REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 27815/2018

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

16/5/2019
DATE

RT SUTHERLAND

In the matter between

WILD & MARR (PTY) LIMITED **APPLICANT**

and

IBRAHIM SILDSKY YUSUF **RESPONDENT**

J U D G M E N T

SUTHERLAND J:

[1] The applicant seeks the sequestration of the respondent. A case for insolvency is made out. The sole controversy for decision is whether an advantage to creditors has been shown.

[2] The onus is on the applicant to establish that proposition. What is stated about the respondent's assets is very little. What the applicant presents is a companies' registry search report which reflects that the respondent has an interest of one or another kind in several companies. What the financial health of these companies might be is not known to the applicant. 18 companies are mentioned. 6 are recorded as being in final deregistration.

[3] What does the respondent declare? He says he is a businessman. He says is that 6 of the companies are dormant. 11 of the companies are by inference, in business. He claims their only value is derived from his personal services. He takes refuge in arguing that no allegation is made of secreted assets. Nonetheless, the participation of the respondent in some form of economic activity, utilising several corporate guises points towards the possession of means, rather than the contrary.

[4] True enough, the applicant is unable to allege what immediate financial benefit might be derived from a sequestration. The applicant cites section 19(c) of the Insolvency Act 24 of 1936:

> " If the court .....is of the opinion that *prima facie* –
>
> ....
>
> (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."

[5] The test for the application of this provision was addressed in *Stratford & Others v Investec Bank Ltd & Others 2015 (3) SA 1 (CC)* at [43] – [45]:

"[43] In terms of the Insolvency Act, a court may grant a sequestration order, either provisionally or finally, if 'there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated'. It is the petitioner who bears the onus of demonstrating that there is reason to believe that this is so. In *Friedman* the court held:

> '(T)he facts put before the Court must satisfy it that there is a reasonable A prospect — not necessarily a likelihood, but a prospect which is not too remote — that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the [Insolvency] Act some may be revealed or recovered for the benefit of creditors, that is sufficient.'

[44] The meaning of the term 'advantage' is broad and should not be rigidified. This includes the nebulous 'not-negligible' pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or 'not-negligible' benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin et al state that —

> 'the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order.'

[45] The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in Friedman. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment,

except through sequestration; or that some pecuniary benefit will redound to the creditors."

[6] In my view there is sufficient material placed before the court to warrant a provisional order. A provisional order will facilitate an investigation of the entities identified and any other assets possessed by the respondent.

The Order

1. The estate of the respondent is placed under provisional sequestration.

2. The respondent and any other party who wishes to avoid such an order being made final, are called upon to advance the reasons, if any, why the court should not grant a final order of sequestration of the said estate on the 27th day of June 2019 at 10:00 or as soon thereafter as the matter may be heard.

3. A copy of this order forthwith be served:

3.1 on the respondent personally;

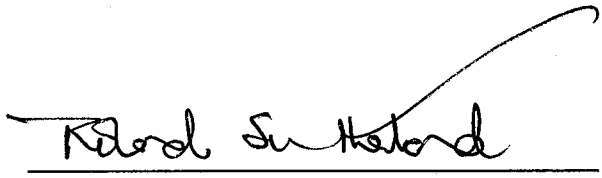
3.2 on the employees of the respondent, if any;

3.3 on all trade unions of which the employees of the respondent are members, if any;

3.4 on the Master; and

3.5 on the South African Revenue Service.

4. The costs of this application are costs in the sequestration of the respondent's estate.



ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of Hearing: 13 May 2019

Date of Judgment: 20 May 2019

For the Applicant: Adv L Hollander

Instructed by Snaid & Edworthy

For the Respondent: Adv D Block

Instructed by Howard Woolf Attorney