

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



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION: DURBAN**

CASE NO: D2296/2021

In the matter between:

MICHAEL LAWRENCE STEWART N.O.

FIRST APPLICANT

PULENG FELICITY BODIBE N.O.

SECOND APPLICANT

JERIFANOS MASHAMBA N.O.

THIRD APPLICANT

(In their capacities as duly appointed joint liquidators
of Carmol Distributors (Pty) Limited in liquidation)

and

M[...] B[...]
(Identity No. [...])
(Date of Birth: [...] 1961)

RESPONDENT

ORDER

The following order is granted: -

- 1. The application for a final sequestration order is dismissed, and the provisional order set aside.**

2. The applicants shall pay the costs of the application.

JUDGMENT

Delivered on: Monday, 12 February 2024

OLSEN J

[1] This is the final extended return day of a provisional order of sequestration relating to the estate of the respondent, Mr M[...] B[...]. (Mr B[...] was originally cited as first respondent, married to one Ms S[...] M[...] who was cited as second respondent married in community of property to him. Mr B[...] protested that the two of them had become divorced as long ago as 1980, and the case proceeded against Mr B[...] alone.) The applicants are the joint liquidators of Carmol Distributors (Proprietary) Limited (in liquidation) –“Carmol”.

[2] Carmol was wound-up by order of the Gauteng Division of the High Court of South Africa upon the application of the Registrar of Banks. That order was made on 30 November 2015. It appears that Carmol was targeted by the Registrar of Banks because the company was soliciting deposits from members of the public, ostensibly for the purpose of generating substantial returns from trading in some way or other in diesel fuel; whereas its mode of business constituted inter alia a scheme involving the use of money paid by later investors to meet the company’s contractual obligations to earlier investors. According to the founding papers in this application the respondent was not a participant in that scheme, but nevertheless received payments from Carmol totalling R1 727 500 over the period October 2012 to November 2014.

[3] In February 2018 the applicants instituted action against the respondent for orders setting aside those dispositions of money to the respondent and for judgment for repayment of those amounts. The respondent defended the action but failed to comply with an order to make discovery, as a result of which default judgment was

entered against him in this court on 14 November 2019. Service of a writ of execution resulted in a *nulla bona* return. The applicants then launched this application for the sequestration of the respondent's estate, having thus established its claim and the existence of an act of insolvency, submitting that there was a reasonable prospect of a pecuniary advantage to Carmol's creditors if a trustee was able to unearth assets or money which the respondent might have disposed of or acquired, or which he might be concealing.

[4] A provisional order was granted despite opposition from the respondent. His opposition was grounded principally on the issue as to whether there was a prospect of advantage to creditors, given that he had no assets at all.

[5] The only issue at this stage of the proceedings, where the applicants seek a final sequestration order, is that of advantage to creditors.

[6] The applicants first moved their application for a final sequestration order in this court on 26 October 2022. The matter served before Lopes J. The respondent was unrepresented on the day. Only the applicants' counsel was heard. The order made by the learned Judge after hearing the applicants went as follows.

- '1. The application is adjourned to the unopposed roll, and the rule nisi is extended, until the 6th March 2023.
3. The Applicants are granted leave to deliver a supplementary replying affidavit, if so advised, on the issue of advantage to creditors.
4. The First Respondent is granted leave to deliver an affidavit in response to the Applicants' supplementary replying affidavit and notice of set down within 15 (fifteen) days of service of the said affidavit on the First Respondent.
5. There shall be no order as to costs.
6. In the event of the applicants failing to deliver a supplementary affidavit as envisaged in paragraph 2 above, the rule nisi is to be discharged on the date set out in paragraph 1 above.'

[7] During argument before me I asked counsel for the applicants whether they could explain what happened during the hearing before Lopes J to generate what appears on the face of it to be an unusual order. I was told that counsel could not help me with that.

[8] The order made on 26 October 2022 is explained by the provisions of s 12(2) of the Insolvency Act, 1936. The relevant provisions of s 12 read as follows.

'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) ...
 - (b) ...; 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 sequester the estate of the debtor.
- (2) **If at such hearing the court is not so satisfied**, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration **or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*.**
(My emphasis)

[9] Section 12(2) of the Insolvency Act accordingly furnishes the court with a discretion as to the course to be followed in the event of the court deciding that, on the papers before it, the applicant has failed to make out the required case. The court must either dismiss the application or require further proof where there is a shortcoming. In either case the "jurisdictional fact" (perhaps using that term rather loosely) is a decision by the court that on the papers the required case has not been made out. As pointed out in *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 625 the effect of the provision is that in the requisite circumstances the court may in the exercise of a discretion allow the applicants to make out a case in reply. The following appears in paragraph 21 of the judgment.

'However, in terms of s 12(2) of the Act, a court may on the return day of a provisional sequestration order, if not satisfied that the debtor is insolvent, require further proof of such insolvency. It follows logically that the court also has a discretion to allow such further proof in a replying affidavit, subject, of course, to the debtor being granted an opportunity to deal with the new matter. Whether, in particular circumstances, an application for sequestration should in terms of the section be dismissed or whether the further proof of insolvency should be allowed is a matter relating to the conduct of the business of the Court hearing the application. In respect of such a matter "different judicial officers, acting reasonably, could legitimately come to different conclusions on the same facts". In these circumstances there can be no doubt that the discretion conferred in the court by s 12 is a discretion which has been referred to as a discretion in the strict or narrow sense, ie. it is for the court hearing the application to decide whether or not to allow further proof.'

[10] The discretion only arises when and if the court decides that the issue upon which further evidence may be submitted is one on which the applicant or petitioner has failed to meet the required standard. The resultant order in other proceedings would be dismissal of the application. The statute provides an alternative which may be employed in the discretion of the court. In my view the order of 26 October 2022 reflects that the discretion was exercised in favour of the applicants.

[11] Section 12(2) of the Insolvency Act does not sanction two different hearings on the same papers. That this was present to the mind of the Judge making the order of October 2022 is apparent from paragraph 5 of his order, which clarifies the point that, on the papers which served before the court at that time, it was decided that the applicant had failed to make out a case on the issue of advantage to creditors.

[12] A supplementary affidavit was delivered by the applicants. In that affidavit the deponent had this to say.

'It is not apparent from the adjournment order as to what more is required from the applicants in regard to "*the issue of advantage to creditors*". However, considering the strict

sanction contained in paragraph 5 of the order the applicants shall elaborate further herein on the said issue.’

A decision on the issue of advantage to creditors rests on the matrix of facts upon which the court’s decision as to whether there is reason to believe that sequestration would be to the advantage of creditors must be based. I am less than impressed with the deponent’s professed ignorance of what the learned Judge had in mind when giving the applicants an opportunity to deliver a further affidavit dealing with advantage to creditors. The judge did not ask for further argument. He undoubtedly conveyed that the applicants were being afforded an opportunity to place further relevant facts before the court. The affidavit the applicants delivered contained a lengthy quotation from the founding affidavit which sets out the basis of its claim of advantage to creditors, but otherwise merely re-argues the case. The affidavit added nothing to the case; it was not one of the type which Lopes J had in mind, and which s 12(2) of the Insolvency Act sanctions: that is to say an affidavit providing ‘further proof of the matters set forth in the petition’.

[13] It is on the strength of the delivery of that further replying affidavit that the applicants claimed a right to argue again before me what they had argued before Lopes J, namely that the papers as they were before that further replying affidavit was delivered made out a case for advantage to creditors. They were not entitled to do that. That argument was rejected by Lopes J. He made no declaratory order to that effect. There was no need to do so. The discretion which he exercised when he made the order of 26 October 2022 depended for its existence on a decision made by him that on the papers before him the applicants had not made out a case for advantage to creditors. In my view that decision was final, subject only to the discretionary relief granted to the applicants to bolster their case by further proof. They failed to take advantage of the opportunity that they had been allowed.

[14] I am bound by the decision made by Lopes J. On that basis the application for the final order must fail.

[15] I should briefly mention my views on the issue of advantage to creditors lest either party be misled by the fact that I conclude that my duty or role here is to make

the order which must now follow in the light of the decision of the court made in October 2022. I find no difficulty in reaching the same conclusion as was reached then on the subject of advantage to creditors. The applicants' case in its founding affidavit and in its original replying affidavit was based on historical information which, due to the passage of time, has become and entirely unsound basis for a conclusion that there is reason to believe that the exercise of investigatory powers by a trustee would produce any advantage to creditors. The applicants produce no evidence to contradict the respondent's assertion that he has no assets.

[16] I accordingly make the following order.

- 1. The application for a final sequestration order is dismissed, and the provisional order set aside.**

- 2. The applicants shall pay the costs of the application.**

OLSEN J

Date of Hearing: Friday, 26 January 2024

Date of Judgment: Monday, 12 February 2024

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