REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023 - 066208

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 03 August 2023 WJ du

In the matter between:

RYNO ENGELBRECHT N.O.	**FIRST APPLICANT**
TSIU VINCENT MATSEPE N.O.	**SECOND APPLICANT**

and

DAVID NAIDOO	**FIRST RESPONDENT**
MASTER OF THE HIGH COURT, JOHANNESBURG	**SECOND RESPONDENT**

JUDGMENT

DU PLESSIS AJ

[1] Background

[1] This urgent application requires the court to exercise its discretionary power in section 127A(1) of the Insolvency Act 24 of 1936 (“the Insolvency Act”) to delay or

deny the automatic rehabilitation of the First Respondent, Mr Naidoo, who is currently an unrehabilitated insolvent.

[2] The Applicants are the trustees of Mr Naidoo's insolvent estate. The First Respondent, Mr Naidoo, is the insolvent. Mr Naidoo's estate was provisionally sequestrated on 21 August 2013 and will automatically be rehabilitated through the effluxion of time on 21 August 2023. It is this rehabilitation that the trustees argue would prejudice the creditors of the insolvent estate, and the public, as the affairs and transactions of Mr Naidoo have not been investigated thoroughly. They contend that this is because of Mr Naidoo's conduct, showing a complete lack of *bona fides* and cooperation with his duly appointed trustees. The trustees go so far as to state that his conduct shows "a clear disdain for the rule of law and an intent to evade his creditors".[1] Such behaviour should not be tolerated and should convince the court to exercise its discretion in terms of s 127A(1) of the Insolvency Act to delay or deny Mr Naidoo's imminent rehabilitation.

[3] The Applicants set out the conduct on which they rely. They show that since Mr Naidoo's provisional sequestration, he has launched 14 appeals and applications to stay and/or rescind orders and/or proceedings. They aver that they did this with the sole purpose of causing delay, it was done in bad faith, and did not have a legitimate aim. They conclude that he has failed to pursue any of the many appeals and/or applications with genuine intent.

[4] On top of that, it seems like Mr Naidoo continues to live a prosperous life spending money in casinos while at the same time failing to comply with any of his obligations imposed on him as an insolvent in terms of the Act. The Applicants list the various contraventions in terms of the Act, highlighting that:

i. Mr Naidoo failed to inform his trustees of his residential and postal address. This is met with a blunt denial, rather than proof that this is not true. He also did not disclose his residential address in this urgent application.

[1] Applicant’s heads of argument paragraph 4.

ii. Mr Naidoo failed to provide the trustees with a duly completed statement of affairs in contravention of s 16 of the Act, attributing this omission to his previous attorneys and accusing them of failing to apprise him with the statement of affairs. He makes no promises of submitting it otherwise.

iii. Mr Naidoo has failed in his obligation to appear at the first and second meetings of creditors, including an enquiry into his affairs at the second meeting. This is contra s 64 of the Act. He states that this is the fault of his previous attorneys, who did not inform him of the notices.

iv. Mr Naidoo knew about the second meeting of creditors, failed to appear despite his statutory obligation to appear, and briefed counsel to appear on his behalf. This second meeting was set down on various dates to conduct an enquiry into Mr Naidoo's affairs, where he was represented by various legal teams, evidence that he knew about the sittings.

[5] Added to this, and on his version, Mr Naidoo has been involved in the management of a Close Corporation while being an unrehabilitated insolvent, in violation of s 47(1)(b)(i) of the Close Corporations Act.[2] He further, in his capacity as sole member of M & M Hiring Marquee CC, and without the trustees' consent, passed a resolution to proceed with the liquidation proceedings against a creditor after he had already been sequestrated.

[6] Perhaps crucial for this application – the Applicant avers that as a direct result of these delays, the trustees have not been able to investigate his affairs and transactions fully, and in turn, could not report to the creditors in terms of s 81(1) of the Act. Therefore, the sequestration proceedings are still ongoing.

[7] The trustees can't know the full extent of Mr Naidoo's debts, the Applicant continues, as this can only be established by Mr Naidoo himself at the enquiry into his affairs. The Master has, in the meantime, transferred the enquiry to the Palm Ridge Magistrates Court due to the non-cooperation of the insolvent in not attending to the enquiry proceedings. This is because only a Judge or a Magistrate

[2] 69 of 1984.

may issue a warrant committing an examinee to prison for failure to participate in an enquiry.[3]

[8] This enquiry is central to the sequestration process. It allows the trustees to investigate the affairs and transactions of the insolvent. The trustees hope to establish various facts when Mr Naidoo attends the enquiry now set down in the Magistrate's Court, such as his pre-sequestration assets and liabilities, whether there are impeachable transactions, the entities in which the insolvent had an interest before sequestration, and the insolvent's pre- and post-sequestration income and expenses and liabilities.

[9] For this reason, they seek an order in terms of s 127A(1) of the Insolvency Act, as the expiry of the period would preclude interrogation of the insolvent, which in turn would prejudice the creditors.

[10] Mr Naidoo disagrees. He mainly argues that the trustees had many years to conduct the necessary meetings and enquiries and failed to do so. They discovered and frozen bank accounts fourteen and two months ago, respectively. They waited too long before launching these proceedings, creating their own urgency and place Mr Naidoo under pressure to oppose, and the court under unnecessary pressure to adjudicate, the application.

[11] Moreover, Mr Naidoo contends that the Applicants focus so excessively on his alleged delaying tactics and obstructive behaviour that they fail to set out the exact stage of administration of the estate, the dividend available to the creditors, or the prejudice the creditors may suffer. None of the creditors brought an application for relief similar to those of the Applicants.

[12] During argument, counsel for Mr Naidoo argued that case law sets out what a court must take into account when considering rehabilitation, namely how the insolvent conducted his trade before he became insolvent and not during insolvency.[4] They refer the court to a directive by the Master in terms of s 71(1) of

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[3] *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

[4] Based on *Ex Parte Heydenreich* 1917 TPD 657 at 658.

the Close Corporations Act 69 of 1984 that deals with the evidence led at sittings of the Insolvency Inquiry of his close corporation, M & M Hiring SA CC. The directive states that during a certain period, he received a direct or indirect salary or other remuneration in the amount of R 2 250 000, which payment was, in the Master's opinion, "not *bona fide* or reasonable in the circumstances of commercial insolvency" the CC was trading under at the time. Yet, counsel for Mr Naidoo says that Mr Naidoo's insolvency did not flow from negligent or reckless conducting of his personal business affairs but rather from his inability to repay his salary received whilst being a member of his commercially insolvent close corporation. That despite the Master stating that it was not *bona fide* or reasonable.

[13] They list other factors that the court must take into account, such as that the primary purpose of s 127A(1) is to provide for automatic rehabilitation. As for his alleged obstructive behaviour, they say he was exercising his constitutional right of access to courts by bringing applications and engaging in the appeal processes. Furthermore, the argument that he failed to present the trustees with a statement of affairs should be disregarded, as it had to be presented to the Master (which did not happen). The failure to submit monthly Income and Expense Statements is also not something the court can consider, as the Applicants never required it from him. They make a similar argument regarding his earnings, and the recovering or liquidating of assets. As for the address, the Applicants never took any steps to compel compliance with the Act. The same goes for the second meeting of creditors. As for the various contraventions, he has not been charged or convicted, they argue, and as for various other allegations, they have not made out a case for it. They should thus not be able to rely on it. In short, an allegation was either answered with he was not requested, compelled, not charged or convicted, or a case was not made out. Still, the court is not informed about what Mr Naidoo did to comply with the obligations placed on him as an insolvent in terms of the Act.

[14] They also question the usefulness of the enquiry process, as, after 10 years, any claim not already proven against the estate would have been prescribed years ago. Lastly, they argue that a less invasive measure is available, namely conditional rehabilitation as per ss 127(2) and (3) of the Insolvency Act.

[2] Ad urgency

[15] The Applicant argues that the matter is sufficiently urgent because the automatic rehabilitation of Mr Naidoo would result in him being discharged from his debts due or arising before his sequestration. In their replying affidavit, they set out the lodged and proven claims amount to about R7 million. There is currently a shortfall of approximately R5,7 million. I accept that in urgent matters, the courts have allowed papers to be amplified in reply, subject to the right of a respondent to file further answering papers.[5] From the facts above, it also seems challenging to set out the dividend and the prejudice since, due to the lack of cooperation from Mr Naidoo, there is not enough information.

[16] Apart from that, there seems to be a reasonable chance that Mr Naidoo did commit various statutory offences and has not complied with his obligations in terms of the Act. This will be reported to the creditors and the Master in terms of s 81(1) of the Act once the sequestration process has been completed. The matter has recently been moved to a Magistrate with more powers to compel compliance with the Act to set that process in motion. It is also in the general public's interest that Mr Naidoo's automatic rehabilitation should be prevented to ensure accountability in that regard.

[17] The urgency hinges on the fact that Mr Naidoo will automatically be rehabilitated on 21 August 2023. The facts above show that the numerous steps taken by the trustees since their application to finalise the sequestration were met by obstructive conduct from Naidoo, making it impossible to complete the sequestration before the expiry of the 10 years.

[18] As for the proceedings only instituted now, I am guided by the judgment of *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*[6] where the court stated that

> "the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case

[5] *Lagoon Beach Hotel (Pty) Ltd v Lehane NO* 2016 (3) SA 143 (SCA) at 152G–H.

[6] 2011 JDR 1832 (GSJ) para 8.

> and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course."

[19] I am satisfied that there is no other remedy to prevent the prejudice to the creditors of the insolvent estate should Mr Naidoo be automatically rehabilitated on 21 August 2023. There is thus no other substantial redress at a hearing in due course. Mr Naidoo should not be allowed to delay accountability for 10 years and then plead delay in bringing the action on the part of the trustees to escape accountability.

[3] The law

[20] The Insolvency Act regulates the sequestration process. The purpose of sequestration is to ensure that the debtor's assets are equally distributed where they are insufficient to meet the claims of all his creditors. Upon the order of sequestration, the *concursus creditorum* is established, replacing a creditor's claim to recover their claim in full of a claim against the insolvent estate to share the proceeds of the assets of the estate based on the order of preference. It is perhaps for this reason that courts interpret the law of insolvency to exist primarily for creditors' benefit.[7] However, sequestration also has the inevitable effect of relieving a debtor from legal proceedings by creditors through rehabilitation since he is freed from all unpaid pre-sequestration debts upon rehabilitation.[8]

[21] Mr Naidoo raised the issue that if the court gives an order to prevent his rehabilitation, it would be a limitation of his rights to freely choose their trade, occupation and profession as guaranteed in terms of s 22 of the Constitution. This point was not laboured during argument by either party, nor was there an argument put forth about the constitutionality of the Insolvency Act. I thus only remark that the Constitution allows for the limitation of rights, as long as it is in line with s 36 of the Constitution.

[22] Such a limitation does not endure forever but ends through rehabilitation. The rehabilitation of an insolvent person may happen by order of the court pursuant to

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[7] *Ex parte Pillay; Mayet v Pillay* 1955 (2) SA 309 (N) 311.

[8] Section 129(1)(b).

an application for rehabilitation in line with ss 123 – 126, or automatically by effluxion of time in terms of s 127A. Both methods end the sequestration and relieve the insolvent of all the limitation that sequestration place on an insolvent.[9]

[23] An insolvent is deemed to be rehabilitated after ten years from the date of sequestration of his estate. In terms of s 127A(1), a court can order otherwise upon the application of an interested person. S127A(1) provides:

> 127A. Rehabilitation by effluxion of time.—
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> (1) Any insolvent not rehabilitated by the court within a period of ten years from the date of sequestration of his estate, shall be deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person after notice to the insolvent orders otherwise prior to the expiration of the said period of ten years.
>
> (2) If a court issues an order contemplated in subsection (1), the registrar shall transmit a copy of the order to every officer charged with the registration of title to any immovable property in the Republic.
>
> (3) Upon receipt of the order by such officer he shall enter a caveat against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of or belonging to the insolvent.
>
> (4) The caveat shall remain in force until the date upon which the insolvent is rehabilitated.

[24] The effect of automatic rehabilitation is the same as rehabilitation by application to the court. When the court considers an application for rehabilitation, the court must determine whether the insolvent ought to be rehabilitated and ought to be allowed to trade with the public on the same basis as any other honest person. In essence, the court must determine whether the insolvent is a fit and proper person to participate in commercial life without any constraints and disabilities.[10]

[25] There is no caselaw on s 127A(1), but commentators on the Act state that this section may be appropriate if "the expiry of such period would preclude interrogation of the insolvent which in the interest of creditors ought to occur (eg, as a result of newly discovered information)".[11]

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[9] S 129(1)(a) of the Insolvency Act.

[10] *Ex parte Harris (Fairhaven Country Estate (Pty) Ltd as intervening party)* [2016] 1 All SA 764 (WCC) para 84.

[11] Meskin *Insolvency Law* para 14.2

[26] Since there is no case law on s 127A(1), it is helpful to look at factors that can be considered when the court must exercise its discretion when faced with the reverse: an application for rehabilitation in terms of s 127(2). Case law on the section emphasises that the court must exercise this discretion judicially and not arbitrarily.[12] The lapse of time cannot outweigh other factors that justify the court's refusal of rehabilitation.[13] The opinions of the Master and trustee must be properly considered.[14] The court does not only focus on the interest of the insolvent but on the interests of his creditors (whether claims are proven or not), the State in relation to any prosecution of him, and the public, specifically the commercial public. The central question is whether the insolvent is a fit person to participate in the commercial life of the community, free of the constraints and disabilities affecting an insolvent.[15]

[27] Examples of factors that persuaded to court to refuse an order for rehabilitation are the following, namely that the insolvent:

i. conducted his business improperly and negligently;[16]

ii. failed to keep proper books of account;[17]

iii. ran up excessive debts prior to sequestration;[18]

iv. he was difficult and refused to cooperate with the trustees in the administration of his estate;[19]

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[12] *Ex Part Phillips* 1928 CPD 381 384.

[13] *Ex parte Fourie* [2008] 4 All SA 340 (D) 343.

[14] Smith, A, van der Linde, K, Calitz, J *Hockly's Law of Insolvency* (2022) 216.

[15] *Ex parte Heydenreich* 1917 TPD 657 at 658659; *Ex parte Helps* 1938 NPD 143 at 149; *Ex parte Martens* 1951 (4) SA 530 (N) at 531532; *Kruger v The Master and Another: Ex parte Kruger* 1982 (1) SA 754 (W) at 758; *Ex parte Le Roux* 1996 (2) SA 419 (C) at 423424; *Ex parte Harris (Fairhaven Country Estate (Pty) Ltd as intervening party)* [2016] 1 All SA 764 (WCC) at para 84.

[16] *Ex parte Blumberg* 1941 EDL 1.

[17] *Ex parte Hajee* 1939 NPD 197.

[18] *Ex parte Ezer* 1934 CPD 65.

[19] *Ex parte Martens* 1951 (4) SA 530 (N).

v. he was highly obstructive in the administration of his estate, making unfounded allegations against his trustees and members of the Master's staff;[20]

vi. he "sidestepped the inhibitions of insolvency" by living luxury without making contributions to the creditors;[21]

vii. he failed to set out in his application for rehabilitation the circumstances that led to his insolvency;[22]

viii. his application discloses nothing to suggest that he had learned the lessons of insolvency, or that he appreciates the possible hardship his sequestration might have caused his creditors.[23]

[28] Importantly, when the court refuses an application for rehabilitation, the court will usually indicate the period after which the application may be renewed, in the absence of which the insolvent may apply again when he considers it appropriate.[24]

[29] The following are factors have favour unconditional rehabilitation under s 127(1), namely that the insolvent:

i. Incurred only very small debts;[25]

ii. Is not to blame for his sequestration, which came about through misfortune;[26]

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[20] *Greub v The Master* 1999 (1) SA 746 (C) 749.

[21] *Ex parte Porritt* 1991 (3) SA 866 (N).

[22] *Ex parte Davis* 1938 CPD 335.

[23] *Ex parte Le Roux* 1996 (2) SA 419 (O).

[24] *Ex parte Porritt* 1991 (3) SA 866 (N).

[25] Ex parte Mark 1932 WLD 53 56.

[26] *Ex parte Meine* 1937 CPD 154.

iii. Neither creditors nor trustees took steps under s 23(5) to obtain part of the insolvent's earnings during his insolvency;[27]

iv. Has no opposition to his application from creditors, the trustee, or the Master.[28]

[30] In terms of s 127(2), it is possible to grant rehabilitation subject to a condition and where the circumstances make it just and equitable to impose the condition.[29] There were no such special conditions motivated in the urgent court.

[31] I thus have to exercise my discretion in deciding whether I will intervene in terms of s 127A(1) and prevent Mr Naidoo from automatically rehabilitating in a few weeks. Considering the indications of fraudulent conduct during his sequestration process by concealing his assets, his failure to disclose material information during the sequestration process, his non-compliance with the legal obligations that the Act imposes on him during sequestration, his failure to cooperate with the trustees, to provide the necessary information and documents, his failure to attend the enquiry proceedings and to keep his trustees appraised of his residential and postal address, and in his general failure to be accountable to his creditors, the trustees and the Master, leads me to the conclusion that Mr Naidoo should not be rehabilitated yet. Should he be rehabilitated on 21 August 2023, he would escape accountability to his creditors, the trustees and the Master, evading all the consequences of his insolvency.

[32] Mr Naidoo's contention that the trustees should have compelled his compliance with the provisions of the Act through the years, and that his non-compliance should therefore be excused does not hold water. The Act places obligations on the insolvent, requiring the compliance of the insolvent, with non-compliance with certain provisions even constituting an offence which the Director of Public Prosecution may prosecute. The compliance is not optional, and the fact that there is no compulsion from the trustees does not excuse non-compliance from the

[27] *Ex parte Jacobs* 1977 (4) SA 155 (NC).

[28] *Ex parte Van Staden* 1967 (4) SA 375 (R).

[29] *Ex part Cutting* 1943 CPD 51.

insolvent. He also offered no reasons for non-compliance other than that he was not compelled to do so.

[33] Initially the Applicant asked that the First Respondent shall not be rehabilitated and nothing else. This seems to be too open-ended. I, however, do not deem it appropriate to extend his insolvency with a specific number of years, as this will possibly merely provide a new target date for Mr Naidoo to evade his obligations. I did, however, find it sensible to provide Mr Naidoo with the option to, at any time, apply for his rehabilitation in terms of the Act. In such an application, Mr Naidoo would have to prove to the court that he has complied with his obligations under the Act and should be rehabilitated.

[4] Order

[34] I, therefore, make the following order:

1. The forms and service provided for in the Uniform Rules of Court are dispensed with and it is directed that the application be enrolled and heard as one of urgency in terms of Uniform Court Rule 6(12).
2. The First Respondent is not to be deemed to be rehabilitated in terms of the provisions of section 127A(1) of the Insolvency Act 24 of 1936 as from 21 August 2023.
3. The order in 2, does not prevent the First Respondent from applying for his rehabilitation in terms of section 124 of the Insolvency Act 24 of 1936.
4. The First Respondent is to pay the costs of this application.

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	JF van der Merwe
Instructed by:	Brits & Matthee

Counsel the for respondent:	R Grundlingh and ASL van Wyk
Instructed by:	Lacante Attorneys Inc
Date of the hearing:	01 August 2023
Date of judgment:	03 August 2023