REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NUMBER: 07385/2013
18620/2013
25313/2013
25314/2013

DELETE WHICHEVER IS APPLICABLE

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

02 DECEMBER 2013 .....
DATE SIGNATURE

In the matter between:

NINVAL PROPERTIES (PTY) LTD Applicant

and

MINNAAR, JOHANNES GERHARDUS STEPHANUS Respondent

and

NINVAL PROPERTIES (PTY) LTD Applicant

and

NEGOTA, GEORGE MAANDA First Respondent
NEGOTA, TAKALANI MARIA Second Respondent

and

LANIYAN, BABTUNDE OLA Applicant

and

NEGOTA, GEORGE MAANDA First Respondent
NEGOTA, TAKALANI MARIA Second Respondent

and

LANIYAN, BABTUNDE OLA Applicant

and

MATHEKGA, SERUMULA STANLEY Respondent

JUDGEMENT

NGALWANA AJ

Introduction

[1] These are four applications effectively by two applicants for the provisional sequestration of the estates of three respondents.

[2] While each application was launched separately from, and independently of, the others, applicants' Counsel requested that they be heard together since they concern the same relief, sought by the same parties, against the same former partners in the same law firm that has since been wound up, and on substantially similar facts.

[3] Counsel for the respondent in the first application under case number 07385/2013 (Minnaar) demurred, but for convenience which in my view did not prejudice any of the parties I continued to hear all four cases together on the understanding that each case will determined separately and on its own facts and merits.

The Facts

[4] The material facts that coalesced to give birth to these applications are relatively uncontroversial and uncomplicated.

4.1 In 2011 the applicant in the third and fourth applications under case numbers 25313/2013 and 25314/2013, respectively, a businessman of Nigerian extraction who was at all material times resident in London, United Kingdom, (*"Laniyan"*) concluded a sale agreement for the purchase of residential property in Houghton Estate for a consideration of over R20 million.

4.2 As he was required to do by the terms of the sale agreement, Laniyan paid the purchase price for the property on signing the sale agreement to a firm of attorneys styled Negota SSH (Gauteng) Incorporated (*"the firm"*) which had been retained by the seller. The money was, as is customary in these matters, to be held in trust pending registration of transfer in Laniyan's name.

4.3 During this transaction (and until the final winding up of the firm in February 2013 at Laniyan's instance) Minnaar, George Maanda Negota (*"Maanda"*)[1] and Mothekga[2] were directors of the firm. A fourth director, Deon Pienaar, has vanished into thin air and so proceedings against him have been postponed *sine die*.

4.4 Following unexplained delays in the registration of transfer of the property after payment by Laniyan into the firm's trust account of the full amount due in terms of the sale agreement, questions inevitably arose as regards what the cause could be.

4.5 It emerged that Pienaar, who was the director trusted with effecting transfer of the property, had been defalcating the firm's trust funds totalling about R36 million, including over R14 million of Laniyan's funds, almost R1,5 million of Ninval Properties'[3] funds, and millions of Rands of other clients' funds.

4.6 The firm ceased trading in May 2012, and in August of the same year the Law Society obtained an order removing Pienaar's name from the roll of attorneys, notaries and conveyancers. It also subsequently obtained an order for the appointment of a *curator bonis* in respect of the firm's various bank accounts.

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1 The first respondent in the second and third applications under case numbers 18620/2013 and 25313/2013, respectively.

2 The respondent in the fourth application under case number 25314/2013.

3 The applicant in the first and second applications under case numbers 07385/2013 and 18620/2013, respectively.

4.7 In July 2012 Ninval Properties obtained an order for the payment of its approximately R1,5 million jointly and severally by the firm and three of its directors who are respondents in the second, third and fourth applications.[4]

4.8 In August 2012 Laniyan lodged a claim with the Attorney's Fidelity Fund (*"the Fidelity Fund"*) in respect of the funds defalcated by Pienaar. The total claim against the Fidelity Fund, according to the applicants, is in excess of R55 million and includes the judgment for which the other directors (the respondents in these applications) were later[5] to be found jointly and severally liable. The board of the Fidelity Fund *"insists"* that a claimant *"should first exhaust all available legal remedies against the attorney in question, or his estate, as well as all other person(s) liable in law, to the point of sequestration of the estate(s) of such person(s)"*[6].

4.9 In February 2013 Laniyan obtained an order for the final winding up of the firm. Its directors[7] were held jointly and severally liable for the payment of Laniyan's R14 million together with interest at 15.5% *per annum*.

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4 The second respondent in the second and third applications under case numbers 18620/2013 and 25313/2013, respectively, was Maanda's spouse to whom he was wedded in community of property. She is no longer with us.

5 In February 2013 following an application he launched in October 2012.

6 Minnaar says this is impermissible hearsay but, in my discretion, I have allowed it since the averment is consistent with the main thrust of the applicants' case which in any event does not depend on the admission of what the Fidelity Fund's board says.

7 Except Pienaar who had by then flown the coop.

4.10 The foundation for Laniyan's and Ninval Properties' sequestration applications is, respectively, an act of insolvency [8] and factual insolvency.

4.11 They aver, too – as they must – that sequestration of the respondents' estates will be to the advantage of the respondents' creditors.[9]

Preliminary Points

[5] The respondents had taken a number of points *in limine* on the basis of which they asserted that the applications must be dismissed. Some of these (such as non-joinder, the validity of the *nulla bona* return and the authentication of the founding affidavits in terms of Rule 63) were abandoned in argument, leaving only three issues, namely,

5.1 the authentication of the replying affidavits pursuant to Rule 63 of the Uniform Rules of Court;

5.2 the striking out of new matter and hearsay matter in the replying affidavit[10]; and

5.3 whether sequestration will be to the advantage of the respondents' creditors.

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8 A *nulla bona* return at the instance of another creditor.

9 What they mean by this becomes clearer later.

10 Even though Minnaar, *ex abudante cautela*, did file answer papers to what he says is new matter in the replying affidavit under case number 07385/2013.

[6] Numerous other skirmishes arose during the course of argument. For example, suggestions were made that the applicants' case has mutated over time. It was alleged that one case was advanced in the founding papers, another in the replying papers, a third in heads of argument and a fourth in oral argument.

[7] In light of the view that I take on the merits of each of these applications, it is not necessary to decide these points, save to say it is not correct to say the applicants raise for the first time in their replying papers the issue that the Fidelity Fund requires sequestration of the respondents *"in order for the fund to make payment to creditors"*.

[8] In my view, even if regard is had to the replying affidavit that the respondents seek to impugn for one or other reason, the application falls to be dismissed because I am unable on the facts before me to form an opinion that *prima facie* there is reason to believe that sequestration of any of the respondents' estates will be to the advantage of the respondents' creditors.

Advantage of Creditors: The Proper Standard

[9] The standard that the applicants must meet in provisional sequestration applications is well-worn, and the starting point is s 10 of the Insolvency Act, 24 of 1936 (*"the Insolvency Act"*). That provision says

"*If the court* to which the petition for the sequestration of the estate of a debtor has been presented *is of the opinion that* prima facie-

(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,

it may make an order sequestrating the estate of the debtor provisionally."

(emphasis supplied)

[10] The first two requirements in paragraphs (a) and (b) of s 10 are uncontroversial. The respondents concede that they are insolvent. The applicants are their creditors by reason of liquidated claims in amounts that exceed the prescribed amounts. What is contentious is whether or not this Court can rationally form the opinion that there is reason to believe that sequestration of the respondents' estate (or the sequestration of any one or more of the respondents' estates) will be to the advantage of creditors.

[11] In my view this is an inquiry that must be approached with caution. It has already received judicial consideration by the Courts, including this division of the High Court[11] where Leveson J – identifying the reason[12] for the distinction

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11 *Hillhouse v Stott; Freban Investments (Pty) Ltd v ITZKIN; Botha v Botha* 1990 (4) SA 580 (W) at 584G-I

12 The reason postulated was that the debtor is expected to know his own business and thus adduce sufficient facts to show advantage to creditors, while a creditor is seldom in such a happy position. That is why the standard for the surrender of one's own estate is stricter (requiring the debtor to *satisfy* the Court that to do so will be to the advantage of creditors), while the standard for compulsory

between the standard to be adopted for determining what is to the advantage of creditors in instances where the debtor surrenders his own estate[13], on the one hand, and the standard to be adopted where a creditor seeks the sequestration of the debtor's estate[14], on the other – said,

> "In terms of s 10 the Court must only have reason to believe that there is advantage to creditors."[15]

[12] Although very little turns on this for purposes of this case, this short-hand formulation requires in my view some qualification. As I understand the plain wording of the provision, the standard is *not* whether or not there is reason to believe (in the broad and objective sense) that sequestration will be to the advantage of creditors. Rather, the standard is whether *"the Court ... is of the opinion that prima facie ... there is reason to believe that it will be to the advantage of creditors"* if a debtor's estate were sequestrated.

[13] In other words, the jurisdictional fact for the granting of a provisional sequestration order is not so much *"reason to believe"* (which would countenance a probe into the existence of the fact constituting the reason on which the belief hinges) as *"the opinion"* of the decision-maker (which would not countenance an investigation into the existence of the fact by which the

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sequestration is less stringent (requiring only *reason to be believe* that sequestration will be to the advantage of creditors).

13 s 6 of the Insolvency Act where the Court must be *"satisfied"* that the sequestration of the debtor's estate will be to the advantage of creditors

14 s 10 of the Insolvency Act

15 *Hillhouse* (supra) at 584G.

belief is sustained). While the former is an objective inquiry, the latter is subjectively ascertainable.

[14] What this means is that the standard for compulsory provisional sequestration orders seems to me on a plain reading of s 10 to be even less stringent than the *"reason to believe"* standard because all that is required is for the Court to be *"of the opinion"* that on the face of it there is reason to believe that sequestration will be to the advantage of creditors. Nevertheless, I have already said nothing turns on this degree of proof for purposes of s 10 in the circumstances of this case because on either formulation the applicants have not met the standard.

[15] The significance of the care that ought to be taken in the formulation of the appropriate standard in provisional sequestration applications becomes clear when regard is had to the development in our law of what is known as jurisdictional facts. The *locus classicus* on jurisdictional facts in our law (admittedly in the sphere of Administrative Law which has now become infused into our supreme law) is *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) (*"the Defence and Aid Fund case")* where the Court said:

> "Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case,

the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power ... . *On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his mind to the matter.*"[16]

(emphasis supplied)

[16] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) the Constitutional Court said *the Defence and Aid Fund case* remains the leading authority on

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16 at 34F-35D

jurisdictional facts in our law.[17] In addition, the principle in *the Defence and Aid Fund case* has relatively recently been followed by the Supreme Court of Appeal in *Kimberley Junior School and Another v Head, Northern Cape Education Department and Others* 2010 (1) SA 217 (SCA) at paras [12]-[13] where the Court said:

> "[12] ... . As was pointed out by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* ... the judgment of Corbett J in *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) remains the leading authority on jurisdictional facts in our law. In that judgment Corbett J ... identified two categories of jurisdictional facts that can be encountered in empowering legislation. The first category, described as 'objective jurisdictional facts', includes the type of fact or state of affairs that must exist in an objective sense before the power can validly be exercised. Here the objective existence of the fact or state of affairs is justiciable in a court of law. If the court finds that objectively the fact or state of affairs did not exist, it will declare invalid the purported exercise of the power.
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> *[13] In the second category, that of subjective jurisdictional facts, the empowering statute has entrusted the repository of the power itself with the function to determine whether in its subjective view the prerequisite fact or state of affairs existed or not. Expressions often used by the legislature to express this intent are, e.g. 'in his or her opinion' or 'if he or*

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17 at para [168] footnote 132

she is satisfied that' the particular fact or state of affairs exists. In this event the question is not whether the prescribed fact or state of affairs existed in an objective sense. The court can only interfere where it is shown that the repository of the power, in forming the opinion that the fact or state of affairs existed, had failed to apply its mind to the matter. Whether a particular jurisdictional fact can be said to fall within the one category or the other, will depend on the interpretation of the empowering statute."

(emphasis supplied)

[17] Most recently, in *Democratic Alliance v President of the RSA and Others* 2012 (1) SA 417 (SCA), the Court acknowledged the distinction between subjective and objective discretionary clauses but found the clause there in issue to be of the objective variety.[18]

[18] Thus, the distinction between subjective and objective discretionary clauses is still very much part of our law on jurisdictional facts. The plain language of s 10 (*"if the court ... is of the opinion that ..."*) connotes a subjective discretionary power which can only be set aside on grounds that the Court was actuated by bad faith or by an ulterior motive or failed to apply its mind to the matter. Not so the phrase *"reason to believe"* which, for its veracity, invites evidence of the existence of the fact by which the belief is sustained. I mention this distinction because it may conceivably come into play in some

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18 At para [118]

sequestration application in future and so care should be taken in the formulation of the applicable standard.

[19] Of course, it is the central conception of our constitutional order that those who exercise public power (such as the Courts) are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law.[19] There can be no doubt that s 10 of the Insolvency Act plainly confers upon the Court the power to make a sequestration order if it considers, in its opinion, that to do so will be to the advantage of creditors. The consideration that a Court must bear in mind is that the opinion it holds in that regard is rationally held, or it must apply its mind to the matter when forming that opinion. It can never be said that an irrational opinion is immune to challenge. The *Defence and Aid Fund case* is not authority for such a proposition.

Applying Proper Standard to Applicants' Case

[20] In my opinion there is *prima facie* no reason to believe that sequestration in these matters will be to the advantage of creditors. The pith and marrow of the applicants' case, which is pleaded both in the founding papers and in reply, and also pursued with much vigour in argument, is that sequestration of the respondents' estates is a condition precedent to the Fidelity Fund

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19 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para [58]; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) at para [34]; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para [49]; *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at para [80]

settling the respondents' creditors' claims that are founded on a raid on the firm's trust account by Pienaar. Invoking *Meskin*[20] and Supreme Court of Appeal authority[21], the applicants in all four applications say

> "The applicant and the other trust creditors of the firm have a (not too remote) reasonable prospect of being reimbursed by the Fidelity Fund, should the estates of the respondent and his previous partners in the firm be sequestrated."

[21] From this proposition it is clear that the applicants consider sequestration in the circumstances of these cases as being the necessary trigger for the Fidelity Fund settling defalcation claims. In my view this is neither the correct legal position nor a correct understanding of the Fidelity Fund's requirements. The Fidelity Fund's requirement that a claimant *"should first exhaust all available legal remedies against the attorney in question, or his estate, as well as all other person(s) liable in law, to the point of sequestration of the estate(s) of such person(s)"*, cannot in my view be understood as requiring the claimant first to obtain a sequestration order. The reason for this is that because there is no legal basis for such a requirement in the enabling statute of which the Fidelity Fund is a creature – the Attorneys Act[22] – such would not only be an *ultra vires* requirement; it would also be an affront to the principle of legality.[23]

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20 Insolvency Law [Issue 40] at 2-20

21 *CSARS v Hawker Air Services (Pty) Ltd; CSARS v Hawker Aviation Partnership and Others* 2006 (4) SA 292 (SCA)

22 53 of 1979

23 See footnote 19 above

[22] A provisional sequestration order is a rather blunt instrument in the hands of a creditor who seeks thereby to carve a crevice through which payments of claims by third parties are to flow into his pockets. One cannot use sequestration orders in order to achieve results for which such orders are not intended. That in my view is clearly the applicants' purpose. They seek sequestration orders not for purposes of recovering monies owing to them from the respondents but rather in order to facilitate payment of claims by the Fidelity Fund. That, in my view, sails very closely to the wind that is abuse of sequestration proceedings.

[23] In any event, the applicants' own version fails to indicate that there is a reasonable prospect that some pecuniary benefit will result to creditors if any one or more of the respondents' estates were sequestrated. The *"pecuniary benefit"* argument is advanced by the applicants not in relation to the residue of the estates sought to be sequestrated but rather in relation to the reimbursement by the Fidelity Fund that they say a sequestration will trigger.

[24] In the result, the applicants have failed to make out a proper case that the sequestration of any one or more or all of the respondents' estates will be to the advantage of creditors.

Order

[25] In the result, I make the following orders:

1. The application for a provisional sequestration order in case number 07385/2013 is dismissed with costs.

2. The application for a provisional sequestration order in case number 18620/2013 is dismissed with costs.

3. The application for a provisional sequestration order in case number 25313/2013 is dismissed with costs.

4. The application for a provisional sequestration order in case number 25314/2013 is dismissed with costs.

V Ngalwana
Acting Judge of the High Court

Appearances

For the applicants:	*CHJ Badenhorst SC; JG Botha*
Instructed by:	*Benater Attorneys & KG Tserkezis Inc*
For the respondent: in 07385/2013	*DP De Villiers & R Carvalheira*
Instructed by:	*Wayne Van Niekerk Inc*
For the respondents: in 18620/2013; 25313/2013 & 25314/2013	*M Smit*
Instructed by:	*Stabin Gross & Shull*
Date of hearing:	*25 November 2013*
Date of judgment:	*28 November 2013*