IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2019/29582

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

12/11/2021
DATE

SIGNATURE

In the matter between:

ENGEN PETROLEUM LIMITED Applicant

and

SING VISHAL Respondent

JUDGEMENT

MKHABELA AJ

[1] On 24 June 2021, Matojane J made an order in favour of the applicant for the provisional sequestration of the respondent's estate.

[2] The applicant now seeks an order for the final sequestration of the estate of the respondent in terms of Section 12 of the Insolvency Act, 24 of 1936.

[3] Having considered the summary of the facts in the judgment of my brother Matojane J, I believe that it will be a display of exuberance on my part to repeat the well captured salient facts in his judgment.

[4] I will therefore confine this judgment to the crisp and sole issue before me which is whether or not this Court can be satisfied that there is reason to believe that sequestration will be to the advantage of creditors of the Respondent if a final sequestration order is granted.

[5] Section 12(1) of the Insolvency Act provides that:

"(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 sub-section (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 sequestrate the estate of the debtor."

[6] It is common cause between the parties that the requirements of subsection 12(1)(a) and (b) are met. In his answering affidavit, the respondent initially contended that the *nulla bona* return by the Sheriff was inaccurate[1]. I must hasten to mention that

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[1] The respondent stated as follows:
"I admit that the writ ws served on me at my place of employment. When the writ was served on me, the Sheriff particularly asked me to point out the property owned by me at my place of employment. I responded to the Sheriff that I have no assetss (as is averred in the Sheriff's return of service). The Sheriff then requested me to sign the nulla bona. He failed to explain to me the import of this document and I signed it without properly reading or understanding it."

the applicant is a judgment creditor and it not in dispute that the judgment remains unsatisfied.

[7] During oral submissions, Mr Kaplan for the Respondent jettisoned the defence based on the alleged inaccuracy of the *nulla bona* return.

[8] Mr Kaplan urged me to discharge the Rule *nisi* on the basis that the applicant has failed to show on a balance of probabilities that sequestration will be to the advantage of the respondent's creditors. This was the only dispute between the parties when the application was argued before me.

[9] It is not in dispute that the judgment arose out of the respondent having assumed liability as a surety and co-principle debtor of an entity known as Africircle Road Corporation CC[2] (*"the CC"*). Since the judgment was granted, the respondent has made no effort to satisfy or rescind it.

[10] I return now to the question of whether there will be benefit to the creditors of the respondent if his estate is sequestrated. It is well established in our case law that it is incumbent upon the applicant to show on a balance of probabilities that there is *"reason to believe"* that sequestration will be to the advantage of creditors (see *Meskin & Co v Friedman*[3]).

[11] His Lordship Roper J in *Meskin v Friedman* (*supra*) had this to say about the meaning of the phrase *"reason to believe"*:

"The phrase 'reason to believe' used as it is in both sections, indicate that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though

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2 It is not in dispute that the respondent placed the CC into voluntary liquidation.
3 *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559.

the Court must be 'satisfied', it is not satisfied that sequestration will be to the advantage of creditors, but only that there is a reason to believe that it will be so."

[12] Concomitant with the obligation to show on a balance of probabilities that there is *"reason to believe"* that sequestration will be to the advantage of the creditors of the respondent, the applicant is enjoined to establish that there are reasonable grounds for the conclusion that, upon a proper investigation of the debtor's affairs, a trustee may discover (or recover) assets which might be realised for the benefit of creditors.[4] The court no doubt retains a discretion to refuse the order notwithsatanding that all the requirements have been satisfied.

[13] In discharging its onus that there is an advantage to creditors of the respondent, the applicant avered that the respondent had caused (*"the CC"*) to be liquidated and caused or formed a new entity called Africircule (Pty) Ltd (*"the company"*) and that the respondent is an owner immovable property of which a bond is registered in the amount of R1600 000.00.

[14] Furthermore, the applicant demonstrated that the respondent failed to account for the disappearance or depletion of the CC s'debtors book from approximately R39 million in February 2018 to R1 900 000.00 on 24 January 2019 as reflected by the CC's financial statement for 2018 that was annexed in the founding affidavit.

[15] In addition the applicant has demonstrated that the respondent is using the same business address of the CC as the business address of the company. This is evident from the Sheriff's *nulla bona* return which was served on the respondent's place of employment being, 2 Robinson Street, Alberton.

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[4] See: *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) at 583.

[16] During oral submissions Mr Aucamp for the applicant contended that the respondent may have committed on act of fraud by transferring the business of the CC into the company. Although the question of whether the respondent may have committed fraud or not is not before me, the fact that the CC was liquidated at the instance of the respondent and that the CC had assets prior to the liquidation is a relevant factor that I must take into account in determining whether it will be to the advantage of creditors of the respondent as a debtor if his estate is sequestration.

[17] Furthermore, Mr Aucamp submitted that a trustee may be able to discover or recover, as the case may be, what happened to the assets of the CC when it was liquidated by the respondent. He submitted further that the sequestration of the estate of the respondent will be to the advantage of creditors of therespondent since the machinery of the Insolvency Act in terms of section 26 would be unleashed.

[18] In my view it is probable that the respondent has complete control of the company given the fact that the name Africircle is retained in the new entity and the principal place of the business of the company is the erstwhile business address of the CC.

[19] In the circumstance, the conclusion is irresistible that the company is the alter ego of the respondent and it exist for his benefit directly or indirectly through third parties.

[20] I am satisfied that, on the above undisputed[5] evidence, a trustee, duly appointed to his estate, would be in a far better position than the applicant to conduct a comprehensive investigation into the business affairs of the respondent including what happened to the debtors' book of the CC when it was liquidated by the respondent. Such investigation will

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[5] I venture to say undisputed evidence given the classic bare denial made by the respondent in his sparse answering affidavit in response to the applicant's evidence which is supported by documentary evidence in the form of financial statements and the business address of the company as reflected by the company search that the applicant has conducted. Accordingly, the respondent's denials have a very hollow ring.

no doubt render the sequestration of the respondent to be to the advantage of creditors of the respondent.

[21] Accordingly, I am satisfied that the preliminary[6] issues and submissions made by the respondent could not vitiate the application.

[22] What is left is the question of costs. Mr Aucamp for the applicant submitted that I should direct as envisaged by section 97(3) of the Insolvency Act, that the costs of opposition shall be included in the costs of the sequestration in the event I find that the opposition was *bona fide* and reasonable. In the light of all the above circumstances, I feel constrained to exercise my discretion in favour of granting a final order.

[23] Given the futile grounds upon which the respondent opposed the application, I am not convinced that the opposition to the application was *bona fide* and reasonable. However, I am bound by the section 97(3) that cost should be cost in the sequestration.

[24] I therefore grant the following order:

1. The Rule *nisi* granted on 24 June 2021 by Matojane J and subsequently extended by me on 28 October 2021 to 12 November 2021 is hereby confirmed.

2. The estate of the respondent is finally sequestrated.

3. The respondent's identity number is recorded as 760630 5874 080.

4. The costs of the application shall be costs in the sequestration.

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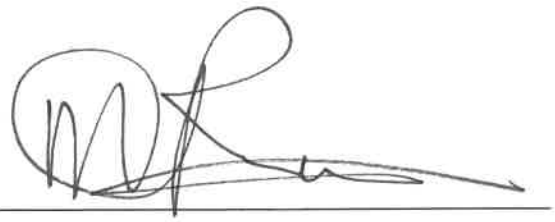
[6] I am also satisfied that all the formalities have been complied with, including service of the provisional order to all relevant stakeholders- including the Master and Sars.



R B MKHABELA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

COUNSEL FOR THE APPLICANT:	S Aucamp
INSTRUCTED BY:	Mathopo Moshimane Mulangaphuma Inc
ATTORNEY FOR THE RESPONDENT:	J Kaplan
INSTRUCTED BY:	Hirschowitz Flionis Attorneys
DATE OF HEARING:	28 October 2021
DATE OF JUDGMENT:	12 November 2021