Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M282/2020

In the matter between:-

DEON MARIUS BOTHA N.O. 1st Applicant

MOTSHWANE MERRIAM KUTUMELA N.O. 2nd Applicant

(in their capacities as joint trustees in the insolvent estate of TP MOKASULE Master's Ref: 0080/2019)

and

B N MOKASULE N.O. 1st Respondent

SC MOKASULE N.O. 2nd Respondent

TG MOKGASANI N.O. 3rd Respondent

(In their capacity as trustees for the **MOKASULE INVESTMENT TRUST Reg No IT143/10)**

JUDGMENT

FMM SNYMAN J

Introduction

[1] On 18 April 2019 an order for the provisional sequestration of the respondent trust, namely the Mokasule Investment Trust with Registration Number IT143/10 (the respondent trust) was granted. This is the return date for the *Rule Nisi* that was issued on 18 April 2019 and the applicants request that the provisional sequestration of the respondent trust be confirmed. The respondents oppose the application and request that the *Rule Nisi* be discharged.

[2] The applicants are the duly appointed trustees of the insolvent estate of Mr Mokasule (the insolvent). The insolvent was sequestrated on 5 December 2019 under case number M105/2019. The insolvent was an erstwhile trustee of the respondent trust. Since the respondent trust is duly cited by its trustees in their official capacity (*Nomino Officio)* I will refer to the respondent trust and respondents interchangeably in this judgment.

[3] The applicants are represented by Mr Walker and the respondents are represented by Adv Scholtz.

[4] The applicants claim (in their official capacity as the joint trustees of the insolvent estate of TP Mokasule) that the

insolvent is a creditor of the respondent trust in an amount of R20,388,840.73, as reflected in the audited financial statements of the insolvent estate. Put differently, the applicants claim that the estate of the insolvent is a creditor to the respondent trust for the repayment of a debt, which debt is denied by the respondents. The fact that the insolvent is a creditor of the respondent trust, as well as the amount, is disputed by the respondent.

[5] The insolvent was previously employed by the Klerksdorp Municipality. The applicants allege that the insolvent amassed assets in the respondent trust by fraudulently purporting to render services to the Klerksdorp Municipality as a meter reader. As such, the argument of the applicant is that the money used by the respondent trust to obtain the immovable property, was money allegedly stolen by the insolvent from the Klerksdorp Municipality and that the application is necessary in the process of recovering money from the insolvent estate of the applicant.

[6] The applicants seek an order for the final sequestration of the respondent trust on the basis that the applicants claim that:

6.1. The respondent trust was utilised by the insolvent as a vehicle to appropriate stolen funds from the Klerksdorp Municipality;

6.2. The respondent trust acquired all of its assets utilising such stolen money;

6.3. In the premises the respondent trust is commercially and factually insolvent and it would be to the benefit of its creditors that the trust be sequestrated and placed in the hands of the Master of this Court.

[7] It is argued by Mr Walker on behalf of the applicants that it is significant to note that the trust had no other source of income by which it could have possibly acquired the immovable properties. The only income would be from the insolvent supplying the money to the trust in order to purchase the property in the name of the trust.

[8] The respondents, together with the insolvent, raised in defence a bald denial of any theft of money from the Klerksdorp Municipality. In addition, the respondent contends that the trust is solvent in that there are sufficient assets in existence to make payment of any claim levelled against the trust. The insolvent provides no explanation for the source of the funds and the respondent takes no issue with the applicant's evidence that the trust had no independent income by means to acquire the substantial immovable properties owned by the respondent trust. The respondent states that the trust generates a rental income from the properties that it possesses. This does not answer the question as to how the properties were obtained.

[9] The respondents state that the application is a gross abuse of the court process.

[10] Mr Walker argued on behalf of the applicant that the legal position pursuant to the theft of money by the insolvent from the Klerksdorp Municipality may be summarised as follows:

10.1. That the municipality may prove its claim against the insolvent's estate in terms of the *condictio furtiva* as well as against his heirs (See **Minister van Verdediging v van Wyk** 1976 (1) SA 315 (W);

10.2. That the claim may be proved for repayment of the alleged stolen amount, together with the fruits resultant from the alleged stolen money, at its highest value since the commission of the theft (See **Clifford v Farinha** 1988 (4) SA 315 (W));

10.3. The claim against the insolvent is not limited only to the value of the alleged theft;

10.4. Whether or not criminal charges have been laid against the insolvent and/or his accomplices, does not detract from their liability in terms of the *condictio furtive*.

[11] It is argued by Mr Walker that, should the facts before the court prove on a balance of probabilities that the proceeds of the alleged theft were indeed utilised by the trust to acquire the immovable properties, the properties fall to be forfeited to

the State in terms of the **Prevention of Organised Crime Act** 121 of 1998. This however, is not the application that serves before this court. This court is not to determine in which manner the properties were obtained by the respondent trust, despite how peculiar it may seem.

[12] The financial statements of the applicant indicate that the insolvent loaned an amount of money of R20,388,840.73 to the respondent trust. The applicant relies on this as the act of insolvency committed by the respondent trust. It is argued by the applicant that the estate of the insolvent is a creditor of the trust for the repayment of the amount of R20,388,840.73. In turn, the applicant states that the amount of ill begotten money are to be reimbursed to the relevant creditor, namely the Klerksdorp Municipality.

[13] No meeting of creditors has been convened in the estate of the insolvent, and the applicants state that no creditor has thus far proven claims against the insolvent estate. As such, the applicants request that they be authorised to launch this application and to utilise the services of attorneys and advocates to do so as required in terms of Section 73 of the **Insolvency Act** 24 of 1936.

Legal framework

[14] In applications of sequestrations, there are specific averments and certain elements which the applicant must prove in order to satisfy the court that a sequestration order is to be granted. These averments include factual insolvency

or act(s) of insolvency and an advantage / benefit to the creditors of the insolvent.

[15] Factual insolvency is proven with several acts, such as when the Sherriff of court issues a *nulla bona* return of service, when a person acknowledges he / she cannot pay a debt, or when the applicant proves that the respondent's liabilities exceed the value of its assets.

[16] Section 8 of the **Insolvency Act** 24 of 1936 determines the legislative acts that would amount to insolvency when committed by a debtor. The relevant subsections of the **Insolvency Act** read as follows:

> *"**8 Acts of insolvency***
>
> *A debtor commits an act of insolvency-*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;*
>
> *(d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;*
>
> *(e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;*
>
> *(f) ..."*

[17] The onus of proving insolvency is on the applicant and should they fail to do so, they are not entitled to an order for sequestration (See: **Ohlasens Cape Breweries Ltd v**

Totten 1911 TPD 48 at 50; and **De Villiers v Bateman** 1946 TPD 126 at 130).

[18] Section 73 of the Insolvency Act 24 of 1936, under which the applicants launch the application for the courts authorisation to institute the proceedings, reads as follows:

> ***"73 Trustee may obtain legal assistance***
> *(1) Subject to the provisions of this section and section 53 (4), the trustee of an insolvent estate may with the prior written authorization of the creditors engage the services of any attorney or counsel to perform the legal work specified in the authorization on behalf of the estate: Provided that the trustee-*
> *(a) if he or she is unable to obtain the prior written authorization of the creditors due to the urgency of the matter or the number of creditors involved, may with the prior written authorization of the Master engage the services of any attorney or counsel to perform the legal work specified in the authorization on behalf of the estate; or*
> *(b) if it is not likely that there will be any surplus after the distribution of the estate, may at any time before the submission of his or her accounts obtain written authorization from the creditors for any legal work performed by any attorney or counsel,and all costs incurred by the trustee, including any costs awarded against the estate in legal proceedings instituted on behalf of or against the estate, in so far as such costs result from any steps taken by the trustee under this subsection, shall be included in the cost of the sequestration of the estate."*

[19] The applicants claim that the insolvent has disposed of his (ill-gotten) property to the trust which would have the effect of

prejudicing his creditors, or preferring one creditor above the other. It is also argued on behalf of the applicant that the insolvent attempts to remove his property with intent to prejudice his creditors by preferring one creditor above the other.

[20] In support of the application, the applicants have also attached a forensic report of Pinkerton Consultants dated 04 October 2019 in which the relationship and business dealings between the insolvent, the respondent trust and other entities of which the insolvent was involved in, are set out. The following is stated in the forensic report paragraph 4.2:

> *"I attach financial statements of the Mokasule Investment Trust, IT143/2010 dated 28 February 2015, that were compiled by Roesch Auditors Incorporated in Klerksdorp on 03 September 2015. These financial statements were obtained during our investigation from a car dealer, Speedy Cars in Klerksdorp where several vehicles were purchased by TP Mokasule and the insolvent handed these financial statements to the owner, Farook Dagor.*
>
> *On page 6 of the financial statements under note 4 Loan payable, TP Mokasula made a loan that is interest free and not repayable within one year to the amount of R22,904,490.46 for the financial year 2014/2015. In the year 2013/2014, a loan amount of R20,388,840.73 is reflected.*
>
> *Our investigation, including an interview with the Sheriff of Klerksdorp, indicated that TP Mokasule himself purchased large*

amounts of properties in cash and registered these properties in the Mokasule Investment Trust.

The loan accounts reflected in the financial statements of the Mokasule Investment Trust confirm the information received about the cash purchase. The properties purchased in the Trust are valued at over R52 million.

In had an interview with the Sheriff, Charl Retief, and he confirmed that all the assets that were purchased at the Sheriff's auctions were done by TP Mokasule and therefore we need to investigate each of these purchases to establish which person/entity donated the funds (Financial statements attached in paragraph 1.5 as per Annexure PC08)"

[21] I am satisfied that the respondent's trust has committed the following acts of insolvency:

21.1 disposing of the immovable property in that the insolvent purchased the properties in the name of the respondent's trust;

21.2 by having property but not refunding the loan to the insolvent;

21.3 in attempting to remove property with the intent to prejudice one creditor above another.

[22] Having regard to the abovementioned, I am satisfied that the applicants have made out a case that the *Rule Nisi* be confirmed. It follows that the respondent trust be placed under sequestration and the Rule Nisi be confirmed.

[23] It is in the interest of justice that the respondent trust be placed under sequestration in the hands of the Master of the Court.

[24] The normal principle of cost orders is that the cost would follow the outcome of the litigation. I see no reason why there should be any deviation from the normal principle and the respondent trust should be ordered to pay the costs awarded in the administration of the estate of the respondent trust.

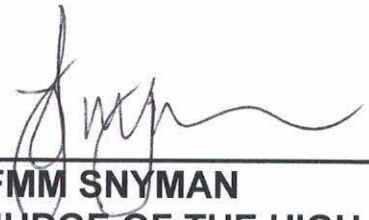
Order

[25] In the premises I make the following order:

i) The applicants are authorised to launch this application and to utilise the services of attorneys and advocates to do so as required in terms of section 73 of the **Insolvency Act** 24 of 1936;

ii) The MOKASULE INVESTMENT TRUST IT NO 143/10 be and is hereby sequestrated in the hands of the Master of this Court.

iii) The costs of the application are costs in the administration of the MOKASULE INVESTMENT TRUST IT NO 143/10.



FMM SNYMAN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

APPEARANCES:

DATE OF HEARING:	**22 APRIL 2022**
DATE OF DELIVERY OF JUDGMENT:	**15 SEPTEMBER 2022**
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