IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

Case No:EL 860/20

In the matter between:

PIERRE RUSSEL LINDE	Applicant
and	
RICHARD WAYNE RAWLINS N.O.	First Respondent
MARISE MEGAN RAWLINS N.O.	Second Respondent
GARY BRIAN KLINKRADT	
As the nominee of K A ADMINISTRATORS	
(PTY) LTD N.O.	Third Respondent

JUDGMENT

TOKOTA J:

[1] On the 1st of September 2020 and at the instance of the applicant, this court granted a provisional order of sequestration against the estate of Rawlins Trust (the Trust).

[2] The act of insolvency relied upon by the applicant as entitling him to the order sought is that on 28 August 2020 the Trust gave notice in writing (the notice) to the applicant, its creditor, that it is unable to pay its debt, section. 8 (g) of the Insolvency Act 24 of 1936. In the notice the Trust acknowledged its indebtedness to the applicant in the amount of R500 000. It is this amount that the Trust signified its inability to pay.

[3] The respondents are the trustees of the Rawlins trust. The Trust was founded in August 2018 and registered as a family Trust in or about January 2019. The applicant and his family are investors in the Trust. The applicant is a practising attorney and a business man. He was involved in advising the Trust about its business concern. He drew a template memorandum of agreement, which would be signed by the potential investors. In the said memorandum of agreement, it is stated that the main business of the Trust is trading, investing and brokering in crypto currency and similar financial products.

[4] Pursuant to this court having granted a provisional sequestration order, the applicant now seeks an order confirming that order as a final order. The application is opposed by the first and second respondents on various grounds. The third respondent supports the application. There was an interlocutory application to strike out certain paragraphs and annexures. That application has been disposed of and there is a pending application for leave to appeal. It was agreed when this main application was argued that the application for leave to appeal must await the outcome of this application.

[5] Besides technical objections from each side the nub of the opposition by the first and second respondents is that the application is ill-conceived in that its ambit falls outside the Insolvency Act 24 of 1936 (the Act). First, it is denied that the Trust committed any act of insolvency or that it is factually insolvent. Second, it is in any event contended that the applicant has not proven that he has a liquidated claim against the Trust. It is submitted that the notice dated 28 August 2020 on which the applicant relies for an act of insolvency has been secured under duress. It is further contended that not only is the claim not a liquidated claim as envisaged in section 9(1) of the Act, the applicant is not a creditor.

[6] I am of the opinion that the question of the notification has to be resolved first as it may dispose of the matter in so far as it relates to insolvency. This is so because in terms of section 12 of the Act a final sequestration may be granted,

> *"[I]f 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*."

[7] Section 9(1) provides "(1) *A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate*

have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor."

[8] If I find that the trust has committed an act of insolvency then I need not investigate whether or not it is factually insolvent in view of the use of the preposition *"or"* in subsection 12(1)(b).

[9] Before dealing with the notice it is expedient to deal with a technical point raised by the applicant, namely that the first and second respondents have no *locus standi* to oppose the application. Mr *De La Harpe SC* who together with Mr *Kotze* appeared for the applicant submitted that there is no resolution by the trustees to oppose the application. In the absence thereof, Mr and Mrs Rawlins do not have *locus standi* to oppose this application.

[10] It is correct that the Trust operates through its trustees and therefore any decision concerning the conduct of its affairs must be taken by the trustees at a meeting convened for that purpose. The procedure for taking decisions of the Trust is contained in Clause 11.1 of the Deed of Trust, which provides that

"a decision of the trustees may be made by:

11.1.1 a resolution approved at a meeting of Trustees by a majority vote....

11.1.2 a written resolution signed by all the Trustees, (including the duly authorised representative of any corporate Trustee)."

[11] It is not in dispute that there was a meeting of the Trustees on 12 October 2020. It was at that meeting that the third respondent refused to support a decision that the granting of final order of sequestration be opposed. I accept the evidence of the first and second respondents that they resolved, to the exclusion of the third respondent, to oppose the application. There is however no written resolution as provided for in the Deed of Trust. In my view, the decision by the first and second respondents constituted a substantial compliance with the requirement of Clause 11. To insist on the written resolution as envisaged in Clause 11.1.2 would be to require form over substance. I conclude therefore that a resolution to oppose the application was properly taken and therefore the first and second respondents have authority to oppose the application.

Is the applicant a creditor and is the claim a liquidated claim?

[12] Mr *DA Silva SC* submitted that the applicant's claim does not fall within the ambit of the provisions of section 9(1) of the Act in that the applicant is not a creditor and the 'purported' claim is not a liquidated claim. For this argument, Mr *Da Silva* relied on the case of **Kleynhans v Van der Westhuizen NO 1970 (2) SA 742 (A) at 749D-E** where he refers to the following:

> *'What appears from the wording in question is that, as far as the element of liquidity is concerned, the emphasis is on the amount of the claim. This is the amount of the claim that must be determined by agreement, an order of a court or otherwise. As far as the appellant's locus standi is concerned, it is crucial that his claim is for an amount of at least R100. If this amount has not yet been determined when he submits his petition to the court, he fails to prove that he has locus standi. See, o.m., Savoury v Bell, 1909 T.H. 130. Neither the relevant provision of the word nor any other provision of the 1916 Act indicates in any way that where the amount of the claim has been determined, as required, the applicant may nevertheless not invoke*

the provisions of the Act, if it appears that his claim is directed at the recovery of damages.

*In my opinion, 'liquidated progress' in art. 9 (1) of the 1936 Act has the same meaning as it had in the corresponding section in the 1916 Act, viz., A claim the amount of which was determined either by agreement or by an order of the Court, or otherwise. The Legislature intended that there should be certainty as to the amount of the claim. It follows in my view that where it appears from the allegations in the petition with certainty that the claim for G is a certain amount of at least R100, the legal basis and nature thereof does not stand the applicant's locus to present the petition to the Court lie, do not touch. When the Court considers a petition, it may, in terms of the provisions of art. 10, grant a provisional order for sequestration if he is 'of judgment', inter alia, that prima facie evidence is that the applicant has a liquidated claim. On the return date, the Court may sequestrate the debtor's estate if he is 'convinced', inter alia, that the applicant has proved that he has a liquidated claim against the debtor. If the Court is not satisfied, it may reject the application or postpone its hearing and require 'further proof of the allegations contained in the request'. [*My translation*]*

[13] The submission that the applicant is not a creditor has merely to be stated to be rejected. It is common cause that the applicant has invested in the Trust. To quote from Mr Rawlins in his answering affidavit he says: "*what the Applicant does not tell the Honourable Court is that he himself was an investor of the investments with the Rawlins Trust and his family made investments in the Rawlins Trust."* Consequently, I find that the applicant is a creditor as envisaged in the Act.

[14] With regard to the submission that there is no liquidated claim, section 9(2) provides "*A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition, shall be reckoned as a liquidated claim for the purposes of subsection (1*).

[15] There was a faint argument by the respondents that the applicant's claim is not a liquidated claim in that his investment is linked to the fluctuation value of crypto currency. They assert that in terms of the agreement the applicant appointed the Trust to invest in and sell or trade, dispose of funds in crypto currency and in other similar financial products. They maintain that the products' value fluctuate continuously. This argument is problematic. First, there was an acknowledgment of indebtedness to the amount of R500 000. By this acknowledgement, the applicant acquired a complete cause of action based on the fixed amount. Therefore even if the argument was valid '*when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts, which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim* 'the claim based on the fixed amount is complete.[1]

[16] Furthermore Mr Rawlins having acknowledged that the Trust owes the applicant a sum of R500 000 and that it is not in a position to pay him that money, he cannot be allowed to turn around and say there is no liquidated claim..'*(N)o person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate*.'[2]

[17] The only complaint raised by Mr Rawlins is that the applicant should follow a certain procedure contained in the memorandum of agreement in order to be paid. It is contended that in terms thereof the Trust had five days to transfer the money from Binance account to Standard Bank account. However, this argument flies in the face that no such agreement was signed by the applicant. In my view, the respondents cannot approbate and reprobate. I

[1]Truter and another v Deysel 2006 (4) SA 168 (SCA) ([2006] ZASCA 16) para 16.

[2]Hlatshwayo v Mare and Deas 1912 AD 242 at 259; Sager Motors (Pvt) Ltd v Patel 1968 (4) SA 98 (RA) at 101F.

therefore conclude that the claim against the Trust is a liquidated claim. Even if I am wrong in this regard, the notice signed by the Trustees is sufficient proof that the claim is liquid.

Was the notice concerning an act of insolvency signed under duress?

[18] The court must always be vigilant to ensure that its process is not being abused and is obliged to exercise its discretion to ensure that the alleged act of insolvency has not been designed or manipulated or used for some ulterior purpose other than genuine notification of an inability to pay a debt. In the event this is discovered, the court will exercise its discretion against an applicant or proceedings constituting abuse of the process of the court.

[19] The first and second respondents contend that the notice is invalid in that it was obtained under duress. The basis of the duress is premised on the contention that the notification letter was obtained in circumstances where the first and second respondents did not realise its consequences. Mr Rawlins stated that on 28 August 2020 he was called to a meeting, which was attended by the applicant, his attorney Mr Pringle, the third respondent's partner Mr Erasmus and two unknown men. It was at that meeting that he and his wife were requested to sign the notice. When they signed the notification letter, they were intimidated by the group of men who were present at the meeting.

[20] It was at the meeting alluded to above that, the applicant asked him if his (applicant's) R500 000 investments could be paid immediately and he confirmed that

it could be paid immediately. Mr Rawlins states that he asked for the purpose of signing the notice and applicant explained that if he was not able to pay all investors immediately then he had to sign it. He states that the five men in the meeting were aggressive throughout and kept on saying that the third respondent had already signed. He disputes authenticity of the document saying the applicant was not entitled to immediate payment on demand. Consequently, so the argument runs, the document does not constitute a notice in writing as envisaged in sec. 8(g) of the Act as it was obtained under duress.

[21] Mr Rawlins in his answering affidavit states*: "I point out to the Honourable Court that there were five men sitting in the room. I had not been introduced to the other two men, I was intimidated by the discussion and I was concerned about my wife. They were aggressive throughout the entire meeting and they kept on saying that the Third Respondent had already signed the document. After they pointed this out for the second time, I signed Annexure "PRL3" and told my wife to sign it as well. I wish to state that Annexure "PRL3" was signed under duress. Annexure PRL3 is factually incorrect, in that the Applicant was not entitled to payment on demand, the Rawlins Trust is in a position to pay the Applicant's claim and it is in a position to pay creditors' claims as and when they arise."*

[22] Clause 11.2 of the Trust Deed provides that *"any agreement or legal document signed by all Trustees of the Trust at the material time shall be deemed to be a written resolution regulating the subject matter of such document or agreement, including the authorisation of the Trustees to act for that specific purpose and related purposes, done in terms of Clause 11.1.1*"

[23] Clause 11.2 of the Trust Deed provides that *"any agreement or legal document signed by all Trustees of the Trust at the material time shall be deemed to be a written resolution regulating the subject matter of such document or agreement, including the authorisation of the Trustees to act for that specific purpose and related purposes, done in terms of Clause 11.1.1*"

[24] It is trite that the validity of a contract concluded under duress may be vitiated by such duress (metus), the *raison d'etre* being that intimidation or improper pressure renders the consent of the party subjected to duress no true consent.[3] Fear must be reasonable and well-grounded apprehension of some great evil, such as death or mayhem, and not arising out of mere timidity, but such as might fall upon a man of courage.

[25] In **Arend v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 311A-B,** it was stated:

"*Duress may take the form of inflicting physical violence upon the person of a contracting party or of inducing in him a fear by means of threats. Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following[4] elements must be established:*

(i) The fear must be a reasonable one.

(ii) It must be caused by the threat of some considerable evil to the person concerned or his family.

[3]Broodryk v Smuts NO 1942 TPD 47 at p.53; Steiger v Union Government, 1919 NPD 75 at p. 79
[4] See also Visser and Another v Kotze (519/2011) [2012] ZASCA 73 (25 May 2012)

(iii) It must be the threat of an imminent or inevitable evil.

(iv) The threat or intimidation must be unlawful or contra bonos mores.

(v) The moral pressure used must have caused damage."

[26] None of the above requirements have been met by the Rawlins. No threats of any nature have been alleged. Duress or intimidation cannot be established by a mere say so. Something more is required.

[27] The defence raised seems to me to be contrived. To borrow from **Plascon-Evans[5],** the allegations of the respondent are so far-fetched or clearly untenable that a court would be justified in rejecting them merely on the papers. After all, *'a person who signs a contractual document thereby signifies assent to the contents of the document, and if these subsequently turn out unfavourably there is no one to blame but him- or herself*[6]. The applicant is the only person who spoke about the money owed in the meeting. The presence of other men did not make any difference. In my view, there is no evidence that the Rawlins were subjected to any pressure when they signed the notice. The only thing that was said was that the third respondent had already signed the document. That is surely not a threat of any nature but it is a statement of fact. Consequently, I find that there was no duress when the notice was signed. Consequently, the notice constituted an act of insolvency.

[5]Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635.
[6]GB Bradfield Christie's Law of Contract in South Africa 7 ed (2016) at 205.

Alleged dispute of fact.

[28] Mr *Da Silva* submitted that there is a dispute of fact in the matter and therefore final order cannot be made. As I understand the papers, the dispute relates to the actual insolvency. There are contradicting financial statements and the amounts, which the Trust actually has in the investment. In my view that dispute cannot be resolved in these papers. However, in light of the view I take of the matter it is not necessary to resolve it. Suffice it to say that I have found that there was an act of insolvency which satisfies the requirement of section 12(1)(b) of the Act.. Accordingly, the question of dispute of fact need not be entertained.

Advantages to creditors

[29] The point of departure in this regard is section 12(1)(c) of the Act. In terms of this section a court hearing the application for a final order of sequestration must be satisfied that there is reason to believe that it will be to the advantage of creditors of the debtor if the estate is sequestrated. Once that is satisfied the court has discretion to sequestrate the estate of the debtor.

[30] With regard to the question whether applicant has satisfied the court that there is reason to believe that the sequestration will be to the advantage of creditors, the meaning of the phrase 'advantage of creditors' has been discussed in numerous

cases and the following considerations seem in the instant case to be relevant to the question at issue.

(a) Creditors acquire a right of control of the sequestrated estate;

(b) Creditors can investigate certain dispositions by the debt aimed at preferring other creditors;

(c) Simulated transactions can be unveiled and reversed for the benefit of all creditors

[31] More than 80 years ago in **Stainer v Estate Bukes, 1933 OPD 86 at p. 90**, DE VILLIERS, J.P., stated:

'There are, of course, other advantages and factors which the Court will take into consideration, besides the direct financial advantages; such as the superior legal machinery which the creditors acquire by sequestration, their rights of control and investigation, etc.; but again these are to be regarded from the point of view of individual creditors who may be adversely affected. The Court should, I would venture to suggest, have regard to the balance of advantage (as well the direct financial advantage as the other indirect advantages mentioned) of the creditors taken as a single entity, and, if the balance is in favour of sequestrating, then the sequestration will be 'to the advantage of creditors', within the meaning of the Insolvency Act.'

That the advantage is not to be limited to direct financial advantage further appears from Awerbuch, Brown &Co. (Pty.) Ltd v le Grange, 1939 OPD 20 at pp. 23 and 25, where FISCHER, J., stated

'The Court can at most decide that there is a reasonable prospect of the discovery of assets, but will certainly not ignore the fact that the insolvents' transactions require investigation apart from the material gain to the creditors.' and VAN DEN HEEVER, J., stated:

'Advantage is a wide term, and that a right of inquisition itself has a value in certain circumstances was recognised as early as the times of Labeo (Dig., 9.2.23.4).

I think that a petitioner discharges the onus of showing that 'there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated' if he shows that there are transactions of the debtor which require investigation, and it is not necessary (as it will frequently be impossible) for him to prove that the estate will pay a dividend.'

These are full Bench decisions of the High courts and are persuasive.

[32] Concerning the present matter there was a suggestion that the Trust may have been created as a platform for a fraudulent Ponzi scheme in which the investors' money would be paid to cover losses, as profit on investments when in fact no profits were earned. It has been suggested that Mr Rawlins had paid himself amounts of money out of the investors' money claiming the same to be the commission on profits. This cannot be resolved in papers. Mr Rawlins disputes these allegations.

[33] When the estate is placed in the hands of sequestration trustees the investors will be at an advantage in that any moneys that have been unduly paid to the Rawlins by fraudulent means would be revealed during the investigation. The investigation automatically follows the final sequestration. There is reason to suspect the genuineness of the establishment of the Trust. Since its inception no meetings of the Trustees were ever convened until the meeting of the 27th of August 2020. This begs a question as to how the profit moneys were disbursed if no meetings were held to authorise such disbursements. I refrain from debating this aspect any further but I am putting it no higher than a mere suspicion.

[34] The right to investigation, it seems to me, is not only an advantage in itself, but is a possible means of securing ultimate material benefit for the creditors in the form, for example, of the recovery of property disposed of by the insolvent, or the disallowance of doubtful or collusive claims. In my opinion, on the facts put before the court there is a reasonable prospect that some pecuniary benefit will result to creditors.

[35] In **Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin; Botha v Botha 1990 (4) SA 580 (W)** following was said (at 585C-F):

> '. . . the *Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that that will be so. That in turn, in my opinion, leads to the conclusion that the expression "reason to believe" means "good reason to believe". The belief itself must be rational or reasonable and, in my opinion, to come to such a belief the Court must be furnished with sufficient facts to support it. In a broad sense it seems proper to say, on the basis of the cases, that "advantage to creditors" ought to have some bearing on the question as to whether the granting of*

the application would secure some useful purpose. I express it thus because as Roper J has shown in the Meskin case, there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and enquiry under the relevant provisions of the Act might unearth assets thereby benefiting creditors.'

[36] In my view, this court has good reason to believe, on the basis of the facts of this case, that assets are likely to come to light when a proper interrogation is conducted under the provisions of the Act. I consider therefore that for present purposes advantage to creditors under s 12(1)(c) of the Act has been shown and accordingly I must confirm the rule previously granted by Mbenenge JP on 1 September 2020.

[37] Mr *De La Harpe* has submitted that the first and second respondents should be ordered to pay costs of opposition. In light of my finding that the Rawlins were acting as trustees of the Trust I see no reason why they should be mulcted with costs.

[38] In the result I make the following order:

1. Final sequestration order is granted and the costs of this application will be costs in the sequestration such costs to include costs of two Counsel.

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B RTOKOTA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: **C Da Silva SC**

Instructed by Schumann

van Den Heever &Slabbert Inc

For the Respondent: **D H De La Harpe SC**

C D Kotze

Instructed by Drake

Flemmer & Orsmond Inc

Date of Hearing: 13 April 2021

Date delivered: 15 June 2021.