THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Cases No: 10679/13 & 10680/13

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD	**APPLICANT**

and

JOHANNES DAVID PRINS BURGER	**FIRST RESPONDENT**
CHERYL DIANE BURGER	**SECOND RESPONDENT**

and in the matter between

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD	**APPLICANT**

And

PAUL MARTIN BURGER	**FIRST RESPONDENT**
ALTA BURGER	**SECOND RESPONDENT**

Coram: ROGERS J

Heard: **27 FEBRUARY 2014**

Delivered: **4 MARCH 2014**

JUDGMENT

ROGERS J:

[1] There are two applications before me for the final sequestration of the brothers Johannes (Jannie) Burger and Paul Burger (known by his middle name Martin). The applicant is the Industrial Development Corporation of South Africa Ltd ('the IDC'). Mr G Woodland SC, leading Ms HT Cronje, appeared for the IDC and Mr S Alberts for the Burger brothers.

[2] The applications were launched on 4 July 2013. They are in substantially the same form except in regard to the assets of the two brothers. The applications for provisional sequestration were belatedly opposed. Notwithstanding such opposition, provisional orders were granted by a Erasmus J on 10 October 2013, with a return date of 21 November 2013. On the latter date, the Burgers gave belated notice of their intention to oppose their final sequestration. An order was thus made extending the return day to 27 February 2013 with a timetable. Further affidavits were filed but did not add much of substance to the affidavits that served before Erasmus J. (All references in this judgment to the paginated record are to case 10679/2013 unless otherwise indicated.)

[3] The IDC's applications are based on an alleged indebtedness by the Burgers of R78 046 337 arising from guarantees given by the Burgers (as principal debtors) in respect of the liabilities of Slabbert Burger Transport (Pty) Ltd ('SBT'), a company of which they were previously the controllers. SBT was placed in a creditors'

voluntary winding-up on 5 December 2012. The said winding-up was converted into a compulsory final winding-up on 8 February 2013 at the instance of Standard Bank.

[4] The Burgers admit the alleged indebtedness to the IDC. In fact, they claim that their indebtedness to IDC exceeds R132 million. This is because of additional interest and because, they say, they have a further indebtedness of about R44 million in relation to a guarantee which the IDC gave to Standard Bank in respect of the obligations of SBT, for which liability they in turn are liable to the IDC as sureties or guarantors. It is common cause that on any reckoning the value of the Burgers' assets is way below their indebtedness to the IDC.

[5] The IDC's standing and the factual insolvency of the Burgers are thus common cause (making it unnecessary to decide whether, as alleged by the IDC, they also committed an act of insolvency). There has been compliance with the procedural requirements contained in the provisional orders. The only question is whether, as required by s 12(1)(c) of the Insolvency Act 24 of 1936, 'there is reason to believe that it will be to the advantage of creditors' if the estates of the Burgers are sequestrated. The Burgers claimed that their indebtedness to the IDC was greater than that alleged by the IDC *inter alia* in order to show that their sequestration would yield a very small dividend (less than two cents in the rand, they say) and thus not be to the benefit of creditors.

[6] The IDC's case that sequestration will be to the advantage of creditors is based not only on the value of the assets from which a dividend could be paid but also on the prospect that further assets might be uncovered pursuant to investigations using the machinery provided by the Insolvency Act (cf *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) at 585G-H),. In this latter regard, the IDC alleges in its founding papers that an existing enquiry into the affairs of SBT in terms of ss 417 and 418 of the Companies Act 61 of 1973, authorised by this court and in which the commissioner is retired Judge Joffe, has already uncovered evidence of widespread irregularities and fraud in the conduct of the affairs of SBT, including the paying of bribes, double-invoicing and so forth. The Burgers allegedly ran the affairs of their group of companies without regard to separate corporate personality. The Burgers deny that they were party to irregularities or fraud. They have responded to

some of the allegations but also state that they are disadvantaged by not having access to the evidence which has been led at the SBT enquiry.

[7] In regard to a likely dividend, there is no absolute rule that a sequestration will not be to the advantage of creditors if it is below a certain amount in the rand. In the ordinary course, where there are a number of creditors and the estate is relatively modest, a dividend of only a few cents in the rand may well not be sufficiently advantageous to creditors to warrant a sequestration order. In such cases, there is often a risk that the free residue will not cover the costs of sequestration. Such a risk is a disincentive to creditors to prove their claims. Each case must, however, be assessed on its own particular facts.

[8] In the present case the evidence reveals that Jannie Burger has assets worth at least R1 039 000. Included in these assets is an unencumbered property in Wellington purchased in 2008 for R700 000. It may well be worth more by now. The founding papers also make reference to a loan claim which Jannie Burger supposedly has against Etbur Property Investments Pty Ltd ('Etbur') with a face value of R599 381. I think this rests on a misreading of the annexed financial statements.[1] Note 4 of those financial statements, when read with the item 'Loans to shareholders' in the balance sheet, indicates that the loans were made by Etbur to the brothers, not the other way round. (As will appear hereunder in the discussion of the financial statements of certain of the entities associated with the Burgers, both brothers appear to have additional assets in the form of claims against various entities though their value was not ventilated in the papers.)

[9] In the case of Martin Burger, his assets, excluding a property he owns in Paarl, are alleged to be worth R541 000. In addition, he owns a bonded property in Paarl. It is common cause that the value of the property exceeds the amount owing to the mortgagee. Mr Burger has not disclosed the quantum of the indebtedness so the full extent of the equity in this property is unknown. He has a loan claim against Slabbert Burger Eiendomme (Pty) Ltd ('SBE') of R2 755 739 though it appears that this company is in liquidation and that any dividend payable to Martin Burger will

[1] Record 214ff.

accrue to the IDC (pursuant, I assume, to a security cession). (Although not mentioned in the papers, the financial statements of SBE indicate that Jannie Burger, like his brother, has a loan claim against SBE, in the amount of R2 326 484.[2])

[10] The only liabilities which the Burgers have, apart from their liability to the IDC, appear to be liabilities to family trusts and group companies. These liabilities are relatively modest in relation to the IDC's very large claim.

[11] If the Burgers owe the IDC more than R132 million, it is clear that the dividend payable on their currently known assets will be very small. Of course, their indebtedness may be reduced by any dividends which the IDC receives in the liquidation of SBT and in the liquidation of other group entities which, like the Burgers, are liable under guarantees. Any such reduction in the indebtedness would increase the dividend expressed as a certain amount per rand (though not the monetary amount of the dividend). There is no danger of the costs of sequestration not being met. Although the amounts that the IDC will recover in the insolvent estates would represent only of a fraction of its full claim, the amounts will not be trivial. Suppose, for example, that a dividend of R800 000 could be paid to the IDC from the estate of Jannie Burger (a not unrealistic assumption): Why should the IDC not be entitled to receive that sum just because its full claim is R132 million rather than, say, R10 million?

[12] Apart from the financial benefit which creditors (in effect, the IDC) could receive by way of a dividend from the known assets of the Burgers, the IDC relies on advantages which may accrue from investigations conducted under the Insolvency Act. The Burgers' response is that there is already an inquiry into the affairs of SBT; that three family trusts have also been sequestrated; and that, since the IDC says that the affairs of the Burgers are inextricably intertwined with those of the group companies and family trusts, everything that could be discovered in an inquiry pursuant to their individual sequestration could just as well be investigated in the liquidation of SBT and in the sequestration of the three family trusts.

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[2] Record 246 read with the balance sheet at record 240.

[13] I do not think that the possibility of investigation in other liquidations and sequestrations is a reason not to make available to creditors the investigative advantages which would flow from a sequestration of the personal estates of the Burgers. The investigation which can permissibly be conducted in relation to any particular liquidation or sequestration is circumscribed. It cannot be taken for granted that all the dealings of the Burgers in their individual capacities, including transactions between themselves and their spouses and between themselves and family trusts, could permissibly be investigated in (for example) the liquidation of SBT. Moreover, and even if the investigations legitimately conducted in other liquidations and sequestrations could uncover irregular dealings of the Burgers in their personal capacities, only a trustee in the insolvent estates of the Burgers could exercise certain resultant remedies such as those pertaining to impeachable transactions.

[14] The founding affidavit discloses a long list of alleged irregularities in which the Burgers were supposedly involved. The Burgers dispute those allegations and for present purposes I naturally cannot, and do not, decide the truth of the allegations. However, they provide a reasonable basis at least for suspecting that the Burgers in general engaged in irregular financial conduct and that it would thus be to the advantage of creditors that there should be the fullest investigation into the affairs of all relevant players, including individual estates of the Burger brothers.

[15] Mr Alberts submitted that the IDC has failed to set out in its papers how an investigation might result in the discovery of further assets in the Burgers' personal estates. He said that the papers do not reveal that the investigations conducted to date in the SBT inquiry show such a likelihood. I repeat, however, that an enquiry into the affairs of SBT is legally limited by matters which are relevant to the affairs of that company. The IDC does not allege that it has knowledge of what an investigation into the estates of the Burger brothers would yield; what it alleges are circumstances which indicate the need for an inquiry because there is a reasonable possibility of pecuniary advantage. This is not a case where there is no reason for suspicion of substantial irregularities. Particulars, albeit disputed, are set out in the founding affidavit. Although those particulars concern in the main the affairs of SBT (the entity under investigation in the s 417 inquiry), they raise a reasonable concern

that there may also have been irregular conduct by the Burgers in relation to their personal affairs and in their dealings with family members and family trusts.

[16] In that regard, the IDC alleged in its founding papers that the Burger brothers were associated with at least 15 trusts. The IDC wishes to have investigated the relationship between the brothers and these trusts. The response in the answering affidavit is that the details of the 15 trusts have not been disclosed by the IDC and that no facts have been placed before the court to establish why such an investigation has to date not occurred. The Burgers do not, however, deny that they are associated with 15 trusts. Mr Alberts in argument justified the bareness of his clients' response by submitting that nothing substantial had been said in the founding affidavit to call for a more detailed answer. Again, however, the IDC cannot be expected to know the details. It wishes to have them investigated. The Burger brothers were at one stage in control of a substantial group of companies. Those companies have collapsed. One knows from experience that trusts can be used to shield assets from creditors. One also knows from experience that when a substantial family-controlled group of companies goes bankrupt, it often transpires that the individuals behind the group abused the group's affairs for their personal benefit. I do not say that this happened in the present case but it is a matter worth investigating.

[17] The financial statements forming part of the record reflect various transactions in which the Burgers or family trusts were involved. The following examples suffice to demonstrate that there is material, relevant to the Burgers' personal affairs, which could usefully be investigated:

[a] Etbur is a Namibian company of which the Burger brothers were, as at February 2012, the directors and shareholders.[3] As at February 2012 Etbur had made loans to the brothers of R599 381 and R382 866.[4] What became of these funds? (Since the brothers are the shareholders of the company, any residual value in the company will represent further value in the estates of the brothers. The financial

[3] Record 218 and note 4 at record 225.
[4] Record 210 read with note 4 at record 225.

statements in question reflect that the value of the company's assets exceeds its liabilities by R3 303 323.)

[b] The brothers were also the directors and shareholders of SBE (their sister was also a director). As at February 2012 the brothers had lent SBE R2 326 484 and R2 755 739 respectively, of which R652 744 was lent during the year ended February 2012 (one can pick this up from the prior-year figures).[5] From where did they get the money which enabled them to make the substantial loans?

[c] One of the property companies with which the brothers are associated is called Purple Rain Properties 437 (Pty) Ltd. In note 12 of this company's financial statements for the year ended 29 February 2012, being the notes dealing with related party transactions, it is recorded that the JDP Trust (of which Jannie Burger was a trustee[6]) owed the company R817 110.[7] The company's trial balance reflects that Jannie Burger in his personal capacity had a loan claim against the company of R302 555 as at February 2012.[8] (The latter loan claim, I should mention, appears to be an additional asset in Jannie Burger's estate, not mentioned in the founding or answering papers.) What did the JDP Trust do with the money obtained from the company and who in particular benefited from the payment; and where did Jannie Burger obtain money to make the loan to the company?

[d] Another of the property companies is Purple Rain Properties 352 (Pty) Ltd. From the company's financial statements it appears that its shareholder was the Jannie Burger Eiendomme Trust. The notes to the financial statements indicate that the company was a debtor to Jannie Burger as at February 2011 in the amount of R1 169 384 but that this amount was repaid during the year ended February 2012 (the loan account had a nil balance on the latter date). The same note indicates that as at February 2011 the JDP Trust owed the company R213 460 but that the said trust was able to repay the money during the year ended February 2012.[9] What did Jannie Burger do with the substantial sum which was repaid to him during the year

[5] Record 246 read with 240.
[6] See record 230.
[7] Record 446 read with trial balance at 445.
[8] Record 445.
[9] Record 450.

ended February 2012; and where did the JDP Trust obtain the money to make repayment to the company during that year?

[e] Yet another property company is Purple Rain Properties 411 (Pty) Ltd. Again, its shareholder is the Jannie Burger Eiendomme Trust. During the financial year ended February 2012 the JDP Trust lent the company R423 892. During the same financial year the company repaid the Jannie Burger Eiendomme Trust R320 261.[10] Similar questions to those which I have posed rhetorically in respect of other transactions arise here.

[f] The brothers are also associated with a company called DMJ Boerdery (Pty) Ltd. Both are listed among its shareholders in note 4 to its financial statements for the year ended February 2012.[11] The financial statements reflect that as at February 2012 Jannie and Martin Burger had loan claims against the company of R64 881 and R921 956 respectively. (Again, these loan claims have not been taken into account in the discussion of the Burgers' assets.)

[g] The notes to the financial statements of the JDP Trust for the year ended February 2012 show that the Trust had a loan claim of R1 726 529 against Jannie Burger, of which R1 610 276 was lent to him during that financial year.[12] What did he do with the proceeds?

[h] One of the allegations of irregularity contained in the founding affidavit is that during late 2011 or early 2012 Jannie Burger sold certain trailers which belonged to SBT at a price below that which SBT had negotiated with the purchaser, and that the proceeds of the sale were recouped not by SBT but by an entity known as Virtigo Properties 33 (Pty) Ltd ('Virtigo'), of which Jannie Burger was alleged to be the 'corporate controller'. In his answering affidavit, Jannie Burger denied that the transaction was fraudulent. He confirmed his direct involvement in the transaction and said that 'to the best of his knowledge' the trailers were not sold below the negotiated price. He said that he derived no personal benefit from the transaction and denied that he was the 'corporate controller' of Virtigo. The financial statements

[10] Record 454.
[11] Record 413 in Case 10680/2013.
[12] Record 233.

of the company as at February 2013 show, however, that Jannie Burger was a director until 30 November 2012 and that since then the sole director has been his wife Cheryl.[13] Note 5 to the financial statements indicates that the shareholders of Virtigo as at February 2013 were Jannie Burger and the JDP Trust. This calls into question Jannie Burger's denial that he was the effective controller of Virtigo. Significantly, note 5 indicates that as at February 2012 Jannie Burger had a loan claim against Virtigo of R6 952 495 and that during the financial year ended February 2013 he was repaid R3 313 296, yielding a reduced balance owing to him as at February 2013 of R3 639 199.[14] Jannie Burger thus had substantial resources to lend to Virtigo and received a substantial amount in repayment during the year ended February 2013. Creditors are entitled to know where he initially obtained the funds to lend to Virtigo and what he did with the amount of more than R3,3 million repaid to him during the financial year ended February 2013. (I note, again, that the loan claim has not been taken into account in the computation of Jannie Burger's assets.)

[18] It is also common cause that Jannie Burger's wife Cheryl ran a successful 'tuck shop' from SBT's business premises and that over the period September 2009 to December 2012 its turnover was about R9,5 million. Creditors are entitled to ascertain how Cheryl Burger funded the tuck shop business and whether it was in truth (as Jannie Burger alleges) her separate enterprise. Upon Jannie Burger's sequestration, the assets of Cheryl Burger will vest in his trustee (s 21(1) of the Insolvency Act), and the trustee will only have to release the assets to her if one or other of the circumstances set out in s 21(2) is satisfied. This would entail an enquiry into whether she acquired the assets in question by a title valid against Jannie Burger's creditors.

[19] In regard to the requirement of advantage to creditors, the test at the provisional stage is whether the court is 'of the opinion that *prima facie*' there is 'reason to believe' that it will be to the advantage of creditors if the estate is sequestrated. For a final sequestration order (which is what I am dealing with), the test is whether the court 'is satisfied' that there is 'reason to believe' that it will be to

[13] Record 394.
[14] Record 402.

the advantage of creditors if the estate is sequestrated. I do not need to find that on a balance of probability advantage will accrue. I must simply be satisfied that there is reason to believe that an advantage will accrue, which is a considerably lower threshold (see *Amod v Khan* 1947 (2) SA 432 (N) at 437-438; *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) at 592C—H; *Hillhouse v Stott & others cases* 1990 (4) SA 580 (W) at 585C-F; *Epstein v Epstein* 1987 (4) SA 606 (C) at 609B-D) . The attitude of creditors, where such views are not materially divergent, can be taken into account in assessing the question of advantage to creditors (see, for example, *Kempff v Amod Essa & Co* 1934 TPD 139 at 141-2; *Geo Browne & Son v McFarlane* 1936 NLR 268 at 273-4). In the present case there is only one independent creditor, the IDC. The IDC's claim represents far and away the largest component of the Burgers' debts. The IDC considers that sequestration will be in its interests.

[20] All things considered, the prospect of a not insubstantial monetary dividend (albeit a very small dividend in the rand), coupled with the not too remote prospect of the recovery of further assets through a process of inquiry in the insolvent estates (see *Commissioner, SARS v Hawker Air Services (Pty Ltd* 2006 (4) SA 292 (SA) para 29)), satisfies me that there is reason to believe that it will be to the advantage of creditors if the estates of the Burgers sequestrated. In the circumstances, I see no basis to exercise the court's residual discretion against the granting of final orders.

[21] Mr Alberts argued that, even if the papers satisfied me that there was reason to believe that sequestration would be to the advantage of creditors, I should nevertheless consider whether a referral to oral evidence (for which his clients asked) would disturb that assessment. He referred in that regard to *Mahomed v Malk* 1930 TPD 605 and *Hilleke v Levy* 1946 AD 214. These cases do not support Mr Albert's contention. *Hillike* dealt with an application for a final interdict. *Mahomed*, like the present case, dealt with the return day of a provisional sequestration order. However, the point in dispute in that case was whether the debtor had committed an act of insolvency. The petitioning creditor was obliged to prove on a balance of probability that an act of insolvency had been committed. Because final relief was being sought, the usual rule applied in the resolution of factual disputes in motion proceedings. Tindall J, delivering the judgment of the full bench, said that such a

question could not usually be decided simply on a balance of probabilities based on an assessment of the affidavits. Resolution of the dispute required oral evidence unless the court was satisfied that oral evidence would 'not disturb this balance of probabilities' (at 619). He proceeded to say that such a conclusion might be reached if the debtor's version was so inherently improbable that it could not reasonably be true or if the admitted facts showed that the attack on the validity of the claim or on the grounds of insolvency was not honestly made or if for other sufficient reason the court was satisfied that the oral evidence would not disturb the balance of probabilities. By these remarks, it appears to me, the learned judge was intending to describe the circumstances in which a court considering the grant of final relief might conclude that there is no genuine dispute of fact. The authoritative test in that regard is now the one laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C. (The position where there are factual dispute at the provisional stage is somewhat different, because in that situation the court is entitled to determine whether the petitioning creditor has made out a *prima facie* case in the sense that the balance of probabilities on the affidavits favour the grant of a provisional order. If the petitioning creditor has made out a *prima facie* case in that sense, a court will not ordinarily accede to a request by the debtor to refer the matter to oral evidence at the provisional stage; but if at the provisional stage the balance of probabilities on the affidavits is not in favour of the petitioning creditor, the court has a discretion to allow oral evidence, such discretion being guided in the main by the prospect of oral evidence tipping the balance in favour of the petitioning creditor (*Kalil v Decotex (Pty) Ltd & Another* 1988 (1) SA 943 (A) at 975I-980A).

[22] Accordingly, if there were a genuine dispute of fact in the present case, the application for final sequestration orders would have to be dismissed unless the IDC requested (and was granted) a referral to oral evidence. The IDC has not made such a request, because Mr Woodland submits on its behalf that there is no genuine dispute of fact. In determining whether there is a genuine dispute of fact, it is important to appreciate the distinction between an enquiry into objective facts such as whether the petitioning creditor has a claim and whether the debtor has committed an act of insolvency, and an enquiry into whether there is reason to believe that sequestration will be to the advantage of creditors. The latter enquiry

calls for a value judgement. Where the advantage to creditors is said to lie in the pecuniary benefit which may be yielded by investigation, the court, in making its value judgement, does not necessarily need to resolve disputed allegations of impropriety on the part of the debtor. The very fact that there are allegations of impropriety is a relevant consideration, even though they may be disputed. The court cannot be expected, in order to determine whether there is reason to believe that it will be to the advantage of creditors to grant a final sequestration order, to investigate and determine the very matters which the petitioning creditor says should be investigated by way of the machinery provided by the Insolvency Act. Where a court grants a final sequestration order because of the benefits which might flow from future investigation, the possibility always exists that in the event the investigation will not bear fruit. That does not mean that the court, when it granted the final order, erred in being satisfied that there was reason to believe that sequestration would be to the advantage of creditors.

[23] I thus grant final orders in both cases.

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ROGERS J

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