



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 23412/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 20 JULY 2022

SIGNATURE

In the matter between:

MATTHEUS HERMANUS WESSELS FOURIE N.O. First Applicant

FREDERIK ROBERT BEYER N. O. Second Applicant

and

ELANI BOTHA N. O. First

Respondent

ANEL LANG N. O. Second Respondent

and

KAMBANI HOLDINGS (PTY) LTD First Intervening Creditor

BRET THOMAS LANG Second Intervening

Party

DANIELLE SANDRA LANG Third Intervening

Party

RONALD COUMBIS

Fourth Intervening

Party

Summary: Insolvency – final sequestration of a property holding family trust where payment of creditor’s claim has been provided for – court’s discretion – provisional order discharged.

ORDER

1. The provisional sequestration order is discharged.
2. The first and second respondents, in their capacities as the trustees of the Gomo Trust, are ordered to pay the applicants’ costs up to 14 August 2021, including the costs of two counsel.
3. The applicants in their capacities as the trustees of the Wesmy Bus Share Trust are ordered to pay the costs of the application incurred subsequent to the delivery of the application for intervention on 14 August 2021.

J U D G M E N T

This matter has been heard by way of open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

The respondents are the trustees of a family trust, the Gomo Trust. The applicants are the trustees of another trust, the Wesmy Bus Share Trust (Wesmy Trust). The sale of a valuable property, on which a luxury residence has been built, to the Wesmy Trust has fallen through. The Wesmy Trust has, however, already paid R 1 587 032,00 in respect of the purchase price of R 9, 5 million. Based on its claim for repayment, the Wesmy Trust has obtained a provisional sequestration order of the Gomo Trust. Confirmation of the order is opposed by another creditor, Kambani Holdings (Pty) Ltd (Kambani) and other family members of the trustees of the Gomo Trust, including yet another disputed trustee, all as intervening parties. The Wesmy Trust has consented to this intervention. Kambani has tendered repayment of the amount claimed by the Wesmy Trust. The facts appear from the chronology set out below.

[2] Relevant chronology

- 2.1 On 13 March 2013, a property known as Erf 217 Sable Hills, the Waterfront Estate Township, Registration Division JR, Gauteng (the property) was registered in the name of the Gomo Trust.
- 2.2 On 28 October 2014 the Gomo Trust concluded a Building Construction Agreement with Kambani. This agreement was cancelled on 4 February 2016, by agreement, but in the meantime a substantial but uncompleted luxury dwelling has been constructed on the property.
- 2.3 On 6 February 2016 the Gomo Trust and Kambani concluded a Principle Sales and Marketing agreement to which they added an addendum on 16 June 2016. Pursuant to the agreements with Kambani, the original title deed to the property had been surrendered to it by the Gomo Trust.

- 2.4 On 18 June 2020, the Gomo Trust sold the property to the Wesmy Trust for an amount of R 9, 5 million. At that stage the disputed value of the property ranged between R 8, 5 million and R 15, 35 million. Pursuant to this sale the Wesmy Trust paid R 900 000,00 to the conveyancer, which included the amount of the transfer duty payable on the sale to SARS and paid R 480 632,00 for the settlement of the clearance figures due to the Tshwane Municipality in respect of outstanding taxes, water consumption and levies. A further R 6 400,00 was paid to a contractor to obtain an electricity connection. In terms of an addendum to the sale agreement dated 10 November 2020 a further R 200 000,00 was also advanced by the Wesmy Trust.
- 2.5 In the meantime, the agreements and negotiations between the Gomo Trust and Kambani at one stage envisaged that the Gomo Trust would unconditionally surrender and cede all its right title and interest in the property to Kambani. It came as no surprise then, that the sale by the Gomo Trust to the Wesmy Trust resulted in litigation between the Gomo Trust and Kambani. This included a claim by Kambani for payment of some R14, 8 million. These disputes currently form the subject of arbitration proceedings between the Gomo Trust and Kambani, the finalisation of which was interrupted by the provisional sequestration order.
- 2.6 The payments made by the Wesmy Trust had been made after the lapsing of the sale agreement due to the non-fulfilment of suspensive conditions and the subsequent attempts to revive the sale agreement are in dispute.
- 2.7 Pursuant to the above the Wesmy Trust's basis upon which it claims the final sequestration of the trust is that it is a creditor in the amount of R 1 587 032,00 and that the Gomo Trust is factually insolvent.

[3] Kambani's tender

- 3.1 On the Wesmy Trust's own papers, Kambani is the only other creditor of the Gomo Trust. Having regard Kambani's vested interest in the property and its ongoing arbitration with the Gomo Trust, its intervention in and opposition to the sequestration application is unsurprising. In fact, its claim against the Gomo Trust is ten times the size of that of the Wesmy Trust.
- 3.2 Prior to its application to intervene, Kambani's attorneys tendered in writing to the Wesmy Trust on 6 August 2021, unconditionally payment of the amount of R 726 032,00 consisting of the amount paid to the Tshwane Municipality in the amount of R 480 632,00, the amount paid to obtain electricity of R 6 400,00 and the advance payment of R 200 000,00 (despite a dispute as to whether that should be paid by one of the trustees personally). The Wesmy Trust was further advised that, as transfer in terms of the sale of the property would no longer proceed, the conveyancing attorney could and should reclaim the transfer duty of R 861 000,00 pre-paid by him to SARS. Kambani further tendered to pay the difference between the deposit of R 900 000,00 paid and the amount to be reclaimed from SARS.
- 3.3 This tender was subsequently repeated by Kambani's deponent on oath in the subsequent application for leave to intervene.
- 3.4 At the hearing of the oral argument in this matter, the tender was again, on instructions from Kambani, repeated in open court by Adv Hartman who appeared for all the intervening parties.

[4] Evaluation

- 4.1 Adv Terblanche SC, who appeared with Adv Storm for the Wesmy Trust, could not furnish any cogent reason why the Wesmy Trust, as a creditor, would not accept a full refund and repayment of what it had paid in respect of an agreement which is no longer viable.
- 4.2 Faint arguments were raised as to interest and costs, without those having been calculated or even estimated. Having regard to the amounts at play, these would in any event be rather insignificant.
- 4.3 The argument that acceptance of the tender would result in a preference to one creditor over another is also incorrect: the tender is not made by the proposed insolvent, but by another creditor. In fact, on the Wesmy Trust's version, the only other creditor.
- 4.4 Even the argument advanced by the Wesmy Trust that the Gomo Trust is factually insolvent is somewhat tenuous and only based on speculative grounds relating to the actual value of the property. Similarly, the value of Kambani's alleged claim and the validity thereof (on which the Wesmy Trust relies for its calculations of factual insolvency) are subject to arbitration proceedings.
- 4.5 When one considers the issue of benefit for creditors, as one must when considering the granting of a final order of sequestration, on the version of the Wesmy Trust, it would receive a dividend which would be less than the tender made by Kambani, should the provisional sequestration order be made final.
- 4.6 What is more weighty, is that once the payment tendered by Kambani is made and the refund is received from SARS (which is with the obvious acquiescence of the Gomo Trust), the Wesmy Trust will no longer be a creditor of the Gomo Trust and will have no *locus standi* to pursue a

sequestration order. The only remaining creditor is one who, knowing its own position and that of the Gomo Trust best, opposes the confirmation of the sequestration order.

4.7 The issues relating to the exercise of a judicial discretion in circumstances where an unpaid creditor approaches a court for a winding-up order, has most recently been considered in *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) at paragraph 12. There it was reiterated that an unpaid creditor had a right *ex debito iustitiae* to a winding-up order and that a court has a very narrow discretion “*that is rarely exercised and then in special and unusual circumstances*”. Examples of consideration of such circumstances can be found in *Service Trade Supplies (Pty) Ltd v Dasco & Sons* 1962 (3) SA 424 (T) at 428B, *Firststrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) paragraph 27, *Oretisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC) paragraph 18 and *Victory Parade Trading 74 Proprietary t/a Agri-Best SA v Tropical Paradise 93 (Pty) Ltd t/a Vari Foods* [2007] ZAWCHC 31 paragraph 28.

4.8 In the present matter, there are only two creditors of the proposed insolvent. The one creditor, whose claim is notionally ten times that of the sequestrating creditor, tenders to pay the sequestrating creditor, virtually in full. There is no obvious benefit to the sequestrating creditor in not accepting this tender and its insistence on sequestrating the proposed insolvent to its own detriment appears *prima facie* illogical and possibly vexatious or bordering on an abuse of process. Particularly where such procedure might prejudice the only other creditor and, since the proposed insolvent is a trust, also the trust beneficiaries. I find that these circumstances constitute “special” or “unusual” circumstances and

having regard thereto, decline to exercise this courts' discretion in favour of the Wesmy Trust.

- 4.9 Notwithstanding the above, until such time as the tender had been made, or at least until it has been made on oath in these proceedings, which was the delivery of Kambani's application for intervention, the Wesmy Trust would have been entitled to proceed with its application and, consequently to costs. Since then, particularly in the absence of any real of substantial justification for persisting with its application, costs should follow the event, being that the provisional sequestration order should be discharged. These considerations will be reflected in the costs order.

[5] Order

1. The provisional sequestration order is discharged.
2. The first and second respondents, in their capacities as the trustees of the Gomo Trust, are ordered to pay the applicants' costs up to 14 August 2021, including the costs of two counsel.
3. The applicants, in their capacities as the trustees of the Wesmy Bus Share Trust, are ordered to pay the costs of the application incurred subsequent to the delivery of the application for intervention on 14 August 2021.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 28 April 2022

Judgment delivered: 20 July 2022

APPEARANCES:

For Applicant: Adv F Terblanche SC together with
Adv F Storm

Attorney for Applicant: Strydom & Bredenkamp Inc., Pretoria

For the intervening Parties: Adv N Hartman

Attorneys for the intervening Parties: Hancock and Associates, Pretoria