REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2022/024156

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

Date: 22 September 2023

In the matter between:

JUGGERNAUT TRUCKING CC Applicant

and

MELCHIOR JACOBUS VAN NIEKERK Respondent

JUDGMENT

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[1] DE VOS AJ

[1] The applicant seeks the provisional sequestration of the estate of the Respondent in terms of section 9(1) of the Insolvency Act. The debt and its non-payment are not in dispute. By the time the matter was heard, the parties narrowed the issue to one controversy: whether the applicant has shown a benefit to creditors.

[2] The genesis of the dispute is a rental agreement for plant equipment. The applicant entered into a rental agreement with a company called Palaeo Minerals. The rental amount was just over R 5 million. Palaeo Minerals failed to meet its obligations and was wound up by this Court on 20 October 2021. Subsequently, the Respondent stood surety in his personal capacity for any performance of Palaeo owed to the applicant. The applicant and the Respondent entered into a settlement agreement, which was made an order of Court in October 2021. The settlement required the Respondent to make monthly payments. Some payments were made, but ultimately, not all were made in time. Almost half of the payments were still outstanding when the attorneys for the applicant demanded the full amount in terms of an acceleration clause. As no response was received, the applicant's attorneys proceeded to have a writ of execution issued against the Respondent.

[3] The Sheriff sought to execute the writ. The Sheriff's return reads as follows:

> "Mr Melchior Jacobus Van Niekerk personally informed me that he has no money, disposable property or assets, inter alia, wherewith to satisfy the writ of execution or any portion thereof. No movable property/disposable assets were pointed out or could be found by me after a diligent search.
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> Therefore, my return is one of nulla bona."

[4] Having set out the context, the Court turns to determine whether the applicant has shown a benefit to creditors. The applicant cannot point to any assets which the Respondent holds. In fact, the applicant openly states that its investigations show that the Respondent does not own immovable property. The applicant, however, points to the eight companies of which the Respondent is a director and the nine active trusts in which he is a trustee.

[5] The Respondent alleges that of the eight companies, only two are still operational and that he is not a shareholder in any of the companies. However, when it comes to the trusts, the Respondent does not show all his cards to the Court. The Respondent states no more than his interests in these trusts are long-standing – some as long as 20 years. In light of this, the respondent contends that the applicant has not met its onus to prove a benefit to creditors.[1]

[1] Stratford v Investec CC judgment 2015 3 1 (CC) para 44 and 45

[6] The Court considers that the "threshold for advantage to creditors is relatively low in arms-length sequestrations".[2] The Court need only be satisfied that there was reason to believe, not even a likelihood but a prospect not too remote, that "as a result of investigation and enquiry assets might be uncovered that will benefit creditors".[3]

[7] The applicant has provided the Court with the judgment of Van der Linde J in *Investec v Le Roux*. In *Investec*, the parties were in dispute as to whether a benefit to creditors had been proven. Investec pointed to a host of juristic entities in which Mr le Roux had an interest but could not identify a quantified benefit to creditors. The way through is presented by Van der Linde J -

> "in exercising a discretion I weigh up the unenviable position of the applicant who cannot without a provisional order scale the stone wall put up by the Respondent, against the inconvenience caused to the Respondent by a provisional sequestration order. If he has assets that can be availed, they will out."[4]

[8] Similarly, in this case, the Respondent, faced with nine different active trusts, says no more than his interests in these trusts span over 20 years. The Respondent has left the Court asking, "What has happened to the assets of the juristic entities in which he admits having had an interest at some stage?"[5]

[9] It weighs with the Court that the Respondent has not made a "clean breast of his position in circumstances where he would fully have appreciated how important it was to have done so".[6]

[10] Adding to this reasoning is the breadth of the definition given to the phrase "benefit to creditors". In *Meskin & Co v Friedman*[7] it was held that -

> "Sequestration confers upon the creditors of the insolvent certain advantages… which, though they tend towards the ultimate pecuniary benefit of creditors, are not in themselves of a pecuniary character. Among these is the advantage of full investigation of the insolvency affairs under the very extensive powers of inquiry given by the Act… In my opinion the Court must satisfy itself that there is a

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[2]Investec Bank Limited v Le Roux (575/2014) [2016] ZAGPJHC 11 (11 February 2016)

[3] Cameron JA (as he then was) said in Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd, 2006 (4) SA 292 (SCA) at [29] quoted with approval Investec

[4] Investec para 45

[5] Id

[6] Id

[7] Meskin & Co v Friedman 1948 (2) SA 555 (W) at 559

reasonable prospect - not necessarily a likelihood that the 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 inquiry under the Act, some may be revealed or recovered for the benefit of creditors, that is sufficient."

[11] This passage was cited with approval by the Constitutional Court in *Stratford and others v Investec Bank Limited and others*.[8]

[12] The applicant has also pointed to the fact that the Respondent's home is registered in the name of a company (Melchior Lynn Eiendomme (Pty) Ltd). The Respondent was, until recently, a director of this company and the directorship has been taken over by his daughter and wife. Similar facts served before Gamble J in *Corruseal Corrugated KZN (Pty) Ltd and Another v Zakharov and Another*[9] when confronted by similar facts -

> "In the answering affidavit the Respondent describes a web of entities and Trusts through which his financial affairs seem to have been controlled. For example, when the Sheriff sought to attach the furniture and appliances in the Respondent's home, it was said that these items were the property of Chestnut Hill (Pty) Ltd, a company allegedly controlled by his daughter. It is thus apparent in the circumstances that an investigation of the Respondent's affairs under an enquiry sanctioned by the Act may yield some pecuniary benefit for creditors."

[13] The facts presented by the applicant indicate that an investigation into the Respondent's affairs may yield a pecunariy benefit. Particularly in light of the presence of the respondent being a director of multiple companies and a trustee of a host of trusts.

[14] For all these reasons, and in particular the judgment of the Court in *Investec* and *Corruseal,* the Court concludes that a case for provisional sequestration has been made.

Order

[15] As a result, the following order is granted:

a) The Respondent's estate be and is hereby provisionally sequestrated.

b) A *rule nisi* issues calling upon all interested parties to show cause, if any, on 13 November **2023**, why an Order in the following terms should not be granted:-

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[8] Stratford and others v Investec Bank Limited and others 2015 (3) SA 1 (CC) at [43]

[9] (2108/2021) [2023] ZAWCHC 48 (6 March 2023)

i) That the Respondent's estate be finally sequestrated.

ii) Directing that the costs of this application be costs in the sequestration of the Respondent's estate.

c) Service of this Order shall be effected:-

i) by the Sheriff of this Court on the Respondent.

ii) by publication once in a local newspaper circulating GAUTENG.

iii) on the offices of the South African Revenue Services.

iv) on the office of the Master of the above Honourable Court.

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I de Vos
Acting Judge of the High Court
Gauteng Division, Pretoria

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	**J van Rooyen**
Instructed by:	Donn E Bruwer Attorney
Counsel for the applicant:	**JW Kloek**
Instructed by:	JJ Badenhorst Attorneys
Date of the hearing:	7 August 2023
Date of judgment:	22 September 2023