**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 21/21875**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

19/12/2023 _____
DATE SIGNATURE

In the matter between:

**TRANSNET SECOND DEFINED BENEFIT FUND** **Applicant**

and

**ERIC ANTHONY WOOD** **Respondent**

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**JUDGMENT**

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**YACOOB J:**

**INTRODUCTION**

1. The applicant ("the Fund") seeks the final sequestration of the respondent ("Mr Wood"), in terms of section 12 of the Insolvency Act, 24 of 1936 ("the Act").

2. Mr Wood's estate was placed under provisional sequestration in terms of section 10 of the Act in an order granted on 10 November 2022, handed down together with a written judgment by my brother Manoim J ("the first judgment").

3. The application to sequestrate is based on claims against Mr Wood for over R110 million, emanating from Mr Wood's alleged control of certain entities which had a fiduciary relationship with the Fund, the actions of which caused loss to the Fund and gain, ultimately, to Mr Wood. The Fund has other claims against Mr Wood, related to the same set of facts, which are the subject of action proceedings.

4. It was submitted for Mr Wood that the Fund makes use of smoke and mirrors and emotive language to obscure the fact that it does not have a case against him. It must be noted that both sides in these proceedings have used their fair share of emotive language. The accusation of smoke and mirrors could equally be levelled at Mr Wood for much of his defence.

5. To the extent that the Fund seeks to rely on allegations of conspiracies, state capture and use of misappropriated funds for allegedly nefarious purposes, Mr Wood is right that none of that is relevant to whether the Fund has established its case in terms of section 12 of the Act. I do not take that into account. Nor did Manoim J take those allegations into account in the section 10 determination.

6. The history of the relationship between Mr Wood's entities and the Fund is set out in detail in the first judgment I do not propose to repeat it here. Much of it is common cause. I will deal with the facts only to the extent it is necessary to deal with what is before me. That is, whether the Fund has made out a case for a final sequestration order in terms of section 12 of the Act, or whether the matter should be referred to oral evidence, as submitted on Mr Wood's behalf.

**THE APPLICABLE TEST**

7. The Fund argues that, Manoim J having found that there was a *prima facie* case, Mr Wood now has the obligation to dislodge the *prima facie* case, which he does not do, and therefore it is entitled to a final order.

8. Mr Wood submits that the Fund must do more than simply establish a *prima facie case* in order to be entitled to a final order. He submits that even if the balance of probabilities favours the Fund, the application should be referred to oral evidence, to be determined together with the action he is defending, so that the factual disputes he raises can be dealt with. He also relies on the death of the deponent to the Fund's founding affidavit to raise the spectre of hearsay.

9. In addition Mr Wood relies on many of the same arguments considered and rejected in the first judgment. Although it is for this court to consider those arguments as they are relevant to the matter as a whole, it seems to me that there is nothing substantively different which has been put before this court which would move me to deal with those arguments differently than they have already been dealt with. The only difference is the difference between what is required for an order in terms of section 10 of the Insolvency Act, and the requirements for an order in terms of section 12 thereof.

10. In March 2023, Mr Wood filed a so-called "Opposing Affidavit". This was in addition to the Answering Affidavit and Supplementary Affidavit already filed before the hearing which preceded the first judgment. The stated purpose of the Opposing Affidavit was, firstly, to inform the court that the deponent to the Fund's affidavit had died and that this meant, for some reason, that the Fund could no longer rely on his affidavits; and secondly to demonstrate to the court that there are irreconcilable material disputes of fact that needed to be resolved by referring the matter to oral evidence before the court could make a decision.

11. The Opposing Affidavit does not contain any relevant new factual material. Apart from the death of Mr Maritz, the Fund's deponent, the affidavit consists of submissions that are argumentative in nature, contending that there are four fundamental disputes of fact which require referral to oral evidence. Mr Wood has always relied on an irreconcilable dispute of fact in opposing the application, so this was nothing new.

12. The affidavit also has annexed to it a summary of expert evidence that is to be adduced at the trial in the action between the parties, in response to the expert evidence of the Fund. The expert witness is Mr Wood himself. In the affidavit Mr Wood holds this up as evidence of a dispute of fact. Again, however, it is nothing new. The summary's contents are in great part *verbatim* a repetition of the relevant parts of Mr Wood's answering affidavit. The fact that it is now cast as an opposing expert report does not give it any greater probity. There being nothing really new before me, I am in the position of determining whether the applicant has made out a case for relief in terms of section 12 of the Insolvency Act, on essentially the same evidence on which the first judgment found that a case for relief in terms of section 10 of the Insolvency Act was made out.[1]

13. At the hearing before me, the consistent reliance on a dispute of fact notwithstanding, it was submitted for Mr Wood that no demonstration of disputes of fact was necessary for a referral to oral evidence. All that was required was that it be demonstrated that the forensic tool of cross-examination would show the deficiencies in the applicant's case. This lower threshold, it was submitted, was because the sequestration involved a matter of status.

14. In the first judgment, Manoim J accepted that there were disputes of fact on certain issues, but found that since a *prima facie* case was made out, a provisional order should be granted. The test relied on was that set out by Corbett JA in *Kalil v Decotex (Pty) Ltd and Another*,[2] in which it is clarified that for purposes of a provisional order of sequestration (or liquidation), the finding of a *prima facie* case when the application is opposed and there is a full set of affidavits, meant that the case was made out on a balance of probabilities in favour of the applicant, even though it there was a possibility that it may be dislodged by a referral to oral evidence.

15. Corbett JA also held that no lasting injustice results if an order is granted despite there being disputed issues, for two reasons. The first is that the respondent has the opportunity to ask for a referral to oral evidence on the return date, and the second, that the purpose of the provisional order is to

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[1] That is, for the provisional order.
[2] 1988 (1) SA 943 (A)

preserve the *status quo* while issues that arise are dealt with. It was also pointed out that a referral to oral evidence without granting a provisional order is not usually appropriate, if a *prima facie* case in the sense set out above has been established, because that would defeat the purpose of preserving the respondent's affairs. The appropriate time for a referral to oral evidence is on the return date.[3]

16. Mr Wood now asks for the opportunity to dislodge the Fund's case by means of oral evidence, and submits that it would be appropriate that this be dealt with as part of action proceedings already pending between the parties, where there is an overlap in the evidence relied on, even if the cause of action is distinct. He does not ask for the discharge of the provisional order.

17. The test at this stage of the proceedings is different that it was at the first, or provisional stage. The court dealing with a provisional sequestration must be of the opinion that *prima facie*[4] the applicant has established a liquidated claim against the respondent for not less than R100; that the debtor has committed an act of insolvency or is insolvent, and that there is reason to believe that the sequestration will be to the advantage of creditors. The court then has a discretion to order provisional sequestration. If it does so, it must also issue a *rule nisi*, calling on the debtor to show on the return date why the estate should not be finally sequestrated.

18. On the return day, section 12 of the Insolvency Act applies. At this stage, the same three elements must be determined, save that the court must be satisfied, on a balance of probabilities, of the existence of those elements. It then has a discretion to sequestrate the estate. If the court is not satisfied, it either dismisses the application for sequestration, or orders that further proof be adduced, and may then postpone the hearing for a reasonable period to permit this.

19. It was submitted for Mr Wood that an order can only be made if the court is satisfied that "oral evidence can make no difference to the impression given by the affidavits", relying on a judgment of the Full Court of the Cape Provincial

[3] *Kalil v Decotex* pages 976-979
[4] In the sense set out in *Kalil v Decotex*

Division, *Priest v Collett*.[5] However, in that judgment, the court was dealing with a situation in which a respondent in sequestration proceedings raises a dispute of fact, pointing out that bringing sequestration proceedings where there is no preceding judgment in the creditor's favour is risky. It is not a question of oral evidence for the sake of it.

20. It is clear that Corbett JA holding in *Kalil v Decotex* that the appropriate time for a referral to oral evidence is on the return date does not mean that a respondent is entitled to a referral just because he is would like to cross-examine the applicant's witnesses. Nor would he be entitled to a referral so that he may take advantage of the death of one of the witnesses. It must be evident on the papers that there is an issue which would be determined or resolved by the referral. This would logically include the determination of any irresoluble dispute of fact. For that to happen, the court must be satisfied that there is in fact a real, or *bona fide* dispute of fact, relevant to the requirements that must be established in terms of section 12 of the Act, that demands referral.

**HAVE THE REQUIREMENTS OF SECTION 12 BEEN MET?**

A liquidated claim

21. The Fund's claim against Mr Wood in these proceedings is founded in his having effective control of and having received benefits from his control Regiments Capital (Pty) Ltd and its wholly owned subsidiaries, Regiments Fund Managers (Pty) Ltd and Regiments Securities Limited.

22. The Fund relies on various sets of transactions which caused benefits to Mr Wood and those entities to found its liquidated claims against Mr Wood. The first are what the Fund refers to as "bond churning transactions", in which large numbers of bonds were traded on the same days. The second are interest rate swap transactions in which the Fund and Transnet each assumed the interest rate exposure of Nedbank to the other, each advised by Mr Wood wearing the hat of a different entity, and which resulted in the misappropriation of funds to

[5] 1930 372 CPD at 375

pay transaction fees for services allegedly provided to Transnet (not the Fund) by Regiments Capital. The Fund claims the disgorgement of an amount that can be traced to Mr Wood, as a part of the amount that has not yet been recovered.

23. Regiments Fund Managers was the Fund's fund manager and had a fiduciary duty to the Fund. The allegation is that that, amongst other things, the Fund entered into a number of unnecessary transactions, called "bond churning transactions", which resulted in fees being generated for Regiments Fund Managers and loss to the Fund. The allegation is that the only purpose of those transactions was in order to generate fees for Regiments Fund Managers. The fees generated by these transactions amounted to R348 million, of which R90-odd million was paid to companies nominated by Mr Wood, which paid on over R46 million to Mr Wood.

24. The transactions entailed the sale and purchase on the same day of billions of R186 bonds to Regiments Securities, resulting also in profits being gained by Regiments Securities. Although the numbers sold and purchased in each set of transactions was not identical, purchase from Regiments Securities was consistently at a higher price than sale to Regiments Securities. Mr Wood's nominee companies received a share of the profits resulting from these transactions.

25. Mr Wood does not deny the transactions, nor their outcomes. He alleges however that the transactions were justified, and that the Regiments entities were entitled to act as they did. He submits on this basis that his nominee companies were entitled to the payments that they received, and that, ultimately, he was too.

26. In his justification of the transactions, Mr Wood relies on general principles related to fund management, specifically, the need to manage delta risk in a defined benefit fund. It is common cause that buying or selling R186 bonds to manage delta risk is an appropriate strategy. However, there is absolutely nothing in Mr Wood's version which explains the positive effect on delta risk management of the trade of billions more bonds than was necessary to result in

a net difference of numbers of bonds held by the Fund, in sets of simultaneous transactions, at prices always to the disadvantage to the Fund, in multiple trades on a scale at which the only perceptible benefit was to the Fund's fund managers, where the trades took place only with a related entity of the fund managers, resulting in a profit to that entity. The only possible conclusion is that this was done contrary to Mr Wood's fiduciary duty to the Fund, as a director of Regiments Fund Managers and an advisor of the Fund in his own person, albeit through Regiments Fund Managers, in order to generate transaction fees for Regiments Fund Managers and consequent fees for himself.

27. Mr Wood also claims in his justification of the bond churning transactions that Regiments Fund Managers was entitled to act as it did because its agreement with the Fund gave it a broad mandate in terms of which it always acted. It is true that the mandate was broad. However the mandate did not, nor could it by law, agree to a blanket exclusion, without full disclosure, of the fiduciary duties of Regiments Fund Managers and the natural persons through which it acted (including Mr Wood).

28. Mr Wood attempts to rely on the proposition that it was Regiments Fund Managers which owed the fiduciary duty to the Fund, and not he himself, since it was Regiments Fund Managers which had the contract with the Fund, and therefore that a claim lies only to Regiments Fund Managers. This argument was properly dealt with in the first judgment and I take the same view. The same applies to Mr Wood's reliance on his having left Regiments by the time payments were made, and before some of the bond churning transactions took place. He still benefitted from his actions while he was still with Regiments, and transactions took place on his advice. Having left by the time he benefitted does not free him from liability.

29. I am satisfied that the Fund has established that the bond churning transactions were not justified, and in fact resulted in fixed and determined loss to the Fund and gain to Mr Wood's entities and Mr Wood himself, and that Mr Wood is liable to the Fund for the amount that it has shown was paid to his nominated entities. There is nothing that Mr Wood has put before the court that raises a dispute of fact on this score, and which leads to a finding that oral evidence and

cross-examination may dislodge what the Fund has established. A liquidated claim therefore has been established.

30. That being the case, there is no need to consider the liability of Wood emerging from the interest rate swaps and the use of the Fund's cash to pay Regiments Capital for an alleged debt of Transnet. However, to the extent necessary, I agree with and adopt Manoim J's analysis and conclusion regarding the use of the Fund's cash to pay Regiments on Transnet's behalf.

Insolvency

31. The debtor must either have committed an act of insolvency or be insolvent. The Fund submits that Mr Wood is insolvent, because his debts outvalue his assets.

32. On Mr Wood's own version, his assets are worth R1 455 000. The Fund has established a claim of at least R90 million against him. On what is before this court, therefore, Mr Wood is insolvent.

Advantage to creditors

33. The applicable test is that set out in *CSARS v Hawker*:[6]

> "a court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The Court needs to be satisfied only that there is reason to believe … that as a result of investigation and enquiry assets may be unearthed that will benefit creditors".

34. Taking into account that Mr Wood has received, through his entities which received payment on his behalf as well as directly, many millions of rands more than he claims his estate is worth, I am satisfied that there is reason to believe that investigation and enquiry may unearth assets that will benefit creditors.

**CONCLUSION**

[6] 2006 (4) SA 292 (SCA) at [29]

35. For these reasons I am satisfied that the Fund has established that it has a liquidated claim against Mr Wood of more than R100, that he is insolvent, and that it is to the benefit of creditors to liquidate him. I do not see any reason to refer the matter to oral evidence. Nor has Mr Wood raised any reason which would support an exercise of my discretion in his favour.

36. To the extent that I have not dealt with any of Mr Wood's arguments in the papers, which were set out in detail and argued in detail in the written and oral argument before Manoim J, I have considered them and there is nothing that Mr Wood has submitted which moves me to find differently on them. They were not argued before me in the hearing, and there is nothing that I can find on the papers that moves me to deal separately with them.

37. For these reasons I make the following order:

    1. The estate of the respondent, ERIC ANTHONY WOOD (Identity Number 630522 5020 087) is sequestrated.

    2. Costs, including costs of two counsel, are costs in the sequestration of the respondent's estate.

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**S. YACOOB**
**JUDGE OF THE HIGH COURT**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Appearances**

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| Counsel for the applicant: | A E Bham SC, M Chaskalson SC, N Luthuli |
| Instructed by: | ENS Africa |
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| Counsel for the respondent: | E L Theron SC |
| Instructed by: | Fairbridges Wertheim Becker |

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| Date of hearing: | 24 July 2023 |
| Date of judgment: | 19 December 2023 |