rise to the applicant's claim or Mr. Maree's indebtedness.

[107] With these authorities in mind, the position is the following: Where the dispute raised by a respondent in a sequestration application is purely legal in nature, and arises from essentially common cause or undisputed facts, a Court is entitled to determine that issue within the context of such proceedings.

[108] I now turn to deal with the question of whether the *lis alibi pendens* principles precluded me from determining the legal questions / disputes within the context of the pending Maree / Investec action.

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45 2015 (4) SA 449 (WCC) para 12.

46 2025 (1) SA 210 (GP) at para 50 and see fn 50 which cites with approval the aforesaid references to *Orestisolve (*and *Trinity Asset Management supra.*

[109] Broadly stated, a plea of *lis alibi pendens* arises when two legal proceedings involving the same parties, similar causes of action, and the same subject matter (i.e. the underlying central dispute(s) of law or fact is essentially the same) are pending simultaneously in different courts.

[110] The Supreme Court of Appeal describes the plea and its requirements as follows in *Caesarstone Sdol-Yam Ltd v The World of Marble and Granite 2000 CC and Others*:[47]

> 'As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere, and therefore it is inappropriate for it to be litigated in the same court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties, and that it is desirable that there be finality in litigation …'

[111] That said, it is trite that a plea of *lis alibi pendens* is not an absolute bar or defence, even if all its elements or requirements are present. It instead operates as a dilatory plea. In this regard, was stated in *Loader v Dursot Bros (Pty) Ltd*[48] that:

> 'It is clear on the authorities that a plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings because it is prima facie vexatious to bring two actions in respect of the same subject matter. The court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a *lis alibi pendens* is proved to exist.'

[112] The aforesaid is because a Court, in the exercise of its discretion and with due consideration to the prevailing circumstances,[49] may find that the rights afforded to a

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[47] 2013 (6) SA 499 (SCA) para 2. See also *Nestle (South Africa) (Pty) Ltd v Mars Inc.* 2001 (4) SA 542 (SCA), paras 16 and 17.

[48] *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T) 138 and 139.

[49] See *inter-alia Michaelson v Lowenstein* 1905 TS 324 at 328; *Loader* supra; *Les Marquis (Pty) Ltd v Marchand & others* 1989 (2) SA 651 (T) 658D-E; *Yekelo v Bodlani* 1990 (3) SA 970 (Tk) 973C-E; *Van As v Appollus en Andere* 1993 (1) SA 606 (C) 610D-F; *Friedrich Kling GmbH v Continental Jewellery Manufacturers; Guthmann and Wittenauer GmbH v Continental Jewellery Manufacturers* 1993 (3) SA 76 (C) 83B-C – as collected in the useful article by Johan Moorcroft, *Some Thoughts On Lis Pendens*, published 4 June 2024.

litigant in terms of section 34 of the Constitution,[50] or considerations of justice, equity and the balance of convenience, trump the invoking of the plea.[51] As such, a Court has an inherent discretion, to be exercised judicially, to allow a second case to proceed.[52]

[113] Within the above considerations in mind, there is nothing before me that persuades me that (i) the sequestration application is *mala fide* or pursued vexatiously, or with an ulterior purpose or motive, (ii) that it would be unjust, inconvenient or unfair for me to decide the legal questions / disputes, and (iii) that my determining the issue would impinge upon Mr. Maree’s section 34 rights. Theron AJ determined the legal questions / disputes; albeit he did so within the context of a provisional sequestration order. He cannot be faulted for doing so. Moreover, my determining the legal questions / disputes within the context of this application will put an end to the parallel proceedings, avoid a risk of conflicting judgments, and ensure finality and the orderly administration of justice;[53] while protecting the interests of the *concursus creditorum*.

[114] Consequently, in the exercise of my judicial discretion, I will determine the legal questions / disputes.

Determining the legal questions / disputes

[115] I have considered and applied my mind to the relevant NCA provisions, the arguments made, and Theron AJ’s reasoning and findings on the legal questions / disputes. I have done so accepting that the onus and degree of proof applicable to a final sequestration

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50 Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. And see for example *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) para 15, as applied in *Acacia Leasing ((Pty) Ltd v JP Krugerrand Deals CC* 2019 JDR 1056 (GJ) para 7 where this Court rejected a plea of *lis alibi pendens*.

51 *Keyter NO v Van Der Meulen and Another* 2014 (5) SA 215 (ECG) para 12 and 20.

52 *Hi-Q Automotive (Pty) Ltd v Erga Investments (Pty) Ltd* [2024] JOL 63227 (GJ).

53 *L.E.M v A.N.M and Others* (2023/112995) [2025] ZAGPJHC 1244 (4 December 2025) para 5.

order is higher than that when considering a provisional order,[54] albeit I doubt that this higher onus has any real impact on the determination of a legal issue.

[116] I start with the material common causes terms of the Maree Guarantee, being:

> '1. This guarantee and indemnity ('Guarantee') is made by the Guarantor Group[55] in favour of Investec and its successors or assigns. The Guarantor Group hereby unconditionally and irrevocably guarantees as a principal obligation:
>
> 1.1 the due and punctual payment of all and any monies which Viturwell (Pty) Limited ("Debtor") may now or from time to time in the future owe to Investec from whatsoever cause and howsoever arising, including any judgment debt against the Debtor; and
>
> 1.2 the due and punctual performance and discharge by the Debtor of each of the Debtor's obligations to Investec under or arising from all contracts or agreements entered into or to be entered into in the future between Investec and the Debtor,
>
> 2 …
>
> 3. The liability of the Guarantor Group in terms of this Guarantee shall be limited to R's 182,000,000.00 … Plus interest thereon plus and costs incurred by Investec enforcing its rights in terms of this Guarantee.
>
> 4. The Guarantor Group hereby unconditionally and irrevocably undertakes that should it receive a written demand from Investec for payment of any amount contemplated in clauses 1.1 or 1.2 …, the Guarantor Group shall immediately pay such amount so demanded to Investec in cash without setoff, counter-claim or any other deduction whatsoever.'
>
> And:
>
> 'Each Guarantor hereby reaffirms by signing below that:
>
> 1 The Guarantor understands that this Guarantee will secure not only one transaction but also any and all future transactions entered into between the Debtor and Investec as provided for in this Guarantee and Indemnity unless clause 1 indicates that the Guarantee expressly applies only in

54 *Mars, The Law of Insolvency in South Africa,* supra, and see *De Beer v Cowling* 2014 JDR 2384 (GP) para 4.

55 The reference to the "Guarantor Group" is a reference to Mr. Maree ('the Guarantor').

respect of the obligations of the debt or under or in connection with the Specific Loan Agreement.'

2. …

3. The Guarantor understands its rights and obligations under this Guarantee.

4. The Guarantor understands that its liability in terms of this Guarantee will be continuous until all the Debtor's existing and future obligations have been met as provided for in this Guarantee.

5. The Guarantor acknowledges that it has the right to obtain independent legal advice on this Guarantee.'

[117] Simply stated, the fact and terms of the Maree Guarantee, which Mr. Maree does not dispute, provide that Mr. Maree undertook to satisfy, upon demand, Viturwell's obligations to Investec, including those owed in terms of the Viturwell loan agreement with Investec.

[118] Given these terms, I cannot fault Theron AJ's reasoning or findings on the legal question. I quote, for ease of refence, the relevant portions of Theron AJ's judgment (the underlining is Theron AJ's and his footnote references are included but renumbered accordingly for purposes of this judgment):

'[59] The dispute raised by Maree is a legal question, namely does the Maree guarantee stand to be set aside, alternatively, is liability thereunder suspended on the basis that it constitutes reckless credit in terms of Section 79 of the NCA.

[60] Section 4(1) of the NCA provides that:

'(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, <u>except</u>-

(a) a credit agreement in terms of which the consumer is-

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);

…

> (b) *a large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time of the agreement is made, below the threshold value determined by the Minister in terms of section 7(1);'*

[61] A '*large agreement*' is one in which the principal debt under the transaction exceeds R250 000.00.[56]

[62] Section 4(2)(c) reads as follows:

> *'this Act applies to a credit guarantee <u>only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted</u>;'*

[63] Section 8(5) of the NCA reads as follows:

> *'An agreement, <u>irrespective of its form</u> but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, <u>in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer</u> in terms of a credit facility or a credit transaction to which this Act applies.'*

[64] The loan to Viturwell is demonstrably a large agreement. Maree guarantees the obligations of Viturwell in terms of a large agreement to which the NCA does not apply.

[65] Part D of the NCA applies only to credit agreements and consumers as defined in the NCA.

[66] The Maree guarantee is an undertaking or promise to satisfy upon demand the obligations of Viturwell in terms of the underlying loan agreement, which is a large agreement. I therefore find that the provisions of Part D of the NCA are not applicable to the Maree guarantee.

[67] As a second string to this bow, Maree alleges that the Maree Guarantee is 'self-contained contract that creates a principal obligation, and not an accessory obligation' and therefore remains governed by the NCA.

[68] It is clear to me from the wording of the Maree guarantee that he interceded as co-principal debtor with Viturwell for the amounts owing to Investec by Viturwell. In doing so, Viturwell was not liberated from its

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[56] Section 9(4) of the NCA read with "*Determination of Thresholds*" published in terms of the NCA under General Notice 713 in Government Gazette 28893 of 1 June 2016.

obligations. Rather, both Maree and Viturwell became liable in solidum for the debt.[57]

[69] The purpose of the Maree guarantee was not for Investec to provide credit to Maree. Although Maree points to the phraseology of the Maree Guarantee which speaks to a 'principal obligation', what is recorded to be that principal obligation is guarantee of the due and punctual payment by Viturwell to Investec, which Maree guarantees.

[70] Indeed, no credit was ever advanced to Maree, and he cannot and does not assert for the converse.

[71] No credit provider – consumer relationship was established between Maree and Investec and the Maree Guarantee thus, factually, could not be a credit facility of credit transaction in its own right.[58]

[72] Alternatively, a further assertion was made in the answering affidavit, but not advanced during argument, that the Maree Guarantee is not a credit guarantee because it 'makes no reference whatsoever to the Loan Agreement' and therefore the 'exclusion contained in section 4(2)(c) of the NCA does not apply …'.

[73] Maree's argument would mean that every continuing and covering security given by a surety or guarantor would not (and could not) constitute a 'Credit Guarantee' in relation to a loan agreement if such was not specifically referred to in the suretyship/guarantee, even though it is manifest that section 8(5) of the NCA was directed at the regulation of this very type of agreement.

[74] Not only is this argument absurd, but it would also profoundly (and adversely) affect the entire financial and banking sector.

[75] A purposive approach must be adopted to ascertain whether an agreement constitutes a credit guarantee.[59]

[76] It is not disputed that the Maree guarantee was given as security for Viturwell's indebtedness to Investec under and in terms of the Loan Agreement.

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57 *Total South Africa (Pty) Limited v Bekker NO* 1992 (1) SA 617 (A) 627G to 628C.

58 *Shaw v McIntosh and Another* 2019 (1) SA 398 (SCA) paras 12 and 13.

59 *Ratlou v Man Financial Services SA (Pty) Limited* 2019 (5) SA 117 (SCA).

> [77] The Maree guarantee and the Loan Agreement were executed on the same day.
>
> [78] If the Maree guarantee was not issued in respect of the Loan Agreement, it begs the question for what debt it was 'granted'? Only one debt of Viturwell to Investec is advanced by Investec, and no other debts are referenced. Indeed, Investec confirms that only one loan facility was granted by it to Viturwell.
>
> [79] I consequently reject any argument that the Maree guarantee was not a credit guarantee as defined [in] the NCA.'

[119] To the above must be added the following explanation in *Toyota Financial Services (South Africa) v Waste Partners Investment (Pty) Ltd*:[60]

> '… The provisions of the National Credit Act do not apply to juristic persons with an asset value or annual turnover of more than R1 million, nor does it apply to juristic persons with an asset value or annual turnover of less than R1 million who enters into a mortgage agreement or an agreement with a loan value of more than R 250 000. In this case the loan amount exceeds R 250 000, so irrespective of the turnover of the Defendant, the National Credit Act is not applicable, and there is, therefore, no statutory requirement to deliver a notice to the Defendant in terms of section 129 prior to the enforcement of the agreement.'

[120] Ultimately decisive of the legal questions / disputes is the express wording of section 78(1) - the opening section of Part D ('Over-indebtedness and reckless credit') - of the NCA. The section, under the heading 'Application and interpretation of this Part', reads:

> '78(1) of This Part does not apply to a credit agreement in respect of which the consumer is a juristic person.'

[121] In summary, because Investec did not extend credit to Mr. Maree, and because the provisions in issue of the NCA do not apply to the Viturwell loan agreement, they also

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60 2022 JDR 2824 (GJ) para 31.

do not apply to the related Maree Guarantee.[61] Consequently, the NCA's Part D ('Over-indebtedness and reckless credit') does not apply to the Maree Guarantee.

[122] No oral argument was presented at the hearing before me on behalf of Mr. Maree as to any errors, defects or omissions in, or reasons to depart from, Theron AJ's reasoning and findings.

[123] In conclusion of this topic, the 'legal questions / disputes' are determined as follows: (i) the Maree Guarantee does not stand to be set aside, (ii) the Maree Guarantee does not constitute reckless credit of the type contemplated in the NCA, and (iii) Mr. Maree's liability under the Maree Guarantee does not fall to be suspended.

[124] As such, I am satisfied that Investec has established the required claim against Mr. Maree, and is a creditor of his estate in at least the prescribed amount.[62]

Mr. Maree has committed an act of insolvency and is also insolvent

[125] Investec states that Mr. Maree's pleaded statement that he is unable to satisfy the Maree Guarantee debt in his particulars of claim in the Maree / Investec action is an act of insolvency in terms of section 8(g)[63] of the Insolvency Act. I agree.

[126] Investec also argues that Mr. Maree's written request for relief for a two year suspension of liability under the Maree Guarantee is an act of insolvency under section

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[61] *Plastomark (Pty) Ltd v CK Injection Moulders CC and Another; In re: Ultrapolymers (Pty) Ltd v CK Injection Moulders CC and Another* (19065/2015) [2015] ZAWCHC 129 (1 September 2015) [2015] ZAWCHC 129 para 15-21.

[62] See section 12(1)(a) of the Insolvency Act, 1936.

[63] A debtor has given notice in writing to any one of his creditors that he is unable to pay any of his debts.

8(e)[64] of the Insolvency Act. I likewise agree, albeit I believe that it is, in substance, also a section 8(g) act of insolvency.

[127] Equally important is Mr. Maree's claim in his answering affidavit in this application that the sequestration of his estate will not be to the advantage to creditors (an issue I deal with next in this judgment).[65] It is therefore understandable that Mr. Maree does not seriously contend that he is solvent.

[128] I am therefore satisfied that Mr. Maree has committed at least one an act of insolvency and is also insolvent.[66]

Is there an advantage to creditors by the final sequestration Mr. Maree estate?

[129] While the Insolvency Act does not define the phrase '*advantage to creditors*', it is generally accepted that creditors will be advantaged when there is a reasonable prospect of some pecuniary benefit to the general body of Mr. Maree's creditors.[67] The concept of advantage to creditors is therefore something of a broad church.[68] It is not only limited to a suitable (not-negligible) dividend, but incorporates a non-exhaustive list of other considerations and factors;[69] such as an enquiry into a debtor's financial affairs.[70] In essence, a sequestration order must have served some useful purpose.[71]

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64 A debtor makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts.

65 An admission of insolvency in sequestration proceedings is sufficient to establish an act of insolvency – see *Courier- IT SA (Pty) Ltd v Van Staden and Another* 2022 JDR (GJ) pars 65 to 67.

66 *See* section 12(1)(b) of the Insolvency Act, 1936.

67 *Ex Parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP) para 13.

68 *Stratford and others v Investec Bank Ltd* 2015 (3) SA 1 (CC) para 44 to 46 and *Body Corporate of Empire Gardens v Sithole and Another* 2017 (4) SA (SCA) para 10.

69 See for example that listed in *Body Corporate of Ceres v Ntukwana supra* para 31.

70 *Ex Parte Shmukler-Tshiko and Thirteen other cases* 2012 JDR 1796 (GSJ) para 34 and 59.

71 *Hillhouse v Stott* 1990 (4) SA 580 (W) 585E and *Body Corporate Empire Gardens v Sithole* 2017 (4) SA (SCA) 161 at page 164 H.

[130] Accordingly, while the onus of establishing an advantage to creditors remains on the petitioning creditor,[72] the petitioning creditor is not required to convince a Court, either *prima facie* or on a balance of probabilities, that there will as a fact be an advantage to creditors. All that is required is that the petitioning creditor establishes that there is reason to believe that there is a prospect, which is not too remote, that there will be an advantage to creditors.[73]

[131] Investec claims that creditors will receive a pecuniary benefit, in the form of a not immaterial dividend[74] of approximately R0.75 in the Rand in Mr. Maree's sequestration based on an analysis performed by Investec. In an endeavour to dilute this claimed dividend, Mr. Maree delphically claims, relying on share certificates, that he is not a shareholder in various related companies. He does so in the face of his previous representations to Investec that, while these shares may have been held by others, they were nevertheless to be regarded as his assets (i.e. that they fell within his estate).

[132] The Supreme Court of Appeal, in *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd and Hawker Aviation Partnership and Others*,[75] confirmed that a Court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit, but that the court need be satisfied only that there is reason to believe - not necessarily a likelihood, but a prospect not too remote - that by invoking the machinery of the Insolvency Act, 1936 and as result of the accompanying

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72 See *Mercantile Bank Limited, a division of Capitec Bank Limited v Ross and another* [2023] JOL 58951 (GJ) and the discussion of this judgment on this point in *K2015353139 South Africa (Pty) Limited v Motsoane and another* [2024] JOL 65874 (GJ).

73 See *inter-alia Wilkins v Pieterse* 1937 CPD 165, *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (N) 592H-F and *Epstein v Epstein* 1987 (four) SA 606 (C) 609D.

74 *Stratford supra*.

75 2006 (4) SA 292 (SCA).

investigations and enquiries, assets might be unearthed, attached, recovered or sold, the proceeds of which will yield a pecuniary benefit for creditors.[76]

[133] Investec also pursues this application on the aforesaid basis. There is indubitable merit in it doing so. Having regard to *inter-alia* (i) the dispute that Mr. Maree now raises regarding the true ownership of shareholdings he previously relied upon when engaging with Investec, (ii) the non-explanation of the fate of the asset bases of the various companies wound-up by Mr. Maree, (iii) Investec's claims that Mr. Maree played a key role in Viturwell's misappropriation and misdirection of funds (a most serious claim which he fails to meaningfully address), (iv) Mr. Maree's unexplained withdrawal of some R5,7 million from related company bank accounts, and (v) the receipt of some R21,5 million by Mr. Maree's and Zatopax's Mr. Muller family members, I am satisfied that there is at least a prospect, not too remote, that an investigation and enquiry into Mr. Maree's financial affairs may reveal assets capable of realisation in order to achieve a reasonably satisfactory or meaningful pecuniary benefit for his estate's creditors.[77] Mr. Malherbe's submission that there is no evidence that Mr. Maree himself pocketed 'any money himself' merely entrenches the need for an investigation and enquiry.

[134] If anything, the aforesaid considerations, separately or cumulatively, serve as a classic example of satisfying section 12(1)(c)'s advantage to creditors requirement within the context of insolvency investigations and enquiries.[78] I am therefore satisfied that there is

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76 See *inter-alia Stratford supra*, *Liberty Group v Moosa* 2023 (5) SA 126 (SCA) para 127, *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) 583; *Lynn & Main Inc v Naidoo & another* 2006 (1) SA 59 (N) 68 to 69; *Commissioner, South African Revenue Service v Hawker Aviation Partnership & Others* 2006 (4) SA 292 (SCA) 306, and *BP Southern Africa (Pty) Ltd v Furstenburg* 1966 (1) SA 717 (O) 720, Amod v Kahn 1947 (2) SA 432 (N) 438, and *Meskin & Co v Frieman* 1948 (2) SA 555 (W) 559.

77 *Stratford and others v Investec Bank Ltd* supra at 46.

78 *Meskin & Co v Friedman supra* 558, and *Du Randt Richards Inc Attorneys v Scheepers NO and another (ABSA Bank Limited intervening)* [2013] JOL 30519 (GSJ) para 5.

reason to believe that it will be to the advantage of Mr. Maree's creditors if his estate is finally sequestrated.[79]

[135] *Semble*, whilst unnecessary for purposes of determining the fate of this application, it may be time for our Court's to consider definitely expanding, in an appropriate case obviously, the advantage to creditors consideration to include neutralising recidivistic businesspeople and serial defaulters who transact and conduct their affairs recklessly, with gross negligence or for fraudulent purposes to the prejudice of creditors.[80] I reiterate that section 12(1)(c) of the Insolvency Act only references an 'advantage to creditors'. As, already indicted, this is not a closed list. The advantage to creditors consideration should possibly not only sound, be it directly or indirectly, in a dividend or possible return for creditors, or what the Constitutional Court labels as a "pecuniary benefit'[81], but also in an advantage ensuing to creditors by their being protected from doing business with recalcitrant insolvents, who avoid having their estates sequestrated only because a petitioning creditor is unable to demonstrate an advantage to creditors that sounds, be it directly or indirectly, in pecuniary dividend for creditors. I believe that this, in an appropriate case, would not only be to the advantage of creditors but also in the broader public interest.

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[79] See section 12(1)(c) of the Insolvency Act, 1936.

[80] Using the language in section 22 of the Companies Act, No. 71 of 2008

[81] *Stratford supra* para 45

Mr. Maree's additional defenses / considerations / arguments

[136] I have, at some length, carefully considered - in addition to that set out above - all of the other defences, considerations and arguments raised by and on behalf of Mr. Maree in his answering affidavit, his heads of argument filed in respect of the provisional sequestration (albeit their main focus was the then-postponement application proceedings), and in oral argument before me.

[137] None of Mr. Maree's additional defences, considerations and arguments have merit, nor do they move me to come to a different conclusion in respect of this application, or to exercise my discretion any differently.

[138] Mr. Maree's additional defences, considerations and arguments include a meritless, and ultimately (correctly) not pursued, denial of the personal knowledge of the deponent to Investec's founding and replying affidavits.[82]

[139] Mr. Maree also claims that it would be unfair, unreasonable and unduly harsh for his estate to suffer a final sequestration order despite the pending and to be determined Investec / Santam proceedings, and the Santam / Maree proceedings. There is an obvious overlap between these claims and that already stated above when dealing with Mr. Maree's *lis pendens* defence and his last-minute 'stay' application.

[140] In addition to that stated above *inter-alia* in respect of Mr. Maree's 'stay' application and his *lis alibi pendens* plea, I also must add that the Investec / Santam proceedings and the Santam / Maree proceedings are proceedings aimed at enforcement and money judgments.

[141] It is trite that sequestration proceedings are not proceedings pertaining to the enforcement of a debt.[83] They are instead aimed primarily at securing an equitable

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[82] On the lack of merit in this denial see the *ratio* in *Rees and Another v Investec Bank Limited* 2014 (4) SA 220 (SCA).

distribution of an insolvent's estate among the insolvent's creditors.[84] As Trengove AJ in *Investec Bank Ltd and Another v Mutemeri and Another* stated:[85]

> '…a sequestration order is not an order for enforcement of the claim. Its purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally'.

[142] Consequently, I am unable to find that a respondent, in opposing sequestration proceedings, is able to invoke *lis alibi pendens* within the context of pending (other) proceedings unrelated to the sequestration of his or her estate.[86]

[143] I also find nothing unfair, unreasonable or unduly harsh for Mr. Maree's estate to suffer a final sequestration order in circumstances where Mr. Maree voluntarily undertook and undertook the obligations that he did under the Maree Guarantee. Mr. Maree is, by all accounts, an experienced businessperson.

[144] Finally, Mr. Malherbe, on behalf of Mr. Maree, did not take no issue with Investec's compliance with the necessary service and procedural formalities for the sequestration application, nor with its compliance with the terms of the provisional sequestration order.

[145] It is statutorily prescribed, and long-established, that the granting of a sequestration order is discretionary; irrespective of the grounds upon which the sequestration order is sought.[87]

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83 *Collett v Priest* 1931 AD 290 at 299.

84 *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd* (19664/2022) [2023] ZAWCHC 202; 2023 (6) SA 452 (WCC).

85 2010 (1) SA 265 (GSJ) para 31.

86 *Electrolux South Africa supra.*

87 Section 12(1) of The Insolvency Act.

[146] This discretion is, however, a limited or narrow discretion where an unpaid creditor is *ex debito justitiae* entitled to a sequestration order. This limited or narrow discretion is to be judicially but rarely exercised and then in special or unusual circumstances only.

[147] This is case where an unpaid creditor is *ex debito justitiae* entitled to a sequestration order. Considering this application holistically, and also considering its various features, nuances and so too Mr. Maree's various pleas *ad misericordiam*, separately, there are no special or unusual circumstances, nor any circumstances, that warrant my not granting a final sequestration order.

Costs / litigation is not a game

[148] Before concluding this judgment, I must mention that while it is understandably desirable that litigation should not result in a '*zero-sum context*',[88] litigation is more importantly not a game, and must not be engaged in as such.[89]

[149] More specifically:[90]

> 'Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process

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88 See *Commissioner: Companies & Intellectual Property Commission v Independent Music Performance Rights Assoc and Another* (37475/2020) [2020] ZAGPPHC 668 (23 November 2020) para [1].

89 See, *inter-alia*, *Cadac (Pty) Ltd v Weber-Stephen Products Co and others 2011 (3) 570 (SCA)* para 10; *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) para 197. *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) para 14, MGB v DEB 2013 (6) SA 86 (KZD) para 39, *Niewoudt v Joubert* 1988 (3) SA 84 (SE) 90E and 91 B/C, *Ramodibe v S* (A80/2018) [2020] ZAGPPHC 271 (4 May 2020) para 32, *Sithole v Regional Magistrate A Swanepoel and Another* (REV69/2022) [2024] ZALMPPHC 17 (26 February 2024) para 19, *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) para 120.

90 *Oladeji v Inspector General of Police and Another* (2018) LPELR-45141 (CA) and attributed to Nigerian Supreme Court Justice Karibi-Whyte – see *Aduaka and Anyaegbu*, *The Abuse of Legal Process in Nigeria: The Remedies*, The International Institute for Science, Technology and Education (IISTE), Journal of Law, Policy and Globalization, www.iiste.org. Similar judicial sentiments and language is used by Naude-Odendaal J, with whom Phatudi JP concurs, in *Sithole v Regional Magistrate A Swanepoel and Another* (REV69/2022) [2024] ZALMPPHC 17 (26 February 2024) para 19 and also in *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] KEHC 6100 (KLR) page 26 – a decision of the Kenyan High Court: Nairobi (Milimani Law Courts).

where the parties place on the table of justice their different positions clearly, plainly and without tricks.'

[150] The aforesaid must also be true because judicial resources are severely constrained in this Division.[91] As Navsa JA states in *Socratous v Grindstone Investment*:[92] 'Courts are public institutions under severe pressure'. If and where litigation is treated as a game, Court and judicial resources are further unduly burdened; frustrating the administration of justice, and eroding faith in the judicial system.

[151] Rendering the aforesaid judicial sentiments and dicta applicable, Mr. Maree's opposition to the sequestration application, on a conspectus of the whole application, and Zatopax's intervention application are not *bona fide* or reasonable. As such, in the absence of the required special circumstances,[93] the ordinary or general rule applies[94] and the costs of Mr. Maree's opposition to the sequestration application are not to be included in the costs of the sequestration.[95]

[152] I must however mention that Messrs *Malherbe* and *Griesel* respectively – faced with prominent and seasoned opponents and difficult cases – conducted themselves in the best traditions of the Bar, argued pointedly and without hyperbole, and made the appropriate concessions; for which I express my gratitude.

Conclusion and orders

[153] For the reasons set out above, I grant the following orders:

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91 *Supercart South Africa (Pty) Limited v Vanesco (Pty) Limited* [2025] 2 All SA 911 (GJ) para 28.

92 2011 (6) SA 325 (SCA).

93 *Julie Whyte Dresses* (*Pty) Ltd v Whitehead* 1970 (3) SA 218 (D).

94 *Behrman v Sideris* 1950 (2) SA 366 (T) and *Cyril Smiedt (Pty) Ltd v Lourens* 1966 (1) SA 1150 (O) at 158.

95 *Matsepe NO V Plaatjie NO* [2020] JOL 47327 (FB).

1. The intervention application by Zatopax (Pty) Ltd dated 9 March 2026 is dismissed with costs, which costs shall be on Scale C and shall include the applicant's costs of both senior and junior counsel (where employed).

2. The respondent's application dated 9 March 2026 for a stay of the provisional sequestration order is dismissed.

3. The provisional order for the sequestration of the estate of the respondent (Identity no. 6[…]) is confirmed and made final, and a final order for the sequestration of his estate is granted.

4. The respondent's costs of his opposition to the sequestration application are not to be included in the costs of the sequestration of his estate.

5. The costs of these proceedings, other than the costs order set out in paragraphs 1 and 4 above, are to be costs in the sequestration of the respondent's estate. These costs shall be taxed on Scale C and shall include the applicant's costs of both senior and junior counsel (where employed).

AMM AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted:

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected above. This judgment is handed down electronically by circulation to the parties / their legal representatives by email and/or by uploading it to the electronic file of this matter on CaseLines.

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COUNSEL FOR THE RESPONDENT:	Mr. *Malherbe* (Adv.)

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COUNSEL FOR INTERVENING APPLICANT:	Initially Mr. *E. Braga* (Adv.) and subsequently Mr. *PJA Griesel* (Adv.)
INSTRUCTED BY:	Van Rensburg Schoon Inc.
ENROLLED AS MATTER:	OIN-7
DATE OF ARGUMENT:	10 March 2026
DATE OF JUDGMENT:	15 June 2026