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

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: 84994/2019

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

17 JUNE 2022 _____

DATE
SIGNATURE

In the matter between:

MARTHINUS JACOBUS DEWALD BREYTENBACH N.O. **FIRST APPLICANT**

RICHARD HICKEN N.O. **SECOND APPLICANT**

(In their capacity of joint trustees of
CLIVE MALCOLM ELLISON)

and

CLIVE MALCOLM ELLISON **FIRST RESPONDENT**
ID […]

THE CITY OF TSHWANE **SECOND RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 17 JUNE 2022.

JUDGMENT

COLLIS J

INTRODUCTION

1. This is an opposed application wherein the Applicants are seeking an order,[1] as well as certian consequential relief, evicting the First Respondent from the residential premises situated at [...] Waterkloof, Pretoria ('the premises') registered in the name of the sequestrated estate of the First Respodent.

2. The First Respondent has brought a counter-application seeking *inter alia* an order declaring that the premises from which he is to be evicted falls outside the sequestrated estate.[2]

3. On 22 October 2021, the Applicants obtained an ex parte order against the First Respondent in terms of the provisions of section 4(2) of the Prevention

[1] Notice of Motion page 3-6.
[2] Notice of Counter application, page 341-345, Answering Affidavit, para 20-25, page 322,323.

of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act').

4. This order was personally served on the First Respondent on 29 October 2021. Subsequently, the order together with the section 4(2) notice was also served on the First Respondent's attorneys on 25 October 2021. Thereafter the set down was served on the First Respondents attorneys of record on 11 November 2021.

5. As far as the procedural requirements for the enrolment of the application is concerned this Court is satisfied that same have been complied with by the Applicants.

ISSUES FOR DETERMINATION

6. As per the joint pactice note, the issues to be determined by the court have been set out to be the following:[3]

6.1 The effect of the order of Kollapen J granted on 12 April 2018;

6.2 Whether the provisions of section 127A and 129 of the Insolvency Act 24 of 1936 ('the Insolvency Act') are applicable;

6.3 Insofar as the provisions of section 127 and 129 are applicable, the

[3] Joint Practice Note: Index 000-15 para 10.

'date of sequestration' as envisaged in terms of the provisions of section 20(2)(a), 124 (2) and section 127A (1) of the Insolvency Act;

6.4 Whether the immovable property in question, which is occupied by the First Respondent is part of the sequestrated estate of the First Respondent i.e. vests in the Applicants as the trustees of the First Respondent;

6.5 Whether the eviction of the First Respondent will be just and equitable in terms of the provisions of section 4(6) and/or section 4(7) of the PIE Act;

6.6 A just and equitable date for the eviction of the First Respondent in terms of section 4(9) of the PIE Act.

BACKGROUND FACTS [4]

7. On 4 October 2000, the First Respondent was sequestrated under case number 3873/2000[5] and on the 14th of March 2013 under case number 359/2012[6] in the United Kingdom. These applications were brought by the petitioning creditor, the Commissioner of Her Majesty's Revenue and Customs, the revenue collection agency of the United Kingdom.

8. In terms of the applications it was established at the time that the First Respondent owes the sequestrating creditor, Her Majesty's Revenue and

[4] Founding Affidavit page 9-11 at paragraph 5.1- 5.17.
[5] NOM annexure DB3 Index 004-16.
[6] NOM annexure DB2 Index 004-15.

Customs, an amount of R12 103 054. 00 (twelve million one hundred and three thousand and fifty-four rand).[7]

9. On the 31st of January 2017, this Court granted a provisional order recognising the insolvency of the First Respondent in the United Kingdom on 4 October 2000 under case number 3873/2000 and on 14 March 2013 under case number 359/2012.[8] Further in terms of the order, the Second Applicant's appointment as trustee of the insolvent estate of the First Respondent was also recognised. On the 12th of April 2018[9], this Court further confirmed the provisional order which inter alia recognised the 4 October 2000 insolvency of the First Respondent, as the 14 March 2013 bankruptcy order had been discharged. This appears from the judgment of Kollapen J.The result being that the 4 October 2000 bankruptcy order remains extant as the First Respondent's applications to annul the 4 October 2000 bankruptcy order were dismissed with costs.[10] The First Respondent therefter applied for leave to appeal the Kollapen J order and on the 3rd of August 2018, the application for leave was dismissed by this Honourable Court.[11] What then ensued was the appointment by the Master of First and Second Applicants as trustees of the First Respondent,[12] which occured on the 18th of March 2019. It is important to note that the insolvent estate is the owner of the fixed property

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7 Founding Affidavit, para 5.1, pp 9. The First Respondent's denial of being indebted to the sequestrating creditor is premised upon his assertion that he has become rehabilitated in terms of the Insolvency Act 24 of 1936. This assertion is incorrect, as dealt with below.

8 Notice of Motion annexure DB4 at pages 19-275 See application case no: 55354/2016; Notice of Motion annexure DB5 at pages 276-277 provisional order.

9 Notice of Motion annexure DB6 order of Court at pages 278-279; Judgment at pages 280-286.

10 Annexure DB19, page 381, DB20, page 382.

11 Annexure DB7 pages 287.

12 Annexure DB8 Index 004-340 p 288 & Annexure DB17, page 377.

i.e. Erf […], Pretoria, situated at […], Waterkloof. The First Respondent is presently in occupation thereof.

APPLICANT'S CASE

10. On behalf of the applicants the following arguments were advanced:

10.1 It is the duty of the trustees to realise the assets of the estate and to make full and equitable distribution of the amounts realised on behalf of the insolvent estate amongst the general body of creditors and thus avoid the preference of any one creditor above another. The trustees must take possession and control of the affairs of the insolvent estate for the benefit of the general body of creditors.[13]

10.2 This has the effect that the assets of the insolvent, in this case the First Respondents immovable property being […], Waterkloof, Pretoria has to be sold by the trustees.[14]

10.3 On the 23 May 2019 a second meeting of creditors was held and Absa Bank submitted and proved a claim in the amount of R 1 111 749.50 in terms of the bond over the property situated at […], Waterkloof, Pretoria. This is the same property that the First Respondent is occupying.[15]

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[13] Notice of Motion Founding affidavit Index para 5.7 p 004-8.
[14] Notice of Motion Founding Affidavit Index 004-8 para 5.8.
[15] Notice of Motion Founding Affidavit Index 004-9 para 5.14.

10.4 On the 31st July 2019 a letter of demand was sent to the First Respondent demanding that he vacates the premises by no later than the 31st of August 2019.[16]

10.5 On the 1st August 2019 the First Respondent responded by email stating that he does not believe that the trustees have the right to evict him and that a formal response will follow from his attorney.[17]

10.6 Further that the First Respondent is not entitled to continue to occupy the property after sequestration,[18] and by refusing the trustees and valuators access to the property he is making it difficult for them to carry out their duties, more so in circumstances where no legal basis exist why the First Respondent should not be ordered to vacate the premises in question.

THE FIRST RESPONDENT'S CASE

11. The First Respondent's case is the following:

11.1 In response the First Respondent denies that the Applicants are entitled to evict him form the immovable property.[19]

11.2 The First Respondent further denies that he owes the sequestrating creditor Her Majesty's Revenue and Customs any amount.[20]

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16 Notice of Motion Founding Affidavit Index 004-9 para 5-15.
17 Notice of Motion Founding Affidavit Index 004-9 para 5.16.
18 Notice of Motion Founding Affidavit Index 004-11 para 7.4.
19 Answering Affidavit Index 006-5 para 8.
20 Answering Affidavit Index 006-5 para 9.1.

11.3 Further that the Applicants are only entitled to administer as his estate the property at the date of his sequestration on 4 October 2000 and all the property which he may have acquired or which may have accrued to him during his sequestration until 4 October 2010.[21]

11.4 The immovable property which is the subject of these eviction proceedings falls outside of his insolvent estate, which the Applicants can administer, in that the immovable property was only registered in his name on 20 December 2012, as such well after 4 October 2010.[22]

11.5 In addition the only creditor who has proven a claim is ABSA but as ABSA is not a creditor of the relevant estate, no creditors of the relevant estate have proven any claims and the mortgaged property thus falls outside of the relevant estate.

11.6 Furthermore that he has been rehabilitated in terms of section 127A of the Insolvency Act 24 of 1936 ("the Insolvency Act") and ostensibly so due to an efflux of time, as a result of which the First Respondent alleges that he is discharged of all debts which arose before his UK sequestration on 4 October 2000.

11.7 That the applicants are only entitled to administer as his estate at the date of his UK sequestration on 4 October 2000 and all the property which he may have acquired or which may have accrued to him until 4 October 2010.

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[21] Answering Affidavit Index 006-6 para 9.2.
[22] Answering Affidavit Index 006-8 para 10.7.

11.8 That the immovable property which is the subject of these eviction proceedings falls outside of the First Respondent's insolvent estate which the applicants can administer, in that the immovable property was only registered in his name on 20 December 2012, i.e. thus after 4 October 2010.

11.9 As he resides on the property, which is his home, he does not own alternative accommodation into which he can relocate,[23] and it on this basis that he contends that it would not be just and equitable that he should vacate his home which he only acquired on 20 December 2012.[24]

REPLYING AFFIDAVIT[25]

12. In the Replying Affidavit the Applicants assert that the arguments advanced by the First Respondent in his Answering Affidavit, are nothing other than an attempt to appeal or revisit the order by Kollapen J granted on 12 April 2018.

13. Furthermore, that the immovable property in question was specifically identified as the asset of the First Respondent in the order made by Kollapen J.

14. Furthermore, that at all material times the First Respondent was aware that the Applicants intended to execute on property held by him in his own personal name. However, in the proceedings held before Kollapen J, the argument advanced by him, was that he was

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[23] Answering Affidavit Index 006-12 para 18.2.
[24] Answering Affidavit Index 006-13 para 18.6.
[25] Replying Affidavit Index 007-3 onwards.

not the true owner of the property albeit that he was aware of the consequences of the order sought by the Applicants and during those proceedings he did not seek to exclude the immovable property from the ambit of the order. [26]

15. In light of the order made by Kollapen J it is evident that the First Respondent has not been rehabilitated in terms of section 127A of the Insolvency Act seeing that any such argument would render the order so granted as nugatory. Put differently, had the First Respondent been rehabilitated it would have been incompetent for Kollapen J to have granted the order.

16. The effect of the order made by Kollapen J, does not make the First Respondent an insolvent in South Africa. The effect of the order is not that the First Respondent is sequestrated in terms of the Insolvency Act and that the provisions of the Insolvency Act apply, save to the extent that such order specifically provides for.

17. The effect of the order is confined to the administration of the First Respondent's assets in South Africa and for this purpose in terms of the order by Kollapen J, the Applicants are given the rights, powers and duties of a trustee as provided for in terms of the insolvency Act, including but not limited to protecting and realising any assets which the First Respondent may have in South Africa, and the Applicants can administer the estate of the First Respondent as if a sequestration order had been granted against him by a South African Court.

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[26] Replying Affidavit Index 007-8 para 10.

18. In terms of the order given by Kollapen J, the Applicants are empowered to realise the assets of the First Respondent from the immovable property as the estate of the First Respondent vests in the Applicants in terms of section 20(1)(a) of the Insolvency Act. As such any other provision contained in the Insolvency Act, which are unrelated to the rights, powers and duties of a trustee are not applicable, which includes the provisions of section 127A of the Insolvency Act.[27]

19. Insofar as the date of 4 October 2000 is to be regarded as 'the date of sequestration' in terms of section 20(2)(a) and (b) of the Insolvency Act, the First Respondent remained sequestrated as at 12 April 2018 and remains so sequestrated and the immovable property in question was acquired by the First Respondent whilst he was sequestrated on 20 December 2012. As such the First Respondent will remain sequestrated until rehabilitated in terms of section 127A of the Insolvency Act until 12 April 2028 and this Court accepted it as such that the First Respondent remained as undischarged bankrupt as at date of the Kollapen J order.

20. It is on this basis that the Applicants deny that they are not entitled to administer and realise all of the First Respondent's assets, without exception, more so in circumstances where the First Respondent has not been rehabilitated.

WHAT IS THE EFFECT OF THE KOLLAPEN J ORDER DATED 12 APRIL 2018?

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[27] Replying Affidavit Index 007-10 para 12.4.4 and para 12.4.5.

21. On behalf of the Applicants the following arguments were advanced in answer to this question.

22. In terms of the order granted by His Lordship Mr Justice Kollapen the Applicants are empowered and were granted the right to:

"- administer the estate of the first respondent in respect of all of his assets which are or may be found or are situated within South Africa;

- *Granting the applicant all the rights, powers and title of a trustee in terms of the Insolvency Act No. 24 of 1936, including but not limited to the protecting and realising any assets which the first respondent may have in South Africa for the benefit of the Bankruptcy Estate;*
- *Entitling the applicant to administer the estate of the first respondent as if a sequestration order had been granted against him by a South African Court."*

23. The immovable property, being the subject of these proceedings and more specifically Erf [...], was specifically identified as an asset of the First Respondent in respect of which His Lordship Mr Justice Kollapen made the above order, as is evident from the founding affidavit filed in those proceedings and specifically paragraph 21 thereof.[28]

[28] Annexure "DB4"at page 31.

24. A perusal of the judgment further confirms the aforementioned, at the following paragraphs:

> *"6. The Applicant states that his investigation led him to discover that the first respondent owns immovable property in South Africa, namely Erf [...] and that he also is the holder of a bank account in South Africa. It is common cause that the property is indeed registered in the name of the first Respondent and that he is the holder of the bank account in question.*
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> *7. It is on this basis that the Applicant approaches Court for the relief sought in order to administer the estate of the first Respondent in respect of all of his assets in South Africa in order to provide relief to the creditors of the Bankrupt Estate of the first Respondent.*

a. The First Respondent fails to take the Court into his confidence by providing contradictory and meritless arguments in these proceedings, as appears from the answering affidavit filed by the First Respondent in respect of the application brought by the trustees, to recognise the insolvency of the First Respondent, from which it is evident that the First Respondent was fully aware of the fact that what the Applicants sought were to execute on assets in his name.

b. The First Respondent stated the following[29]:

"4.2 Applicant presumably envisions to have the bankruptcy orders granted in the United Kingdom to be recognised in terms of South African law with the purpose to execute on assets in my name in the Republic of South Africa.

4.3 *One of these assets mentioned in the Founding Affidavit, is the property situated at [...], also known as Erf [...], Gauteng (hereinafter "the Property"). The Windeed search attached as Annexure "RH8" to the Founding Affidavit reflects that the Property is registered in my personal name;*

. . .

4.9 From the Founding Affidavit it is clear that Applicant intends to execute on the Property held, according to Applicant, in my own personal name. As the Oakleigh Investment Trust should in fact be the owner of the Property, the Trust has a direct material and recognisable interest in the application at hand;"

25. Contrary to the contentions now made by the First Respondent, in the aforementioned proceedings the First Respondent alleged not to be the true owner of the property. He was however aware of the consequence of the order sought by the Applicants and did not seek

[29] Annexure "DB4" page 102-104.

to exclude the immovable property from the ambit of the order and he cannot now seek to do so in a belated and meritless attempt.

26. Concerning the order of Kollapen J, the Applicants' argued that it is binding and stands until it is set aside on appeal. As pointed out in the founding affidavit, the application for leave to appeal brought by the First Respondent was dismissed and it is therefore not open to the First Respondent to challenge the order and judgment of Kollapen J.

27. When regard is had to the First Respondent's opposition and the counter-application, the question which is be answered, taking into consideration His Lordship Mr Justice Kollapen's judgment and order, is whether the order provides for an interpretation that excludes […], Gauteng from the sequestrated estate and assets so referred to therein, which is to be administered by the Applicants.

28. In opposition to the same question, the following arguments were advanced on behalf of the First Respondent:

28.1 It is unequivocally denied that the First Respondent owes the debt as alleged by the sequestrating creditor, Her Majesty's Revenue and Customs.

28.2 As will appear below, the recognition order was granted by this Court on 12 April 2018, in terms of which the second applicant is entitled to administer the estate of the first respondent as if the sequestration order had been granted by a South African Court.

28.3 It is further contended that the First Respondent has duly been rehabilitated in terms of section 127A of the Insolvency Act, 1936, with the result that in terms of section 129(1)(b), the First Respondent is discharged of all debts which arose before the date of the first deemed sequestration, being 4 October 2000.

28.4 Her Majesty's Revenue and Customs, being the sequestration creditor has not proven a claim against the insolvent estate, in fact the claim was rejected due to insufficient proof.

***Vide*: Claim rejected - Annexure DB15: p 007-25.**

Claim lodged - Annexure DB16: p 007-26 to 31.

28.5 The final recognition order in paragraph 1.1 recognises the insolvency ordered in the United Kingdom on 4 October 2000 under case number 3873/2000. The final recognition order does not recognise the second bankruptcy under case number 359/2012 and it is further common cause that such order has been discharged.

***Vide*: Annexure DB6: p 004-330.**

28.6 This is also apparent from paragraph 5 of the judgment of Kollapen J, which is annexed at “DB6" to the founding affidavit. The final recognition order expressly provides that in recognising the insolvency ordered under case number 3873/2000, that the second applicant is entitled;

“to administer the estate of the first respondent as if a sequestration order had been granted against him by a South African court.”

***Vide*: Annexure DB6: p 004-331 paragraph 1.3.3 of the final recognition order.**

28.7 Accordingly, counsel submitted that, pursuant to the final recognition order being granted by Kollapen J, it is not to be considered as a sequestration order being granted on 12 April 2018. Instead, the effect thereof is rather, as if the First Respondent’s South African estate was sequestrated on 4 October 2000 and that the recognition order merely recognises the authority of a foreign trustee to administer the property of an insolvent within South African law.

28.8 Support for this reasoning is found in the case of Moolman v Builders & Developers (Pty) Ltd. The appeal was directed at an order made by Mullins J in the South Eastern Cape Local Division;

"(c) Declaring that thereafter the applicant shall by virtue of this recognition be empowered to administer the said estate in respect of all assets of the said estate which are situated within the Republic of South Africa;"

Vide: (in Provisional Liquidation) (170/89) [1989] ZASCA 171; [1990] 2 All SA 77 (A) (1 December 1989),

28.9 It is on this basis that counsel had argued that a recognition order is limited to the administration of assets only and does not amount to an order of sequestration / liquidation. An insolvent estate must first exist before a recognition may be sought and ordered.

28.10 Furthermore, when granting a recognition order to a foreign trustee it was held in Chaplin NO v Gregory (or Wyld), that the court cannot make an order declaring him to be entitled to property that does not vest in him according to the law administered by that court.

***Vide:* 1950 (3) SA 555 (C).**

Mars: The Law of Insolvency in South Africa, Ninth Edition at 669, footnote 64.

28.11 It is on this basis that counsel had argued that the First respondent persists with the contention that the effective date of insolvency / bankruptcy remains 4 October 2000, where the trustee is granted powers to retrospectively administer the estate of the insolvent for the period of 4 October 2000 to 4 October 2010, utilising the Laws of South Africa as per prayer 1.3.3 of the 12 April 2018 Kollapen J court order.

ANALYSIS

29. This Court in considering the Kollapen order dated 12 April 2018, is enjoined to have regard to the approach adopted in the Natal Joint Municipality Fund Endumeni Municipality decision. In this decision it was held that the approach to be adopted when interpreting a judgment or a court order is the same as that applicable when interpreting a document or legislation.

30. Thus, the well-known rules of interpretation are applicable even when dealing with the interpretation of a judgment or a court order. The approach to adopt when dealing with the issue of interpretation of a document is dealt with in Natal Joint Municipality Fund Endumeni Municipality [30], in the following terms:

[30] 2012 (4) SA 593 (SCA).

[18] . . . The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the

language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

31. In addition, further reliance was placed on the decision Plaaslike Oorgangsraad van Bronkerspruit v Senekal [31], where the Supreme Court of Appeal in dealing with the issue of interpreting a judgment quoted with approval from what was said in Administrator, Cape and Another v Mtshwagela and Others [32]. In the latter decision it was said that:

"*The Court's intension is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasoning for giving it must be read as a whole order to ascertain its intention. If on such reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading to the Court‟s granting*

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[31] (2001) 22 ILJ 602 (SCA).
[32] 1990 (1) SA 705 (A) at 715 F-I.

the judgment or order may be investigated and regarded in order to clarify it."

32. In Firestone South Africa (Pty) Ltd v Genticuro[33], it was held that in dealing with ambiguities in a court order, the order and the court's reasoning must be read as a whole, without reference to extrinsic evidence. It is only if uncertainty persists after reading the whole of the judgment that regard may be had to extrinsic circumstances in seeking to determine the intention of the court.[34]

33. On the common cause facts an answer to the above question will be crystalised as follows:

33.1 The recognition order sought before Kollapen J, granted on 12 April 2018, emanated from the 2000 bankruptcy order, which was premised on the fact that the First Respondent is the owner of Erf […], Gauteng, the immovable property in question. It is common cause that the First Respondent became the registered owner of this property on 20 December 2012. It is therefore common cause that at the time when the Kollapen J order was granted, the property in question formed part of the estate of the First Respondent.

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[33] 1977 (4) SA 298(A).
[34] See also ABSA Bank Ltd t/a Volkskas Bank v Page and another (2002) 2 All SA 241 (A).

33.2 By consequence of this order being granted, it thereby recognised that the Applicants are entitled to execute against all off the assets which are or which may be found situated within South Africa.

33.3 A plain reading of the order of Kollapen J say so as much that the Applicants are entitled to administer '*the estate of the first respondent in respect of all of his assets which are or may be found or are situated within South Africa'* and are given the "*rights, powers and title of a trustee in terms of the Insolvency Act No. 24 of 1936, including but not limited to the protecting and realising any assets which the first respondent may have in South Africa for the benefit of the Bankruptcy Estate*". It is significant that the order of Kollapen J itself, did not expressly made reference to either the inclusion or exclusion of Erf […]. In my view this is not destructive of assigning an interpretation to the order of Kollapen J. At best the order of Kollapen J is to be interpreted to make reference to assets of the sequestrated person known or unknown. The jurisdictional requirements being that a person must have been sequestrated at the time and having assets registered under his name in South Africa, known or unknown. These jurisdictional requirements were met with the order made Kollapen J.

33.4 Both parties as mentioned, also requested this Court to make a determination as to whether the immovable property in question is

either to be included or excluded from the sequestrated estate of the First Respondent. This in circumstances where the property in question was specifically made reference to, in the affidavits placed before Kollapen J, thereby having been in existence at the time and known to the trustees. In making this determination, one not only has to consider the order itself but must have regard to the intension of the Court and the reasoning employed by the Court for giving such an order. The common cause fact being that at the time of the Kollapen J order being made that the immovable property was registered as an asset of the First Respondent, situated within South Africa and the First Respondent was still an undischarged bankrupt.

33.5 The First Respondent in addition, requested this Court to make a finding that the date of sequestration of the First Respondent is to be regarded 4 October 2000, instead of 12 April 2018 as contended for by the Applicants. The importance of the determination turning on the fact that, if the First Respondent's date of sequestration is taken as 4 October 2000, by effluxion of time he would have been rehabilitated after a ten-year period by 2010. However, if his date of sequestration is to be taken as 12 April 2018, he will only be rehabilitated after a ten-year period during 2028. To express an opinion on the date of sequestration by interpreting the order of Kollapen J, I do not believe is relevant to the relief sought by the Applicants.

WHETHER THE PROVISIONS OF SECTION 127A AND 129(1)(a) OF THE INSOLVENCY ACT IS APPLICABLE?

34. On behalf of the Applicants the arguments advanced was to the effect that the First Respondent has not been rehabilitated because he has not been sequestrated in terms of the Insolvency Act. Even if he was sequestrated in terms of the Insolvency Act, the First Respondent will only be rehabilitated in terms of our Insolvency Law on 12 April 2028.

35. Further to this, the argument advanced, was that any such contrary argument presented would render the order granted by Kollapen J as nugatory, as it would have been incompetent for Kollapen J to have granted such order. In addition, at the time when Kollapen J granted the order recognising the First Respondent's insolvency he, by law, was an undischarged bankrupt. A fact which was correctly accepted by the court and which finding remains unchallenged in the absence of the order of Kollapen J being appealed or set aside.

36. In addition, counsel for the Applicants had argued that, the effect of the order of Kollapen J does not make the First Respondent an insolvent in South Africa. Instead the effect of the order is not that the First Respondent is sequestrated in terms of the Insolvency Act and that the provisions of the Insolvency Act apply to him in toto, save to the extent that the order expressly provides for the

administration of the First Respondent's assets in South Africa, and for this purpose, in terms of the order given by Kollapen J, the Applicants (the Second Applicant) are given the rights, powers and duties of a trustee as provided for in terms of the Insolvency Act, including but not limited to protecting and realising any assets which the First Respondent may have in South Africa, and the Applicants (the Second Applicant) can administer the estate of the First Respondent as if a sequestration order had been granted against him by a South African court.

37. Consequently, in terms of the order of Kollapen J all the rights, powers and duties of a trustee in terms of the applicable provisions of the Insolvency Act are bestowed upon the Applicants (the Second Applicant). As a result, the Applicants are empowered to realise the assets of the First Respondent in South Africa and to seek the eviction of the First Respondent from the immovable property as the estate of the First Respondent vests in the Applicants (the First Applicant) in terms of the provisions of Section 20(1)(a)[35] of the Insolvency Act.

38. It is therefore on this basis that it was argued, that any provisions of the Insolvency Act which are unrelated to the rights, powers and duties of a trustee are not applicable. Most importantly, this

[35] "20Effect of sequestration on insolvent's property
(1) The effect of the sequestration of the estate of an insolvent shall be-
(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been
appointed, and, upon the appointment of a trustee, to vest the estate in him;"

includes the provisions contained Section 127A of the Insolvency Act.

39. Insofar as the contention by the First Respondent, that the date of 4 October 2000 is to be regarded as "*the date of sequestration*" in terms of Section 20(2)(a) and (b)[36] of the Insolvency Act, it was argued by the Applicants, that the First Respondent remained sequestrated as at 12 April 2018 this date being a date after the immovable property in question was acquired by the First Respondent.

40. This latter date, it was argued, for all intents and purposes is the date that the estate of the First Respondent was sequestrated at the behest of the Applicants (the Second Applicant) as if an application for the sequestration of the estate of the First Respondent had been brought by the Applicants (the Second Applicant) in terms of the Insolvency Act.

41. It was for this reason that it was submitted, that the provisions of Section 127A and Section 129 of the Insolvency Act do not apply to the First Respondent. These sections of the Insolvency Act do not pertain to the rights, powers and duties of a trustee but instead deal

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[36] "(2) For the purposes of subsection (1) the estate of an insolvent shall include-
(a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment;
(b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three."

with the cessation of the sequestration of a debtor where a debtor is sequestrated in terms of the Insolvency Act. The First Respondent was not sequestrated in terms of the Insolvency Act and instead was sequestrated by virtue of the 4 October 2000 bankruptcy order.

42. In terms of the Insolvency Act, the "*date of sequestration*" as envisaged in terms of *inter alia* section 20(2)(a), 124(2)[37] and 127A(1) is the date when a court orders the sequestration of the estate either pursuant to an application to the court by an insolvent in terms of the Insolvency Act for the surrender of his or her estate, i.e. an order granted in terms of the provisions of 6(1)[38] of the

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[37] "124 Application for rehabilitation

. . .

(2) An insolvent who is not entitled under subsection (1) to apply to the court for his rehabilitation and who has previously given to the Master and to the trustee of his estate in writing and by advertisement in the Gazette not less than six weeks' notice of his intention to apply to the court for his rehabilitation may so apply-

(a) after twelve months have elapsed from the confirmation by the Master, of the first trustee's account in his estate, unless he falls within the provisions of paragraph (b) or (c); or

(b) after three years have elapsed from such confirmation if his estate has either under this Act or a prior law been sequestrated prior to the sequestration to which he desires to put an end and if he does not fall within the provisions of paragraph (c); or

(c) after five years have elapsed from the date of his conviction of any fraudulent act in relation to his existing or any previous insolvency or of any offence under section one hundred and thirty-two, one hundred and thirty-three or one hundred and thirty-four of this Act or under any corresponding provision of the Insolvency Act, 1916 (Act 32 of 1916):

Provided that no application for rehabilitation under this subsection shall be granted before
the expiration of a period of four years from the date of sequestration of the estate of the applicant, except upon the recommendation of the Master."

[38] "6Acceptance by court of surrender of estate

(1) If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all costs of the sequestration which will in

Insolvency Act, or an application to court by a creditor in terms of the Insolvency Act for the sequestration of the estate of a debtor, i.e. an order in terms of the provisions of Section 12(1)[39] of the Insolvency Act.

43. It was for this reason that it was argued, that 12 April 2018 is to be taken as the "*date of the sequestration*" of the estate of the First Respondent as envisaged in terms of the provisions of *inter alia* section 20(2)(a), 124(2) and 127A (1) of the Insolvency Act.

44. In relation to the question as to whether the provisions of section 127A and 129(1)(a) finds applicability, the First Respondent advanced the following arguments:

44.1 Firstly that a determination of the date of the sequestration is of vital importance in that the estate of the First Respondent is deemed to have been sequestrated on 4 October 2000.

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terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and make an order sequestrating that estate."

[39] "12 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; 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 sequestrate the estate of the debtor."

There is no other sequestration order which forms the basis of the appointment of the applicants as trustees.

44.2 That once sequestrated by an order of the High Court the sequestrated person has a myriad of adverse consequences that could have an inhibiting effect on an individual and his/her freedom to transact and build a new life.

44.3 Further that the Insolvency Act 24 of 1936 makes provision for a sequestrated person to be rehabilitated under certain circumstances so that the insolvent person may continue with his or her life without the insolvent status. The effects of rehabilitation are as follows:

44.3.1 It puts an end to sequestration.

44.3.2 Discharges all debts of the insolvent.

44.3.3 It relieves the insolvent of every disability resulting from the sequestration order.

44.4 Having regard to section 127A (1) of the Insolvency Act, an insolvent person is either rehabilitated automatically or by way of a court order. Automatic rehabilitation occurs by the effluxion of ten years in terms of section 127A of the Act. The ten-year period is calculated from the date on which the provisional sequestration order was granted. This ten-year

period could potentially be extended if an interested person makes an application to the High Court in which sufficient reasons are set out for the extension.

44.5 As no such an extension was ever requested for the appointment of the trustees during 2014, this well after the expiry of the ten-year period, was in itself irregular. The trustees were still within their powers and duties to administer all assets and liabilities which formed part of the insolvent estate during the period of 4 October 2000 to 4 October 2010.

44.6 In addition, the further argument advanced, was that once rehabilitated and having regard to the provisions of section 129 of the Insolvency Act, the effect of a rehabilitation under Section 127A is to discharge the insolvent from pre-sequestration liabilities. At the same time, the assets of the estate between 4 October 2000 and 4 October 2010 which have not yet been distributed by the Trustees remain vested in the Trustees until they are distributed.

44.7 It is on this basis therefore that counsel had argued, that the result after a rehabilitation order has been granted, is for two estates to come into being. The one estate consists of the free

residue of the insolvent's pre-sequestration estate which remains vested in the trustee. The other estate is a new estate consisting of assets of the insolvent acquired after sequestration or rehabilitation that do not form part of his insolvent estate.

Vide: ***Muller v Kaplan NO and Others* (14732/10) [2011] ZAGPJHC 46 (17 May 2011)**

44.8 Consequently counsel submitted that, the applicants as trustees are entitled to administer the estate vesting in them all the property of the first respondent as at the date of the sequestration (4 October 2000) and all the property which may have been acquired or which may have been accrued during the period of sequestration (i.e. from 4 October 2000 to 4 October 2010).

44.9 Considering the argument that the appointment of the trustees was irregular, in that their appointment took place during 2014, and as such beyond the 10-year period of the insolvent person being sequestrated, it is common cause that the order of Kollapen J vested the trustees with certain powers.

44.10 It is further common cause that these powers so bestowed upon the trustees took place with full participation of the First Respondent during the proceedings before Kollapen J, and that no challenge was mounted against the powers being bestowed on them by the order of Kollapen J or that their appointment would be irregular. As the order of Kollapen J, to date remains unchallenged by the First Respondent, there cannot be any merit given to this argument.

44.11 As far as the date when the immovable property was acquired by the First Respondent, it is common cause between the parties that the property was acquired by way of a divorce settlement on 4 February 2011 whereafter the registration of transfer was effected on 20 December 2012.

Vide: Deed of transfer: Annexure AA1 to 3: p 006-17 to 19.

44.12 The date on which the immovable property was registered into the name of the First Respondent is to my mind of no moment if one has regard to the date when the recognition order was granted by Kollapen J, on 12 April 2018. As at this date, and in terms of the recognition order the First Respondent was still an undischarged bankrupt.

45. It is for this reason that I therefore conclude that as of 12th April 2018, the immovable property formed part of the sequestrated estate of the First Respondent and that it would be subject to be realised by the trustees.

ON THE QUESTION WHETHER EVICTION OF THE FIRST RESPONDENT WILL BE JUST AND EQUITABLE?

46. In order for the Applicants to succeed in evicting the First Respondent from his immovable property the substantive requirements for a lawful eviction set out in sections 4(6), (7), (8) and (9) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') should be met. These sections are quoted hereunder for ease of reference and provides as follows:

"(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are

initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land sold in a sale of execution pursuant to a mortgage, where the land has been made available or can reasonably be made available by a municipality or other Organ of State or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

(8) If the court is satisfied that all the requirements of this section had been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

(9) In determining a just and equitable date contemplated in sub-section (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or his family have resided on the land question."

47. In City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others[40], Wallis JA set out the requisite approach to be adopted when dealing with issues of eviction as follows:

[40] 2012 (6) SA 294 (SCA)

"A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve a gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate inquiries. First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant the order. Before doing so, however, it must consider what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second inquiry, it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that he grants as a result of these two discreet inquiries is a single order. Accordingly, it cannot be granted until both inquiries have

been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the inquiry be concluded until the court is satisfied that it is in a position of all the information necessary to make both findings based on justice and equity."

48. Given the conspectus of the evidence placed before this Court and in enabling the trustees to carry out their duties bestowed upon them, I consider it just and equitable to order the eviction of the First Respondent from the immovable property in question.

49. The next question to then be determined is in relation to the factors which a Court must have regard to in determining whether the First Respondent has disclosed a valid defence which will justify his continued occupation in the immovable property.

50. In this regard the decision of Occupiers, Berea v De Wet NO 2017 (5) SA 346 (CC) is instructive where the following was stated:

"*[47] It deserves to be emphasised that the duty that rests on the court under s 26(3) of the Constitution and s 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant*

information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction. This may be difficult, as in the present matter, where the unlawful occupiers do not have legal representation at the eviction proceedings. In this regard, emphasis must be placed on the notice provisions of PIE, which require that notice of the eviction proceedings must be served on the unlawful occupiers and 'must state that the unlawful occupier . . . has the right to apply for legal aid'."[41]

51. In addressing this issue of the relevant factors to be considered by the Court in determining his eviction, the First Respondent merely alleges, as per the Answering Affidavit, that he resides on the immovable property which is his home and that he does not own alternative accommodation in the event that this Court orders his eviction and that he is elderly. This is the sole basis upon which he thus contends that to evict him, will not be regarded of as just and equitable given the prevailing circumstances.

52. As previously mentioned, the immovable property in question has a registered mortgage bond registered over it, in respect of which by the First Respondent's own admission, he is not in default with any of his repayments to ABSA Bank.

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[41] Para [47] at 361.

53. From this admission, it is thus clear that affordability to source alternative accommodation will not be an impediment, if this Court considers it just and equitable to order the eviction of the First Respondent and consequently his eviction will be ordered.

54. In determining a just and equitable date as is required by the provisions of section 4(8) and 4(9) of PIE and having regard to the period that the First Respondent has resided on the immovable property in question and his means it will be just and equitable to order his eviction from the immovable property 30 days from the date of the court order.

COUNTER-APPLICATION

55. In the Counter Application the First Respondent alleges that ABSA is directly affected by the relief that is sought in the counter-application, where the first respondent will seek the leave of the court in an interlocutory application to join ABSA to the first respondent’s counter-application.

56. Similarly, the First Respondent alleges, that the Master of the High Court, Pretoria may also have an interest in the relief, and it is also for this reason that leave of the Court is sought for the Master to be joined as an interested party to the counter-application.

57. The relief sought to join these interested parties, will not per se affect their rights in the absence of them having been formally joined to these proceedings as the appointed trustees in terms of the enabling legislation is nevertheless obliged to consider and take into account the rights of all affected persons. It is for this reason that I deem it unnecessary to grant the joinder of these parties concerned.

ORDER

58. In the result the following order is made:

58.1 The First Respondent is evicted from the premises situated at [...] Pretoria ('the premises').

58.2 The First Respondent is to vacate the premises within 30 days of the date of this order.

58.3 The sheriff and his/her lawful deputy is authorised and directed to take such steps as are necessary to evict the First Respondent from the premises in the event that the First Respondent does not vacate the premises within 30 days from the date of this order.

58.4 The First Respondent is to pay the costs of this application on the attorney and client scale.

58.5 The First Respondent's counter-application is dismissed with costs on an attorney and client scale.

C COLLIS

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicants	: Adv L. Hollander
Attorney for the Applicants	: Serfontein Viljoen & Swart
Counsel for the First Respondent	: Adv. C.B. Ellis
Attorney for the First Respondent	: A. Kaplan Attorneys
Date of Hearing	: 23 November 2021
Date of Judgment	: 17 June 2022

Judgment transmitted electronically.