IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2019/29582

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

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In the matter between:

ENGEN PETROLEUM LIMITED Applicant

and

SING VISHAL Respondent

SUMMARY

Sequestration proceedings – section 12(1) of the Insolvency Act 24 of 1936 – requirements for final order of sequestration – test – balance of probabilities – whether sequestration advantageous to creditors.

A *rule nisi* having been granted and the respondent provisionally sequestrated, the court had to decide whether to grant the final order of sequestration, declaring the respondent insolvent in terms of section 12(1) of the Insolvency Act 24 of 1936 ("*Act*"). The matter having arose from the respondent having assumed liability as a surety and co-principle debtor of an entity known as Africircle Road Corporation CC (*"the CC"*).

Facing the court was the question of whether there was reason to believe that sequestration would be to the advantage of creditors of the respondent, having met all the other requirements of the section.

In opposing the final sequestration, the respondent contended that the applicant had failed to discharge its onus and show, on a balance of probabilities, that sequestration would be to the advantage of the creditors.

The court reiterated the established principle that in such an application, it was incumbent upon the applicant to show on a balance of probabilities that there was "*reason to believe*" that sequestration would be to the advantage of creditors and to also establish that there were reasonable grounds for the conclusion that, upon a proper investigation of the debtor's affairs, a trustee may discover (or recover) assets which might be realised for the benefit of creditors.

In discharging its onus, the applicant submitted that the respondent had caused his former business to be liquidated and caused or formed a new entity called Africircule (Pty) Ltd ("*the company*") and that the respondent was an owner of immovable property of which a bond was registered for a sizeable amount. It was also evident that the respondent was using the same business address of the CC as the business address of the company as per Sheriff's *nulla bona* return which had been served on the respondent's place of employment. The applicant also contended that the respondent may have committed an act of fraud by transferring the business of the CC into the company. In this regard, the court held that the fact that the CC was liquidated at the instance of the respondent and that the CC had assets prior to the liquidation, was a relevant factor in determining whether it would be to the advantage of creditors of the respondent if his estate is sequestrated.

The court held that is was probable that the company was the *alter ego* of the respondent and in such circumstances, a duly appointed trustee would be in a better position to conduct a comprehensive investigation into the business affairs of the respondent.

It further held that such investigation would in no doubt render the sequestration of the respondent to be to the advantage of creditors of the respondent. The *rule nisi* confirmed.

The court also commented that on the question of costs, and said that based on the circumstances surrounding the application, it was not convinced that the opposition was bona fide and reasonable, however, it was bound by the Act that costs of the application shall be costs in the sequestration.