REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 10394/2012

In the matter between:

INVESTEC BANK LIMITED Applicant

(Registration No. [...])

and

IVOR CHARLES STRATFORD First Respondent

(ID. No. [...])

(Address: House 2[...] P[...] V[...] E[...], P[...])

(Marital status: Married in community of property to SHEILA MARGARET STRATFORD)

ID. No. 4[...])

and

SHEILA MARGARET STRATFORD Second Respondent

(ID. No. 4[...])

(Address: House 2[...] P[...] V[...] E[..], P[...])

(Matital status: Married in community of property to IVOR CHARLES STRATFORD)

(ID. No. 4[...])

and

CLEAN NGOMA First intervening

Employee / Creditor

ERIC DLOKOLO Second Intervening

Employee / Creditor

ANDRIES ADONIS Third intervening

Employee / Creditor

JUDGMENT DELIVERED ON 14 AUGUST 2013

MANTAME, J A.

INTRODUCTION

[1] This is an opposed application for the granting of the final order of sequestration. After granting of the *rule nisi by* Cioete AJ,(as she then was) on 15 October 2012,. Respondents and intervening parties filed a counter-application, seeking an order declaring Section *9(4A) of* the insolvency Act, 24 *of* 1936 (鍍he Act") to be unconstitutional in so far as it does not make provision for the service of a petition on employees who are not in a business operation of their employer, but in a domestic environment, being the Respondents in this regard.

B. **BACKGROUND AND FACTS**

[2] Applicant lent and advanced some monies to First and Second Respondents. Respondents acknowledged liability to the Applicant and signed some suretyship agreements as acknowledgement for the obligations of his family trust and companies in the Pinnacle Group where Respondents heid shares. Applicant alleges that Respondents are indebted to it in the sum of *two hundred and forty million, thirteen thousand, two hundred and fifty seven rand and ninety six cents (“R240 013 257.96’)* together with interest

[3] Respondents do not seem *to* be disputing Applicant’s claim, but suggest that Applicant has a liquidated claim against Respondent as contemplated by Section 9(1) of the insolvency Act. Respondents contended that Applicants are bound not to gain anything substantial from these sequestration proceedings as they have assets worth no more than *seven hundred and eighty thousand rand (“R780 000.00”).* This amount is made

up as follows: The amount of no more than *four hundred thousand ("R400 000.00")* will accrue to the estate of the Respondents from the free residue of the Stratford Trust, and the amount of *three hundred and eighty thousand rand ("R380 000.00")* will be derived from the proceeds of the house in King Williams Town, Eastern Cape, if sold, that is occupied by their domestic worker and owned by the Respondents. The Respondents contends that the dividend would be much less and there would be no advantage to creditors, given the amount of *seven hundred and eighty thousand rand ("R780 000.00").* No other assets were disclosed by the Respondents other than these assets.

[4] When the rule *nisi* was granted on 15 October 2012, Applicants and Respondents were legally represented at all relevant times.

C. **ISSUES TO BE DECIDED**

[5] This court is now called upon to decide on whether the petitioning creditor has established a claim against the debtor; whether the debtor has committed an act of insolvency or is insolvent; whether it would be to the advantage of the creditors of the debtor if his estate is sequestrated; furthermore if it would be just, fair and in the interest of justice to decfare Section 9(4A) of the insolvency Act, 24 of 1936 to be unconstitutional in so far as it does not make provision for the service of a petition on employees who are not employed in a business operation of their employer, being the Respondents in this regard. The latter constitutional challenge was filed by the employees of the Respondents who are working as their domestic workers and had since been admitted as intervening parties in these proceedings.

D.APPLICANT'S CASE FOR THE FINAL ORDER OF SEQUESTRATION AGAINST FIRST AND SECOND RESPONDENTS

[6] Mr. Manca for the Applicant argued that this is a return day of a provisional order of sequestration in terms of which the joint estate of the First and Second Respondents was placed under provisional sequestration in terms of Section 10 of the Act The service requirements as provided for in the provisional order were complied with by the Applicant, and this court is now left to consider whether a final order should be granted against First and Second Respondents,

[7] Counsel for the Applicant submitted that Section *12(1) of the* insolvency Act provides as follows:

> "*(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 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 sequestrate the estate of the debtor."

It was therefore argued that, on any version, Applicant has satisfied all those requirements for them to be granted a final order.

[8] Applicant's counsel submitted that, Respondents in answering to Applicant's claim, couched their affidavit in a rather strange way, Respondents failed to deal with the issues raised by the Applicant and rather alleged that, *"for the purposes of this application*, I *will accept the Applicant's allegations and reserve my rights to deal with them at a later stage."* In essence, that amounts to a bald denial. Counsel submitted that this position was **dealt** with in **Wightman t/a JW Construction v Headfour fPtv) Ltd & Another 2008 (3) SA 371 @ [13]:~**

"*[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously an unambiguously addressed the fact said to be disputed.*

There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment.When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but; instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say, "*generally" because factual averments seldom stand apart from a broader matrix of circumstances, all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which he direct disputes and to reflect such disputes fully and accurately in the answering affidavit if that does not happen it should come as no surprise that the court takes a robust review of the matter.* "

in essence, Applicants Counsel argued that Respondents has failed to properly deny ihe allegations made by

the Applicant, but instead opted to make generalisations and did not deal with the actual issues raised.

[9] Mr. van Rensburg for the Respondents and intervening parties *submitted* that in terms of Section 12(1)(b) of the insolvency Act, Applicant needs to convince the court that there is reason to believe that a final order will be to the advantage, of creditors. If this requirement has not been fulfilled, the *rule nisi* has to be discharged. The onus to grant a final sequestration order is higher pitched than the onus on the rule *nisi*, where the court upon presentation with the petition for the sequestration of the estate of the debtor, is of the opinion that prima *facie*, the petitioner has established a claim against the debtor; a debtor has committed an act of insolvency or is insolvent and that there is reason to believe that it will be to the advantage of the creditors that the debtor's estate be provisionally sequestrated. In any event, even if the Applicant has satisfied all the requirements for a final sequestration, the court still retains its discretion to refuse the final order. The tenor of the fact is to obtain pecuniary benefit for creditors. If it is found that the sequestration proceedings were instituted for other motives, the court may refuse to grant the order. It is therefore Respondent's submission that even the *rule nisi* should never have been granted as the Applicants failed to satisfy the requirements *as mentioned above.* As a result, the application should be dismissed and the rule *nisi be* discharged.

[10] Applicant argued that there has been a series of transactions made by the First Respondent during the period leading to his provisional sequestration, and assets belonging to the First Respondent or his entities that might form part of the free residue in the Respondents estate. If a final order is granted, those assets will need to be investigated by a duly appointed trustee. These include, but not limited to:-

10.1 A payment of twenty eight million rand (R28 000 000.00*)* made on 12 March 2009 to PPM in all likelihood was transferred to First Respondent or entities controlled by him;

10.2 A payment of six million rand (R6 000 000.00) made on 15 May 2009 from PP1 to "Ivor C Stratford investments" (as there is no registered company with that name). The money might have been diverted to First Respondent personally;

10.3 The fact or allegations that First Respondent was a director af PPM and was a 50% shareholder of PPM and such entity was controlled by him;

10.4 Erf 6[...] Hout Bay sold by Respondents on 4 June 2011 for one million, seven hundred and fifty thousand rand (R1 750 000.00) and the proceeds need to be investigated;

10.5 Erf 4[...] Gonubie sold by Respondents in February 2012 for eight hundred thousand rand (R800 000.00) and the proceeds need to be investigated;

10.6 Erf 1[...] King Williams Town that is valued at three hundred and eighty thousand rand (R380 000,00) and is unbonded, belonging to the Respondents;

10.7 The actual value of the Stratford Trust as per Applicants allegations. Respondents alleges that such trust is not worth more than four hundred thousand rand (R400 000.00);

10.8 A payment made by First Respondent to Marie May Kolsch amounting to one hundred and thirty thousand rand (R130 000,00);

10.9 An investigation to be conducted to all twenty-four (24) legal entities the Respondents are associated with.

[11] Counsel for the Respondents argued that, in the best case scenario, Respondents have assets worth no more than seven hundred and eighty thousand rand (R780 000.00) and, that cannot be an advantage to the general body of creditors. Further the costs of sequestration will amount to a substantial sum and will reduce this amount of seven hundred and eighty thousand rand (R780 000.00). After the investigations have been conducted there will be nothing left to distribute to the creditors. Mr. van Rensburg conceded though that Respondents have already had two *j*udgments from RMB. Judgments of nineteen million, one hundred thousand\ five hundred and three rand and ninety-two cents *(“R19 100 503.92”)* dated 27 June 2011 and *one million eight hundred and four thousand, eight hundred and eight rand and sixty four cents (“R1 804 808.64")* dated 5 May 2011. Mr. van Rensburg further admitted that Applicant has a claim against Respondents, but Respondents do not owe Applicant an amount of *two hundred and forty million, thirteen thousand, two hundred and fifty seven rand and ninety six cents (“R240 013257.96”)* plus interest, Respondents do not allege exactly as to how much they owe Applicant.

[12] Further, Mr. Manca submitted that there is evidence to prove *that there* are assets in Respondent's estate to the value of seven hundred and eighty thousand rand (R780 000.00), made up of the value of Erf 1[...] King Williams Town -and its valuation is three hundred and eighty thousand rand (“R380 000.00”) and four hundred thousand rand (aR400 000.00”) from the Stratford’s Trust Respondents had interests in many companies which he claims they are either dormant or liquidated. Respondents have made no mention of the dividends they may receive from the liquidated companies. Respondents disposed of two immovable properties at the time Respondents were insolvent and distributed the proceeds to his creditors and donated some to churches. These proceeds need to be investigated as it has been stated above. Large amounts of monies were paid to Merle, a company that was used by Respondents to own and develop properties. Nothing was said about these properties and where they are. Merle apparently made some bond repayment on behalf of PPM. These are the issues that need to be Investigated. Besides, Respondents have not come to the

fore about their true status of their financial affairs. They only responded on allegations that were put by Applicant before this court.

E. PRESCRIPTION OF APPLICANTS CLAIM

[13] Mr. van Rensburg furthermore argued that the transactions as mentioned above in paragraph 9 are irrecoverable, pursuant to the provisions of the Prescription Act 68 of 1969. in essence, whatever claim Applicant has, based on those transactions have prescribed. Such prescription occurred even before a provisional order was granted. Even if that was not so, First Respondent has given adequate explanation to the disposal of such amounts.

[14] In response to the point of prescription raised by Respondents, Mr Manca submitted that there is no question of claims prescribing in this regard. In **Duet and Magnum Financall Services CC (ín liquidation) v Koster 2010(4) SA 499[D],** where it was held - "*Prescription commences to run no later than date of appointment of liquidators"* this could never be an issue as the final sequestration has not been granted and as trustee has not been appointed.

F. **NON COMPLIANCE WITH SECTION 9(4A) (a) (ii) AND *(b)* OF THE ACT**

[15] It was Respondents submission that prior to the granting of the provisional order, Applicant should have complied with the provisions of sub-sections 9(4A) (a) (li) and *(b)* of *the Act* Reference was made to **Gunaudoo and Another v Hannover Reinsurance Group Africa (Pty) Ltd and Another 2012 (6) SA 537 (SCA),** where it was held that, the intention of the Legislature was to only make this provision *applicable to* empfoyees of the debtor, emp fayed in a business of the latter. This section was amended to ensure that employees of debtors facing sequestration or winding-up were notified of the proceedings - Section 9 (4A) of the insolvency Act was inserted to require that notice be given to the debtor's employees before a provisional order was granted and the amended Section 11 (4) provided for service of a rule *nisi on* the employees.

[16] Further, Mr van Rensburg argued that when Handley enquired from Respondents whether they had a domestic worker, the response was in the affirmative. At the time Respondents did not disclose to Handley that there were other employees as Handley did not ask about further employees. Mr van Rensburg contended that Handley was compelled to make full enquiries in order to comply with the peremptory legal requirements of service on the employees. At the time he had three domestic employees, that is, Mr Eric Dlokolo ~ the gardener, Mr Andries Adonis - the handyman and Mr Clean Ngema - a domestic worker.

[17] In response to such allegations, Applicant contended that although the provision does not require a copy of the petition to be furnished to employees of the debtor who are not employed in a business operation of the debtor, Applicant did in fact furnish a copy of its petition to the First and Second Respondent's domestic

employees in accordance with the provision. In **Berrange NO v Hassan and Another 2009(2) SA 339 (N) 353,** it was held that the word 'furnish' implies a form of informal service. Ms Handley, the candidate attorney who served the papers in the main application on First and Second Respondents, asked whether they had any employees. The response from the Respondents was that they had a domestic worker and Handley proceeded to leave a copy of the petition on the kitchen table at the Respondents residence as there was no notice board at the premises. At all times the first intervening employee, who was employed by the Respondents as a domestic worker, had access to the kitchen table. It therefore follows that the gardener and the handyman fails within a definition of a 'domestic worker' In terms of the Basic Conditions of Employment Act.

[18] It is Applicants submission fhat there is no requirement that a debtor's employees should actually receive the notice of application; that a petition must be directly drawn to the attention of the employees or that the said employees be advised personally of the application and its consequences. Similarly, the Respondents did not inform their employees that a copy of the application was left on the kitchen table for them. If this court finds that there was compliance or at least substantial compliance with Section 9 (4A), the constitutional challenge raised by the Respondents will fall away, and there would be no reason for its determination.

G. **THE CONSTITUTIONAL CHALLENGE BY THE INTERVENING PARTIES**

[19] Mr van Rensburg for the intervening parties argued that the exclusion of domestic employees from the protection contemplated by the provision of Section 9(4A) of the Act renders the said sub-section to be unconstitutional on the basis of race and gender discrimination. Such inherent discrimination could be found in provisions of Section 9(4A) of the Act. It was argued that the first point of departure was the consideration of this issue by the Constitutional Court in **City Council of Pretoria v Walker 1998(2) SA 363 (CC)**, where it was held that the intention to discriminate whether directly or indirectly is irrelevant as both situations are covered by Section 8 of the constitution which deals with Equality. Reference was given to the whole host of authorities and Mr van Rensburg went on to analyse the situation, in his case to be involving domestic workers, in their situation, such discrimination involves race and gender, and inevitably affected their rights. Domestic workers are, by virtue of the meaning ascribed to Section 9(4A) by the Supreme Court of Appeal in **Gungudoo** *(supra),* excluded from the protection by law, as employees referred to were those in the business sector.

[20] The intervening parties' contention is that the lack of notice of the sequestration proceedings amounts to an unconstitutional breach of their fundamental right to fair labour practises as their employment was effectively terminated and lost employment without any prior notice. Had they been given notice prior the hearing of the provisional orden they would have sought legal assistance and opposed the application. The

issues that are now before the court could have been raised then and perhaps they could have been able to retain their employment. If all else failed, they could have had reasonable time to seek other employment opportunities elsewhere. Such unfair and unconstitutional practise could not be justified in this democratic and constitutional society. Even though Handley, the candidate attorney, left a copy on the table for the First intervening Party, the papers were never brought to the attention of the intervening parties; even if they found them, there is no indication that they were meant for them and there is nothing in the papers themselves indicating that the consequences of the sequestration could affect their rights. Domestic workers are not schooled in legal matters and have no financial means to obtain legal assistance, regardless of their economic situation; it is therefore paramount that they be advised about the process as it impacts on their fundamental rights. A proper case has been made by the intervening parties, and therefore this court should not grant an order in terms of Section *12(2)* of the insolvency Act and discharge the rule *nisi* and further declare Section 9(4A) of the insolvency Act to be unconstitutional.

[21] in turn, Mr Manca for the Applicant submitted that the Respondents predicated constitutional challenge is on the interpretation of Section 9(4A) by the SCA in **Gungudoo judgment.** The provision requires a petition to be furnished only to those employees of the debtor who are involved in the debtor's business concern ("business employees") and not a debtor's domestic employees. The constitutional issue raised by Respondents does not fail to be determined in circumstances where there was compliance with Section 9(4A). This issue can be decided without reaching a constitutional point, in any event, Section 9(4A) does not infringe the rights of the intervening employees as alleged by the Respondents and no case has been made out for the declaration of invalidity sought Although the provision does not require a copy of the petition to furnish to employees of the debtor who are not employed in a business operation of the debtor, the Applicant in fact did furnish a copy of the petition to the First and Second Respondents' domestic employees in accordance with the provision. Respondents in their own version do not dispute that a copy of the petition was left on the kitchen counter or table. Counsel submitted, furnishing a copy of the petition to the employees by leaving it on a kitchen table was a better and more accessible option than the one envisaged in Section 9(4A) (aa) (ií) and (bb). In those two scenarios, a copy of the petition is affixed in a notice board inside the debtor's premises or is affixed to the front gate of the premises, in circumstances whereby sub-section (aa) nor (bb) were unachievable, because of the nature of the premises, a kitchen tabie Is the most accessibie place to any domestic worker. There is no provision requiring the employees to actually receive the application; or the petition be directly drawn to the attention of the employees or that employees be personally advised of the appiication for sequestration and the consequences thereof.

[22] Besides First and Second Respondents have not made an explanation as to why they did not inform their employees that a copy of the application had been left for them on the kitchen table. An Applicant in any application must first exhaust the possibilities of relief through indirect application of the Bill of Rights

before relying directly on the Bill of Rights. The SCA in **Gungudoo** judgment did not interpret the provision with reference to any of the constitutional rights relied upon by the Respondents. Mr Manca agreed with Respondents though that domestic workers, as defined in the Basic Condrtions of Employment Act, 75 of 1997, "BCEA" are vulnerable employees who require the protection of the law. But in this instance, there is no basis for the contention that Section 9(4A) infringes the intervening employees' constitutional rights and as such, has not made out a case sought in their counter application.

[23] It was Applicant's argument that the nature of a person's employment in a business or in a domestic context does not involve any personal attributes or characteristics and cannot impair one's human dignity. The Respondents have not established an unfair discrimination in terms of Section 9(3) of the constitution. Regarding the Respondents contention that no legitimate governmental purpose is served by the differentiation between business empfoyees and domestic employees, Counsel for the Applicant made reference to the SCA judgment of Gungudoo *(supra)* at paragraph 41 that,

> *"the purpose of the relevant provisions of the LRA, Insolvency Act and 1973 Companies Act, which were adopted as a package, was to ensure that where a debtor conducted business, notice of sequestration or windlng-up proceedings must be given to employees of the business".*

[24] The issues relating to fair labour practices relating to employer and employee are dealt with in Section 23(1) of the Constitution. Domestic employees are furthermore protected by numerous legislation provisions, for instance, the BCEA, the Sectoral Determinatíon 7: Domestic Worker Sector; and the LRA. Any limitation to any rights is contained in Section 36 of the Constitution. By all means, the intervening parties are protected by the law.

[25] Further, the intervening parties filed a counter application after having been granted leave to do so. They have failed to put substantial ground on which the final order should not be granted. Besides allegations, that if they have been made aware about the provisional sequestration, they would have opposed the granting of such order. However, they *have* not *put any grounds* on which they would have opposed the granting of such an order. The intervening parties rely exclusively on the fact that there was non-compliance with the provision of service on them and that Section 9(4A) inherently discriminates them. As such Section 9(4A) should be declared unconstitutional. In the eyes of the Applicant, this is a matter that could be decided without reaching a constitutional point and as such this counter application should be dismissed with costs. If for whatever reason, this court is not amenable to grant that order, it would be appropriate for this court to use the powers in terms of Section 172 of the Constitution to make an order that is just and equitable.

[26] Third and Fourth Respondents were further joined in these proceedings as interested parties. Third Respondent elected to oppose the constitutional challenge of Section 9(4A) by intervening parties. Fourth

Respondent decided to abide by the decision of this court

[27] Ms Mangcu-Lockwood for the Third Respondent submitted that the reason why the Minister of Justice and Constitutional Development opposed this matter, is because of the *dicta* in **Van Der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust) as Amicus Curiae 2006 *(4) BA* 230**, *"where it was held that where a constitutional validity of legislation is an issue, the Minister responsible for its administration must be party to the proceedings. The Ministers' view and evidence ought to be heard and considered. The courts should not pronounce on validity of legislation without benefit of hearing the organ of state concerned on purpose pursued by legislation, its legitimacy, factual context, impact of its application and justification, if any, for limiting entrenched right The views of state organs are also important when considering whether; and on what conditions, to suspend any declaration of invalidity..."*

[28] The intervening parties' case is that the SCA's interpretation of Section 9{4A) of insolvency Act in Gungudoo (supra) renders the provision unconstitutional and in conflict with various provisions of, but not limited to the constitution, fair labour practices and the right to access to courts,

[29] Third Respondent disputes the aflegations by Mr Van Rensburg that domestic workers are excluded from protection by Section 9(4A). Besides their protection being afforded by Section 9(4A), Section 23(1) of the Constitution states that everyone has a right to fair labour practice. The LRA and BCEA were effectively promulgated to give effect to Section 23. The protection of the domestic employees is provided for in the LRA, BCEA and the Sectoral Determination in instances where there is an order of sequestration. There is no basis by the intervening parties to allege that their right to fair labour practices is infringed.

[30] Counsel for the Third Respondent further submitted that the intervening party's main contention was- that they did not have an opportunity to oppose the granting of a provisional order, but have not detailed the allegations as to how this opportunity would have changed their circumstances.

[31] It was further argued by Third Respondents' counsel that the correct approach to a constitutional challenge was summarised in **Harksen v Lane NO and Others 1398/1) SA 300 CC**. *that if there is differentiation on a specified ground, then discrimination will have been established, if not established, It will depend upon whether the ground is based on attribute and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. If differentiation amounts to "discrimination" does it amount to ᵘunfair discrimination"? If it is to be on a specified ground, then unfairness will be presumed if on an unspecified groundunfairness wifi have to be established by the Complainant The test of unfairness focuses primarily on the impact of the discnminatbn on the Complainant and others in his or her situation, if at the end of this stage of the inquiry, the differentiation is found not to be fair; then there will be no violation of Section 8(2).*

[32] Section 9(4A) differentiates between employees employed in the business operation of an employer facing sequestration and those who are not. However, such differentiation does not amount to unfair discrimination as it meets the criteria for justifiability under Section 36 of the Constitution. The intention of the legislature when drafting Section 9(4A) of the insolvency Act did not include domestic worker in its ambit This was acknowledged by the SCA in *Gungudoo judgment* . As the name Insolvency Act suggests, it deals with insolvencies and not domestic circumstances. So the relief sought in the counter-application is inappropriate. Be that as it may, there is adequate protection of domestic worfcers in the context of an employer's insolvency. Besides, a copy of the petition was left on the kitchen table of First and Second Respondents home on 29 May 2012 after First and Second Respondents received their own petitions. There is no reason given by First and Second Respondents why they failed to advise the intervening parties of *the* petition for provisional sequestration. They are in daily contact with the intervening parties and are better placed to notify them of the implications of such a petition since they have an employment relationship with their employees.

[33] Finally, Third Respondent's counsel submitted that the giving of notice on the part of creditors is most costly and onerous as it appears on Section 9 of the Insolvency Act The order sought by the intervening parties would introduce more administrative and cost burdens on the side of the creditors. That was borne by the report filed by the South African Law Reform Commission, ("SALRC") on the Review of the law.

[34] SALRC further did not support a recommendation that any application for provisional or final liquidation (or sequestration) must be served upon a union (or workers). "*Even if the proposal is practical, the costs involved (which must be paid before workers can receive anything from the insolvent estate) may be astronomical and do not seen to be justified "*

H. **ANALYSIS OF EVIDENCE AND APPLICABLE LEGISLATION**

[35] In my analysis, I will first deal with the application for the granting of a final order. According to the Applicant, since they satisfied all the requirements stipulated in Section 10 of the Insolvency Act there is no reason why Section 12 of the said Act should not be granted as they further complied with such section. Respondents on the other hand dispute that there was any compliance by the Applicant for the final order to be granted.

[36] It seems the Respondents do not dispute the fact that Applicants have a claim against them; and they have committed an act of insolvency. The only dispute is whether the f匡al order of sequestration would be to the advantage to creditors. After analysing the evidence by both parties J am not convinced by the Respondents argument that its estate is worth seven hundred and eighty thousand rand (迭780 000.00・) and it cannot be said to be advantageous to the creditors as this would amount to a dividend of no more than two

cents (0,02 cents) in a rand. I tend to agree with Applicant that Respondents have been engaged in numerous business entities and have been involved in several transactions and if the final order is granted, these transactions and entities will need to be investigated by a trustee. Respondents seem to be opposed to the investigation by a trustee on the basis that such investigation will bear no favourable distribution to the creditors but rather will deplete further the insolvent estate of the Respondents and there is nothing further to be investigated. In my mind, if there is nothing to hide, why is First Respondent not upfront to this court about all the information relating to the business entities that Respondents are linked with. To this end, Respondents have failed to explain-their financial status to this court. The only explanation that came forth is the explanation of the transactions that were raised by Applicant in their founding papers. As a businessman who was involved in property investments and other businesses, he has not volunteered information on his drawings from those businesses, other *than* ihe ones that were liquidated.

[37] A person in the stature of the First Respondent who went international with his businesses besides property business he was involved in South Africa cannot be said to be worth seven hundred and eight thousand rand (“R 780 000.00"). No explanation was afforded by him to the allegations by Applicant amongst others that First Respondent was a director of PPM and his trust was a 50% shareholder of PPM and was corporate controller of PPM; an amount of six million rand (R6 000 000.00) was paid to Ivor C Stratford Investment which proved to be a nonexistent company. The amount of twenty eight million rand (R28 000 000.00) paid to PPM was admitted by First Respondents but no full explanation was given regarding its disbursement; and four million, one hundred and fifty one thousand and seven rand (R4 151 007.00) that was paid to Gloria Jean Coffees (a coffee shop owned by PPM); a nine million rand (R9 000 000.00) that was paid to TC Stratford Family Trust; a six million and six thousand, one hundred and fifty eight rand and forty four cents (R6 006 158.44) that was paid to PPM; a three million rand (R3 000 000,00) that was paid to Clifton Trust controlled by Mervyn Key, and amount of one million, five thousand and ninety three, seven hundred and twenty six rand and ninety two cents (R1 593 *726.92)* that was paid to IC Stratford Family Trust; an amount of one and a half million rand (R1 5000 000.00) that was paid to Newport Finance; an amount of five hundred and thirteen thousand, five hundred and seventy nine rand and fifty eight cents (R513 579.58) that was paid to Kovacs Investments 43 (Pty) Ltd, and amount of four thousand, four hundred and one, three hundred and forty eight rand and two cents (R441 348.02) that was paid to CJC; an amount of two hundred thousand, five hundred and twenty seven rand and fifty cents (R200 527.50) that was paid to operational expenses; an amount of six thousand and thirty two thousand, six hundred and sixteen rand (R632 616.00) that was used by PPM to pay salaries and an amount of three thousand three hundred and three, seven hundred and three rand and seven cents (R333 703.07) that was paid to Imperial Bank on behalf of Kovacs; an amount of one hundred and ninety four thousand, six hundred *a*nd fifty six rand and ninety four cents (R194 656.94) paid to Annford investments and amounts of three thousand, six hundred and nine

thousand, six hundred and sixty one rand and thirty cents (R369 661.30) and sixty two thousand, seven hundred and fifteen rand and seventy cents (R62 715.70) paid to GJG, First Respondent has failed to give an account of these transactions. I am in agreement with Applicant that if First Respondent lent this monies to PPM, surely he has a claim against PPM and that would constitute an asset to his estate. For instance an explanation that an amount of nine million rand (R9 000 000.00) was paid to Strafford Trust, and four and a half million rand (R4.5 million) was paid to Merla Management Consultants (Pty) Ltd in my view was insufficient. If was never disputed that First Respondent was the sole shareholder in this company. Similarly, a claim from this company would constitute an asset to his estate, it is not disputed that his four and a half million rand (R4,5 miílion) was paid to Merla towards a bond over a property registered in the name of PPM.

[38] This court was made aware of these different entities and transactions by Applicant It is common cause that First Respondent conducted businesses internationally, and this court is not aware of what loss or benefit did he incur on those enterprises more especially that First Respondent conducted his personal affairs using various corporate entities. Further monies paid to First Respondent's son and daughter, it is not dear whether they were loans from PPM. Those amounts, if claimable, could prove to be an asset to Respondents estate. Furthermore, the proceeds of Erf 6[...], Hout Bay and Erf 4[...] Gonubie properties if properly investigated could prove to be favourable to Respondents estate.

[39] It is a long established principle that the court may make a final order of sequestration if it is satisfied that such sequestration will be to the advantage to creditors. The facts that have been put before this court by Applicant proved that there are prospects that some pecuniary benefit would result to creditors. It appears that First Respondent, in his insolvent estate, has made transactions and they need to be investigated. Respondents have tried to explain as to how the funds from those transactions were disbursed. Even though that is the case, a trustee would be able to unearth and confirm if such disbursement was justifiable.

[40] Respondents have taken a point that prior to the granting of the provisional order, Applicant should have complied with provisions of sub-sections 9(4A) *(a)* (ii) and (b) of the Insolvency Act. The petition was not served to their domestic employees. This compliance is compulsory and Jack thereof must cause the rufe *nisi* to be discharged. This also led *to* the intervening parties in the form of domestic employees challenging the constitutionality of sub-section 9(4A) (a) *(ii) and* (b) as it indirectly discriminate on them.

[41] Before deciding on the granting of the final order, I will first deal with the allegations by the Respondents that the domestic workers were not served with a petition prior to the granting of the provisional order. Compliance with the provision *is* compulsory and Jack thereof must cause the *rule nisi to* be discharged Applicant submitted that there was compliance with Section 9(4A). Further this issue could be decided without reaching a constitutional challenge.

[42] Section 9(4A) (a) (ii) requires a copy of the petition to be furnished to the debtor's employees-

> *"(aa) by fixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtors premises;*
>
> *or*
>
> *(bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition."*

It seems to me the Respondents and intervening parties have interpreted the statute abundantly more than what the legislature intended. There is no provision that the petition must be served to each and every domestic employee, or that the petition must be directly drawn to the attention of the employees; or that employees must be personally advised of an application for sequestration of such an application. As submitted by Applicant and Third Respondent, the Labour Relations Act and the Basic Condition of Employment Act, were all promulgated pursuant to a right to fair labour practices. Under no circumstances can the intervening parties cfaim that they were discriminated against. The petition was left for the employee/s on the day First and Second Respondents were served with their petition. Handley asked the Respondents whether they had any employees. Respondents advised fhat they had a domestic employee. They were not upfront about the number of employees they had from the onset instead of advising Handley about the employees Respondents elected to advise about a domestic employee. Handley proceeded to leave a copy of the petition on the kitchen table at the Respondents premises. For the Respondents to argue that the domestic employees were not "served" with the petition is rather absurd. Respondents have not explained to this court as to what happened to the copy of the petition that was left for the domestic employee/s by Handley. Furthermore, if they felt strongly that their domestic employees should be advised or else observed from their employees that they are concerned about the pending provisional sequestration proceedings, they should have explained same to their employees and more especially if these proceedings would have a potential negative impact on their employment for them to weigh their options. Strangely, these workers have not lost their employment up until the date of the hearing of this matter. The intervening parties have not taken this court into their confidence as to on what basis were they going to oppose the granting of the provisional order. On that basis alone, I see no reason for the discharge of the *rule nisi.* In any event, Handley furnished a copy of the petition by ieaving it on the Respondent's kitchen table. The Act requires "*a copy of the petition to be furnished" to* the debtor's employees. The provision was complied with even better by Handley by leaving the copy on the kitchen table, other than leaving it outside the house (either in a notice

board or gate as required by the Act), **Gungudoo** (supra) was decided correctly by the SCA in that a petition needed to be furnished only to those employees of the debtor who are involved in the debtor's business concern, and not a debtor's domestic employees, in my view, the domestic employees were furnished with a copy of the petition.

[43] 1 agree with Applicant *that the* constitutional issue raised by the Respondents does not fall to be determined in circumstances where Applicant has complied with Section 9(4A). The intervening parties have not established an unfair discrimination in terms of Section 9(3) of the constitution. No case has been made by the intervening parties for the declaration of this section invalid. In any event, Section 9(4A) does not infringe the rights of the intervening parties and there is no reason whatsoever to declare it unconstitutional.

[44] In my judgment, I have reason to believe that there would be advantage to creditors in terms of Section 12(1) of the Act if proper investigation is conducted by the trustee, more assets are likely to be uncovered and come to light. For instance in **Meskin *& Co* v *Friedman* 1948(2) *SA* 555(W) at 561** - Rogers J heJd that "*In the circumstances of this case, I consider that there is a reasonable prospect that investigation under the Insolvency Act may result in the discovery of assets which will be available to creditors, and them are the further advantages conferred by the sections of Insolvency Act to which I have referred. There is, therefore, reason to believe that sequestration will be to the advantage of creditors.. "*

[45] I accept that Respondents are indebted to Applicant in the sum of two hundred and forty million, thirteen thousand, two hundred and fifty seven rand and ninety six cents (R240 013 257.96), together with interest. Respondents have not disputed this claim and come up with a different amount I am therefore satisfied that if a proper investigation is conducted by the trustee, a substantial amount and or assets could be uncovered from the estate of First and Second Respondents.

[46] Regarding the submission by Mr Van Rensburg that Applicants claim has prescribed and cannot be enforced, such argument is unfounded as it is trite law that prescription start to run once the final order has been granted.

[47] In the result,-I make the following order;

47.1. A final order is granted, placing the joint estate of Ivor Qharies Stratford and Sheila *Margaret* Stratford under sequestration in the hands of the Master;

47.2. Costs would be costs in the sequestration;

47.3. The counter-appiication by the intervening parties is dismissed;

47.4 No order as to costs on the counter-appfication.

MANTAME, J

IN THE HIGH COURT OF SOUTH AFRICA

(THE WESTERN CAPE HIGH COURT, CAPE TOWN)

Cape Town: On Wednesday, 14 August 2013

Before the Honourable Ms Justice Mantame

Case No: 10394/2012

In the matter between:

INVESTEC BANK LIMITED	Applicant
and	
IVOR CHARLES STRATFORD	First Respondent
SHEILA MARGARET STRATFORD	Second Respondent
THE MINISTER OF JUSTICE AND	
CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE MINISTER OF LABOUR	Fourth Respondent
and	
CLEAN NGOMA Employee / Creditor	First Intervening
ERIC DLOKOLO Employee / Creditor	Second Intervening

ANDRIES ADONIS Third Intervening

Employee / Creditor

COURT ORDER

HAVING HEARD THE LEGAL REPRESENTATIVES OF THE PARTIES AND HAVING READ THE DOCUMENTS FILED OF RECORD;

IT IS ORDERED:

1. A final order is granted, pfacing the joint estate of Ivor Charles Stratford and Sheila Margaret Stratford under sequestration in the hands of the Master;

2. Costs would be costs in the sequestration;

3. The counter-application by the intervening parties is dismissed;

4. No order as to costs on the counter-application.

BY ORDER OF THE COURT

COURT REGISTRAR

Van Rensburg & Co

c/o 247 BBM Attorneys

CAPE TOWN