REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 2021/34174

DELETE WHICHEVER IS NOT APPLICABLE

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

14 April 2023 .....
DATE SIGNATURE

In the matter between:

FRANCK, FRANCOIS **Applicant**

and

DYKE, CRAIG ANDREW **First Respondent**

DYKE, CRAIG ANDREA PAULINE **Second Respondent**

Neutral Citation: *Franck v Dyke and Another* (Case No: 2021/34174) [2023] ZAGPJHC 340 (14 April 2023)

JUDGMENT

ENGELBRECHT, AJ

INTRODUCTION AND BACKGROUND

[1] This is an application for the estate of the first respondent, Mr Craig Andrew Dyke (Mr Dyke), to be placed into provisional sequestration, in the hands of the Master of the High Court, and for associated and consequential relief. The application is made by Mr Francois Franck (Mr Franck), on the basis of a *nulla bona* return of service issued by the Sheriff of this court on 16 April 2021, pursuant to a warrant of execution of 28 February 2019.

[2] The second respondent (Mrs Dyke) is married to Mr Dyke, out of community of property and profit and/or loss, with the exclusion of the accrual system, as contemplated in the Matrimonial Property Act 88 of 1984. No substantive relief is sought against Mrs Dyke.

[3] The *nulla bona* return of service that forms the basis of this application was the culmination of a series of unfortunate events that started with Mr Dyke being engaged to do repair work on Mr Franck's motor vehicle. Mr Dyke held on to the vehicle in circumstances where he asserted had not been fully remunerated for repair work to another vehicle. Mr Franck approached the court to secure the return of his vehicle. He obtained the order on 28 May 2018, and Mr Dyke was ordered to pay Mr Franck's costs. Pursuant to the costs order, Mr Franck's attorneys on 20 February 2019 had a bill of costs taxed, in the amount of R32 601.39. On 28 February 2019, they caused a Warrant of Execution (the writ) to be issued. After two failed attempts to execute the writ, the Sheriff was ultimately able to serve it on Mr Dyke on 28 November 2019. The Sheriff made an inventory of the movable property attached on that day, but on or about 8 December 2019 Mrs Dyke made claim to the movable property that had been attached. She explained that Mr Dyke had "*… long ago liquidated anything, he brought in to the marriage"* and, as they were married out of community of property, Mr Dyke had "*no claim on what is left".* Interpleader proceedings in respect of Mrs Dyke's claim were interrupted by the commencement of the Covid-19 lockdown and in April 2021 instructions were given to the Sheriff to release the movable property from attachment. An instruction was given to re-serve the writ on Mr Dyke. This was done on 16 April 2021, and the return of service

recorded that "*Mr Dyke informed me that he has no money or disposable assets wherewith to satisfy the said Writ or any portion thereof. No disposable assets were either pointed out or could be found by me after diligent search and enquiry. MY RETURN IS ONE OF NULLA BONA. … Defendant refused to sign a Nulla Bona"*.

[4] For the sake of completeness, I record that Mr Dyke, for a period of more than three years, failed to return the vehicle to Mr Franck in accordance with the May 2018 order and ultimately was held in contempt of court by my brother Tlhotlhalemaje AJ, as appears from a judgment of 16 September 2022 under case number 12317/2017. The judgment also records a purported attempt by Mr Dyke to have appealed the 28 May 2018 order that formed the basis of the writ, but that process was never pursued to finality (leaving aside the procedural irregularities attributable to the fact that Mr Dyke was unrepresented as he remains before this court).

THE LAW

[5] Section 10 of the Insolvency Act 24 o 1936 (Insolvency Act) provides that:

"*If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie –*

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (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 make an order sequestrating the estate of the debtor provisionally."

[6] In terms of section 11(1), "*If the court sequestrates the estate of a debtor provisionally it must simultaneously grant a rule nisi calling upon the debtor upon a day mentioned in the rule to appear and show cause why his or her estate should not be sequestrated finally*".

COMPLIANCE WITH THE REQUIREMENTS IN THE PRESENT CASE

Standing of the applicant

[7] Mr Franck is a creditor of Mr Dyke as contemplated in section 9(1) of the Insolvency Act. He has an unsecured liquidated claim against Mr Dyke in excess of the prescribed amount. The requirement in section 10(a) is met.

Act of insolvency

[8] Before me, it is common cause that Mr Dyke committed an act of insolvency, as contemplated in section 8(b) of the Insolvency Act, in light of the issue of the *nulla bona* return by the Sheriff. Moreover, in answer to the application, the respondents stated on oath that Mr Dyke is unable to pay the amount due. The requirement in section 10(b) is met.

Reason to believe that it will be to the advantage of creditors of the estate is sequestrated

[9] The known creditors of Mr Dyke are (i) Mr Franck; (ii) South African Home Loans Guarantee Trust (SA Home Loans), the bond holder in respect of an immovable property that Mr Dyke owns together with his wife; and (iii) the City of Johannesburg, in respect of outstanding municipal charges. The amount outstanding on the bond is not known. What is known, is that the bond initially registered in 2012 was in the amount of R730 000 (seven hundred and thirty thousand rands), and that Mrs Dyke has been making bond repayments since that time (*i.e.* for a period in excess of 10 years), so that the indebtedness must have diminished by some margin. As at September 2022, the debt outstanding to the City of Johannesburg was in excess of R300 000 (three hundred thousand rands).

[10] Mr Dyke's only known asset is his undivided half share in the immovable property situated at Erf 1298 Vorna Valley Extension 25 (the property). The City of Johannesburg municipal statement reflects the market value of the property as R1 277 000. An automated valuation reflects an expected value of R1 750 000, with an estimated low of R1 220 000 and an estimated high of R2 050 000. Based on oral submissions before me, the respondents asserted that the state of the property is not such that a high market value can be attributed to it.

[11] The difficulty that presents itself in the present case is that, quite apart from the ordinary uncertainty concerning the amount that could be realised from the sale of the property in due course, the extent of debts owed to creditors is uncertain and unknown. These facts engage the question whether there is reason to believe that the sequestration will be to the advantage of creditors.

[12] In this assessment, I am guided by the judgment in *Meskin & Co v Friedman:*[1]

> *"Secs. 10 and 12 of the Insolvency Act, 24 of 1936, cast upon a petitioning creditor the onus of showing, not merely that the debtor has committed an act of insolvency or is insolvent, but also that there is 'reason to believe' that sequestration will be to the advantage of creditors. Under sec. 10, which sets out the powers of the Court to which the petition for sequestration is first presented, it is only necessary that the Court shall be of the opinion that prima facie there is such 'reason to believe'. Under sec. 12, which deals with the position when the rule nisi comes up for confirmation, the Court may make a final order of sequestration if it 'is satisfied' that there is such reason to believe. The phrase 'reason to believe', used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the Court must be 'satisfied', it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so.*

[1] 1948 (2) SA 555 (W) at 558 to 559. Emphasis supplied.

What is the nature of the 'advantage' contemplated in these two sections? Sequestration confers upon the creditors of the insolvent certain advantages (described by DE VILLIERS, J.P., in Stainer v Estate Bukes (1933 OPD 86 at p. 90) as the 'indirect' advantages) which, though they tend towards the ultimate pecuniary benefit of the creditors, are not in themselves of a pecuniary character. Among these is the advantage of full investigation of the insolvent's affairs under the very extensive powers of enquiry given by the Act. In Awerbuch, Brown & Co v Le Grange (1939 OPD 20), it is suggested that this right of inquisition is in itself an advantage such as is referred to in the sections, so that it is sufficient to make out a reasonable case for enquiry without showing that any material benefit to the creditors is likely to result from the investigation. With great deference I venture to think that this states the position more favourably to the petitioning creditor than is justified by the language of the sections. As the 'advantage' of investigation follows automatically upon sequestration, the Legislature must, in my opinion, have had some other kind of advantage in view when it required that the Court should have 'reason to believe' that there would be advantage to the creditors. The right of investigation is given, as it seems to me, not as an advantage in itself, but as a possible means of securing ultimate material benefit for the creditors in the form, for example, of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collusive claims. 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 creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient (see e.g., Pelunsky & Co v Beiles and Others (1908, T.S. 370); Wilkins v Pieterse (1937 CPD 165 at p. 170); Awerbuch, Brown & Co v Le Grange (supra); Estate Salzmann v van Rooyen (1944 OPD 1); Miller v Janks (1944 TPD 127)).”

[13] I am guided, further, by the unanimous judgment of the Constitutional Court in *Stratford and Others v Investec bank Limited and Others:*[2]

[2] 2015 (3) SA 1 (cc) at paras 44 – 45. Footnotes omitted.

"[44] The meaning of the term 'advantage' is broad and should not be rigidified. This includes the nebulous 'not-negligible' pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or 'not-negligible' benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin et al state that —

'the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order.' [Footnotes omitted.]

[45] The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in Friedman. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment, except through sequestration; or that some pecuniary benefit will redound to the creditors."

[14] In the present instance, the estimated value of the property and the known facts concerning the indebtedness of Mr Dyke do provide the basis for concluding that there is a reasonable prospect that there will be an advantage to creditors, even if the extent of the pecuniary advantage is not capable of being positively determined. It does not appear to me that there exist means for creditors to obtain payment other than through sequestration, given the assertion on oath by the respondents that Mr Dyke

does not have other assets, that he is not gainfully employed, and that he is unable to be gainfully employed given his health.

[15] That is sufficient a basis to conclude that the requirement of section 10(c) is met. For that reason, I do not deal with the submission that there is reason to believe that there may be a further advantage to creditors resulting from the inquiry to follow in the sense that further assets may be revealed due to Mr Dyke's membership of a close corporation. It may be that such a benefit may be derived in due course, but on the facts before me I am unable to reach a conclusion in that regard. As I have indicated, I do not need to, given my findings in the previous paragraph.

DISCRETION

[16] Section 10 postulates that a court "*may*" – i.e. not "*must*" grant an order if the requirements of the provision are met. It is accordingly an empowering provision that affords the court a discretion. It does not compel the court to grant the order if all of the requirements are met.

[17] In circumstances where all of the requirements are met, this court must accordingly decide whether to exercise its discretion to grant the order sought. That discretion must be exercised judiciously. In circumstances where all the requirements for placing an estate under provisional sequestration are met, the court should be slow to exercise its discretion against the grant of the order that is sought. Ultimately, the discretion to be exercised must be influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case.

[18] In the present case, there is a complicating factor in the sense that Mrs Dyke is the co-owner of the only known asset in Mr Dyke's estate. Although the respondents are married out of community of property and with the exclusion of the accrual system, Mrs Dyke's fate is bound up with that of Mr Dyke. In order for any benefit to creditors to be realised, the property will in due course have to be sold and Mrs Dyke will of course be affected by the sale of that asset.

[19] I have carefully considered the facts placed before me, including the allegation that it has been Mrs Dyke that has serviced the bond for more than 10 years without the assistance of Mr Dyke. These facts, however much sympathy they might evince, do not lead to the conclusion that the court's discretion ought to be exercised against the grant of the order sought. This court cannot ignore that Mr Dyke's undivided half share in the property is his only asset, and that the only ostensible means for Mr Dyke's creditors to achieve any form of payment from Mr Dyke lies in the sequestration process. Mrs Dyke's position is simply not a factor that can be relied upon to avoid the grant of the order. In any event, both Mr and Mrs Dyke will be afforded the opportunity to make submissions to the court on why Mr Dyke's estate should not be placed into final sequestration.

[20] That said, I am not inclined to make a costs order against Mrs Dyke in respect of her participation in these proceedings. It is appropriate for the costs of this application to be costs in the sequestration.

ORDER

[21] In the circumstances, it is ordered that:

21.1. The estate of the First Respondent is provisionally sequestrated and his estate is placed in the hands of the Master of the High Court.

21.2. A rule *nisi,* returnable on **24 July 2023 at 10h00**, is hereby issued, calling upon the First Respondent and any other interested parties to appear in this Court on and to show cause on that date and at that time why the First Respondent's estate should not be sequestrated finally.

21.3. The provisional sequestration order shall –

21.3.1. be published in the Government Gazette and a newspaper circulating in Gauteng;

21.3.2. be served on the First and Second Respondents;

21.3.3. be served on the employees of the First Respondent (if any) and/or their trade union representative(s) by affixing a copy of this order to the principal outer gate(s) at 3 Sparrow Avenue, Vorna Valley, Midrand;

21.3.4. be served on the South African Revenue Services;

21.3.5. be served on the Master of the High Court;

21.3.6. be delivered by registered post or electronic mail, if the mail address is known, to all known creditors of the First Respondent.

21.4. The aforesaid return day of the rule *nisi* may be anticipated upon 24 hours' written notice to that effect being given to the Applicant.

21.5. The costs of the application shall be costs in the sequestration of the First Respondent's estate.

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MJ Engelbrecht

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their

legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 14 April *2023.*

Heard on : 12 April 2023

Delivered: 14 April 2023

Appearances:

For the Applicant:	ADV L Franck
For the 1st & 2nd Respondent:	both in person