



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 212/24

In the matter between:

BLOSSOM NOMTHANDAZO MOKASULE N.O. First Applicant

SIPHO CLINTON MOKASULE N.O. Second Applicant

TEME GENUINE MOKGASANI N.O. Third Applicant

and

DEON MARIUS BOTHA N.O. First Respondent

MOTSHWANE MERRIAM KUTUMELA N.O. Second Respondent

Neutral citation: *Mokasule N.O. and Others v Botha N.O. and Another* [2026] ZACC 36

Coram: Mlambo DCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Nuku AJ, Opperman AJ, Rogers J, Savage J and Tshiqi J

Judgment: Mlambo DCJ (unanimous)

Decided on: 11 September 2026

Summary: Insolvency Act 24 of 1936 — section 8 — acts of insolvency — factual insolvency

Duty of proper consideration — failure to appreciate facts —
failure of justice — final sequestration

ORDER

On application for leave to appeal from the Supreme Court of Appeal (dismissing an application for leave to appeal a judgment of the High Court of South Africa, North West Division, Mahikeng):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Supreme Court of Appeal in the applications for leave to appeal and reconsideration are set aside.
4. The order of the High Court of South Africa, North West Division, Mahikeng (High Court), is set aside.
5. The application heard under case number M282/2020 seeking an order for the final sequestration of the Mokasule Investment Trust with Registration Number I[...], is remitted to the High Court, to be heard by a different judge.
6. The respondents are ordered to pay the applicants' costs in this Court.
7. The respondents are ordered to pay the applicants' costs in the application for leave to appeal in the Supreme Court of Appeal.
8. Each party must pay their own wasted costs in respect of the abortive hearing of the matter that resulted in the High Court handing down judgment on 15 September 2022.

JUDGMENT

MLAMBO DCJ (Dambuza J, Kollapen J, Majiedt J, Mhlantla J, Nuku AJ, Opperman AJ, Rogers J, Savage J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the High Court of South Africa, North West Division, Mahikeng (High Court), which sanctioned the final sequestration of the Mokasule Investment Trust (Trust). The applicants are Blossom Nomthandazo Mokasule, Sipho Clinton Mokasule and Teme Genuine Mokgasani in their capacities as trustees of the Trust (applicants). The respondents are Deon Marius Botha and Motshwane Merriam Kutumela, who were appointed as joint trustees of the insolvent estate of Thomas Patric Mokasule (insolvent) and initiated the legal proceedings to sequester the Trust. They will be referred to as the insolvent's trustees or the respondents according to the context.

Factual background

[2] On 5 December 2019, the respondents were appointed as trustees of the insolvent estate of Mr TP Mokasule, an erstwhile trustee of the Trust, alongside the applicants. The insolvent's trustees claimed that the insolvent was a creditor of the Trust in the amount of R20 388 840.73. This was alleged to be reflected in the "audited" financial statements of the Trust. The allegation that the insolvent was a creditor of the Trust, as well as the amount, was disputed by the applicants.

[3] The trustees alleged that the insolvent acquired assets in the name of the Trust by fraudulently purporting to render services to the Klerksdorp Municipality (Municipality) as a meter reader. They further alleged that the insolvent had used the money stolen from the Municipality to acquire immovable property in the name of the Trust and that the application to sequester the Trust was necessary for the recovery of the stolen money.

Litigation history

High Court

[4] On 18 April 2019, the insolvent's trustees were granted a provisional sequestration order of the Trust and a return date for the *rule nisi* was issued, with 22 April 2022 as the return date. Overall, the case advanced by the insolvent's trustees for the final sequestration of the Trust was that: (a) all the funds utilised to acquire the immovable properties originated from the theft perpetrated by the insolvent; (b) the Trust had no independent income, as all the funds utilised to acquire the assets were either advanced by the insolvent from the stolen funds or channelled to the Trust directly by the insolvent from ill-gotten gains; and (c) the Trust could not be deemed to be solvent as all funds in its name were to be reimbursed to the Municipality, being the "relevant creditor".

[5] The insolvent's trustees averred in their founding affidavit that the Trust had no source of income by which it could possibly have acquired the immovable properties, as at all material times since its registration in 2010, the Trust was not a trading entity and generated no income whatsoever. They alleged that the Trust's "audited" financial statements ending February 2015 revealed that the insolvent had loaned an amount of R20 388 840.73 to the Trust. They alleged that *ex facie* (on the face of it), the financial statements revealed that the Trust owned property and plant equipment valued at R24 022 591.17. They also alleged that of all the 20 properties owned by the Trust, only a single property was encumbered by the registration of a mortgage bond over the property in favour of Absa Bank Limited for the sum of R3.9 million. They averred that the insolvent's schedule reflected the properties to be valued in excess of R47 million. They also averred that no meeting of creditors had been convened in the

estate of the insolvent and that no creditor had proven any claims against the insolvent estate.

[6] In contrast, the present applicants denied any theft of money from the Municipality by the insolvent. They branded the application as a gross abuse of court process. They averred that the application was defective due to the non-joinder of the Master of the High Court; that the insolvent's trustees misrepresented facts, as the Trust had more than one trustee who were not joined in the proceedings; that the insolvent's trustees made no allegations regarding the Trust, with all of the allegations in the application only referring to the insolvent; that the insolvent's trustees should have cited each party with an interest in the matter, all trustees included; and that therefore, on the basis of the defects highlighted, the High Court should not consider the merits and instead should dismiss the application with punitive costs.

[7] The present applicants contended that, according to the insolvent's trustees, the Trust had assets that exceeded its liabilities; that the Trust assets could easily pay the insolvent's trustees' proven debts, if any, yet no such demand had been made; and that the insolvent's trustees had launched an application to sequester the Trust so as to maliciously take control of the Trust's assets for their own gain. They denied that the insolvent had ever done any meter reading as a form of business. They further stated that the Trust received rental income with no benefits accruing to its beneficiaries and that the Trust could be a wealth preservation vehicle without the need to trade. Furthermore, they averred that the insolvent's trustees had no proof whatsoever of any fraud committed by the insolvent. Importantly, they contended that the insolvent's trustees had not qualified the solvency and liquidity test that they relied on to sequester the Trust. They questioned the insolvent's trustees' accusations against the insolvent and their attempt to sequester the Trust in the absence of any proven claims by creditors.

Finally, they averred that a trust may not be sequestrated by virtue of debts owed by any of its trustees personally, as this would make the trust property vulnerable to attacks by multiple parties on contracts the trust had not concluded.

[8] The High Court, contrary to the insolvent's trustees' submission that the insolvent was a creditor of the Trust as reflected in the Trust's "audited" financial statements, made confusing statements regarding the financial statements. In its judgment, it initially said that according to the insolvent's trustees these were the financial statements of the "insolvent estate", but later stated that these were the financial statements of the insolvent's trustees. There is no reasoning by the High Court regarding its stance about the financial statements.

[9] The High Court outlined the legal principles pertaining to applications for the sequestration of debtors. It held that the onus of proving insolvency was on the insolvent's trustees and that should they fail to do so, they were not entitled to an order for sequestration. The Court proceeded to find that the Trust had committed the following acts of insolvency: (a) disposing of immovable property, in that the insolvent had purchased the properties in the name of the Trust; (b) acquiring property without repaying the loan made to it by the insolvent; and (c) attempting to alienate¹ the property with the intent to prejudice one creditor above another. The Court held that the insolvent's trustees had made out a case for the confirmation of the *rule nisi* and granted an order for the final sequestration of the Trust with costs.

[10] On 8 January 2024, the High Court dismissed an application for leave to appeal with costs on the basis that there were no reasonable prospects that

¹ In *Deon Marius Botha N.O. v B N Mokusule N.O.*, unreported judgment of the North West High Court, Mahikeng, Case No M282/2020 (15 September 2022), the Court stated "attempting to *remove* the property with the intent to prejudice one creditor above another" (emphasis added).

another court may come to a different conclusion. The applicants petitioned the Supreme Court of Appeal for leave to appeal but their application was dismissed with costs. Subsequently, they applied to the President of that Court for reconsideration of their application for leave to appeal in terms of section 17(2)(f) of the Superior Courts Act.² That application was also dismissed with costs.

In this Court

Applicants' submissions

Condonation

[11] The applicants have set out their case for condonation in a confusing way, exacerbated by manifest date errors. However, having regard to the correct dates, the relevant facts are clear enough. The applicants base their condonation request on several factors. They submit that the delay was not due to any fault of their own or their legal representatives. They further submit that upon learning of the order granted by the Supreme Court of Appeal, they expeditiously endeavored to prepare the application for leave to appeal to this Court and, the condonation application.

[12] The applicants submit that their application has good prospects of success, having regard to the prejudicial manner in which sequestration principles were incorrectly applied by the High Court. They submit that the respondents will suffer no prejudice if condonation is granted. They further assert that, what the High Court did amounts to real and actual prejudice not only to the Trust but to similarly situated debtors.

² 10 of 2013.

Leave to file a replying affidavit

[13] The applicants have asked this Court to grant them leave to file a replying affidavit. They submit that the replying affidavit is extremely important and directly addresses the incorrect submissions set out in the respondents' answering affidavit in relation to the nature of the dispute between the parties. Some of the alleged flaws that the applicants feel they should respond to include the argument that insolvency law proceedings such as sequestrations are procedures that should not be initiated as measures of last resort. They also deem it necessary to respond to what they submit to be incorrect and inaccurate submissions by the respondents relating to allegations of the commission of crimes. They submit that this Court must be provided with the correct picture of events to prevent prejudice to the Trust and similarly situated debtors.

Jurisdiction

[14] The applicants submit that this Court's general jurisdiction is engaged. They submit that the High Court committed a clear error of law and misapplication of the applicable test for insolvency in sequestration applications. This is alleged to be a result of the High Court failing to apply the two stages that must be followed when a court is called upon to sequester a debtor's estate. The applicants submit that in misapplying the test, the High Court committed a fundamental error of law that constitutes an arguable point of law of general public importance. Therefore, the applicants submit that the interests of justice require the intervention of this Court.

[15] The applicants also submit that due to widespread indebtedness in South Africa, the error of law committed by the High Court is a matter of public interest. They further submit that it is a matter of public interest that the High Court judgment be reversed, as it will be construed as authority

that allows unscrupulous creditors to bypass ordinary civil procedure remedies. According to the applicants, because the High Court failed to apply the correct test of insolvency when sequestrating the Trust, this application has excellent prospects of success. In their written submissions, they make the point that the High Court's treatment of the facts and the law, including its reasoning and conclusion, resembles the kind of flaws that were characterised by this Court in *Makate*³ as being so fundamental and pervasive as to vitiate the High Court's judgment, constituting a failure of justice and thus, a breach of the rule of law and the right to a fair hearing guaranteed in section 34 of the Constitution.

Leave to appeal

[16] The applicants' main contentions are that the findings of the High Court were not supported by evidence, and that it failed to apply principles applicable in sequestration matters.

[17] The applicants advance a number of submissions in this regard, particularly: that the respondents failed to make out a proper case before the High Court; that the High Court's judgment failed to account for the respondents' failure to establish a debt to sustain the claim for sequestration; that the High Court failed to appreciate the fact that the assets of the Trust far exceeded any liabilities that could be attributed to it; and that the High Court made an order on the basis of acts of insolvency without the respondents having alleged or proved any act of insolvency in their founding affidavit. Rather, the respondents are alleged to have focused on the insolvent's alleged criminal dealings. Finally, the applicants submit that the High Court relied on unfounded hearsay evidence.

³ *Vodacom (Pty) Ltd v Makate* [2025] ZACC 13; 2025 (6) SA 352 (CC); 2025 (10) BCLR 1174 (CC).

[18] Regarding the error of law committed by the High Court, the applicants submit that the High Court failed to conduct a basic test for insolvency when determining whether the Trust was liable to be sequestrated. They point out that there are two stages that must be followed when a court is called upon to sequester a debtor's estate at the instance of a creditor. First, insolvency must be established, and second, the court must assess whether the requirements for compulsory sequestration provided for in sections 8, 9 and 12 of the Insolvency Act⁴ (Act) are met. They submit that the respondents failed to demonstrate factual insolvency or technical insolvency (that is, an act of insolvency) in terms of section 8 of the Act.⁵ The applicants submit further that even without the respondents making any averments regarding acts of insolvency, the High Court found that three acts of insolvency were established in terms of section 8(c), (d) and (e) of the Act.

[19] The applicants submit that the High Court found that: there had been a disposal of properties without a concomitant finding that the Trust (the entity sought to be sequestrated) was the entity that disposed of the properties; and that the Trust failed to refund the loan to the insolvent estate of the trustee, despite the terms of payment not being provided to the Court and no payment being requested. In addition, the High Court found that the

⁴ 24 of 1936.

⁵ The relevant sections of the Act are as follows:

“8 Acts of Insolvency

A debtor commits an act of insolvency—

...

- (c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;
- (d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;
- (e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts.”

Trust had attempted to alienate property with the intention to prejudice one creditor above another, despite neither the founding affidavit nor the judgment of the High Court identifying said property and, lastly, that not one creditor was identified in either the founding affidavit or the judgment.

Respondents' submissions

Condonation

[20] In their answering affidavit, the respondents did not oppose condonation for the late filing of the application for leave to appeal. However, subsequent to this Court directing the parties to file written submissions, the respondents, in their written submissions, included submissions opposing the condonation application. The basis for the respondents' opposition to condonation is that the entire period of the delay is not explained and that the interests of justice do not favour the granting of condonation.

Jurisdiction

[21] The respondents submit that the applicants have failed to establish that this Court's jurisdiction is engaged. They contend that the finding of factual and technical insolvency in terms of section 8 of the Act does not raise a constitutional issue, nor does it raise an arguable point of law of general public importance which ought to be heard by this Court. They submit that the finding is purely a question of fact, which the applicants were unable to surmount. They further submit that merely alleging that a matter raises an arguable point of law is insufficient. Finally, the respondents submit that general jurisdiction cannot be grounded in a claim that the High Court erred in law.

Leave to appeal

[22] The respondents submit that the applicants' notice of motion for leave to appeal is irregular in that it was not drafted in line with this Court's Rules

and that, for this reason, the application falls to be dismissed. The respondents make a number of factually dependent submissions regarding the indebtedness of the Trust to the insolvent, which need not occupy us. They submit that the applicants have failed to indicate with specificity which aspects of sections 8, 9 and 12 of the Act were not complied with. They further submit that the debt was established through audited financial statements from the insolvent, which fact was accepted by the High Court and the Supreme Court of Appeal. They further contend that there is nothing wrong with the High Court's interpretation of the provisions of the Act and that they made out a proper case for the sequestration of the Trust. They aver that the Trust is clearly insolvent and the debt was not denied by the applicants.

[23] According to the respondents, they complied with all the relevant provisions of the Act. In their view, the current dispute turns on whether the requirements of section 12(1)(b) were met, that is that “the court [should be] satisfied that . . . the debtor has committed an *act of insolvency* or *is insolvent*”.⁶ They say that, in considering this, the question is whether they established the existence of either of these facts on a balance of probabilities. They submit that the High Court's finding cannot be disputed in so far as it held that the funds misappropriated by the insolvent from the Municipality were used to acquire all the assets of the Trust. This means that the total asset value of the Trust, together with the fruits of the assets which were acquired using the illicit funds, must be returned to the insolvent estate and then distributed to creditors. Following this, they submit, the Trust is thus factually insolvent, and the assets cannot be considered as a basis to oppose the sequestration of the Trust. They contend that the purchase of properties in the name of the Trust by the insolvent, as a guise

⁶ Emphasis added.

of legitimacy, from illegal proceeds, clearly constitutes an act of insolvency and clearly preferred one creditor above another.

[24] The respondents submit that the assets of the Trust do not exceed its liabilities. The “so-called” assets of the Trust were never properly or legally acquired. They submit that the applicants have not put up any concrete evidence to dispute this fact. They further submit that the evidence that the insolvent’s trustees relied on in the High Court was not based on speculation or on hearsay.

[25] Regarding the High Court’s judgment, the respondents submit that: (a) it was based on sound insolvency principles; (b) it does not demonstrate a lack of appreciation for the established insolvency law principles and the insolvency test, and therefore it is not flawed; and (c) there was no error of law or misapplication of insolvency law.

Analysis

Condonation

[26] The overarching consideration for the granting of condonation is whether it is in the interests of justice.⁷ This Court has in a number of decisions outlined the factors that must be considered when condonation is at issue. These factors include the extent and cause of the delay, the reasonableness of the applicants’ explanation for the delay, prospects of success and the prejudice the parties will suffer if condonation is granted or refused.⁸ I am satisfied that the delay of four days in bringing the application for leave to appeal is minimal, the explanation for the delay is

⁷ *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (*Van Wyk*) at para 20 and *Ethekekwini Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) (*Ethekekwini Municipality*) at para 23.

⁸ *Van Wyk* id; *Ethekekwini Municipality* id at paras 24-5; and *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

adequate and there is no prejudice to the respondents, should condonation be granted.

[27] In any event, on the pleadings there is no opposition to condonation being granted. The respondents' attempt to oppose the application in their written submissions, whilst having not done so in their answering affidavit, cannot be countenanced. The purpose of written submissions is to provide argument on the position taken in the pleadings, not to take a different position. Condonation is therefore granted.

Leave to file a replying affidavit

[28] The applicants have applied to file a replying affidavit for the reasons already outlined earlier. The position is that, in this Court, replying affidavits are not ordinarily permitted in applications for leave to appeal, unless there are exceptional circumstances justifying them. This is not the case here. The further evidence sought to be introduced is unnecessary in the overall assessment and determination of the issues. It is, therefore, not in the interests of justice to grant the applicants leave to file a replying affidavit. Leave to file a replying affidavit is refused.

Jurisdiction

[29] It is so that for this Court to entertain this application, its jurisdiction must be engaged. This means that the matter must either raise a constitutional issue or an arguable point of law of general public importance which ought to be considered by this Court. I have already mentioned that the applicants aver that the High Court's judgment is flawed and demonstrates a lack of appreciation for the established insolvency law principles and the test for insolvency. The applicants rely on *Makate*, which was delivered shortly after this application was launched in this Court, to make the point that the flaws in the High Court's judgment were so

fundamental and pervasive as to vitiate the judgment. The applicants submit that this constitutes a failure of justice and thus, a breach of the rule of law and the fair hearing right guaranteed in section 34 of the Constitution.

[30] The criticism of the High Court’s judgment is well-founded for the reasons raised by the applicants. The High Court ignored applicable and established principles regarding the assessment and determination of the insolvency of debtors. This is quintessentially a matter of general public importance warranting the attention of this Court. As submitted by the applicants, the errors in the High Court judgment are pervasive, especially in its failure to decide the issues with which it was confronted, based on the evidence before it. In a nutshell, this engages the jurisdiction of this Court in that the applicants did not enjoy a fair hearing as guaranteed by section 34 of the Constitution and there was clearly a failure of justice. That said, it must be emphasised that not every case with shortcomings in reasoning will follow the *Makate* route. This is indeed one of those rare cases where the High Court’s flaws, in the assessment and determination of the matter before it, are so fundamental and pervasive as to vitiate its judgment.

[31] I am mindful that *Makate* was only relied on by the parties in their written submissions, as that decision had not been delivered when this application was lodged. In this regard, I refer to what this Court stated in *Botha*:⁹

“In our law, there is a general rule that in motion proceedings ‘it is to the founding affidavit which a Judge will look to determine what the complaint is’.

...

[O]ur courts have adopted an approach largely predicated on fairness to the parties and the proper ventilation of the issue raised, even if belatedly so. If the new case is

⁹ *Botha v Smuts* [2024] ZACC 22; 2024 (12) BCLR 1477 (CC); 2025 (1) SA 581 (CC).

legal in nature, foreshadowed in the pleaded case, and does not cause prejudice to the other party, then a court should allow an applicant to make the new case in reply. The default position remains that a party must make out its case in the founding affidavit and a departure from that rule will only apply in exceptional circumstances.”¹⁰

[32] In my view, *Botha* is instructive. In line with the principle enunciated there, the applicants laid a proper basis in their pleadings for this Court’s jurisdiction, and their reliance on *Makate* in these circumstances is permissible. The other submissions on jurisdiction need not detain us. *Makate* has already established that this Court’s constitutional jurisdiction is engaged on this basis.

Leave to appeal

[33] A preliminary issue to deal with is the respondents’ contention that the applicants have filed an irregular notice of motion for leave to appeal in this Court. This submission must be rejected. The respondents do not explain in any way why the notice is irregular. They make a bare averment with no substantiation whatsoever.

[34] Having concluded that this Court’s jurisdiction is engaged, it remains to be determined whether leave to appeal should be granted. This Court must determine whether it is in the interests of justice to do so.¹¹ Some factors that this Court will take into consideration are: the prospects of success;¹² the public importance of the issues raised;¹³ the position of the applicants in

¹⁰ Id at paras 60 and 65.

¹¹ *Economic Freedom Fighters v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) at para 46.

¹² *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) (*Boesak*) at para 12.

¹³ *AB v Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC) (*Pridwin*) at para 114.

society;¹⁴ the factual nature of the dispute;¹⁵ mootness;¹⁶ whether the challenge is abstract;¹⁷ and whether the issues have been ventilated before the lower courts.¹⁸ The applicants have amply demonstrated that the High Court's judgment is flawed. In my view, a reading of the High Court's judgment leads to the ineluctable conclusion that the High Court failed to appreciate the facts and issues before it. As was the case in *Makate*, it is in the interests of justice for leave to appeal to be granted.

[35] It must be pointed out at this stage that the application is fact-laden and requires an adequate consideration and assessment of the facts. This Court has said that it does not involve itself in factual controversies.¹⁹ That is for the lower courts. But the High Court woefully failed to assess and determine the matter on its facts; and to compound matters, the case has also not had the benefit of being ventilated before the Supreme Court of Appeal, as it dismissed the application for leave to appeal. However, this Court will not be pronouncing on the factual issues involved. I intend to focus on how the High Court treated the facts to demonstrate the High Court's failure to comply with the duty of proper consideration.

Failure to appreciate the facts and issues

[36] The furnishing of reasons is a mechanism to ensure that judges do not act arbitrarily.²⁰ It serves a broader public purpose in that it demonstrates to

¹⁴ Id at para 116.

¹⁵ *Boesak* above n 12 at para 15.

¹⁶ *Pridwin* above n 13 at para 110.

¹⁷ *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) at para 35.

¹⁸ *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) at para 63.

¹⁹ *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC); [2011] 6 BLLR 527 (CC); (2011) 32 ILJ 545 (CC) at para 12.

²⁰ *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12.

the public at large that courts are open and transparent, as well as provides guidance to the public in respect of similar matters.²¹ In *Makate*, this Court ruled that it could set aside the decision of a court on the basis of that court's failure to appreciate the facts and issues before it.²² The question is, how flawed must an assessment be for it to constitute a failure of justice?²³

[37] This Court in *Makate* held that the flaws in the assessment must be so fundamental and pervasive as to vitiate the court's judgment.²⁴ There must have been a failure in the performance of a duty of proper consideration.²⁵ The adequacy of the reasons is not concerned with whether they are sound or correct, but with whether they sufficiently explain how the court reached its ultimate conclusions.²⁶ The reasons must be responsive to the case's live issues and the parties' key arguments.²⁷ The reasons must disclose the "path of reasoning".²⁸ The judgment must explain how and why, pursuant to the resolution of the material issues, the court reached its conclusion on the disposition of the case and the orders made.²⁹

[38] This Court stated in *Makate* that in general, adequate reasons must at least deal with each of the main issues in the case by—

“(a) identifying, in respect of each such issue, the essential import of the evidence of each side; (b) explaining how and why the court has resolved any material factual disputes in a particular way; (c) identifying, where applicable, the essential import of

²¹ *Id.*

²² *Makate* above n 3 at paras 104-5.

²³ *Id.* at para 43.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at para 63.

²⁷ *Id.* See also *R v Walker* 2008 SCC 34; [2008] 2 SCR 245 at para 20.

²⁸ *Makate* *id.*

²⁹ *Id.* at para 64.

competing submissions on the law applicable to the facts; (d) explaining how and why the court has resolved any material disputes on the law in a particular way; and (e) explaining how and with what result the court has applied the law to the facts.”³⁰

[39] Importantly, the mere existence of these principles is not a source of recourse for any litigant who is aggrieved by an adverse judgment.³¹ As stated above, the flaws in the adjudicative process must be so fundamental and pervasive as to vitiate the court’s judgment.³² Such fundamental flaws would constitute a failure of justice, breach the rule of law and infringe the fair hearing right enshrined in section 34 of the Constitution.³³ As will be demonstrated, the High Court committed a grave injustice in failing to give proper consideration to the facts before it and to apply the correct principles of law. Furthermore, there was no explanation as to what principles of law, if any, the Court relied on. This is a gross infringement of the applicants’ right to a fair public hearing as well as to the rule of law.

[40] The overarching premise of the High Court’s finding of insolvency of the Trust is with regard to the alleged criminal conduct of the insolvent, and not the Trust. The High Court focused on how the properties of the Trust were acquired, which ties back to the allegation that the Trust acquired all of its assets utilising stolen money. How the properties were obtained is of no consequence in a sequestration application. In a sequestration application, what is important is whether the subject of the application is factually insolvent. In this case in particular, what was important was whether the Trust was factually insolvent, as that was the case advanced by the insolvent’s trustees in the High Court. The debt itself was denied and, importantly, no acts of insolvency were relied upon in the pleadings. The

³⁰ Id.

³¹ Id at para 65.

³² Id at para 66.

³³ Id.

High Court relied on allegations of criminal conduct by the insolvent, allegations which have not been proven in criminal proceedings and were clearly hearsay. The High Court does not explain how and why it found these allegations of criminal conduct to be admissible and relevant in a sequestration application.

[41] The High Court held that the Trust committed an act of insolvency in attempting to alienate the property with the intent to prejudice one creditor above another. However, this was not pleaded. Indeed, even the High Court's judgment discloses no such facts. No such property was identified. Nothing in the judgment discloses how the High Court came to this conclusion. The path of reasoning is not disclosed.

[42] The High Court further found that the Trust committed an act of insolvency by disposing of immovable property, in that the insolvent purchased the properties in the name of the Trust. I find it difficult to see how this qualifies as an act of insolvency by the Trust, even if it had been pleaded as such, which it was not. This seems to be an attempt to utilise section 8(c) of the Act. Section 8(c) states that a debtor commits an act of insolvency if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another.

[43] The finding by the High Court demonstrates a lack of appreciation not only of the facts before it, but also of the applicable law. In other words, it is not a misapplication of the law to the facts, but a total failure to appreciate the facts, what insolvency law principles provide for and how they should be applied.

[44] The High Court further found, despite the absence of such a pleaded case, that the Trust had committed an act of insolvency by having property

but not refunding the loan to the insolvent. The loan was disputed, and there was no evidence before the High Court of a demand for its repayment. The High Court relied on a disputed forensic report, but it did not explain how it dealt with the applicants' rejection of the veracity of the forensic report.

[45] Further, the affidavits in the High Court indicate that the Trust had sufficient assets to pay the debt in question, if proven, and yet no demand for payment was made. The High Court does not grapple with this in its judgment. I reiterate what this Court said in *De Lange*.³⁴ Insolvency laws “constitute a last resort for creditors to enforce valid claims against their debtors and they also ensure a fair and just distribution of debtors' assets among competing creditors in the event of such debtors' liabilities exceeding their assets”.³⁵ The High Court did not demonstrate that the sequestration application was a measure of last resort. It also did not explain what effect, if any, the assets of the Trust have on a finding of technical insolvency.

[46] Overall, the above demonstrates that the High Court failed in its duty of proper consideration. Consequently, the order of final sequestration must be set aside.

Remedy

[47] As this Court stated in *Makate*, we are not at large to decide factual issues.³⁶ This Court has only intervened in this matter to demonstrate the failure of the High Court to comply with the duty of proper consideration. This is evidenced by the High Court's failure to appreciate the facts; what

³⁴ *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

³⁵ *Id* at para 32.

³⁶ *Makate* above n 3 at para 104.

the insolvency law principles provide for; how they should be applied; as well as the absence of the “path of reasoning” in the High Court’s judgment.

[48] Importantly, I must emphasise that this Court’s judgment does not pronounce a view on the merits, but simply highlights the material shortcomings in the High Court’s judgment. And it must be reiterated that this is one of those rare cases where, as held in *Makate*, the High Court’s flaw in the assessment is so fundamental and pervasive as to vitiate its judgment. The appropriate remedy in the circumstances is to remit the matter to the High Court for a proper determination by a different judge.

Costs

[49] The general principle is that costs must follow the result. I see no reason to deviate from this principle. Therefore, the respondents are to pay the applicants’ costs in this Court. Neither of the parties are to blame for the costs of the abortive High Court proceedings. In the circumstances, it is appropriate that each party bears their own costs, confined to the abortive hearing leading to the High Court judgment handed down on 15 September 2022. The applicants have also requested that: (a) the costs order granted by the two Judges of Appeal who considered and dismissed the applicants’ application for leave to appeal at the Supreme Court of Appeal be set aside and replaced by an order that the costs be costs in the appeal; and (b) the cost order granted by the Deputy President of the Supreme Court of Appeal against the applicants when refusing the application for reconsideration be set aside.

[50] I therefore grant the applicants their request in respect of the orders of the Supreme Court of Appeal as it is a fair request.

Order

[51] In the result, the following order is made:

1. Leave to appeal is granted.

2. The appeal is upheld.
3. The orders of the Supreme Court of Appeal in the applications for leave to appeal and reconsideration are set aside.
4. The order of the High Court of South Africa, North West Division, Mahikeng (High Court), is set aside.
5. The application heard under case number M282/2020 seeking an order for the final sequestration of the Mokasule Investment Trust with Registration Number I[...], is remitted to the High Court, to be heard by a different judge.
6. The respondents are ordered to pay the applicants' costs in this Court.
7. The respondents are ordered to pay the applicants' costs in the application for leave to appeal in the Supreme Court of Appeal.
8. Each party must pay their own wasted costs in respect of the abortive hearing of the matter that resulted in the High Court handing down judgment on 15 September 2022.

For the Applicants:

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For the Respondents:

S J van Rensburg SC instructed by
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