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

CASE NOS: 348/2021 and 10047/2021

In the matter between:

JEAN PIERRE LE ROUX Applicant

and

PERMASOLVE INVESTMENTS (PTY) LTD Respondent

In the application of:

PERMASOLVE INVESTMENTS (PTY) LTD First Applicant

THE TRUSTEES FOR THE TIME BEING OF THE ST JOHN'S ROAD TRUST Second Applicant

THE TRUSTEES FOR THE TIME BEING OF THE PRB PROPERTY HOLDING TRUST Third Applicant

THE GORLESTON (PTY) LTD Fourth Applicant

REGAL HOLDING (PTY) LTD Fifth Applicant

In re:

JUAN PIERRE LE ROUX First Respondent
(Identity Number [….])
Residence: Sydney, Australia

NATASHA LE ROUX Second Respondent
(Identity Number [….])

In the application of:

SIVALUTCHMEE MOODLIAR N.O First Intervening Applicant

JANINE ADELE SNYDERS N.O Second Intervening Applicant

In re:

PERMASOLVE INVESTMENTS (PTY) LTD First - Fifth Applicants

& 4 OTHERS

and

JUAN PIERRE LE ROUX First Respondent
(Identity Number [….])
Residence: Sydney, Australia

NATASHA LE ROUX Second Respondent

REASONS FOR JUDGMENT

Delivered electronically on 11 February 2022

FRANCIS, J

INTRODUCTION

[1] This matter concerns three separate but inter-related applications.

[2] The first application is a rescission application lodged by Jean Pierre Le Roux ("Le Roux") against a judgment obtained by default against him by Permasolve Investments (Pty) Ltd ("Permasolve").

[3] The second application involves an application to confirm the provisional sequestration order obtained against the estate of Le Roux ("the main application"). The provisional sequestration order was granted pursuant to an *ex parte* application brought by Permasolve, The Trustees for the Time Being of the St John's Road Trust, The Trustees for the Time Being of the PRB Property Holding Trust, The Gorleston (Pty) Ltd, and Regal Holding (Pty) Ltd (collectively referred to as the "applicants").

[4] The third application involves an application to intervene brought by Sivalutchmee Moodliar N.O and Janine Adele Snyders N.O ("the intervening applicants") in their capacity as the joint provisional liquidators of Gridco Building Construction (Pty)

Ltd (in liquidation) ("Gridco"). Le Roux is a 90% shareholder and director of Gridco. The intervening applicants applied for leave to intervene in the main application and for their own provisional order in the event that the main application was not successful. They have also applied for certain ancillary relief relating to their functions as provisional liquidators of Gridco.

[5] The main application as well as the intervention application were set down to be heard on 10 and 11 November 2021 while the rescission application was set down on the unopposed roll for 10 November 2021. Representations were made by Le Roux to have the rescission application heard simultaneously with the main and intervening applications and this request was subsequently granted by the Judge President.

[6] After hearing argument on each of the three applications, the legal representatives for the applicants as well as the intervening applicants requested that I hand down the order as soon as possible with reasons to follow. This request was motivated on the basis that an order restraining Le Roux's funds in Australia was in place until 19 November 2021 and the order of this court would have a bearing on that order. Given the complexity of this matter and the voluminous record, it was clearly not possible to produce a reasoned judgment by the time the court order obtained in Australia would come up for reconsideration. The legal representatives for Le Roux did not register any objection. Accordingly, I handed down the order on 16 November 2021 and now provide the reasons therefor.

[7] For the sake of completeness, I reproduce the order granted:

> *"1. The application under case number 348/2021 is dismissed with costs.*
>
> *2. The intervening applicants are authorised in terms of section 386(5) of the Companies Act 61 of 1973 ("the 1973 Act"), as read with item 9(1) of schedule 5 of the Companies Act 71 of 2008, to exercise the following powers in the administration of Gridco Building Construction (Pty) Ltd (in liquidation) ("the company"):*
>
> *2.1 to institute or defend any legal proceedings on behalf of the company, including bringing this application;*
>
> *2.2 to compromise, admit or settle any claims or demands against the company that the company has against any other party;*
>
> *2.3 to obtain the advice and services of attorneys and counsel where required and conclude agreements with the intervening applicants' attorneys in terms of the provisions of section 73 of the Insolvency Act 24 of 1936, as read with the provisions of the 1973 Act; and*

2.4 the actions performed by the intervening applicants thus far in taking control of the company and in bringing this application are confirmed and ratified.

3. The intervening applicants are granted leave to intervene in the applicants' sequestration application against the respondents under case number 10047/2021.

4. The rule nisi issued on 17 June 2021, and extended on 19 August 2021, is made absolute and the estate of (Le Roux) is placed under final sequestration.

*5. This order will be served on the respondents by email to the first respondent's attorneys of record in South Africa at **laverne@constructionlaw.co.za**.*

6. The costs of the applicants and the intervening applicants, including those costs incurred as a result of the opposition of (Le Roux), will be costs in the administration of (Le Roux's) insolvent estate, and shall include the costs of two counsel."

BACKGROUND

[8] Before addressing each of the applications, I provide a brief background to give

some context to the applications. This description is based on facts which are either common cause or are not seriously placed in dispute by the parties.

[9] All three applications are linked in some way to Gridco and the subsequent liquidation of this company.

[10] Le Roux applied to place Gridco in business rescue and this was effected on 18 April 2019. The business rescue process was not successful and the business rescue practitioner, Johannes Klopper, applied for an order to discontinue the business rescue proceedings. He also simultaneously applied to place Gridco in liquidation, being of the view that there were no reasonable prospects of rescue and that Gridco was factually and commercially insolvent.

[11] On 30 July 2019, Gridco was placed – unopposed – in provisional liquidation.

[12] On 8 October 2020, despite opposition from Le Roux, Gridco was placed in final liquidation. Le Roux applied for leave to appeal the final order but this application was refused. He subsequently petitioned the Supreme Court of Appeal ("SCA") for leave to appeal but this application, too, was dismissed on 28 April 2021. Gridco remains in final liquidation.

[13] Le Roux stood as surety for a lease entered into between Gridco and Permasolve and was sued in this capacity by Permasolve for alleged breaches of the lease

agreement. Permasolve subsequently obtained judgment by default against Le Roux on 16 March 2021 in the amount of R908 313.71 plus interest thereon and costs.

[14] By the time default judgment was granted in favour of Permasolve, Le Roux had moved to Australia and had disposed of almost all his assets in South Africa, save for a property situated at 41 Bay Beach Avenue, Sunset Links, Milnerton, Western Cape ("the Milnerton property"). This property was sold on 23 December 2020 for R9.1 million and was transferred to the new owner on 26 April 2021.

[15] Permasolve approached this court on an urgent and *ex parte* basis for a provisional sequestration order against Le Roux's estate. This order was granted on 17 June 2021.

[16] The proceeds from the sale of the property were transferred into Le Roux's bank account with the Commonwealth Bank of Australia ("CBA") on 22 June 2021.

[17] On 2 July 2021, Messrs Malcolm Steven Gore ("Gore") and Andre Botha October ("collectively referred to as the provisional trustees") were appointed as provisional trustees of Le Roux's estate.

[18] After some interaction between the provisional trustees and Le Roux's Australian solicitors, the parties reached an agreement in terms of which Le Roux is restrained from removing any assets or disposing of any such assets or

diminishing their value whilst in Australia. He is allowed to utilise monies out of the Australian bank account for ordinary living expenses and such like, provided that the funds in the account at CBA are not reduced below a combined balance of the monies received by Le Roux in respect of the proceeds from the Milnerton property, namely AUD794,585.60. In other words, at a minimum, the net proceeds of the sale of the Milnerton property are frozen in the CBA account. This agreement was made an order of court by the Federal Court of Australia: New South Wales District ("the Australian court") on 23 July 2021 (the "freezing order") and was subsequently extended to 19 November 2021.

[19] I now turn to consider each of the three applications. The parties filed voluminous documentation and the record extends to thousands of pages together with extensive heads of argument. The intervening applicants support Permasolve's main application and, quite understandably, there is a considerable overlap and duplication in both sets of papers. This has had a knock-on effect in that Le Roux filed separate opposing papers to each of the applications which has also resulted in some duplication. I do not intend traversing all the evidence or arguments proffered but will instead only recite those facts and arguments which I consider to be relevant to the decision that I have reached in respect of each of the applications.

THE RESCISSION APPLICATION

[20] The following facts are either common cause or were not seriously disputed by the parties:

[20.1] Permasolve concluded a written agreement of lease with Gridco for the office premises located at Suite 406, The Point, 76 Regent Road, Sea Point, Cape Town ("the leased premises"). The lease agreement was for a three-year period and was to terminate on 31 May 2018 but was subsequently extended to 31 May 2021.

[20.2] Le Roux bound himself jointly and severally with Permasolve as surety for, and principal debtor with, Gridco for the due performance by Gridco of its obligations to Permasolve. He chose his *domicilium citandi et executandi* ("*domicilium*") as the leased premises.

[20.3] For the period 1 June 2019 to 31 September 2019, Gridco allegedly underpaid certain amounts due under the lease agreement in the total sum of R134 585.17. As a result of this alleged breach, Permasolve cancelled the lease agreement on 16 September 2019.

[20.4] Gridco failed to vacate the premises and Permasolve was unable to re-let the premises from the termination of the lease agreement until January 2021.

[20.5] As a consequence of Gridco's alleged breach of the lease, Permasolve instituted action against Le Roux for the payment of the outstanding amounts owing under the lease and instituted a claim for "holding over" in respect of the early termination of the lease.

[20.6] The summons was purportedly served on Le Roux at his chosen *domicilium*.

[20.7] Le Roux failed to enter an appearance to defend and default judgment was granted on 16 March 2021 by the registrar under Uniform Rule 31(5)(a)[1] for:

> "*1. Payment in the amount of R908,313.71 (nine hundred and eight thousand three hundred and thirteen Rand and 71 cents);*
>
> *2. Interest on the aforesaid amount at the prescribed rate of interest a tempore morae; and*
>
> *3. Costs of suit, taxed on the scale as between attorney and own client, plus the Sheriff's fees.*"

[1] This rule states:

> "*Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, who wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant ...*"

[21] Le Roux lodged this application for rescission of the default judgment in terms of rule 31(2)(b) (a court may set aside a judgment "upon good cause shown"), alternatively rule 42(1)(a) (an order or judgment may be rescinded if the order or judgment was "erroneously sought or erroneously granted in the absence of any party affected thereby"), or further alternatively, the common law (a judgment may be rescinded if the defendant was not in wilful default and has a good and *bona fide* defence to the claim).

[22] Le Roux raised a number of defences in support of his application to rescind the default judgment which may be briefly summarised as follows:

[22.1] the judgment was invalid because the combined summons was not served at his *domicilium* address, or at all - the summons was served by affixing a copy to the post box situated in the foyer of the building on the ground floor rather than on his *domicilium* address which is situated on the 4th floor of the building;

[22.2] because Permasolve had cancelled the lease, there was no obligation on Gridco to pay the rental after the lease had been cancelled;

[22.3] Permasolve's claim for "holding over" with regard to the claim for the unexpired portion of the lease was not liquidated and, in effect, was a damages claim which could not to be granted by the registrar;

[22.4] the claim for rent for October 2019 was incorrectly claimed because the lease had already been cancelled; and

[22.5] the claims for water, electricity, and ancillary charges were inappropriately quantified and excessive.

[23] Permasolve mounted a spirited refutation of each of the defences raised by Le Roux. It also raised a point *in limine* to the effect that Le Roux lacked *locus standi* to bring the rescission application in his personal capacity.

[24] I will first deal with the point *in limine* relating to the issue of *locus standi* as this will determine whether it is necessary to proceed with a consideration of the merits of the rescission application.

[25] Section 20(1)(a) of the Insolvency Act states that:

"(*1) 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 a trustee, to vest the estate in him;"

[26] The vesting of the estate in the trustee once he or she has been appointed takes place when the provisional order is granted. In this regard, section 2 of the Insolvency Act defines a "sequestration order" as meaning "*any order of court whereby an estate is sequestrated and includes a provisional order, when it has not been set aside*". Thus, if a provisional trustee has been appointed pending the election of a permanent trustee, the estate vests in the provisional trustee until the appointment of a permanent trustee, if any.[2]

[27] It is the trustee who, being vested with the insolvent estate, has an interest in the property of the estate and, therefore, has *locus standi* to sue or be sued on behalf of the insolvent estate. The property that vests in the trustee is defined broadly and includes personal rights of action, being movable incorporeal property, that existed at the time of sequestration[3].

[28] According to the provisions of section 25 of the Insolvency Act, the insolvent does not regain his or her full legal standing until he or she is rehabilitated. An insolvent, however, is not absolutely barred from bringing or defending certain actions.

[2] Section 18(3) of the Insolvency Act.
[3] ***Voget v Kleynhans* 2003 (2) SA 148 (C)** at 152.

[29] As an insolvent, he or she can sue or be sued in the exceptional circumstances that are provided for under section 23 of the Insolvency Act. Section 23(6) of the Insolvency Act provides that:

> "*The insolvent may sue or be sued in his own name without reference to the trustee of his estate in any matter relating to status or any right in so far as it does not affect his estate in respect of any claim due to or against him under this section …*"

[30] Where the insolvent's trustee refuses to institute proceedings against a debtor for the recovery of any benefit to which the insolvent estate is entitled, the right of an insolvent to sue, by virtue of his or her reversionary interest in the insolvent estate, is recognised by the courts[4].

[31] It is not disputed that Le Roux's estate was provisionally sequestrated on 18 June 2021 and that the founding papers for his rescission application was issued and delivered on 22 July 2021. It is also not disputed that Le Roux did not obtain the consent of his provisional trustees or join them in the rescission proceedings. In addition, there is also no suggestion by Le Roux that the trustees have refused, or are not prepared, to bring an application to rescind the default judgment. He, therefore, does not have standing to bring this application. Indeed, Le Roux's lack of *locus standi* was expressly raised by Permasolve in its answering affidavit to the rescission application. In his reply, Le Roux appears to have acknowledged this

[4] See, ***Niewoudt v The Master and Others NNO* 1988 (4) SA 513 (A)** at 524H-525G.

deficiency by stating that he would join the provisional trustees in the rescission application proceedings. This was not done.

[32] Counsel for Le Roux submitted during argument that Le Roux ought to be allowed to bring the rescission application because the failure to do so would deprive him of his constitutionally guaranteed right to have his dispute heard. The right relied on is section 34 of the Constitution which states:

> "*34* ***Access to courts***
>
> *Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*"

[33] There are several difficulties with this line of argument and the manner in which it was presented:

[33.1] Firstly, this constitutional argument does not appear anywhere in Le Roux's affidavits or even in his heads of argument. The import of this argument is, in effect, a challenge to those provisions of the Insolvency Act which preserve the right to sue in the circumstances of this application to Le Roux's trustees. Where reliance is placed on

the Constitution in asserting a litigant's rights, accuracy in pleadings is of the utmost importance[5].

[33.2] The access to court argument was presented right at the end of oral argument before this court - in reply. This is fundamentally unfair to the other parties as they did not have an opportunity to reflect on, engage with, or confront this constitutional argument.

[33.3] This argument is, in any event, misconceived as none of Le Roux's rights have been taken away. The trustees, in the exercise of their functions, may exercise their section 34 rights in the event that it is necessary to approach a court or any tribunal to protect or preserve any property in the insolvent estate.

[34] On the evidence before me, I am satisfied that Le Roux lacks the necessary legal standing to bring the rescission application in his personal capacity. In the circumstances, it is not necessary to make any determination on the merits of the application.

THE INTERVENTION APPLICATION

[35] The intervening applicants, as joint provisional liquidators of Gridco, seek three distinct forms of relief:

[5] ***Phillips and Others v National Director of Public Prosecutions*** **2006 (1) SA 505 (CC)** para 40.

[35.1] leave to intervene in the main application;

[35.2] an extension of their powers as the liquidators of Gridco; and

[35.3] their own provisional sequestration order against Le Roux in the event that this court discharges the provisional order in the main application.

[36] The intervening applicants assert that they have two claims against Le Roux's estate:

[36.1] A loan account claim of at least R10.39 million which Le Roux allegedly owes Gridco ("the loan account claim"); and

[36.2] A claim in relation to the cost orders which Gridco has against Le Roux arising out of his opposition to Gridco's liquidation. In this regard, the SCA bill of costs have been taxed in the amount of R61 606 and 50% of this amount is owed, due, and payable to Gridco, i.e. a sum of R30 803. At the stage that the intervention application was lodged, the costs orders in the court *a quo* relating to the liquidation application and the application for leave to appeal had

not yet been taxed. The untaxed bill of costs exceeds R750 000, the undisputed portion thereof being at least R445 000.

[37] Le Roux, for his part, opposed the application to intervene principally on the basis that he did not owe Gridco any money on loan account and he also disputed the amounts claimed in respect of the untaxed bill of costs and the proportionate share of the costs that he was liable for.

[38] On the available evidence, there cannot be any dispute that Gridco, at the very least, has a liquidated claim in excess of R100 against Le Roux's estate in respect of the SCA taxed costs which remain unpaid. Gridco is thus a creditor of Le Roux's estate. Accordingly, the provisional liquidators have the necessary legal standing to institute both the proceedings relating to the intervention application and the provisional sequestration proceedings, should this be necessary.

[39] It is generally accepted that an intervening creditor may intervene at any stage to either support a sequestration or to have a rule *nisi* discharged. The legal position was summarised thus by the court in ***Levay***[6]:

"*It is well established that an intervening creditor may be given leave to intervene at any stage, either to oppose a sequestration or to have a rule nisi discharged. A creditor may also intervene when an applicant for a*

[6] ***Levay and Another v Van Den Heever and Others N.N.O*** **2018 (4) SA 473 (GJ)** at para [11].

sequestration order does not proceed with his application or does not succeed therein. The court takes a practical view in these matters and also bears in mind the interests of the general body of creditors. The practice in insolvencies is unique as it is neither a pure intervention nor a substitution and is sui generis from a procedural point of view. The aforesaid principles have been summed up in ***Fullard v Fullard 1979 (1) SA 368 (T)***."

[40] Furthermore, the intervening applicants in this matter also have a direct and substantial interest in bringing the intervention application. I agree with their submissions that if the provisional order was discharged in the main application, this would have deleterious consequences for all the creditors of Le Roux, including Gridco. As noted earlier in this judgment, a freezing order was obtained in the Australian court by the trustees of Le Roux's estate. This freezing order was granted because the provisional sequestration order was in place and the Australian court recognised the trustees' authority and standing. If the main application was to be discharged, there is a distinct possibility that the freezing order would likewise be discharged and the South African creditors, including the provisional liquidators with their claims against Le Roux, will have little hope of being paid as Le Roux's assets would be beyond the reach of this court and any execution process.

[41] It is for the above reasons that I had little hesitation in granting the order permitting the provisional liquidators to intervene in the main application.

[42] The intervening applicants have applied for the extension of their powers:

[42.1] to institute or defend any legal proceedings on behalf of Gridco, including this application;

[42.2] to compromise, admit or settle any claims or demands against Gridco or that Gridco has against any other party;

[42.3] to obtain the advice and services of attorneys and counsel where required and conclude agreements with the intervening applicants' attorneys; and

[42.4] that all the actions performed by the intervening applicants thus far in taking control of Gridco and bringing this application, be confirmed and ratified.

[43] In motivation of their application for an extension of powers, the intervening applicants contend that the second meeting of creditors where they would ordinarily obtain the necessary authority, is many months away. They submit that they cannot afford to wait out the many months it takes to convene the second meeting of creditors because urgent steps are required in order for them to secure

and realise Gridco's assets, including the claims which Gridco has against Le Roux.

[44] The intervening applicants, furthermore, submitted that they required the assistance of legal advisors to launch this application on an urgent basis, and the ancillary relief sought, which involved relatively complex matters. Le Roux has departed to Australia with the vast majority of his assets and the intervening applicants do not wish to risk the *consursus* being terminated and the freezing order being jeopardised if the main application was to be discharged.

[45] The Master, too, has indicated that there is no difficulty with the extension of powers application.

[46] Le Roux opposes the extension of powers application on the basis that an extension of powers is not necessary as Gridco's creditors will still need to vote on whether to confirm the intervening applicants' appointment as the final liquidators. In his view, by approaching the court for an extension of powers, the intervening applicants wish to circumvent the meeting of creditors which is the correct forum where such powers should be requested and authority obtained to incur expenditure. Le Roux submits further that the intervening applicants have aligned themselves with the "Berman brothers", who are allegedly the controlling minds of the applicants in the main application, and he does not believe that they intend to act in the best interests of Gridco's general body of creditors, including himself. In

addition, according to him, the extension of powers application is calculated to appoint legal representatives at rates which are in excess of the rates prescribed by the Uniform Rules of Court. The legal representatives will perform functions which should ordinarily be within the purview of the liquidators, and these legal representatives will submit bills, and be paid therefor, without their bills being taxed.

[47] Finally, Le Roux submits that there is a conflict of interest between one of the intervening applicants, Ms Moodliar, and Gore. They apparently work for the same company, Sanek Recoveries Services (Pty) Ltd, and have been working together in the winding up of Gridco and in respect of Le Roux's estate.

[48] On the facts available, it is apparent that there has been extensive litigation between all the parties, commencing with the Gridco litigation and culminating with the applications before this court. Le Roux himself has retained the services of attorneys and counsel during his battles with the applicants and the intervening applicants. In my view, it was necessary for the provisional liquidators to have appointed legal advisors to assist in bringing this application, and their services will no doubt be required in the ongoing litigation between Gridco and Le Roux. In addition, the matters being litigated are relatively complex and it is possible that litigation may ensue in a foreign jurisdiction.

[49] With regard to the complaint relating to the appointment of the legal practitioners and the payment for their services, there are, in my view, sufficient regulatory rules governing the conduct of legal practitioners in the performance of their duties as legal practitioners and as trustees or liquidators. I do not think it necessary to impose any further conditions in this regard. If any problems do arise, Le Roux is free to approach the relevant regulatory body.

[50] Le Roux has merely asserted a potential conflict of interest with reference to Moodliar and Gore without offering any factual basis for this assertion. Ms Moodliar deposed to a replying affidavit on behalf of the intervening applicants in which she denied that there was any conflict of interest. She averred that the applicants and the liquidators have a common interest in recovering claims from Le Roux and that both the intervening applicants and the provisional trustees are duty bound to determine the assets and liabilities in the latter's estate.

[51] In ***Knoop NO***[7], the SCA observed that it is not unusual, and in fact may well be advantageous, for liquidators to co-operate with each other in circumstances where one company in a group may be indebted to another and different liquidators are appointed in respect of each of the companies. By parity of reasoning, this principle is applicable to the matter at hand.

[52] Certainly, on the facts before this court, there is no evidence that a conflict of

[7] ***Knoop NO and Another v Gupta and Another*** **2021 (3) SA 88 (SCA)**.

interest exists or that the intervening applicants lack independence. There is also no suggestion that Moodliar or Gore benefitted personally whilst executing their duties as provisional liquidator and provisional trustee, respectively[8].

[53] In light of the foregoing, the extension of the powers of the intervening applicants are eminently reasonable and necessary, and the application was granted.

[54] Given the conclusion reached in respect of the main application, it is not necessary to consider the relief sought by the intervening applicants for a provisional sequestration order.

THE MAIN APPLICATION

[55] The applicants obtained a provisional sequestration order on an *ex parte* basis with the rule *nisi* being issued on 17 June 2021. The rule was extended by agreement on 19 August 2021 and the applicants in the main application now seek a confirmation of the provisional sequestration order.

[56] The requirements for a final sequestration order are that[9]:

[8] Cf. ***Knoop NO and Another v Gupta and Another*** at paras [140] and [142].
[9] See, section 12 of the Insolvency Act.

[56.1] the applicants have *locus standi* i.e. that a single applicant has a liquidated claim of at least R100 against the respondent, or that two or more applicants have liquidated claims of at least R200;

[56.2] the respondent has committed an act of insolvency or is insolvent; and

[56.3] there is reason to believe that it will be to the advantage of the respondent's general body of creditors if the respondent's estate is sequestrated.

[57] In addition, even if an applicant has established the jurisdictional requirement for a final order, the court still has a discretion whether or not to grant the order. In the absence of some special or unusual circumstance, the court should grant the order.

[58] In this matter, it is not in dispute that the applicants have *locus standi* and that there is reason to believe that sequestration will be to advantage of Le Roux's general body of creditors. What is in dispute is whether or not Le Roux has committed an act of insolvency or is factually insolvent, and whether the court should exercise its discretion to grant or refuse the final sequestration order.

[59] The sequestration application is principally based on the allegation that Le Roux

committed an act of insolvency in terms of section 8 (a) of the Insolvency Act, which provides that:

> "*A debtor commits an act of insolvency: if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts.*"

[60] The facts relied on by the applicants in support of their allegation that Le Roux has left the country, or has departed from his dwelling, or is otherwise absent therefrom, may be summarised as follows:

[60.1] Le Roux has admitted that he is in process of immigrating to Australia, a process which properly began when he applied for a business innovation investment visa in March 2018;

[60.2] He has disposed of his own assets and the assets of the family trust have been disposed of over a period of approximately two years prior to leaving for Australia;

[60.3] Le Roux's business and livelihood in South Africa has already been terminated and him and his immediate family have departed for

Australia – all with the intention to invest, study, work and/or live permanently in Australia;

[60.4] Le Roux's only remaining business in South Africa is returning for the purposes of participating in creditors and members meetings pursuant to Gridco's winding up;

[60.5] Le Roux was granted his visa in September 2020 and had left South Africa by December 2020.

[61] On the facts cited above, it cannot be seriously disputed that Le Roux has left South Africa, or that he has departed, and has been absent from his dwelling (the Milnerton property). Le Roux has asserted that he has a return ticket to South Africa and intends returning to participate in Gridco's winding up, and that he has retained his medical aid. However, this does not fundamentally alter the picture. The overwhelming evidence, in my view, is that he has left the country and does not intend to return to South Africa to reside in it.

[62] The only area of dispute is whether he did so "*with intent to evade and/or delay the payment of his debts*". Mr Saul Peter Berman ("Berman") deposed to the founding affidavit in support of the applicants' case in this regard.

[63] The applicants' case is that the manner in which Le Roux departed from the country with unpaid debts and without advising his creditors, supports the

inference that he left the country with the intent to evade or delay the payment of his debts.

[64] According to the applicants, after default judgment was obtained, they investigated, *via* the Windeed website, what Le Roux's asset position was in order to ascertain whether there were any assets against which they could execute. The applicants established, in March 2021, that Le Roux had engaged in systematically disposing of his assets and that the only remaining property registered in his name was the Milnerton property. The Le Roux family trust, the Rouxlan Trust, had already disposed of all its immovable property valued in excess of R30 million.

[65] Prior to conducting the investigation, the applicants had no inkling that Le Roux would leave, or indeed had left, South Africa. On 3 March 2021, prior to Permasolve obtaining default judgment, Le Roux had filed an affidavit in the SCA in which he swore under oath that he was "permanently resident" at the Milnerton property, and he was there "*visiting family in Sydney, Australia*", although he expected to return "*shortly*". However, this information was not entirely correct or accurate. According to Berman, on enquiry, Le Roux's former colleagues and contractors in the Western Cape construction industry advised him that Le Roux was in the process of finalising his immigration to Australia. He was further advised that Le Roux had in fact left South Africa on a one-way ticket to Australia in December 2020 and had not since returned. Nor did he intend returning to

South Africa or paying any of the creditors he had left behind. Le Roux had no current existing construction contracts and had not tendered for any construction work. These averments were supported in a confirmatory affidavit by Berman's brother, Peter Berman.

[66] The applicants submitted that it is only with the benefit of hindsight that they realised the full extent of Le Roux's plans to liquidate his assets and to leave the country without paying his debts. Le Roux had, for example, fiercely opposed the final liquidation of Gridco at each and every step, despite the prospects of success being scant. He lost every application that he opposed and was eventually unsuccessful in his petition to the SCA for leave to appeal the liquidation order granted by Golden AJ which had resulted in the final liquidation of Gridco. While the litigation proceedings were underway, Le Roux was systematically disposing his assets and arranging for his permanent departure for Australia with the last of his funds - the proceeds for the sale of the Milnerton property - about to be transferred offshore as well.

[67] According to the applicants, Le Roux had in fact been engaged in a stratagem to buy time for the liquidation of his assets and to plan his immigration to Australia, whilst simultaneously avoiding his having to appear at an insolvency inquiry in terms of sections 417 and 418 of the 1973 Companies Act – something that the applicants had expressly undertaken to pursue in the Gridco liquidation application.

[68] Furthermore, before departing for Australia, Le Roux owed Permasolve the arrear rental due and ancillary charges for which he stood as surety for Gridco. The applicants stated that Le Roux must have known about the outstanding amount due. In the judgment in respect of the liquidation application, Golden AJ specifically recorded that there was an amount outstanding in respect of the arrear rental. In addition, the SCA bill of costs had been taxed prior to Le Roux's departure for Australia. These costs, in the sum of R61 606, was due, owing and payable to the successful litigants in the Gridco liquidation application and remained unpaid. In addition, although the bills of costs in the court *a quo* in respect of the Gridco liquidation application remained untaxed, the uncontested amounts exceeded R2.1 million prior to being taxed and the bills, once taxed, exceeds the sum of R3.3 million.

[69] Le Roux, on the other hand, strenuously opposed the main application on both substantive and procedural grounds. While admitting that he is in Australia, he averred that he had commenced the immigration process sometime before Gridco was placed in business rescue or liquidated. He admits that he had disposed of all his assets in South Africa and that the Rouxlan Trust had also disposed of its assets but avers that there was nothing wrong or untoward about this. He states, for example, that he sold his Milnerton property so that he could travel to Australia with his family. He had attempted to lease out the property but there were no suitable applicants and it made financial sense for him to sell this property.

[70] Le Roux also denied that when he left for Australia there were any debts that were due, owing or payable. He claimed that Permasolve had to issue a demand for performance directly from him prior to issuing summons but this was not done. With regard to the unpaid bills of costs, he submitted that these costs had not yet been taxed by the time he left for Australia and that, in any event, he had made provision by leaving "sufficient" funds in South Africa in an amount of approximately R1.2 million to pay the costs once the bills had been taxed.

[71] I find Le Roux's submissions to be unsatisfactory and indeed improbable.

[72] He stated, for example, that he had described the Milnerton property as his permanent address because he intended to return to South Africa in March 2021 and if he had done so, he would have stayed at that property. However, he had already sold the property in December 2020 and appeared to have no business in South Africa except to possibly attend Gridco company meetings.

[73] Le Roux opines that had no intention to evade or delay payment of his debts and he had left behind sufficient funds in South Africa to pay the costs arising from the Gridco liquidation application. However, Le Roux well knew that there were amounts outstanding in relation to the bills of costs but failed to tell his creditors that he had made provision for the payment of these costs. One would have expected that if the funds left in his South African bank accounts were indeed devoted to pay the legal costs arising from the liquidation application, he would

have paid over these funds to his attorneys for disbursement to his creditors once the bills were taxed. He did not do so. The funds "left behind" were in any event, far less than the uncontested amounts owed in terms of the cost orders which exceeded R2.1 million prior to the bills being taxed. It is difficult not to agree with the applicants' submission that the funds allegedly set aside for the payment of the cost orders was merely a rounding up of the aggregate of the residual balances left in Le Roux's South African bank accounts.

[74] Le Roux also claims that he was not aware of any other debts that were outstanding and that no demand was made against him by Permasolve in respect of the outstanding rental. This cannot be true. In the liquidation application judgment handed down by Golden AJ, it was specifically recorded that there was an amount outstanding in respect of the arrear rental. If he truly wanted to leave South Africa with all his debts paid, he would have engaged Permasolve with regard to this outstanding debt. He did not do so.

[75] I am satisfied on the probabilities that Le Roux's "*dominant, operative or effectual intention in substance and in truth*"[10] was to evade or delay the payment of his debtors as contemplated in section 8(a) of the Insolvency Act.

[76] To summarise, by the time Le Roux leaves for Australia in December 2020, the only asset remaining in his estate is the Milnerton property which he has already sold and is awaiting transfer. He tells none of his creditors that he intends leaving and they only find out about this in June 2021. None of his creditors harboured

[10] ***Hassan and Another v Berrange NO* 2012 (6) SA 329 (SCA)** at para [37].

any suspicion of his departure to Australia because, in March 2021, Le Roux had sworn under oath in his confirmatory application for leave to appeal the SCA that he remained permanently resident at the Milnerton property, was merely visiting family in Sydney, and was due to return shortly in March 2021. This was not true. He left behind debts in respect of rental which he must have known about as well as the unpaid bill of costs which far exceeded the aggregate amount of the money that remained in his bank account on his departure to Australia.

[77] Proof of an act of insolvency is sufficient to warrant a sequestration order. It is thus not necessary, to prove that Le Roux is factually insolvent. Suffice to say, Le Roux's assets in the form of cash in the South African banks is approximately R1.2 million (or R1.171 million according to the applicants) which is substantially less than the cost orders which have been taxed (in excess of R3.3 million). If one factors in the judgment debt obtained by the applicants in the sum of R908 313.71 plus interest and costs, and the loan account claim, *albeit* disputed, in excess of R10 million, the true extent of Le Roux's factual insolvency becomes evident. Le Roux is insolvent in South Africa in that his South African liabilities far exceed his South African assets.

[78] Apart from disputing the merits of the main application, Le Roux submitted that the manner in which the provisional order was obtained was procedurally defective. He submitted that the *ex parte* application was unjustifiably brought without notice and in breach of Le Roux's right to be heard, and in circumstances where there

was no urgency and no need for immediate relief on the part of the applicants. Furthermore, Le Roux alleges that the applicants failed to make full disclosure of several relevant facts which the applicants were obliged to disclose. For these reasons alone, according to Le Roux, the main application ought to be dismissed.

[79] I am of the view that there is no merit to Le Roux's procedural objections.

[80] According to the applicants, they decided that urgent steps are necessary to freeze Le Roux's estate by sequestration in order to inhibit the disposition and/or movement of his assets and the transfer of funds. They decided to approach the court on an *ex parte* basis because if Le Roux were to get wind of the application, it is likely that he would expedite the removal or concealment of his funds. This was especially so given the manner in which Le Roux had departed for Australia. Le Roux had systematically disposed of all his assets and the only remaining asset in his estate was the proceeds from the sale of the Milnerton property. There was a real possibility that these funds would also be transferred off-shore and be lost forever to Le Roux's South Africa creditors.

[81] I am satisfied that the applicants were justified in bringing the application *ex parte*.

Indeed, the facts of this case are not dissimilar to the facts of ***Hassan***[11]. In *casu*, the Supreme Court endorsed a provisional sequestration order that was brought on an urgent basis where the allegation was made that the appellant was

[11] ***Hassan and Another v Berrange NO*** at paras [12] and [13].

disposing of his assets and that if notice was given to him, the debtor would dispose of his assets. The application was made *ex parte* without notice to the respondents.

[82] When applying for an order *ex parte*, it is absolutely essential that an applicant shows the highest good faith and discloses all relevant facts within his or her knowledge which might affect the granting of the order[12]. All material facts must be disclosed which could influence the court, including relevant facts the applicant knows, or reasonably expects, that an absent party would have placed before the court. This should include facts which may be adverse to the applicant's case[13].

[83] The duty of good faith to be displayed in an *ex parte* application does not extend to necessarily arguing the absent respondent's case. The absent respondent will, in any event, have an opportunity to do so on the return date or before that if the return date is anticipated. What is required is that all material facts must be placed before the court which may assist the court in reaching a proper decision.

[84] That all material facts were made known to the court concerning Le Roux's acts of insolvency are supported by the fact that in Le Roux's answering affidavit those material facts were largely common cause; where the parties differed was in the interpretation of those facts. I am not sure one can go so far as to suggest that it was necessary for the applicants to argue both their and Le Roux's interpretation

[12] ***Ganes and Another v Telecom Namibia Ltd*** **2004 (3) SA 615 (SCA)** at paras [3] and [5].
[13] See, ***Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs*** **2019 (3) SA 251 (SCA)**.

of the facts. Clearly, at the stage that the application was brought, the applicants would have been unaware of what Le Roux's defence was or how he would interpret the largely common cause facts placed before the court.

[85] The same applies to the alleged non-disclosures regarding the default judgement. Le Roux alleges that the court was not advised that the rental claim was disputed and that the court was led to believe that Le Roux concedes the rental claim (and suretyship claim). This is not so. As the applicants have pointed out, it is apparent from the founding affidavit, and the annexures thereto, that Le Roux has always disputed the rental claim and there is no suggestion that Le Roux conceded the debt.

[86] Le Roux also alleges that the court was advised that summons was served at the *domicilium* address when this was not so. Le Roux's contention is that the summons was not correctly served at the *domicilium* because it was served by affixing it to a post box on the ground floor of the building whereas the *domicilium* address was on the fourth floor of the building. This is the defence that Le Roux raised in his rescission application but this does not necessarily mean that the objection is good in law or, conversely, that it was incumbent on the applicants to raise this issue in the *ex parte* application; at that stage they were not even aware that such a defence would be raised. In their view, in terms of the existing law relating to service, they were quite entitled to accept that service was properly made at the *domicilium* when the summons was placed by affixing it to the post

box. Furthermore, if a *domicilium* had been chosen, service is good at that address even though the defendant was known not to be living there[14].

[87] Le Roux opines further that the court was not advised that Gridco had vacated the premises at the *domicilium* address. Again, as pointed out by the applicants, this is not entirely incorrect. In the founding affidavit, the cancellation of the lease was pleaded and a copy of the notice of cancellation was annexed to the founding affidavit. The claim for holding over was also referred to in the founding affidavit and this claim could only arise if the lessee had prematurely left the premises.

[88] I am, therefore, satisfied that in bringing the application *ex parte,* the applicants adhered to the duty of utmost good faith, to the duty of full and fair disclosure, and that the applicants disclosed all relevant adverse material that the absent Le Roux might have put up in opposition to the order.

[89] Le Roux argued that the sequestration application was brought with an ulterior purpose. He alleges that he has substantial claims against Gridco and that the applicants fear his participation in the winding up of Gridco. They have thus brought the sequestration application with the ulterior purpose of preventing him from acting in Gridco's winding up. Furthermore, the provisional trustees, especially Gore, is compromised given his conflict of interest and he will now participate on Le Roux's behalf in the winding up of Gridco.

[14] See, ***Prudential Building Society v Botha* 1953 (3) SA 887 (W)**.

[90] I have already addressed the alleged conflict of interest issue raised by Le Roux in the context of the intervention application and nothing more needs to be said about this. In addition, one could add that the alleged claims which Gridco has against the applicants is not a counterclaim in the sequestration application and, therefore, irrelevant. In any event, there is nothing stopping Le Roux from participating in the meetings involving the winding up of Gridco. Nor is there anything stopping him from taking the necessary legal action should he suspect that the provisional liquidators, or the provisional trustees, are not performing their statutory functions properly.

[91] On a conspectus of all the evidence placed before this court, I am satisfied that Le Roux has committed an act of insolvency and there was no legal deficiency in the manner in which the provisional application order was obtained. As noted, Le Roux did not dispute that the applicants have *locus standi* and that sequestration would be in the interests of the creditors. This being the case, all the jurisdictional requirements for the final sequestration order have been met. There is, of course, no dispute that the applicants have complied with all the procedural formalities relating to the service requirements for the sequestration order, the Masters report, and the bond of security.

[92] Even though the applicants have satisfied the jurisdictional requirements for the confirmation of the provisional order, the court still has a discretion whether or not to grant the order.

[93] Le Roux has not placed before this court any special or unusual circumstances that would justify the discharge of the provisional order. On the other hand, the applicants have argued forcefully that the court should exercise its discretion in confirming the provisional order if regard is had to the following: Le Roux's conduct and the manner in which he left for Australia, the extremely unlikely possibility of him returning, that his liabilities in South Africa are far in excess of his assets, and that the provisional sequestration order is the only reason why the funds from the Milnerton property are being restrained in Australia. The grant of the final order of sequestration is, thus, the only way in which the South African creditors could have the funds held in Australia returned to South Africa and, in this way, receive some recompense.

[94] I agree with the applicants' submissions. Quite simply, there is nothing on the papers to suggest that the court's discretion should be exercised in favour of Le Roux. On the contrary, all the factors point to the exercise of the court's discretion in favour of the confirmation of the provisional order.

[95] It was for the above reasons that I granted the order which is set out in paragraph 7 above.

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FRANCIS J

Judge of the High Court

Counsel for Main Applicant	Adv John Dickerson SC & Adv Claire Morgan
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