IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MAKHANDA]

CASE NO.: 3815/2022

In the matter between:-

DONOVAN THEODORE MAJIEDT N.O	**FIRST APPLICANT**
OLGA KOTZE N.O	**SECOND APPLICANT**

and

DANIEL OLIVIER DIPPENAAR N.O	**FIRST RESPONDENT**
MURI-ZANN van GEND N.O	**SECOND RESPONDENT**
REHAN COETZEE N.O	**THIRD RESPONDENT**
(in their capacities as trustees of the MD Trust)	

JUDGMENT

NORMAN J:

[1] On 23 April 2024, Malusi J issued an Order placing the estate of MD Trust, with reference number IT46/2020 under provisional sequestration. He also issued a *Rule nisi* calling upon all the interested parties to show cause on 21 May 2024 why the estate of MD Trust should not be placed under final sequestration. He further gave directives on how service should be effected on interested parties including, amongst others, the South African Revenue Services, the Master of this court and employees of MD Trust, if any, and by publication in the Daily Dispatch newspaper. There has been compliance with the orders relating to service.

[2] The applicants seek an order, in terms of section 12(1) of the Insolvency Act 24 of 1936 (the Act), finally sequestrating the estate of the MD Trust. To this end the applicants are required to satisfy the court (a) that they have a liquidated claim against the Trust as envisaged in section 9 (1) of the Act; (b)that the MD Trust had

committed an act of insolvency or is in fact insolvent; and (c) that there is reason to believe that it will be to the advantage of the creditors of the MD Trust if its estate is sequestrated. The relief for the final sequestration order is opposed by the respondents.

Relevant facts

[3] The applicants are the joint trustees of the insolvent estate of Mr Johannes Dippenaar (Johannes). He was cited as the second respondent in his capacity as a trustee of the MD Trust. His wife Ms Martha Dippenaar (Martha) was previously cited as a Trustee of MD Trust. Both the estates of Johannes and Martha were sequestrated. Mr Nel (Nel) , one of the trustees of MD Trust also resigned from the Trust. On 21 May 2024, Mr Daniel Dippenaar (Daniel) , Ms Muri- Zann van Gend (Muri) and Mr Rehan Coetzee (Coetzee) were substituted as the representative trustees of the MD Trust. On 28 May 2024 the application was postponed to 05 September 2024 and the provisional sequestration order was extended. On 05 September 2024 , the application was again postponed with the provisional order extended accordingly.

Applicants case

[4] The applicants ground the liability of MD Trust to Johannes on, *inter alia*, the fact that the MD Trust's property situate in Jeffreys Bay, known as Port Au Prince, Erf 1026, Astonbay Marina Martinique (the property) was purchased for an amount of R2 350 000. The purchase price was paid with funds that were borrowed from Johannes, according to Nel, who was at the relevant time a trustee of the MD Trust. However, the amount of the loan as reflected in the financial statements of Johannes is an amount of R2 858 485.00. Nel further stated that, the loan was a long-term loan, payable on demand.

[5] The deponent to the founding affidavit, the first applicant stated at para 15:

> "Although both sets of financial statements, ironically drafted by the same auditor, cannot be true, the upshot is that the MD Trust is indebted to the estate of the second respondent either in an amount of R1,175m as a distribution or R2,858,485 for monies loaned and advanced."

[6] The other debt relates to the First Rand Bank Limited, as one of the creditors of MD Trust. It holds a mortgage bond over the property of the MD Trust. On 7 December 2020 FirstRand Bank Limited sought and obtained default judgment against the

Trustees of the MD Trust jointly with the trustees of the Geduld Boerdery Trust for the sum R7 444 893.89.

[7] First Rand Bank Limited, through its Regional Head, Commercial Recoveries, Mr Elrich Mark Cameron (Cameron) , stated that MD Trust bound the Trust as surety in *solidum* for and as co-principal debtor jointly and severally with the Geduld Boerdery Trust for due payment of all monies due to FirstRand Bank Limited by the Geduld Boerdery Trust. The estate of the Geduld Boerdery Trust was also sequestrated. After the distribution of its assets the sum of R3 022 576.87 of the judgment remained unpaid. First Rand Bank Limited supports the final sequestration of the estate of the MD Trust.

[8] During January 2017 a R2 million continuing covering bond was registered in favour of the FirstRand Bank Limited over the property. There is a shortfall of R3 944 553.74 as shown in the second and final liquidation and distribution account. The Geduld Boerdery Trust is currently indebted to the FirstRand Bank in the total amount of R6 100 204.60 as indicated in the bank certificate of balance. FirstRand Bank Limited has a claim against MD Trust in the amount of R2 million in respect of the aforementioned suretyship and the continuing covering bond.

[9] The applicants contend that the MD Trust is factually insolvent as envisaged in section 8 of the Act in that it has one property valued at R4 175 000.00 but has liabilities in the amount of at least R 4 917 042.91. It is for this reason that they conclude that MD Trust is *de facto* insolvent in that the some of its liabilities exceed the fair value of its assets.

[10] They alleged that the MD Trust committed an act of insolvency in terms of section 8 (c) in that it made or attempted to make a disposition of property which has or would have the effect of prejudicing its creditors or preferring one creditor above another. They also relied on section 8 (d) that the Trust attempted removed or to attempted to remove its property with intent to prejudice its creditors or prefer one creditor above another. They contend that the sequestration of the MD Trust will be to the advantage of creditors as the property can be realized by a trustee who can distribute the proceeds of sale in accordance with the distribution plan in terms of the Act.

Respondent's opposition

[11] The respondents oppose the final order of sequestration and rely on grounds similar to those that were raised in resisting the provisional order of sequestration. Those grounds are: That applicants as trustees of the insolvent estate of Johannes do not

have the authority to bring the application and they lack legal standing to do so; there has been no compliance with the legal requirements; a claim that the sum owed to Johannes by the MD Trust was settled by the MD Trust by providing security for loan secured by the second respondent for his farming activities; by providing security in the form of suretyship for the liabilities of the Geduld Boerdery Trust, the liability of the MD Trust was discharged; that a claim relating to the liability of the MD Trust to Johannes has become prescribed; and that the value of the assets of the property exceeds the sum of its liabilities and thus the MD Trust is not insolvent. In an affidavit deposed by the third respondent the respondents placed further facts in resisting the final order. They contend that the claim to Johannes prescribed because it became due and payable in 2016; the MD Trust has a damages claim against the FirstRand Bank Limited for its refusal, without any legal basis , to consent to the cancellation of its bond and thus enable the property to be registered in the name of the buyer; they denied that the applicants have established a liquidated claim of at least R100 against the MD Trust ; and that the authenticity of the financial statements attached to the founding affidavit were never proven by the applicants.

[12] They also stated that the property was sold for R4 175 000.00 and upon transfer the Trust would have settled the First Rand Bank Limited debt. However, the First Rand Bank Limited withheld its consent to cancellation of its bond security. As a result of such conduct, the sale could not be finalized. The purchaser has since withdrawn from the transaction and requested a refund of the purchase amount. They further stated that the applicants were informed of the transaction at the time it was still pending. The property had been occupied by the purchaser and all municipal accounts and levies were paid in full by December 2022. Johannes explained in his affidavit that the distribution or allocation in the financial statements marked 'MD-11', signed on 1 November 2016 shortly before he signed the suretyship on behalf of the MD Trust on 15 November 2016. He received advice at the time that an allocation according to the financial statement and an agreement with the trustees to settle the loan by providing surety as was needed and would enable them to provide valuable surety to the bank. He confirmed that the agreement was concluded with the MD Trust in 2016. In reply to those allegations, Mr Phillipus Jacobus Roos, the applicants attorney, stated , amongst others that there were no documents produced to support the allegations of an agreement made because a Trust cannot rely on a verbal

agreement. He also stated that this transaction was not mentioned in the insolvency enquiry of the Geduld Boerdery Trust.

Legal submissions

[13] Mr De La Harpe SC, for the applicants, made the following submissions:

13.1 The respondents claim the loan to Johannes has prescribed but at the same time contend that that claim was payable on demand. They further contend that the value of the assets of the MD Trust, the value of its immovable property exceed some of its liabilities and therefore the allegation that it is solvent cannot be sustained.

13.2 The Applicants are the trustees of the insolvent estate of Johannes. The loan made by Johannes to the MD Trust is what gave rise to a claim in the hands of the applicants as the trustees of the insolvent estate of Johannes.

13.3. There was compliance with the manner of service directed by the court in the provisional sequestration order. He relied on section 12 of the Insolvency Act that provides :

> *"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 9; 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."*

13.4 The applicants bear the onus to prove on a balance of probabilities that they established a liability in excess of the prescribed minimum that the estate of the MD Trust is insolvent. There is reason to believe that the sequestration of the estate of the MD Trust will be to the advantage of its creditors.

13.5 In resisting the grounds advanced by the respondents on the issue of authority and standing, the applicants contend that because Johannes's estate was sequestrated section 20 of the Insolvency Act vests the estate of the insolvent in his trustees. They are also empowered by section 77, to recover payment, where necessary, by legal proceedings. The creditors authorised the trustees to

bring the application as envisaged in section 73 of the Act. It was argued that authorisation is relevant only to the trustees liability, as between himself and insolvent estate, in relation to the costs of the legal proceedings. In this regard, reliance was placed on **Patel v Paruk**[1].

13.6 Liability for a loan repayable on demand is not discharged by the debtor, by making an allocation of the sum of the loan or by the MD Trust providing a suretyship which was never called upon for the liability of another. The claim that the liability of the MD Trust was paid or discharged is without merit and should be rejected.

13.7 The debt created by the loan was not to be regarded as immediately repayable. Only upon demand, would the trustees of the insolvent estate of the MD Trust, have completed the cause of action for its recovery and only then would prescription commence to run. They relied on **Stockdale & Another v Stockdale**[2]. The applicants have demonstrated that the sequestration of the estate of the MD Trust will be to the benefit or to the advantage of its creditors[3]. A final order for the sequestration of the estate of the MD Trust should issue with the costs of the application including its postponement to be costs in the sequestration.

[14] Mr Coetzee, on the other hand, who represented the respondents in his capacity as a trustee of the MD Trust and not as a legal practitioner, made the following submissions:

14.1 In addressing the prescription point he submitted that the claim in relation to the loan made by Johannes to the MD Trust may have prescribed because repayment of the loan amount became due and payable in 2016 when it was advanced.

14.2 The respondents persist in their objections to the final order of sequestration being granted based largely on the grounds, inter alia, that in an application for sequestration the applicant bears the onus. Where the respondents dispute the indebtedness upon which the

[1] Patel v Paruk's Trustee 1944 AD 469 at 474; see also Bowman N.O v Sacks and Others 1986 (4) SA 459 W at 461.
[2] Stockdale and Another v Stockdale 2004 (1) SA 68 (C).
[3] Stratford and Others v Investec Bank Limited and Others [2015] JOL 32695 (CC).

applicants rely, the onus on the respondents is to prove, not that, it is not indebted to the applicant, but that the indebtedness is *bona fide* disputed and on reasonable grounds. When the respondents discharge that onus, the application should fail even if it appears that the MD Trust is nevertheless unable to pay its debts. In this regard the respondents relied on **Kalil v Decotex (Pty) Ltd. and Another**[4].

14.3 The practical considerations dictate that an applicant should apply for sequestration only after the claim in question has been proved having followed the appropriate procedure. Sequestration proceedings are not designed to settle disputes about reciprocal claims when ordinary procedures were available and appropriate for such cases. They relied on **Lindhaven Meat Market CC v Reyneke**[5].

14.4. The general rule is that a party wishing to produce a document must prove that it is authentic especially where the entire application depends on that document. The applicants rely for their claim to be a creditor and to be vested with *locus standi* to proceed with the application, on the financial statements whose authenticity or correctness was not proved nor confirmed by either the author of the documents or any of the trustees involved in the preparation thereof. They also contend that the applicants did not comply with the formal requirements for sequestration.

14.5 Nel stated that the financial statements appear to reflect the asset at cost and that an allocation of that value to Johannes and Martha in discharge of the indebtedness which, if correct, means that any claim related thereto may have prescribed.

Discussion

[15] The applicable test when an applicant seeks a final order of sequestration is that the court must be satisfied that the requirements for a sequestration order are proved on a balance of probabilities. I shall first address the defences raised by the respondents in resisting the grant of the final order of sequestration.

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[4] Kalil v Decotex (Pty) Ltd. and Another 1988 (1) SA 943 (AD) at 956 G – I.
[5] Lindhaven Meat Market CC v Reyneke 2001 (1) SA 454 (W) at 459 C – D.

Were the trustees authorised to institute these proceedings?

[16] In terms of section 20 of the Act the effect of sequestration of the estate of Johannes is that he was divested of his estate and upon the appointment of the applicants as trustees his estate vested in them. That estate included all property of the insolvent at the date of sequestration.

[17] The respondents contend that the applicants have no authority to institute these proceedings because they were not authorised by the creditors or the Master. On 7 December 2022, the applicants attorneys, Honey Attorneys sought , by way of a letter sent to all known creditors, sought consent to proceed with the sequestration proceedings and requested them to ratify all actions already taken by the applicants. In a letter dated 24 March 2023, Jaco Ross Inc. Attorneys,representing Karan Beef , responded to Honey Attorneys as follows in relation to this application:

> *"1. The aforementioned matter refers*
> *2. We confirm that we act on behalf of our client, Karan Beef the only proven creditor of the insolvent estate of Mr J.O Dippenaar.*
> *3. On behalf of the only proven creditor of the insolvent estate, we hereby confirm that we supported the sequestration application of MD Trust at the time that it was issued, that we still support the application and we further request that you obtain the Master of the High Court's authority.*
> *4. Kindly acknowledge receipt.*
> *Yours faithfully*
> *Jaco Ross Inc. Attorneys."*

[18] The respondents contend that no such authority was sought and obtained from the Master. The applicants rely for their authority to bring the application on the fact that they are joint trustees of the sequestrated estate of Johannes as they were appointed by the Master of the High Court in Bloemfontein on 10 May 2022. They also rely on the provisions of sections 73 and 77 of the Act, which provide:

> **"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) ..." (my emphasis)
>
> **77. Recovery of debts due to estate**
> A trustee shall, in the notification of his appointment in the Gazette, in terms of subsection (3) of section 56, call upon all persons indebted to the estate of which he is trustee to pay their debts within a period

and at a place mentioned in that notice, and if any such person fails to do so, the trustee shall forthwith recover payment from him, if need be by legal proceedings."

[19] In the Patel's case, Tindall JA , relying on Gerothwohl v Cochrane stated:

> "The original proviso, prohibiting the trustee from instituting or defending any legal proceedings without the prescribed consent, was enacted as between the trustee and the creditors, in order to protect the estate from being dissipated in litigation. The legislature could not have intended that steps taken by a trustee to institute or defend proceedings must necessarily be a nullity because the prescribed consent had not been obtained. An interpretation to the contrary would bring about the result that, where there is not enough time to enable the trustee to obtain such consent, he may be powerless to issue a summons timeously in order to prevent a claim due to the estate from becoming prescribed or to file a plea in order to prevent a default judgment from being obtained against him..." .

[20] In **Lupacchini NO & another v Minister of Safety and Security**[6] , the Supreme Court of Appeal held :

> "[22] I regret that I can find no indications that legal proceedings commenced by unauthorised trustees were intended to be valid. On the contrary, the indications seem to me all to point the other way. Unless it were to be the case that all transactions performed in conflict with the section are to be treated as valid – which clearly cannot be the case, because otherwise the Act would be altogether ineffective – then I find nothing to distinguish its effect on legal proceedings. Indeed, it would seem to me that the case is even stronger for finding legal proceedings to be a nullity. Conradie J sought to reconcile his finding in *Watt* with his expressed view that unauthorised trustees are not capable of validly contracting as follows:[42]
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> 'In entering appearance to defend this action the [trustees] incurred no contractual liability on behalf of the trust save possibly for payment of their attorneys' fees; that, however, is not something which arises in these proceedings. The trust incurred no contractual liability for costs to the plaintiff. It did not even incur any liability for potential, judicially imposed, costs. If the [trustees] were not authorised to conduct the litigation they would incur personal liability for any adverse costs order'. (my emphasis)
>
> While it is open to third parties to conclude contracts with trustees at their peril, they are left no choice when it comes to being sued. If the only consequence of trustees suing in conflict with the section is to be that the trust is not bound to pay the costs, which is what Conradie J seems to suggest, that would be cold comfort to those who are sued by a wealthy trust that is administered by impecunious trustees.[43] I do not think the legislature could have intended to submit third parties to litigation at the hands of unauthorised trustees with the consequence that they are precluded from looking to the assets of the trust for recompense if the trust were to lose."

[21] The facts herein are distinguishable from the Lupacchini matter. On 31 October 2022 the application was issued notifying all the parties that the application would be made on 06 December 2022. On 07 November 2022 the application was served on the Master of the High Court. On 8 November 2022 the Master issued the certificate confirming that sufficient security had been furnished to prosecute all sequestration proceedings in this matter. That to me , signified authority to the applicants to prosecute the sequestration application. It was in writing and was given prior to the hearing of the matter. That meant that the trustees actions were consistent with the authority of the Master. Nothing precluded the Master from filing a report and raised lack of support for sequestration.

[6] Lupacchini NO & another v Minister of Safety and Security 2010(6) SA 457 (SCA), para 22.

[22] In **Ex parte: Master of the High Court of South Africa (North Gauteng)**[7], Bertelsmann J stated:

> "28. The South African insolvency system is creditor - driven. The majority of creditors in number or claims have the right to elect trustees and liquidators and to take decisions in respect of the manner in which assets falling into the estate or constituting property of a corporate body in winding-up should be dealt with. Nonetheless, their choice of trustees is subject to the Master's approval and the exercise of their functions is subject to the Master's control. (my underlining.)

[23] The applicants alleged that they were authorised by the creditors. The following facts are relevant:

[24] In the replying affidavit deposed to by the second applicant, it is stated that the applicants rely on section 73 (1) and contended that authority is not something which the respondents are able to competently challenge. She further stated: *"I, however, place on record that the trustees have received the necessary authority from creditors to bring this application."* The letter dated 24 March 2023, from Jaco Roos Attorneys, representing Karan Beef, specifically requested the applicants to obtain authority from the Master of this court. By that time authority from the Master was already in place as I have found. Most importantly, in that letter it was specifically stated that "*On behalf of the only proven creditor of the insolvent estate, we hereby confirm that we supported the sequestration application of MD Trust at the time that it was issued, that we still support the application."*

[25] The other creditor as aforementioned is the FirstRand Bank. In an affidavit deposed to by Cameron, he stated: *"I hereby confirm that FirstRand Bank supports the final sequestration of the MD Trust."* Later in the affidavit he stated:

> "17. FirstRand Bank Limited therefore supports the application for sequestration, requires that the rule nisi be conformed (sic) and made final and severely objects to any suggestion that the rule nisi be extended any further."

[26] In **Robert Thornton Smith v Kwanonqubela Town Council**[8] Harms JA stated, when he had to consider the validity of the submission that raised the question whether what seemed to be unauthorised institution of the proceedings was capable of ratification:

> "[9] It is in general essential for a valid ratification "that there must have been an intention on the part of the principal to confirm and adopt the unauthorised acts of the agent

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[7]Ex parte: Master of the High Court of South Africa (North Gauteng) (2011 (5) SA 311 (GNP)) [2011] ZAGPPHC 105; 28042/11 (27 June 2011).

[8] **Robert Thornton Smith v Kwanonqubela Town Council** (399/97) [1999] ZASCA 58; [1999] 4 All SA 331 (A) (10 September 1999) at para 9.

done on his behalf, and that the intention must be expressed either with full knowledge of all the material circumstances, or with the object of confirming the agent's action in all events, whatever the circumstances may be" (Reid and Others v Warner 1907 TS 961 at 971 in fine - 972)."

[27] The sentiments expressed by the creditors display their intention to adopt and confirm or support the actions taken by the applicants. That should allay any concerns that the applicants were on a frolic of their own. I am satisfied that the applicants were duly authorised by the creditors who indicated their support for the application in writing.

Compliance with statutory requirements

[28] A creditor who commences sequestration proceedings against a debtor must deposit with the Master security for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and all costs of administering .

[29] In the founding affidavit at paragraph 21.6, the first applicant stated, inter alia,

"21.6 I will instruct my legal representatives to comply with the formal requirements for a sequestration and to file a compliance affidavit with this Honourable Court".

[30] Prior to the applicants obtaining a provisional sequestration order and on 08 November 2022, there was compliance with the '*formal requirements for a sequestration*". The respondents denied that the applicants complied with the legal requirements for the relief sought. In response to paragraph 14, where the respondents deny such compliance, the second applicant replied as follows:

'21.6 I will instruct my legal representatives to comply with the formal requirements for a sequestration and to file a compliance affidavit with this Honourable Court.' There are two compliance affidavits filed that deal with the service of the application itself and the rule nisi and the furnishing of bond of security.

[31] Section 9 (3) (b) provides that the petition shall be accompanied by a certificate of the Master given not more than 10 days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the insolvent estate until the appointment of a provisional trustee. That is the date on the

notice of motion. It guarantees the proper administration of funds and property by the executor or trustee. The words employed by the Legislature "shall" makes compliance with that section mandatory. In **Court v Standard Bank of SA Ltd ; Court v Bester NO**[9] **,** the Supreme Court of Appeal held:

> "On 15 July 1991 the application without the Master's report was served on the appellant. The original papers, together with the certificate, were returned to the Registrar and the application came before the Court on 17 July 1991. To sum up, the certificate did not accompany the application either when it was signed, filed with the Registrar, issued or when it was served. By the time the papers were served on the appellant security had however, already been furnished and the certificate had come into existence. It was before the Court when the matter was heard. Sec 9(3) (b) of the Act requires the application to be accompanied by the certificate and requires further that the certificate must have been issued not more than ten days before the date of the notice of motion (Anthony Black Films v Beyl 1982 (2) SA 478 (W)). The subsection is silent as to when the certificate must accompany the application. It seems clear that the certificate need not be attached to the application when it is signed and that it need not even then exist. (Rennies Consolidated (Transvaal) (Pty) Ltd v Cooper 1975 (1) SA 165 (T) at 166 E-H; Mafeking Creamery Bpk v Mamba Boerdery (Edms) Bpk; Mafeking Creamery Bpk v Van Jaarsveld 1980 (2) SA 776 (NC)at 781C and De Wet NO v Mandelie (Edms) Bpk 1983 (1) SA 544 (T) at 546 C-D). Different views have been expressed in the Provincial Divisions as to when thereafter the certificate must accompany the application. In the Transvaal it has been held that the certificate must be obtained before the application is filed and served and must accompany such filing and service. (Arnawil Investments (Pty) Ltd v Stamelman and Another 1972 (2) SA 13 (W) at 14 A; the Rennies Consolidated case, supra at 166 F-H; A Holman Trading Co (Pty) Ltd v Pipeweld Construction and Erection (Pty) Ltd 1977 (4) SA 360 (T) at 363 B-D; and De Wet NO v Mandelie (Edms) Bpk., supra, at 547 G-H. In the Arnawil Investments case, supra, Marais J stated (at 13-14) that the purpose of the security requirement of sec 9(3) was to discourage frivolous or vexatious proceedings against solvent persons and to safeguard such persons against monetary loss where such proceedings are nevertheless brought. For security to be an effective brake on unfounded petitions for sequestration it was thought to be necessary to insist on security being furnished at some stage prior to the incurring of costs by the respondent. That stage would be reached before the service of the application on the respondent. Hence the words "the petition shall be accompanied by a certificate". Marais J went on to say (at 14 B-C):
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> > "The use of the word 'shall' in conjunction with 'accompanied' in my view also closes the door to means of proof other than a prescribed certificate, of the fact that the Master has been furnished with the required security for costs. If this is the correct construction of the sub-section, a respondent served with a petition for his sequestration would not be put to any expense whatever if, at the time of service, he finds no security certificate in the papers served on him. And that does seem to have been the result intended by the Legislature."

[32] The notice of motion was signed on 28 October 2022. The certificate of tendered security by the Master was delivered on 08 November 2022. I have already referred to the contents of the Master's certificate. I accordingly reject the respondents complaint that there was no compliance with the legal requirements.

Did the Trust commit an act of insolvency?

[33] Nel stated that First Rand Bank Limited instituted an action to recover its debt from the MD Trust. It obtained default judgment and thereafter the sheriff attached the property in question. A sale in execution was arranged to be held on 9 September 2022. Thereafter the FirstRand Bank Limited and Nel who was the only trustee remaining at the time , agreed to cancel the sale in execution subject to certain terms

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[9] Court v Standard Bank of SA Ltd ; Court v Bester NO , 1995 (3) SA 123 (A) paras 14-17.

and conditions. They entered into an agreement relating to payment terms of the debt between MD Trust and the First Rand Bank Limited.

[34] The applicants refer in this regard to immovable property. In **Hassan and Another v Berrange NO**[10], Zulman JA, considered, amongst others, the provisions of s 12(1) read with sections 9(1); 8(a) and 8 (d) of the Insolvency Act. At paragraph 45, he stated:

> "[45] Meskin[21] in dealing with s 8(d) states:
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> > 'It is submitted that the word 'removes' and the word 'remove' have their ordinary meanings and affect the meaning to be assigned, in this context, to the word 'property'. By the use of the latter word it is submitted, the intention is to refer only to corporeal movables, ie, property capable of being moved physically from one place to another. The intention is to hit a debtor's physical moving or attempted moving of any of his corporeal movables from one place to another (whether or not such moving constitutes also a disposition (as defined in section 2 of the Insolvency Act) which occurs with the requisite intent. To speak of a 'removable' in the context of immovable property or of an incorporeal right is, it is submitted, giving language its ordinary meaning, notionally unsound.'
> >
> > The learned author refers for these propositions to *S v Levitt*[22] and the reported judgment of the court *a quo*[23] and to the definition of 'property' in section 2 of the Insolvency Act. This definition defines property as meaning 'movable or immovable property wherever situate within the Republic, ...'. It is not necessary to decide in this case whether the learned author is correct in restricting the meaning of the word 'property' in section 8(d) to corporeal property. This is so since the transfer of a balance owing to a debtor by his bank to another bank would be tantamount to a transfer of actual money, a corporeal, represented by the credit, as was the situation in the present matter. In the context of theft of money represented by a credit our courts have accepted that a misappropriation thereof can constitute or amount to theft because such misappropriation is the equivalent of the appropriation of the actual corporeal money.[24]"

[35] Lewis JA , in the same judgment differed from the approach that the authors in Meskin adopted. She found that the word 'property' in general refers to both corporeals and incorporeals. Therefore, she found, there can be no reason to restrict its meaning in section 8 (d) to movables only.

[36] A disposition is defined in section 2 of the Act as *"... any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefore, but does not include a disposition in compliance with an order of court".*

[37] A contract of suretyship, although not specifically mentioned in the definition is a disposition since it is a contract which provides for a payment by the debtor.[11] A creditor who has received such a disposition, and who wishes to avoid the setting aside thereof needs to prove that , the disposition was made in the ordinary course of business[12]; and it was not intended to prefer one creditor over another.[13] In this case

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[10] Hassan and Another v Berrange NO (170/05) [2006] ZASCA 79; 2012 (6) SA 329 (SCA) (31 May 2006).
[11] Langeberg Kooperasie Bpk v Inverdoorn Farming and Trading Co. Ltd 1965 (2) SA 597 (A) at 602.
[12] Griffiths v Janse van Rensburg NO and Another [2016] 1 All SA 643 (SCA).

that creditor would be the First Rand Limited, the very creditor that supports the final sequestration order[14].

[38] The applicants allege that MD Trust made or attempted to make a disposition of the property and or removed or attempted to remove the property, to the prejudice of his creditors or preferring one creditor above another. Nel admitted that the deeds of sale were concluded but denied that the Trust had committed an act of insolvency.

[39] There are two deeds of sale that the applicants rely on. First is the deed of sale between MD Trust and Arno Bouwer. Nel represented the Trust when he entered into that agreement. It was the same trustee that entered into the second one between the MD Trust and the Nellie and Casper Family Trust. Johannes and Martha are referred to the application as unrehabilitated insolvents. The respondents do not challenge the authority of Nel to enter into those agreements instead they admit that the MD Trust concluded those sale agreements.

[40] The applicants also rely on the agreement between the Trust and the First Rand Bank Limited, which amounts to the MD Trust abandoning or transferring its rights to the property to the Bank. That , too, constituted a disposition as envisaged in the Act.

[41] In **Burger N.O. and Others v Bester N.O. and Others**[15], the appeal was dismissed with costs on the basis that the application did not engage the Constitutional Court's jurisdiction. However, the Constitutional Court at paragraph 37 stated:

> "[37] The second issue on which the applicants rely to establish jurisdiction, relates to the authority of a trustee, which is a legal question. However, the law relating to the operation of a trust is well-settled. The powers of a trustee to act on behalf of the trust are located within the four corners of the trust deed. They provide for the circumstances in which the actions of trustees may bind a trust. Thus, a trustee acting outside the parameters of the powers conferred on her will be found not to have acted on behalf of the trust. In Hoosen N.O v Deedat.[16], a trust deed was silent on the delegation of powers, rights, and duties to a single trustee, but conspicuously made provision for collective action by the trustees. That Court rejected the notion that a single trustee could act for a trust on her own initiative without her co-trustees' authorisation. This principle has not changed. In Land and Agricultural Development Bank of SA v Parker (Land Bank)[17] the same principle was reiterated by the Supreme Court of Appeal. The broad context in that matter concerned a

[13] Cooper & Another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA).
[14] Courier – IT S.A (Pty)Ltd v Van Staden and Another (21/ 6064) [2022] ZAGPJHC 94 (14 February 2022).
[15] Burger N.O. and Others v Bester N.O. and Others (CCT 246/20) & (CCT 160/20) [2021] ZACC 48; 2024 (1) BCLR 1 (CC) (13 December 2021).
[16] Hoosen N.O. v Deedat [1999] ZASCA 49; 1999 4 SA. 425 (SCA).
[17] Land and Agricultural Development Bank of SA v Parker [2004] ZASCA 56; 2005 (2) SA 77 SCA (*Land Bank*).

dispute over a family trust. The family trust was alleged to owe over R16 million to the Land Bank which sought the payment of these monies. The question at the forefront of the enquiry was which circumstances had bound the trust through the dealings of its trustees. The Supreme Court of Appeal said:

> "[A] provision [in a trust deed] requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf."

[38] In my view, nothing more needs to be said about the requirements to bind a trust. The requisite number of trustees must be in office before the trust can be said to have acted. The law is settled on this point and the argument does not assist the applicants."
(my emphasis)

[42] As aforementioned the respondents admit the agreements and associate themselves with the actions of Nel. I am satisfied that the applicants proved that the MD Trust committed an act of insolvency when it entered into the aforementioned sale agreements, including the payment arrangement agreement with the First Rand Bank Limited, as envisaged in sections 8 (c) and 8(d) of the Act.

Has a liquidated claim been established by the applicants?

[43] The applicants allege that they have a liquidated claim of R2,350m, alternatively R1,175m against the MD Trust. Earlier on in the founding affidavit the first applicant stated that the MD Trust is indebted to Johannes's estate either in the amount of R1,175m as a distribution or R2,858,485. In the alternative, they claim that the apparent allocation or distribution of R2 350 000.00, has never been settled. Nel filed an answering affidavit where he admitted that the funds used to purchase the property were borrowed from Johannes. He also stated that the financial statements appear to reflect the asset at cost and an allocation of that value(and the value of the loan) to Johannes and Martha in discharge of the indebtedness. He further stated that if that is correct, then any claim related thereto may have prescribed. In response to those allegations the second applicant stated:

> ***"AD PARAGRAPH 7***
>
> *13. It is common cause that the money was lent. There is no evidence that the loan and / or 'apparent' / allocation was settled.*
>
> ***AD PARAGRAPH 8.1***
>
> *It is common cause that the loan was payable on demand. There could be no prescription."*

[44] The circumstances surrounding the loan are stated in Johannes's answering affidavit. He indicated therein that he never intended to reclaim the purchase amount advanced by him when the property was purchased. This would mean that it was a donation but

Nel stated that it was unlikely that it was a donation at the insolvency hearing. He further admitted that Johannes has a claim against the MD Trust.

[45] Johannes stated that he was advised of the benefits of reflecting the loan in the Trust's financial statements, which advice he believed to be correct at the time. He was further advised at the time that an allocation as per the statement and an agreement with the trustees to settle the loan by providing surety as was needed by the First Rand Bank Limited as it was willing to grant the loan. He confirmed that the agreement was concluded with the MD Trust in 2016 in terms of the advice he received then. As aforementioned the surety constituted a disposition. On this very issue Johannes vacillated as he contended that there was a loan, the Trust provided surety for his loan with the First Rand Bank Limited and that there was an allocation or distribution which discharged the loan.

[46] Nel had stated that it was a loan payable on demand. The current trustee state that the loan was due and payable in 2016. They also state that the agreement between Johannes and the Trust was a verbal one.

[47] Given the various versions given by the respondents in relation to the loan , on a balance of probabilities , the version of the applicants is to be preferred, namely that, since the loan was repayable on demand, it has not prescribed. I also find that whether the indebtedness was discharged or whether the claim has become prescribed are issues that have not given rise to a genuine dispute of fact. In any event, the respondents have not availed themselves of their right to apply for the deponents concerned to be called for cross- examination under Rule 6 (5) (g) of the Uniform Rules of Court in relation to the loan to Johannes. I find that the defences raised by the respondents are untenable. They are not bona fide. In **Plascon – Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd**[18] Corbett JA stated:

> "The existence of disputes of fact does not, as I have indicated, necessarily preclude a final interdict being granted. The main consequence is simply that, in terms of the above-mentioned general rule, where the affidavits in this case raise real and bona fide disputes of fact, the appellant is bound to accept the respondent's version of the facts." As stated above, there are no genuine disputes of fact herein.

[18]Plascon – Evans Paints (TVL) Ltd. v Van Riebeck Paints(Pty) Ltd. (53/84) [1984]ZASCA 51; 1984(2)ALL SA 366(A) ; 1984 (3) SA 623; 1984(3) SA 620(21 May 1984) paragraph 24

[48] In **Kleynhans v Van der Westhuizen NO**[19]it was held that a liquidated claim in terms of s 9(1) of the Insolvency Act means a claim where the amount is fixed either by agreement or by an order of court or otherwise. What the legislature intended was that there should be certainty in connection with the amount of the claim.

[49] I am satisfied that the applicants have established a claim against the MD Trust. Even if it were to be proved that there was an allocation of R1,175 mil, there would still be an amount of R1, 175 m outstanding which will be more than the R100 prescribed in the Act. The parties are in agreement that there was a loan for the purchase price of R2,350 000.00. It is also apparent that that loan was not repaid. For all the above reasons I am satisfied that the applicants have established their claim against the MD Trust.

Whether sequestration of the Trust's estate will be to the advantage of creditors?

[50] The loan to the Trust by Johannes was revealed in the insolvency enquiry. On Johannes's version the loan was put on the financial statements as a loan and as a repaid loan. It is not disputed that the amounts relating to the loan are different on the statements. That calls for further investigations to enquire into the affairs of the trust for the benefit of the concursus. The conduct of the MD Trust where it attempted to dispose of its sole asset supports the applicants allegations that placing the trust under final sequestration will be to the advantage of all creditors. There are no reasons advanced by Johannes why he would loan to the Trust a huge amount but have no wish of claiming it back. Once the loan was discovered , then he raised an allocation as having discharged the debt. In my view that conduct if allowed to continue, apart from the rands and cents, would be prejudicial to the body of creditors.

[51] The applicants contend that the MD Trust is factually insolvent as envisaged in section 8 of the Insolvency Act No. 24 of 1936 (the Act) in that it has one property valued at R4 175 000.00 but has liabilities to the value of at least R 4 917 042.91. It is for this reason that they conclude that MD Trust is *de facto* insolvent in that some

[19] Kleynhans v Van der Westhuizen NO (198/69) [1970] ZASCA 24 (25 March 1970)

of its liabilities exceed the fair value of its assets. The respondents simply denied this and attempted to raise the issue of movable assets in the amount of R300 000.00. Even if that amount is taken into account there will still be a shortfall of about R600 000.00.

[52] I am satisfied that the applicants proved that final sequestration of the MD Trust will be to the advantage of creditors. The creation of a concursus creditorum will enable the supervised liquidation of the MD Trust's assets for the objectively regulated benefit of all of its creditors.

Costs

[53] It follows that the applicants have been successful in the relief they sought and are accordingly entitled to their costs.

[54] In the circumstances I accordingly make the following Order:

ORDER

1. **A final sequestration order be and is hereby granted in terms of section 12(1) of the Insolvency Act 24 of 1936, sequestrating the estate of the MD Trust, with reference number IT 46/2010.**
2. **The applicants costs of the application, including all reserved costs, as taxed or agreed, shall be included in the costs of the sequestration of the MD Trust with reference number IT 46/2010.**

T.V. NORMAN

JUDGE OF THE HIGH COURT

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Matter heard on	:	**05 September 2024**
Judgment delivered on	:	**24 October 2024**