



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Before: The Hon. Mr Acting Justice Montzinger

Hearing: 05 November 2021

Judgment: 17 November 2021

Case number: 17697/21

In the ex parte application of:

JOCHEN ECKHOFF N.O.

First Applicant

NURGEHAN ABDOOL GAFAAR OMAR N.O.

Second Applicant

(in their capacities as the duly appointed joint liquidators of JCICC 100 CC – in provisional liquidation)

Case number: 17696/21

In the ex parte application of:

JOCHEN ECKHOFF N.O.

First Applicant

SIFISO STEPHEN NYONI N.O.

Second Applicant

(In their capacities as the duly appointed joint provisional trustees of the insolvent joint estate of Jerome Benjamin Swartz and Lucille Swartz)

JUDGMENT**DELIVERED BY E-MAIL ON WEDNESDAY 17 NOVEMBER 2021**

MONTZINGER AJ:

[1] Two ex parte urgent applications came before me on 27 October 2021. In matter under case number 17697/21 the applicants sought the extension of their powers as joint liquidators in the insolvent estate of a provisionally liquidated close corporation known as JCICC Network 100 CC (“the JCICC application”). In matter under case number 17696/21 the joint provisional trustees in the insolvent estate of Mr and Mrs Swartz sought substantially the same relief (“the Swartz application”).

[2] In addition, in both matters, the applicants sought an order authorising the South African Police Services or the Sheriff of the High Court to enter and search any premises at which property belonging to the insolvent close corporation and joint estate is found and to take possession of such property.

[3] Although the applications were launched on an ex parte basis both, out of caution, were served on the insolvents, Mr. and Mrs. Swartz. The result of this cautionary approach was that Mr. Sitzer, the Swartz’ attorney, and counsel appeared on the hearing date in both applications seeking an opportunity for Messrs Sitzer and Swartz to file opposing papers in both applications. After argument the request was granted and the matters were postponed with directives for the filing of affidavits, if any, by Wednesday 3 November 2021. Messrs Sitzer and Swartz filed affidavits. The applicants replied and both applications were argued on 5 November 2021.

[4] This Court granted orders in respect of both applications individually on Monday 8 November 2021, without reasons, but with the undertaking that reasons will be provided at a later stage. Although the two applications are distinct from each other there is a substantial amount of overlap between the parties involved and the facts that underlie both matters. For that reason, a single judgment is handed down containing the reasons for both orders issued.

[5] Two issues required consideration. Whether the applicants in both applications have made out a case for the extension of their powers as liquidators and provisional trustees. Further, whether the applicants have made out a case for an interdict to search and find property belonging to the insolvent estates.

THE JCICC APPLICATION

[6] Prior to JCICC's provisional liquidation Mr Swartz was its sole member. From the record it appears that a commercial relationship of significant value existed between JCICC and Standard Bank. This relationship was regulated by business loan, instalment sales and commercial property finance agreements. JCICC defaulted on its obligations in terms of these agreements and its conduct resulted in Standard Bank applying for its liquidation based on a claim of R 12 million excluding interest and costs.

[7] There was an attempt at opposing the liquidation application in the form of a business rescue application, which was unsuccessful. Consequently, JCICC was provisionally liquidated on 09 June 2021. It also appears from the record that the final

order of liquidation is also opposed, is part heard and is set to conclude, before a different judge, on 22 November 2021.

[8] On 7 July 2021 the applicants were appointed by the Master of the High Court as the liquidators of JCICC and soon after assumed their positions to take control of the assets of the provisionally liquidated close corporation. Their appointment is final as no provisional liquidators are appointed in respect of a close corporation¹.

[9] Since 15 July to 13 September 2021 representatives from the applicants' office have endeavoured to obtain information from Mr Swartz with regards to the assets of JCICC. Mr Sitzer represented Mr and Mrs Swartz and was the channel of communication with the applicants. On consideration of the correspondence in the record it appears that Mr Swartz have employed a Stalingrad approach to the persistent but patient requests from the liquidators. On the date the applications were heard and even after the opposing affidavits were filed uncertainty over the assets of JCICC still existed.

[10] By law the liquidators are only empowered to exercise the powers listed in s 386(4)² of the 1973 Companies Act if they are granted authority to do so. Section 386(3)(a) of the 1973 Companies Act specify that the authority can only be obtained from a meeting of creditors and members or contributories or on the directions of the Master under s 387. If the liquidators cannot obtain directions from creditors³ and none of the circumstances in s 387(2) of the 1973 Companies Act is present, then the only

¹ Section 66 of the Close Corporation's Act

² Read with item 9 of schedule 5 to the 2008 Companies Act, further read with s 66 of the Close Corporations Act

³ Who have proved a claim against the estate

other remedy open to the liquidators is to approach the court in terms of s 386(5) for such powers as are necessary for the winding up of the affairs of the close corporation.

Conclusion on the JCICC application

[11] It is common cause that no creditors meeting has been convened yet. The liquidators also cannot approach the Master as they are not able to refer any matter for the directions by creditors and members or contributories in a general meeting. It is apparent that Mr Swartz is currently engaged in litigation against the liquidators. Not allowing the liquidators to defend and bring legal proceedings can surely not be in the best interest of the creditors.

[12] Considering the lack of cooperation from Messrs Swartz and Sitzer the liquidators will possibly be required to institute further legal proceedings to compel the disclosure of vehicles and/or to interdict the continued use of the assets, by third parties, who is doing so without the approval by the liquidators.

[13] To therefore approach the court and seek to be granted the power to institute and defend legal proceedings and to ratify actions already taken for purposes of this application, is the only feasible approach and seems to be the most prudent way to safeguard the liquidators and the interest of the general body of creditors. There is no real opposition on the papers to this relief and the applicants are thus entitled to an order.

[14] JCICC seems to be the vehicle through which at least two businesses were operated. The main business of JCICC is described as *investment in immovable property* while allegations are also made about a possible car rental business also conducted under the auspices of JCICC. Section 386(4)(f) of the 1973 Companies Act empowers the liquidators to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof. Seems to me that Mr Swartz does not want interference in the management of the business of JCICC by the liquidators, as he is likely still benefitting from the proceeds of the continued operations of the provisionally liquidated close corporation. All assets of JCICC should be under the control and management of the liquidators.

[15] Messrs Swartz and Sitzler, in their correspondence with the liquidators, claim the existence of various agreements concluded between JCICC and various other entities. The nature and extent of these agreements are not explained or known. The liquidators must get control over these agreements and determine whether they benefit the general body of creditors. I can therefore see no reason why the liquidators are not entitled to this relief.

[16] It seems Mr Swartz's objection to the relief is the fear that JCICC will suffer commercial damage if the liquidators are allowed to sell the assets, in particular the cars of the rental business. This fear is not well founded as it is apparent from a reading of the founding affidavit that the liquidators simply seek the power to secure the assets of JCICC. In any event the liquidators are only empowered to sell assets after compliance with prescribed procedures that requires either approval from the Master or at a general meeting of creditors.

[17] With regards to the powers to continue the business operated by JCICC the attempt to oppose this relief is self-defeating. Mr Swartz appears to want the business operations of JCICC to continue but he does not want the liquidators to do so. As mentioned, it seems to me Mr Swartz seek to keep control over the affairs and assets of JCICC to the detriment of the general body of creditors and the lawfully appointed liquidators. Without a court empowering them to do so, liquidators are not empowered to continue the business of the provisionally liquidated close corporation. They have approached the court for exactly that purpose and has made out a clear case why they should be granted the powers.

THE SWARTZ APPLICATION

[18] The joint estate of Mr. and Mrs. Swartz was provisionally sequestrated by this court on 10 June 2021.

[19] As mentioned Mr. Swartz is not only the sole member of JCICC, but also of another close corporation known as Pygon Trading CC. Pygon Trading was also provisionally liquidated on 18 May 2021. The applications for the final liquidation orders of JCICC and Pygon are also part heard and set to continue on 22 November 2021.

[20] On perusal and consideration of the opposing affidavits by Messrs Swartz and Sitzer, it was apparent that no real opposition to the relief is discernible. It is demonstrably obvious that the trustees must engage in legal proceedings on behalf of the insolvent estate. They must do so since Mr. Swartz owned memberships in various

closed corporations, i.e., at least JCICC and Python. In fact, instead of assisting the trustees Mr. Swartz seems to be content to rather litigate to the prejudice of the creditors of the insolvent estate. Furthermore, he refuses to cooperate with the trustees to locate the whereabouts of all the movable assets. Mr Swartz has rather been deliberately evasive, notwithstanding his responsibilities imposed on him by the Insolvency Act⁴.

[21] Since the collection and control of assets are at stake it is important to point out that by law and specifically in terms of s 20(1)(a) of the Insolvency Act⁵ that: *“The effect of the sequestration of the estate of an insolvent shall be (a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of trustee, to vest the estate in him”*.

[22] Section 18(3) of the Insolvency Act empowers a provisional trustee, on appointment, with all the powers and duties of a trustee⁶. Reading s 20 and ss 18(3) together it is self-evident that upon sequestration and the appointment of the provisional trustee all the assets of the insolvent estate falls under the control of the provisional trustee. The provisional trustee takes control of the assets within the limitation of the powers and duties of a trustee prescribed by the statute. However, the taking control of the insolvent estate is done in the context and understanding that it is not the function of the provisional trustee to start winding up the estate but merely to take physical control and preserve it for creditors until a trustee is appointed⁷.

⁴ Inter alia s 23 of the Insolvency Act

⁵ 16 of 1943

⁶ *Bremer Meulens (Edms) Bpk v Tzerfos* 1978 (3) SA 892 (O) at 895

⁷ *Goodwin Stabel Trust v Duohehex (Pty) Ltd* 1998 (4) SA 606 (C) at 620

[23] However, the Insolvency Act caters for two limitations to the provisional trustee's ability to execute his/her duties. Firstly, the sale of estate assets can only occur with the authority of the court or the Master. Secondly, the trustee cannot institute or defend legal proceedings on behalf of the insolvent estate, unless the court is approached to obtain authority to institute legal proceedings.

Conclusion on the Swartz application

[24] Should a situation arise that a provisional trustee is handicapped in executing his/her functions or should the need arise to legally represent the interest of the insolvent estate the trustee has the right to approach a court for the extension of powers. In this case the provisional trustees are demonstrably handicapped in their endeavours to take control of the assets of the insolvents. With all the ongoing litigation it is reasonable to assume that a first meeting of creditors will not be held until sometime early in 2022. This situation is prejudicial to the body of creditors.

[25] The conduct by Mr Swartz as highlighted when the JCICC application was discussed above, is equally applicable to the relief sought in this application. There is in fact no opposition with a degree of merit in respect of this application. The applicants are thus entitled to the relief they seek.

THE INTERDICTIONARY RELIEF IN BOTH APPLICATIONS

[26] The applicants seek an interim order to search and seize property, wherever it may be, of both the Swartz and JCICC insolvent estates. The relief is interim in nature

as the status of both matters are 'provisional' and may be affected by whether final orders are granted or not. To obtain interim interdictory relief a litigant must overcome four requirements as established in the judgment of *Setlogelo*⁸.

[27] In both applications the applicants have established a clear right. The liquidators in terms of s 386 of the 1973 Companies Act while the trustees in terms of s 69(1) of the Insolvency Act. Having established a clear right this Court was constrained to conclude that there is no further need to enquire whether the right exists⁹, in respect of both applications. Both sets of applicants are thus entitled to protection of these rights.

[28] Before an interim interdict may be granted, one of the requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing and must not have taken place already¹⁰. However, if an applicant can establish a clear right an apprehension of irreparable harm need not be established¹¹.

[29] This Court has already found that the applicants have established a clear right that requires protection. A harm analysis is thus not necessary, but for the avoidance of doubt the suffering of harm is obvious, for all the reasons canvassed in this

⁸ *Setlogelo v Setlogelo* 1914 AD 221 later confirmed in *Webster v Mitchell* 1948 (1) SA 1186 (W)

⁹ See ft10

¹⁰ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*) at para 25.

¹¹ *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality, Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) 267

judgment, since without protection neither the liquidators nor provisional trustees will be able to execute their statutory duties to the benefit of the body of creditors.

[30] Next is the balance of convenience consideration. This Court has already found that the applicants will suffer harm if the interim interdict is not granted. Harm is also an element of the balance of convenience enquiry¹². Since harm is present, the balance of convenience favours the granting of an interdict.

[31] Regarding the requirement that an applicant seeking an interdict should not ask for one if an alternative remedy is available, it was contended in the opposing affidavit that the applicants do have an alternative remedy in terms of s 69(3)¹³ of the Insolvency Act as it can issue writ of attachments in the magistrate's Court. It is so that the mentioned section allows for a situation where a liquidator or provisional trustee can approach a magistrate court in the area in which assets of the insolvent estate is situated, to issue a warrant to search for and take possession of the assets.

[32] However, to succeed with an interim interdict and to comply with the requirement that no other alternative remedy is available the legal position¹⁴ is that the alternative remedy must: (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection.

[33] Considering the facts and circumstances of these applications I cannot agree that to embark on a process as prescribed in s 69(3) will serve as an adequate

¹² *Harnischfeger Corporation & another v Appleton & another* 1993 (4) SA 479 (W) at 491 B-E

¹³ This section also applies to close corporation by virtue of s 339 of the 1973 Companies Act

¹⁴ See inter alia: *Hotz and Others v University of Cape Town* [2016] 4 All SA 723 (SCA), 2017 (2) SA 485 (SCA)

alternative. The process does not appear to be logistically viable and neither cost nor time effective. Moreover, I am of the view that Mr. Swartz caused the ineffectiveness of s 69(3) as an alternative as the applicants are still in the dark with regards to where all the movable assets are, to which extent they are safe and secure, and to which extent the insolvent estates will not be prejudiced. Neither the liquidators nor provisional trustees have an idea of the true extent, nature, and location of the assets in both insolvent estates. It would be highly impractical and superfluous to follow the steps in s 69(3) of the Insolvency Act. Section 69(3) therefore does not present an adequate alternative remedy.

[34] In both applications the applicants have therefore made out a case for an interim interdict.

CONCLUSION AND ORDER

[35] Having regard to the circumstances that compelled the applicants to approach this Court for the relief contemplated in the two notices of motion, I am satisfied that a proper case was made out for the relief in both applications, and I thus granted the orders marked "X", respectively, on 8 November 2021 in matters with case numbers 17696/21 and 17697/21.


A. MONTZINGER
Acting Judge of the High Court

Appearances:

Applicants' counsel:	Adv B Manca SC
Applicants' attorney:	ENS Attorneys
Counsel for Messrs Swartz and Sitzer:	Adv Botha
Attorney Messrs Swartz and Sitzer:	Sitzer & Associates