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

CASE NO: 14546/21
REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED: NO
28 OCTOBER 2022

In the matter between:

ANTON SEARL LEWIS N.O	**Applicant**
and	
S [....] 1 A [....] V [....] D [....] S [....] 2 N.O	**1st Respondent**
L [....] M [....] R [....] -V [....] D [....] S [....] 2 N.O	**2nd Respondent**
EXCLUSIVE TRUST SERVICE PTY LTD	**3rd Respondent**

JUDGMENT

Mdalana-Mayisela J

[1] In this application, the applicant, who is the appointed liquidator of the joint estate of S [....] 1 A [....] V [....] D [....] S [....] 2 and L [....] M [....] R [....] -V [....] D [....] S [....] 2, pursuant to the order of the Supreme Court of Appeal ("SCA") dated 27 May 2019, which authorised the appointment of a liquidator to determine the liabilities and

assets of the former joint estate of S [....] 1 and L [....] , has launched the present application for an order placing the estate of the Ludan Trust with registration number IT7697/95 under sequestration in the hands of the Master of the High Court; and directing that the costs of the application form part of the costs of the sequestration of the estate of the Trust. In the alternative, the applicant seeks an order that the Trust is to make payment to the applicant in the sum of R19 391 288,87 together with interest calculated at the prescribed rate from date of judgment until date of final payment with costs to be borne by the Trust.

[2] S [....] 1 (“the first respondent”) and L [....] (“the second respondent”) were married to each other in community of property for over 28 years, and their marriage was dissolved by a decree of divorce granted on 26 October 2015 by this court with division of the joint estate. The first and second respondents are co-trustees of the Ludan Trust. This is a family Trust established for the benefit of the first and second respondents and their children who are at present adults. The Trust has over some time a third trustee who participates in the activities of the Trust as an independent trustee. As at the time when the litigation ensued, Trust Protect (Pty) Ltd has resigned as the third trustee. The third trustee, Exclusive Trust Service (Pty) Ltd was subsequently joined as the third respondent in this litigation.

[3] Both the first and second respondents are represented by different set of attorneys in this litigation. They have filed separate answering affidavits through their respective attorneys. The second respondent is opposing the application, whereas the first respondent’s affidavit does not resist the relief sought by the applicant. The applicant has filed a replying affidavit and other affidavits were subsequently filed including an application for leave to amend the notice of motion by the applicant essentially seeking to apply for a provisional sequestration order instead of the final sequestration initially sought in the original notice of motion. The second respondent has opposed the proposed amendment. I found that the proposed amendment would not be prejudicial to the respondents. I granted the amendment. This application has inordinately generated voluminous papers, when the issue for determination is not entirely a complex one. I have however benefitted from the comprehensive heads of argument filed by counsel and the extensive oral submissions they made.

[4] In brief, the applicant's case is that pursuant to the order of the SCA the first and second respondents could not agree on the name of the person to be appointed as a liquidator of the joint estate. This resulted in the Institute of Regulatory Board of Auditors ("the IRBA") appointing the applicant as the liquidator. The applicant is a chartered accountant ("CA") and partner at Levitt Kirson Chartered Accountants South Africa.

[5] The applicant, as liquidator of the joint estate of the first and second respondents seeks an order of sequestration of the Trust. The basis for the application is that he has discovered that the Trust owes the joint estate the sum of R19 391 288,87 in loans that were advanced by the second respondent over a period of time to the Trust. He alleges that the Trust is insolvent because its liabilities exceed the assets. It must be mentioned that the applicant was appointed to liquidate the joint estate, settle its debts, realise its assets so that the joint estate could finally be equally divided between the first and second respondents.

[6] The applicant's terms and conditions of his appointment are contained in a letter dated 5 November 2019, and were agreed to by the first and second respondents who appended their signatures thereto. In terms of clause 3 of the letter of appointment, the applicant was appointed to inter alia:

> [6.1] Discharge all liabilities, liquidate and distribute all of the assets of the Joint estate including the 30% shareholding in the Company Technology Corporate Management (Pty) Ltd (Registration Number: 1987/003100/07), currently registered in the name of the second respondent;
>
> [6.2] Accept, control and administer the assets of the Joint estate and without limiting the generality and total comprehensiveness of these powers, it will include the power to sell, convert assets into cash, invest monies as well as the proceeds thereof and interest earned on assets realised for the benefit of the Joint estate as the liquidator may deem fit in his sole discretion.

[6.3] Make payments of debts, taxes, expenses, disbursements (this list is not exhaustive) and if the cash is insufficient, to pay the shortfall from the assets converted into cash.

[6.4] Enter into and/or defend any application and/or legal proceedings on behalf of the joint estate.

[6.5] Attend upon the valuation of the assets of the joint estate and if deemed necessary, draft management accounts, audit Company and Trust financials; as well as any further services required and related to the applicant's appointment; and

[6.6] Employ representatives whether attorneys, counsel or the like to transact on any business of whatsoever nature required to be done in connection with the division of the joint estate and to pay all such charges and expenses so incurred from the proceeds of the Joint estate.

[7] The applicant alleges that upon his appointment he established that the joint estate had a loan account in the Trust and that the Trust was indebted to the joint estate in substantial amounts of money. He further alleges that he has had extreme difficulty in obtaining accurate and comprehensive information and documentation relating to the Trust and more particularly its current financial position. He says that during his investigations of the assets and liabilities of the joint estate he had sight of the books of account of the Trust and established that the amount of R19 391 288,87 plus interest was reflected as being due to the joint estate as at date of divorce. He also relies on draft financial statements received from the second respondent as confirmation of the existence of the loan account. He also refers to the possibility of the underestimated tax liability by the Trust, as well as PAYE on salaries paid by the Trust as well as income tax liabilities, and related penalties and interest.

[8] The applicant alleges that the existence of the loan account was confirmed by the second respondent in an affidavit filed in the divorce proceedings. He says that he has taken into account the values of the immovable properties owned by the Trust, the movable properties and other investments which come to less than the liability of

the Trust to the joint estate. The Trust owns at least eleven immovable properties, but the movables listed are of negligible value. The applicant concluded after making the realistic assessment of the assets of the Trust that on any version the total assets of the Trust do not exceed R22 029 234,00. He states that the value achieved from the liquidation of the assets of the Trust on a forced sale would be substantially less than the value reflected in the books and records of the Trust. The forced sale values are based on the valuation by Umbono Valuations.

[9] According to the applicant, on proper calculation, the liabilities of the Trust amount to R25 683 144,87, which exceed the assets of the Trust. He says that sequestration of the Trust would benefit the general body of creditors. The Trust has substantial assets which can be liquidated, and the proceeds distributed to the concurrent creditors, and that a dividend of more than 80 cents in the Rand will be received by the concurrent creditors. It is on this basis that the applicant has brought this application.

[10] As I have said, the second respondent is opposing the application, but the first respondent is not. The second respondent has raised some points in *limine* which I dispose of first. The first one is that the applicant lacks authority to institute sequestration proceedings before court because the SCA order does not authorise him to do so. This point in *limine* cannot succeed because the authority to litigate was granted by the respondents themselves when they signed the terms of engagement of the applicant as liquidator.

[11] The second point is that the application is premature because disputes arising should be referred to arbitration as provided for by the SCA order. This point also cannot succeed because only a court can consider and grant sequestration orders. No arbitrator is authorised to usurp the powers of the court by granting sequestration orders. Whether or not the matter is deserving of referral to arbitration will depend on the nature of the dispute. As a result, the applicant did not act ultra vires his powers by bringing sequestration proceedings to court.

[12] The point raised that the joint estate is not a creditor of the Trust is a merits issue and not an in *limine* point per se. Having considered the in *limine* points, I

proceed to deal with the merits. On the merits, the question is whether the applicant has established the facts for the grant of a sequestration order.

[13] The second respondent has raised certain defences on the merits which I turn to. First, the second respondent states that the Trust was established as a family Trust for the benefit of the first and second respondents and their three children. In his personal capacity, the second respondent advanced substantial amounts of money to the Trust. He alleges that it has always been the first respondent and himself 's intention that the Trust assets would be utilised for the benefit of the three children and that their needs must first be catered for. He alleges that the joint estate has waived any right to claim any money advanced to the Trust. He further alleges that the position continued after the children reached the age of majority.

[14] The second respondent has already admitted in the divorce proceedings that the amounts he advanced to the Trust were loan amounts. He also admits that he advanced monies to the Trust, and also pleads that they be treated as donations. The second respondent's defence is not that there were loans advanced by him to the Trust, but that the joint estate has waived its right to enforce repayment thereof. A defence of waiver must be specifically pleaded as it has been here, but that is not all. The party alleging waiver must establish expressed waiver, if not unequivocal conduct by the other party that he/she intended no longer to claim any monies advanced. In this case I find that the second respondent has fallen short of satisfying the requirements for waiver. As a result, the defence of waiver should fail.

[15] The other defence is that it was inappropriate or premature for the applicant to have called up the loan as he did. The loans were advanced by the applicant over many years and not once has the loans been called up. The applicant was appointed to act in the interest of the joint estate and not its detriment. The applicant ought to have taken into account the fact that the Trust was established as a family Trust for the benefit of the family members, and that the assets accumulated by the Trust were accumulated for the benefit of the members of the family. The Trust owns immovable assets which are utilised by members of the family for their benefit. It is not clear why the applicant jumped to sequestration instead of demanding the 50% of the loan account from the second respondent who is indisputably the owner of the

50% of the joint estate, or on the final division of the joint estate deduct 50% of the loan account from the second respondent's proceeds of the joint estate.

[16] By seeking an order sequestrating the Trust, the applicant is acting detrimental to the joint estate or at least the beneficiaries of the joint estate which is the first and second respondents. On the facts and circumstances of this case, it is not just and equitable to sequestrate the Trust as same will be detrimental to the joint estate.

[17] The next question is whether the applicant has proven insolvency. It is trite that the applicant must make out a case in the founding affidavit. In this case I find that the applicant has not established on the facts that the Trust is insolvent. The applicant says that he does not have all the information at his disposal about the extent of the Trust assets and liabilities. This is an indication that the applicant has jumped the gun by applying for sequestration. On the applicant's own version, the only major creditor of the Trust is the joint estate. The joint estate entails the first and second respondents as the beneficiaries and owners of the joint estate. After his investigation, the applicant could not mention any other creditor other than the joint estate. The applicant is certainly not acting in the interest of the second respondent, who is the owner of half of the joint estate and also having entitlement to half of the loaned amount to the Trust. The second respondent has not mandated the applicant to call up the loan account nor did he say that he wanted the Trust to be sequestrated. The applicant did not consult the second respondent on the sequestration before it was launched.

[18] The applicant has failed to prove that sequestration will be to the advantage of creditors. The applicant does not know any creditor other than the joint estate. On the facts, sequestration will be to the detriment of the joint estate. The applicant has said under oath that the sale of the assets of the Trust on a forced sale will fetch less in the market. That surely cannot be regarded as beneficial to the joint estate. The effect of the sequestration would be to diminish the joint estate than maximising it. The court cannot sanction such a conduct.

[19] In the totality of all the facts, I find that the applicant has failed to make out a case for sequestration of the Trust.

[20] The alternative claim is that judgment be granted against the Trust for the amount of R19 391 288,87. This is the money which was advanced by the second respondent to the Trust. The second respondent did not mandate the applicant to recover the amount at least his half share of it from the Trust. It is unthinkable that the applicant would insist on claiming payment from the Trust on behalf of someone who says that he requires no such payment from the Trust. Whilst the applicant is legally permitted to act and litigate on behalf of the joint estate, such right does not extend to acting in a manner that is detrimental to the joint estate and without mandate to sue on behalf of the owners of the joint estate. The alternative claim should also on the facts of this case fail.

[21] For the above reasons, I find that the applicant has not made out a case for the alternative relief sought.

[22] In the circumstances, I make the following order:

1. The application is dismissed with costs, including costs of two counsel where employed.

MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(**Digitally submitted by uploading on Caselines and emailing to the parties)**

Date of delivery: 28 October 2022

Appearances:

On behalf of the Applicant: Adv Redman SC and
Adv Vergano

Instructed by:	Ian Levitt Attorneys
On behalf of the first respondent:	Michael Saltz Attorneys
On behalf of the Second Respondent:	Adv Pieter Van der Berg SC and Adv Ashton Cooke
Instructed by:	Mashabane Liebenberg Sebola Attorneys