REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 25207/2021

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

2 8 2022

DATE

SIGNATURE

In the matter between:

DR CHRIS JANSEN VAN RENSBURG Applicant

and

MARK DEAN KITCHENBRAND First Respondent

NAOMIE ELIZABETH KITCHENBRAND Second Respondent

JUDGMENT

NOCHUMSOHN AJ

1. There are two applications that lie before me.

2. The first application is the application launched by Dr Chris Jansen van Rensburg against the First Respondent, Mark Dean Kitchenbrand, and his wife, the Second Respondent, Naomie Elizabeth Kitchenbrand, to whom he is married in community of property. The relief sought in such application is for the confirmation of a rule nisi handed down in the urgent court by Georgiades AJ on 11 June 2021. In a fourteen page written judgment, which I will refer to below, Georgiades AJ ordered that:

2.1. the estate of the Respondents be placed under provisional sequestration;

2.2. the Respondents be called upon to advance reasons as to why such order should not be made final; and

2.3. the costs of the application be in the sequestration.

3. The interim order referred to was extended from time to time and is now before me, wherein the said Applicant, Dr Chris Jansen van Rensburg, seeks confirmation of the interim rule.

4. The second application which lies before me, under the same case number, is one brought by Jacobus Barend Johannes Pretorius against Dr Chris Jansen van Rensburg as the First Respondent and Mr and Mrs Kitchenbrand, respectively as the Second and Third Respondents. The relief sought therein is for Mr Pretorius to intervene as the Second Applicant in the aforementioned application for the sequestration of Mr and Mrs Kitchenbrand.

5. Both applications are opposed. Extensive and voluminous Affidavits have been exchanged by all parties in both. Some of such Affidavits have been filed without the leave of the court, and in some instances, out of time and without condonation. There have been various squabbles between the parties as to the admissibility of such Affidavits. It is not the intention of the court to delve into the minutiae of these points. In the interests of justice, all of the Affidavits are admitted, in order to give context to the proceedings, as a whole.

6. The Applicant in the sequestration application, Dr Chris Jansen van Rensburg, has not opposed the application for intervention. Conversely, he supports the application.

7. Mr Pretorius' version of how he came to place his funds in the hands of Mr Kitchenbrand, coincides with the version of Dr Jansen van Rensburg. Both seem to have had an unwavering trust in Mr Kitchenbrand and had placed vast sums of money in his hands, for investment purposes, in the faith and belief that substantial returns would be yielded. Neither have received any returns and in both instances, they have been unable to obtain any reasonable form of financial satisfaction or return on or return of their investments.

8. Both are faced with the same defences from Mr Kitchenbrand in these proceedings. In the voluminous affidavits, Mr Kitchenbrand's defences boil down to the same three points. The first is that both Dr Van Rensburg and Mr Pretorius had invested in companies controlled by Mr Kitchenbrand, thereby denying that the investments were placed with him personally. Secondly, Mr Kitchenhand denied having committed an act of insolvency in relation to either Dr Van Rensburg or Mr Pretorius. Thirdly, Mr Kitchenbrand denied that the sequestration of his estate would be to the advantage of creditors.

9. The principles for the granting of an application for intervention are well set out in SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others 2017 (5) SA 1 (CC) 4G/5E. The Applicant must show that he has a right adversely affected or likely to be affected by the order sought and that he has a direct and substantial interest in the subject matter of the case. Where an applicant's case for intervention is based upon a direct and substantial interest that is demonstrated, the court has no discretion. It must allow the applicant to intervene and should not proceed in the absence of parties having such legally recognised interests.

10. The consequences of the intervention being granted, would generally be governed by directive of the court. Such directives may include an extension of the return day, or to proceed immediately into the hearing for final relief. I specifically enquired from counsel for all three parties as to whether I ought to proceed to immediately deal with the application for confirmation of the Rule, were I to grant the application for intervention. All three advocates were

agreeable to this. Adv Tromp for the Respondents did not suggest that the Kitchenbrands would require more time to deal with the sequestration on its merits, post the grant of the intervention.

11. In Mr Kitchenbrand's Affidavit of 15 June 2022, opposing the application for intervention, he does not engage with the facts set out in Mr Pretorius' Founding Affidavit. Mr Kitchenbrand raises generic and wide-ranging allegations, in vacuo. He deals with certain points in a thinly veiled and haphazard manner. In content, substance and form, such Affidavit is entirely insufficient, unsatisfactory and falls to be rejected in its entirety. I engaged with Adv Tromp during the course of the argument and called upon her to demonstrate where the Kitchenbrands papers serve to respond to the detailed allegations made, on the merits. She was unable to do so.

12. Against the version of Mr Kitchenbrand, Mr Pretorius set out a very sad and detailed account of the respects in which he was effectively defrauded by Mr Kitchenbrand, in the millions. A summary of the allegations in such founding papers are briefly the following:

12.1. Mr Pretorius set out in detail from paragraphs 51 to 74, the manner and respects in which he was unduly coerced and persuaded to invest R8 million with Mr Kitchenbrand, who led him to believe that he was acquiring an interest in an entity known as iCore. It is quite clear from these

paragraphs that Mr Kitchenbrand personally undertook to indemnify Mr Pretorius against the loss of any investments placed. It is also clear that there was no definite structured investment plan for any one given company or entity. Mr Pretorius explained further at paragraph 77 that the R8 Million was retained by Mr Kitchenbrand personally, as iCore did not exist. He alleged that he was effectively defrauded out of R8 Million.

12.2. Mr Pretorius explained further that his ex-wife has invested with Mr Kitchenbrand's company, known as RentQuip, to which Mr Kitchenbrand was the sole director and shareholder. It was through his ex-wife that he was initially introduced to Mr Kitchenbrand.

12.3. Mr Pretorius set out that Mr Kitchenbrand had informed him about a portable payment system that he had developed, the IT to which belonged to him. This technology was known as the Vendex System. He proposed an opportunity for Mr Pretorius to invest in a new company to be formed, which would own the Vendex IT. Mr Pretorius agreed to purchase 10% of the shares in such new company, against payment of R1 Million. An agreement was attached to the founding papers, reflecting that RentQuip would be the custodian of the shares in the Vendex system, as well as its intellectual property, until such time as the new company had been formed. Mr Pretorius duly paid R1 Million over to RentQuip, against an understanding that those funds would be held by RentQuip, pending the

formation of the new company, and the allocation to Mr Pretorius of his shares.

12.4. Alarmingly, Mr Pretorius says at paragraph 87 of his founding affidavit:

"It is glaringly now apparent that once the money was paid into the *RentQuip cash washing machine, it simply disappeared into Mark's* personal coffers. In the premises, Mark had managed to dupe me once again and had scammed me of R1 Million."

12.5. Mr Pretorius avers further that Mr Kitchenbrand tried to explain to him, at a later stage, that the Vendex IT was held in another company which could not perform the work and that he, Mr Kitchenbrand, therefore had "been taken in by this entity". This caused Mr Pretorius to make investigations, from which he established that the Vendex IT was a product designed by Juan Ehlers, of Emiline (Pty) Ltd. Ehlers is the director of Emiline, the designer and developer of the Vendex product, the intellectual property to which at all times vested in Emiline. At no time did Mr Kitchenbrand own the intellectual property of the Vendex system. Mr Kitchenbrand was not authorised or entitled to acquire the intellectual property. Emiline received no payment from any person or entity. No new company was ever formed to hold the Vendex shares. Mr Pretorius was never allocated a 10% shareholding in such new entity or at all.

12.6. Mr Kitchenbrand approached Mr Pretorius with yet a further proposal to acquire shares in an entity known as IPS Renewable (Pty) Ltd. A new

company would be formed to own the shares of IPS, which Mr Kitchenbrand alleged to have owned. Subsequently, Mr Pretorius determined that the shares in IPS were owned by one Mark Phillip and not Mr Kitchenbrand. Against this background, Mr Pretorius had invested R400 000.00 in cash with Mr Kitchenbrand for the acquisition of an interest in IPS, which he did not receive.

12.7. Mr Pretorius averred that Mr Kitchenbrand had asked him to provide him with a loan of R5 million, undertaking to repay the loan after three months, by payment of capital, with interest, amounting to R7,5 million. As persuasion for such investment, Mr Kitchenbrand explained that he had invested in racing pigeons in Europe, that the profits from the sales would provide enormous returns. He led Mr Pretorius into believing that he would also invest his own money and that he had a European fund through which he traded racing pigeons. Consequently, Mr Pretorius made a payment to Mr Kitchenbrand of R5 million. Mr Kitchenbrand did not repay this loan and advised Mr Pretorius that he could not repay, as he would have needed to return the money from Belgium, which he could not do. He advised that returning the money would alert the South African Revenue Services to his European bank account and to his European trade in racing pigeons. Mr Kitchenbrand did however undertake to provide Mr Pretorius with access to funds in Europe and to make the R7,5 million return available to him in his

European bank account, which would be specifically ringfenced for Mr Pretorius.

12.8. Mr Kitchenbrand sold 2.5% of the shares in Lambent Solar Power (Pty) Ltd, to Mr Pretorius. He explained that Lambent was in the process of conducting a Solar Power converter Tulip / Ammonia process liquid to get gas endothermic to exothermic power reaction process. This transaction was set out in a letter address to Mr Pretorius from Mr Kitchenbrand, on a RentQuip letterhead. Mr Pretorius explained that the content and makeup of how the shares were to be allocated was convoluted and beyond him from a legal perspective, and once more constituted nothing more than a scam.

12.9. At paragraph 124 of the founding affidavit, Mr Pretorius again explained that he trusted Mr Kitchenbrand implicitly at the time and accepted at face value what he had been told about Lambent. He subsequently learnt that Lambent was a private company and was a vehicle for the brainchild of certain Jan Jacobus Lategaan. Its business was the private production and supply of electricity. It would supply electricity to the utility market. Mr Lategaan confirmed that Lambent entered into an agreement with Mr Kitchenbrand under which Mr Kitchenbrand was to pay R5 Million, in exchange for 25% of the issued shares in Lambent. However, the shares could not be transferred, as they were subject to the rules of the company, contained in its MOI, which restricted any form of re-sale, without the approval of the company's founders. Lategaan confirmed that Mr

Kitchenbrand was to pay R5 million into the company for his 25%, that he was aware that staff were to be employed, to commence manufacture of the solar electric power generating system, which did materialise. However Mr Kitchenbrand failed to provide the funding undertaken and merely contributed R1,36 million.

12.10. Pertinent to note from a letter attached to Mr Pretorius' founding affidavit as annexure JP14 from Lategaan to Mr Kitchenbrand, he records:

"We see no end to your shenanigans, your false promises, your *boastfulness and the like*..."

12.11. Following such letter, Mr Kitchenbrand was removed as a director of Lambent, and the shares which had been issued to him on 20 September 2016, were withdrawn. Mr Pretorius explained at paragraph 136 of his founding affidavit that the relevance of this is that Mr Kitchenbrand held out that he was authorised to sell 5% of the shares in Lambent to him, for which Mr Pretorius paid R1 million into the account of RentQuip on 17 March 2015. Consideration was to be given for the balance of R7,5 million by set off of the aforesaid loan of R 5 million together with interest.

12.12. Mr Pretorius explained further that Mr Kitchenbrand was prepared to sell to him 2% of his shares in a company known as EV Dynamics, trading in the development of clean energy solutions for use in buses.

12.13. Mr Kitchenbrand represented to Mr Pretorius that the value of the issued shares in EV Dynamics was R1 billion. At paragraph 147 of the founding

affidavit, he avers that Mr Kitchenbrand would sell such 2% at a discounted price of R2 million, on a highly confidential basis.

12.14. R1 million was paid by Mr Pretorius on 13 June 2016, and the balance was paid to Mr Kitchenbrand shortly thereafter. Mr Kitchenbrand failed to transfer any shares in EV Dynamics to him.

12.15. At paragraph 150.2.3, he explains that on 23 August 2017, Mr Kitchenbrand transferred all of his shares in EV Dynamics to a Close Corporation, Sanchocept. Mr Pretorius explained further that in August 2017, Mr Kitchenbrand offered him an additional 1% in EV Dynamics, through a member's interest in Sanchocept. At the same time, Mr Kitchenbrand advised Mr Pretorius that his 2% previously acquired was now to be reallocated by a membership allocation in the CC, to reflect an effective holding of 3% of EV Dynamics.

12.16. Mr Kitchenbrand advised Mr Pretorius that one Pentz would accept a "give away" price of R5 million for his shares in EV Dynamics, which he was prepared to pass onto Mr Pretorius for R3 million. Such sum was paid by Mr Pretorius to Mr Kitchenbrand, for which he received a share certificate in EV Dynamics.

12.17. Mr Pretorius subsequently met Mr Pentz when he learnt from him that he (Pentz) only wanted R2,5 million for the sale of his shares but that Mr Kitchenbrand was only prepared to pay R2 million, which he accepted. Mr Pretorius thus avers that Mr Kitchenbrand made a fraudulent secret profit at his expense of R1 million.

13. Against the aforesaid version, and as I have already indicated, Mr Kitchenbrand makes bald denials in a haphazard and sketchy manner, without engaging the subject matter in sufficient detail. Whilst I am called upon in the Respondents heads of argument to find for Mr Kitchenbrand, based upon the disputes of fact, I would be hard pressed to do so upon a proper application of the Plascon Evans principle. The versions of Mr Kitchenbrand are palpably implausible, farfetched and so clearly untenable that such versions can safely be rejected on the papers (Plascon Evans Limited vs Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623(A) at 634 d to 635 b). Adv Tromp was unable to persuade me to the contrary, her submission being that she was bound by the case presented on the papers.

14. I accept Mr Pretorius' version at paragraphs 177 to 179, inclusive of his Founding Affidavit that throughout his dealings with Mr Kitchenbrand, and in response to his various demands, Mr Kitchenbrand has consistently pleaded an inability to pay. It is thus clear that Mr Kitchenbrand has committed an act of insolvency vis-à-vis Mr Pretorius, foreshadowed under section 8(g) of the Insolvency Act.

15. It is thus clear that Mr Pretorius enjoys a very real and substantial interest in the application for the sequestration of the joint estate of Mr and Mrs Kitchenbrand.

16. Against such demonstrably clear substantial interest, Mr Kitchenbrand has not disclosed any valid reason to resist the application for intervention.

17. Accordingly, and during the course of the hearing on 01 August 2022, the application for intervention was granted by me, and will be formalised in the Order below. As such, Mr Pretorius is to be regarded as a Second Applicant in the application for sequestration brought by Dr Jansen van Rensburg.

18. I am satisfied that for the reasons and details set out in the judgment of Georgiades AJ, the provisional order of sequestration was both competent and necessary. It is not necessary for this court to repeat the terms of that judgment, save for it to echo that it stands by and agrees with all of the subject matter raised therein. I canvassed with Adv Kloek for Dr Jansen van Rensburg, if he was in full agreement with everything stated in such judgement. He responded in the affirmative.

19. In seeking a final sequestration order, the Applicants must satisfy Section 12 of the Insolvency Act. In accordance with such section, if at the Rule Nisi hearing the court is satisfied that:

19.1. the Applicant has established a claim;

19.2. the debtor has committed an act of insolvency or is insolvent;

19.3. there is reason to believe that it would be to the advantage of creditors;

it may sequestrate the Estate.

20. It is noteworthy that in the voluminous series of Affidavits exchanged subsequent to such opposed urgent application, there is not a single shred of credit worthy evidence from the Kitchenbrands, which would serve to cast sufficient doubt upon the claims of both Dr Jansen van Rensburg as well as those of Mr Pretorius. If anything, the Affidavits filed by Mr Kitchenbrand aggravate the circumstances. The court has also taken cognisance of the Affidavit filed by Shawn Williams (CaseLines 040/372), in his capacity as the provisional trustee of Mr and Mrs Kitchenbrand. From such Affidavit, it is abundantly clear that notwithstanding numerous requests, Mr and Mrs Kitchenbrand have failed to provide their co-operation to the provisional trustee.

21. I am thus satisfied that such claims are genuine and to a large extent, lie against Mr Kitchenbrand personally. To a very large extent, his companies were his alter ago, aimed at and utilised for purposes of deceiving both Dr Jansen van Rensburg and Mr Pretorius into placing their funds into Mr Kitchenbrand's hands.

22. It is also clear from the papers that Mr Kitchenbrand has an asset base sufficient to justify an advantage to creditors, were the rule to be confirmed.

23. I am satisfied that the grant of a final sequestration order would be in the best interests of Dr Jansen van Rensburg, Mr Pretorius, and indeed the full body of

creditors. With the armoury of the Insolvency Act, the powers of investigation and inquiry set out therein, the trustees may very well be successful in unearthing where the millions paid by both Dr Jansen van Rensburg and Mr Pretorius ended up. It may well be that such funds have been dissipated and/or concealed. It is also clear that the only remedy available for a competent investigative process, in order to follow the flow of monies and connect the dots, would lie in the appointment of a trustee, fully empowered and authorised under the aegis of the Insolvency Act, to conduct the necessary inquiries.

24. In order to keep the interim order alive, I extended the return day, at the end of the hearing on 01 August 2022, until Wednesday 03 August 2022, it having been my intention to deliver this judgment electronically, via email and to upload same upon caselines, by no later than 03 August 2022.

25. Accordingly, I am inclined to confirm the rule nisi and grant a final order of sequestration.

26. Thus, I make the following orders:

26.1. Jacobus Barend Johannes Pretorius is granted leave to intervene as the Second Applicant in the Application for Sequestration instituted by Dr Chris Jansen van Rensburg against Mark Dean Kitchenbrand and Naomie Elizabeth Kitchenbrand, for the sequestration of their joint estate;

26.2. All headings of all documents filed of record in the main application for sequestration are deemed to be amended to reflect Jacobus Barend Johannes Pretorius as the Second Applicant;

26.3. The rule nisi Order of Georgiades AJ under which the joint estate of Mark Dean Kitchenbrand and Naomie Elizabeth Kitchenbrand was provisionally sequestrated, is hereby confirmed and such sequestration order is hereby made a final order;

26.4. The costs of both the application for intervention as well as the application for sequestration, including all of the reserved costs for all of the prior hearings, are costs in the sequestration and are to be taxed by the taxing master of this court on the scale as between attorney and client.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

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