Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 58165/2021

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

October 2022

……………………..   …………………………...

Date   **ML TWALA**

In the matter between:

STEWART N.O., MICHAEL LAWRENCE **FIRST APPLICANT**

BODIBE N.O., PULENG FELICITY **SECOND APPLICANT**

MASHAMBA N.O., JERIFANOS THIRD APPLICANT

(in their capacity as the duly appointed

Joint liquidators of Carmol Distributors

(Pty) Limited (in liquidation))

And

GOVENDER, DURAN FIRST RESPONDENT

(ID NO: […])

(Date of Birth: […])

(Married in community of property to

Noeleen Govender) (born Geanballey)

GOVENDER, NOELEEN SECOND RESPONDENT

(ID NO: […])

(Date of Birth: […])

(Born Geanballey)

(Married in community of property to

Duran Govender)

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 31st October 2022

TWALA J

[1] Before this Court is the return day for the application for the final sequestration of the joint estate of the respondents, who are married in community of property, brought by the applicants in their capacity as the joint liquidators of Carmol Distributors (Pty) Ltd (in liquidation) ("Carmol") duly appointed as such in terms of the letters of Authority issued by the Master of the High Court Johannesburg on the 26th of July 2016 under the Master's reference number G 1023/2015 and as duly amended on the 10th of October 2017. The joint estate of the respondents was provisionally sequestrated and placed in the hands of the Master on the 17th of March 2022.

[2] It is common cause that Carmol conducted and operated an illegal scheme whose business was the acceptance of deposits from participants who are members of the public which deposits were repayable to the participants upon the expiry of 12 months following the deposits being made. Furthermore, it is undisputed that Carmol applied the deposits received to effect payments to other participants of the scheme, for the personal benefit of the perpetrators of the scheme including payments to their families and friends. The respondents were such participants of the scheme for the period 04 March 2013 to the 19th of November 2014 and during this period they

received excess return payments from Carmol in the sum of R2 553 113. Carmol was then placed under provisional liquidation on the 1st of October 2015 and the final winding up order was made on the 30th of November 2015.

[3] On the 29th of August 2018 the applicants instituted proceedings against the respondents for the setting aside and payment of the repayments. Given that the respondents failed to file their discovery affidavit and to comply with the court order compelling them to do so, the applicants applied and obtained judgment against the respondents on the 3rd of February 2021. On the 23rd of June 2021 the applicants caused a writ of execution to be issued against the respondents and same was only served, after numerous attempts by the sheriff, on both respondents personally on the 7th of October 2021 and the sheriff returned a nulla bona after the respondents failed to make a payment to satisfy the judgment debt and could not indicate to the sheriff any disposable property sufficient to satisfy the judgment debt.

[4] It is trite that for a creditor to succeed in an application for the sequestration of the estate of a debtor, it needs to establish that it has a claim in excess of R100 which the debtor is unable to contest on reasonable and bona fide grounds, that the debtor has committed an act of insolvency and that there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated.

[5] Section 12 of the Insolvency Act, 24 of 1936 (as amended) ("the Act") provides as follows:

> *"final sequestration or dismissal of petition for sequestration*
>
> *(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 subsection (1) of section nine;*
>
> (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.*

[6] I do not understand the respondents to be contesting the claim of the respondents nor that they have committed an act of insolvency. The respondents' submission is that the applicants have failed to establish that it will be to the advantage of their creditors if their joint estate is sequestrated and therefore are not entitled to the relief as prayed for. It was contended that the estate of the respondents was provisionally sequestrated on the 17th of March 2022 and a provisional trustee was appointed who should by now have conducted a full investigation of the affairs of the estate of the respondents. It does not lie in the applicants to say that it will be the trustee who is appointed after the final sequestration order is granted who will be in a better position to investigate the estate of the respondents. The respondents, so the argument went, have testified under oath that they do not have any assets to satisfy the judgment debt.

[7] There is no merit in this argument. The act provides that the creditor should have reason to believe that it will be to the advantage of creditors that the debtor's estate be sequestrated. It does not place an onus on the creditor to prove that it will be to the advantage of the creditors but requires a reasonable belief that it will be to the advantage of the debtors that its estate be sequestrated. Given the circumstances of this case that the respondents received payment in excess of R2.5 million from the scheme operated by Carmol, it is hardly surprising that the applicants believe that the trustee that

will be appointed by the Master after the final order of sequestration is granted may unearth some assets belonging to the respondents or dispositions which were made by the respondents before the institution of these proceedings.

[8] It is of no consequence that the provisional trustee should by now have filed a report of what he has discovered in his investigation since his appointment. There is no duty on the provisional trustee to submit such a report nor does the act provide for the applicants to make that report available when the matter comes before the Court. It should be recalled that Carmol operated a scheme wherein members of the public at large deposited money into its account and those moneys were paid and utilised by the perpetrators of the scheme for their own benefit and that of their family members and friends. It was an interwoven scheme involving the public and requires a thorough investigation to its affairs. I hold the view therefore that it is for the trustee to unscramble the egg.

[9] In *Meskin & Co v Friedman 1948 (2) SA 555 (WLD) at 559* the court held that the right to an investigation by a trustee which follows upon a sequestration is not sufficient in itself to constitute the 'advantage' contemplated in insolvency legislation. The court stated the following:

> *"In my opinion, the facts put before the court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to thee creditors. It is not necessary to prove that the respondent has any assets. Even if there are none at all, but there are reasons to believe that as a result of an enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient …."*

[10] In *Dunlop Tyres (Pty) Ltd v Brewit 1999 (2) SA 580 (WLD)* the Court referring to the Meskin decision quoted supra stated the following:

> *"It will be sufficient if the creditor in an overall view of the papers can show, for example, that there is reasonable ground for coming to the conclusion that upon a proper investigation by way of an enquiry under section 65 of the Act a trustee may be able to unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors."*

[11] It would be an absurdity to expect the applicants to investigate the affairs and the estate of the respondents and establish that it will be to the advantage of the creditors of the respondents if their estate was sequestrated – hence the legislature requires merely a reasonable belief. What is reasonable depends on the circumstances of each case. In casu, the fact that the respondents did not contest the claim of the applicants and that the respondents received over R2.5 million from such an interwoven scheme, in my view justifies the applicants' belief that maybe some assets may come to light or revealed when the trustee digs deeper in the affairs of the estate of the respondents. It is not a remote possibility having regard to the amounts received by the respondents.

[12] Although there is no onus upon the respondents to show that the provisional order is resisted on bona fide and reasonable grounds, they bear the evidentiary burden do so. It follows ineluctably therefore that the respondents' resistance of the grant of the final order of sequestration of their joint estate is not bona fide and on reasonable grounds but is meant to frustrate the applicants from obtaining the relief they seek.

[13] In the circumstances, the following order is made:

1. The joint estate of the respondents is hereby finally sequestrated and placed in the hand of the Master of this Court,
2. The costs of this application are to be costs in the sequestration of the joint estate of the respondents.

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TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: **24th of October 2022**

Date of Judgment: **31st of October 2022**

For the Applicant: **Advocate JH Groenewald**

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