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

Case No: 8539/2021

In the matter between:

ANDREA JESSIE HARVEY N.O. **Applicant**

And

SERVAAS DANIEL THERON **First Respondent**

LINDA DIXON **Second Respondent**

Matter Heard: 5 June 2023
Judgment Delivered: 29 June 2023

JUDGMENT

MANTAME J

Introduction

[1] The applicant ("*the executrix*") seeks an order placing the first respondent under provisional liquidation. The executrix was appointed as such by the Master of the High Court on 27 August 2019.

[2] The first respondent is a former legal practitioner *("Attorney")*, who is a partner and conducts business at Overberg Administrators and Planners of Estates and

Sworn Appraisers and Valuations in Kleinmond. He was previously appointed by the applicant as her agent. The second respondent is in a long-term relationship with the first respondent. No relief is sought against the second respondent, but merely joined as an interested party. Both respondents initially opposed this application but the second respondent's attorneys withdrew as attorneys of record. This application is only opposed by the first respondent.

Factual Background

[3] As stated above, the first respondent was previously appointed as an agent on behalf of the applicant to assist with the administration of her late father's deceased estate. In the process of executing these duties, the first respondent made unauthorised cash withdrawals from the Estate Late Clarence Leslie Trefz *("applicant's late father")* bank account in the amount of R522 759.00. On becoming aware of such withdrawals, the applicant demanded payment of the said amount. Despite the first respondent's acknowledgment of his liability, he failed to make payments to the applicant. It is the applicant's contention that the first respondent has committed various acts of insolvency as envisaged in section 8(c) of the Insolvency Act 24 of 1936 ("*Insolvency Act*") which reads as follows:

> '*if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another'*
> and 8(e) which reads:
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> *'if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts.'* -The applicant was convinced that the first respondent's liabilities exceeded his assets.

[4] According to the applicant, when her father passed away on 9 August 2019, the first respondent was appointed to act as the executor of the deceased estate in terms of the will. However, the first respondent renounced his appointment and the applicant remained the executrix in her father's estate. Despite her sole appointment, the first respondent recommended that she appoints RJL Finck

Attorneys ("*Finck Attorneys*") as her agent. Through these attorneys, the applicant provided him with a power of attorney to administer her late father's estate and to act in her stead, in order to limit her travel between United Kingdom and South Africa to finalise the estate. The first respondent impressed upon the applicant that he was experienced in the administration of the deceased estate.

[5] At the time the applicant appointed the first respondent as her agent, she was not aware that the first respondent had been struck from the roll of attorneys by the Law Society of the Cape of Good Hope (as it was previously known) on 17 July 2012. The applicant observed that the reasons for his striking off from the roll of attorneys was related to the present matter, i.e. he made payments for his personal expenses from his firm's trust account, and to cover up this prohibited act, he debited the payments made to him for his benefit to various deceased estates and other clients in respect of whom he held trust monies. The first respondent did not disclose to the applicant that he was no longer a practising attorney.

[6] The first respondent proceeded to have full control over her father's deceased estate pursuant to her granting him a power of attorney. He opened the estate's bank account with Nedbank and arranged for the cash to be paid into the Late Estate Bank Account. A considerable amount of time lapsed without any report from the first respondent. At the time, the applicant believed that this was an uncomplicated estate and could be finalised in a relatively short period of time. It later transpired that there were two (2) accounts with Nedbank, including a fixed deposit. In summary, these cash transactions totalled to an amount of approximately R1.6 million.

[7] On 16 June 2020, the applicant contacted the first respondent and made enquiries whether the funds of the estate have been released. He confirmed that they were released, but he intended to invest them again until the estate is finalised. However, he promised to sort out the request the following week.

[8] Time passed without hearing from the first respondent. On 9 July 2020, the applicant requested a progress report and expressed her frustration for the delay. The first respondent promised once more to go to the bank, however, nothing yielded from this promise.

[9] Due to the lack of response by the first respondent and the applicant's frustration, the applicant contacted a certain Mr Chris Barnard from Nedbank to furnish her with bank statements. On perusal of these bank statements, the applicant ascertained that cash withdrawals had been made from the Estate Late bank account from the time when the first respondent was in charge of the deceased estate. The applicant calculated all the withdrawals made and on 19 July 2020 she forwarded an email to the first respondent requesting that the said amount be repaid.

[10] The first respondent did not respond to the email sent by the applicant. The applicant decided to approach her present attorneys for advice. On 26 August 2020, they advised the first respondent that his mandate has been terminated and requested him to hand over the files relating to the deceased estate to them. On perusal of the statement, it was evident that the first respondent issued cash cheques against the estate bank account. He did so over a period of a year and these cheques amounted to R522 759.00, excluding bank charges associated with the withdrawals.

[11] On 16 November 2020, the applicant's attorneys of record addressed a letter of demand for the first respondent to repay the funds. However, he failed to repay the amount so demanded. The applicant asserted that the deceased estate has a liquidated claim against the first respondent in the amount of R522 759.00. He has been unable to satisfy this debt despite demand for a considerable time.

[12] The applicant's attorneys of record conducted a deeds search on the first respondent's assets. It was discovered that the first respondent owns 20% share in an immovable property i.e. erf 6[…] Kleinmond. He owns this property with the second respondent and his mother. The second respondent purchased her 60% share in the immovable property for R875 000.00. The transaction was registered during August 2020. It was therefore evident that the first respondent does not have assets of any significant value.

[13] It has come to the attention of the applicant that the first respondent is indebted to other creditors. The first respondent has used the same *modus operandi*

that he used on her late father's estate in defrauding them. These claims amount to more than R1 million. It was stated that the first respondent's estate is hopelessly insolvent. It would be in the interest of his general body of creditors if his estate were to be sequestrated.

[14] In opposing this application, the first respondent stated that he made a full and formal tender of his alleged indebtedness to the applicant. As a consequence thereof, the applicant does not have *locus standi* to proceed with this application, but has to withdraw it. The applicant refused to accept the tender on the basis that there are other creditors who wished to persist with this application. The first respondent disputed this contention and stated that the claims of those creditors have not been established on a *prima facie* basis. They were only referred to in a fleeting manner. These allegations constitute an inadmissible hearsay evidence. In addition, these other creditors are not party to these proceedings. It was the first respondent's assertion that these proceedings constitute an abuse of process.

Supplementary Affidavit

[15] Subsequent to the filing of the three (3) sets of papers in the normal cause, the first respondent made an application that he be permitted to deliver a supplementary opposing affidavit. To the extent that he relied on hearsay in this affidavit, he requested that the hearsay evidence be admitted in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988, *("LEAA")* and that he shall demonstrate that it is in the interest of justice for such evidence to be admitted.

[16] The first respondent stated that, at the time he deposed to his answering affidavit, he made a tender to settle the applicant's claim in full with interest, together with legal costs taxed on a party and party scale (this tender was said to still stand). However, this tender was refused by the applicant.

[17] In his affidavit, the first respondent denied that he was 'hopelessly insolvent' and that he 'committed various acts of insolvency'. He contended that his assets exceeds his liabilities and that this application is an abuse of process. In the first respondent's view, this application is a vindictive scheme that is carried on by the

applicant and her erstwhile attorney, Guthrie & Theron and subsequently by their proxy, being her current attorneys of record.

[18] The applicant conjured up allegations that he is indebted to further creditors in his replying affidavit. There are serious disputes of facts in this regard. In his experience, it is fairly common for an heir or interested party to be dissatisfied with the executor of a deceased estate. The applicant's complaints are a common occurrence. The heir or interested parties are quick to enforce their views on the executor in respect of the winding up of an estate. These heirs are normally blissfully unaware of the nuances of Administration of Estates Act and the watchdog role of the Master of the High Court. The first respondent was of the view that these newly acquired creditors by the applicant fall in this category. These creditors in his opinion have been rounded up by the applicant and her attorneys in an effort to draw a negative inference about him. In the circumstances, this Court ought not to attach any weight to these unfounded allegations.

[19] The first respondent reiterated that on 29 October 2021 he tendered payment of the alleged capital amount due, together with interest and costs taxed on a party and party scale. However, such tender was refused in the premise that some creditors would intervene in these proceedings in due course. To date, no creditors have intervened.

[20] On 20 November 2021, when he filed his answering affidavit, he took a point that the applicant has no *locus standi* to sue in these proceedings as the claim was dealt with (tender) by the first respondent. Despite that being so, the applicant in her replying affidavit alleged that the first respondent withdrew funds from the estate late bank accounts of K L Taylor to the sum of R182 222.00; E R Davis to the sum of R363 010.10 and S A Kotze to the sum of R4 328.348.90. Confirmatory affidavits were thus made by the alleged beneficiary, legal agent and executrix in these estates. However, no particulars of the alleged withdrawals were provided. According to the first respondent these allegations demonstrably were made with ulterior motives on the prompting of presumably Messrs Guthrie & Theron who utilized this application as a proxy war against him. The first respondent

acknowledged that he was involved in these estates, but denied indebtedness to these creditors.

[21] In the applicant's founding affidavit, she alleged that the first respondent signed an acknowledgment of debt in respect of the winding-up of the estate late C F Thomson in the amount of R468 418.00; he withdrew cash from the estate late J B Geldenhuys bank account in the sum of R53 265.00; he withdrew cash from estate late C J du Preez bank account in the amount of R341 000.00. No confirmatory affidavits were filed in respect of his alleged indebtedness and / or withdrawals made. In his view, these allegations are inadmissible hearsay evidence. The first respondent confirmed that he was involved in their estate, but denied the allegations of indebtedness to the extent claimed by the applicant. The first respondent advised that these proceedings cannot continue at the instance of the alleged third parties who are not party to these proceedings.

[22] The first respondent denied that he was 'hopelessly insolvent' and / or committed various acts of insolvency as envisaged in section 8(c) & (e) of the Insolvency Act. He claimed to own 80% member's interest in Kajon Investments CC, which is the registered owner of Voogdy Woonstelle, which consists of a block of flats (nine flats) which are valued at R6 100 000.00 (80% = R4 880 000); 100% ownership of erf 6[…], a residential property in Kleinmond, currently valued at R3 600 000.00; and cash at hand of an amount of R50 000.00. The first respondent's total assets are R8 480 000.00.

[23] The liabilities as alleged by the applicant with regard to the estates of the applicant (C L Trefz), Estate Late C F Thomson; Estate Late J B Geldenhuys; Estate Late C J du Preez; Estate Late K L Taylor; Estate Late E R Davis; and Estate Late S A Kotze in total amount to R6 310 037.00. The first respondent pointed out that the title deed in his residential property reflects that he is the 40% registered owner of the property and the second respondent is the 60% registered owner of the property. He has been in the long term relationship with the second respondent. This Court therefore should deem him to be the 100% owner of the property, alternatively, that the value of the 60% ownership needs to be paid to him by the second respondent. This is based on the fact that the 60% of the purchase price that is owned by the

second respondent was paid by him to the erstwhile owners. The first respondent has demonstrated that his assets exceeds his liabilities.

[24] The applicant opposed this application on the basis that this information could and should have been placed before Court when he filed his original answering affidavit. Without an explanation why this information could not be furnished, there is no scope for an extra affidavit. He must demonstrate that the reasons were beyond his control and that it was impossible to place this information before Court. It was somehow stated that the allegations made in this supplementary affidavit are vague and do not take the matter any further.

[25] The applicant stated that when she issued these proceedings, the first respondent knew that his solvency was a central issue. The reason why the tender was not accepted was that the first respondent was insolvent and the applicant was not obliged to accept his tender. It was therefore incumbent upon him to demonstrate in these proceedings that he was solvent. This in her view, he failed to demonstrate. It appears that he attempted to deal with his solvency in this supplementary affidavit, when he was able to do so in his answering affidavit.

[26] Further, the applicant denied that the creditors were ‘conjured up’, it was stated that they were only discovered after the founding affidavit was filed. The applicant denied that there are factual disputes in her allegations. She stated that the first respondent in fact, admitted that he stole money from the deceased estate. The delay in bringing this matter before Court has no bearing on the first respondent’s solvency.

[27] Notwithstanding, the applicant denied that she had to furnish documentary proof beyond reasonable doubt, of all the withdrawals that he made. In her view, these are not criminal proceedings. As it is evident from his affidavit, he does not dispute that he unlawfully withdrew monies from the deceased estates. The applicant pointed out that she took exception to the submission by the first respondent that the allegations of withdrawals from the deceased estates were made on the ‘enticement and prompting’ of Guthrie & Theron. In any event, he admitted that he withdrew money unlawfully from the deceased estates.

[28] Furthermore, the applicant denied that this application proceeded at the instance of the third party creditors. The applicant pointed out that she proceeded with this application on her own. Furthermore, she disputed that 80% interest in a CC with a block of flats valued at R6 million equates to R4.8 million. The only way a member's interest in a CC could be valued is through the production and analysis of the financial statements by an accountant. In any event, it was observed that these flats are all the subject of mortgage bonds. In addition, the valuation was done by the first respondent's close friend and is not a sworn one. Further, it was denied that he is the 100% owner of erf 6[…]. This is not how the property is registered at the Deeds Office. The suspicion is not only raised on the fact that the property valuator is a close friend of the first respondent, they practice together under the name and style Overberg Administrators and Planners of Estates.

[29] The applicant maintained that the first respondent misappropriated various amounts in various deceased estates. The applicant made reference to the affidavit that was deposed to by a certain Mr De Jager in a criminal case against the first respondent. She disputed that her decision to prosecute this application was influenced by other people or entities. In any event, the tender that was made after the institution of these proceedings has no relevance at this stage. The fact that he admitted stealing money from the deceased estates after his name was struck from the roll of attorneys calls for this Court to exercise its discretion in favour of the applicant. In any event, it was denied that the first respondent has assets of R8 million and that they exceed his liabilities.

Submissions

[30] The applicant submitted that when the first respondent filed his five (5) page answering affidavit, he was of the view that the tender of payment in full is a complete answer to an application for sequestration. This was the only defence and he blamed the applicant for not withdrawing the application. In *Salkow v Reeb: Winter Intervening,*[1] Greenberg J held:

[1] 1930 WLD 166 at 174

'*The next point to be considered is whether the tender of payment to Winter of the amount due under the promissory note is answer to the claim for sequestration. I am prepared to assume in favour of the respondent that this is an unconditional tender, but it seems to me that the creditor is not necessarily compelled to accept payment of a debt, where payment is offered to him at a time when he knows that the debtor is in insolvent circumstances, and that the payment to him in full will constitute a preference.*'

[31] The decision, it was argued, was followed in *Ozinsky NO v Lloyd & Others*[2] where Van Deventer J held that:

'*The supposition that PG Wood would have withdrawn its application against payment of its claim was not supported by any evidence. In any event, PG Wood would not have been legally obliged to do so, as acceptance of payment might have constituted an undue preference in the circumstances (*see *Salkow v Reeb 1930 WLD 166*).

In fact and in any event, as first defendant testified, she was advised by attorney Horak that she would not be entitled to pay PG Wood to avoid liquidation.'

[32] It was stated that *Salkow (supra)* was cited by Mars, The Law of Insolvency in South Africa[3] as authority for the following statement:

'*A creditor is under no obligation to accept payment of his debt when such payment is offered at a time when the debtor is insolvent circumstances if the payment would constitute a voidable or undue preference.*'

[33] In the circumstances, it was submitted that the tender is not an answer to an application for sequestration. The first respondent has not attempted to prove that he

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[2] 1992 (3) SA 396 (C) at 424
[3] 9th Edition, p373

made the tender in solvent circumstances and that payment would not constitute undue or voidable preference.

[34] The applicant noted that the first respondent was indebted to the applicant in the amount of R522 759.00. In addition, he was indebted to the Estate Late Thomson in the amount of R468 418.00; he was also indebted to the Estate Late du Preez in the amount of R341 000.00. The first respondent's known asset is a 20% share in immovable property that is worth R875 000.00 as at August 2020, and 20% share would amount to R180 000.00 which is not enough to settle his indebtedness.

[35] In his supplementary affidavit, he sought to explain his assets. For instance, his 80% member's interest in a CC does not equate to an asset of R4, 8 million as the first respondent suggested. As stated above, this could be ascertained by a production of financial statements. The valuations of the members' interest were put to question as they were done by his close friend. It was stated further that no CIPC printouts were provided for this 80% member's interest. It was submitted that this asset should be discarded.

[36] In addition, it was disputed that the first respondent is the 100% owner of erf 6[…]. Since his filing of the supplementary affidavit, the Deeds Office register has not been rectified. This Court was further requested to discard this asset as the first respondent's financial situation remained the same. It was submitted that the applicant is not obliged to accept the tender from the first respondent as that would amount to an attempt to dispose of his property and payment in full of the applicant's claim, while other creditors remained unpaid; that would have an effect of preferring the applicant above the rest.

[37] The first respondent requested the Court to admit its supplementary affidavit. He submitted that the filing of further affidavits in motion proceedings is permitted only with the indulgence of the Court, which has the sole discretion on whether or not to allow such affidavits. See *Hano Trading CC v JR 209 Investments (Pty) Ltd*[4]. In *Gold Fields Ltd v Motley Rice LLC*[5] the Court held that there is no automatic right to

[4] 2013 (1) SA 161 (SCA)
[5] 2015 (4) SA 299 para 122 - 123

file the fourth and further affidavits. The filing of additional affidavits should be allowed only in exceptional circumstances and only with the leave of the Court.

[38] The first respondent contended that it has given sufficient explanation to allow the Court to accept the filing of further affidavits. After the first respondent stated that the applicant has no *locus standi* to bring this application, she sought to support it with the evidence of third parties who were not joined as parties in these proceedings. Rule 12 of the Uniform Rules of Court reads as follows:

> '*Any person entitled to join as plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.*'

[39] In the absence of joinder of these creditors, it was submitted that no weight could be attached to the allegations as referred to by the applicant. In any event, it was submitted that such claims by third parties have been placed in dispute. If there is a real dispute of fact, it was stated that the Court is not in a position to exercise a judicial discretion.

[40] The first respondent denied that the applicant is a creditor of the first respondent as he was her agent in the administration of her father's deceased estate. He has made a formal tender to pay the applicant's debt and her legal costs. In such circumstances, she is no longer his creditor and she does not have *locus standi* to proceed with this application. The applicant failed to make a case that he was insolvent or that there is a reason to believe that his sequestration would be to the advantage of creditors. Reference to the alleged third party creditors constitute inadmissible hearsay evidence. Insofar as this application is concerned, there is no case for insolvency.

Discussion

[41] The first respondent requested this Court to admit the filing of its further supplementary affidavit. Likewise, the applicant requested that her response to that

supplementary affidavit be admitted, if this Court deemed it necessary to admit the further supplementary of the first respondent. On considering the supplementary affidavit, it appears that the first respondent was of the view that by tendering to settle the applicant's claim in his answering affidavit, that tender was dispositive of the application in its entirety. When it transpired that the matter was not disposed of, and the first respondent stated that the applicant in her replying affidavit persisted with her allegations of his indebtedness to third parties, he felt compelled to rebut these allegations and set out his financial position. The applicant opposed this application on the basis that the information could and should have been placed before Court when he filed his original answering affidavit. Without an explanation why this information could not be furnished, there is no scope for an extra affidavit.

[42] In *Standard Bank of South Africa v Sewpersadh*[6] the court set out the legal principles governing the acceptance of a further affidavit:

> '*The Court will exercise its discretion to admit further affidavits only if there are special circumstances which warrant it or if the Court considers such a course advisable. (See Rieseberg v Rieseberg 1926 WLD 59; Joseph & Jeans v Spitz and Others 1931 WLD 48). In Bangtoo Bros and Others v National Transport Commission and Others 1973(4) SA 667 (N) it was held among other things that a litigant who seeks to serve an additional affidavit is under a duty to provide an explanation that negatives mala fides or culpable remissness as the cause of the facts and / or information not being put before the Court at an earlier stage. There must furthermore be a proper and satisfactory explanation as to why the information contained in the affidavit was not put up earlier, and what is more important, the Court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs*.' (Emphasis added)

[43] The Court has considered this application and the opposition thereof. It appears that when the first respondent filed his answering affidavit he was content that his tender would dispose of this application, hence there was no defence put

[6] 2005 (4) SA 148 (C) at 154

forward whatsoever in his answer. In my view, that was remiss of the first respondent not to defend this application holistically.

[44] If the first respondent's contention is to be accepted, it is therefore of utmost importance for this Court to ascertain whether a tender to pay constitute performance, and/or as a result thereof, it is capable of disposing of the application. In *Origo International (Pty) Ltd v Smeg South Africa (Pty) Ltd*[7] the Court was confronted with a question of whether a tender to pay constitute performance. The Court held that:

> '*A tender to pay is a promise or an undertaking to pay and, accordingly, does not constitute actual payment. The applicant's tender, leaving aside the correctness of the amount tendered, accordingly, did not constitute payment.*'

[45] Clearly, it was oblivious of the first respondent to reason that it need not put up a defence in this application simply because he has put up a tender. After it became clear that the applicant completely rejected the tender and proceeded with the application, and after receipt of the applicant's replying affidavit, it dawned on him that he needed to respond to the application. In *Stein Brothers Ltd v Dawood and Another*[8] Le Roux J stated:

> '. . . *that the object of all litigation is to arrive at the truth and at a fair, just and expeditious solution and that, when a fourth and fifth set of affidavits have been placed before a Court, it is clearly entitled to look at them and should not shut its eyes to facts which may lead to a just decision of the matter by reason of the existence of a mere technicality.*' (Emphasis added)

[46] Likewise, in this matter, there are five (5) sets of affidavits that have been filed. The supplementary affidavit was an afterthought and a wakeup call after the applicant's version was left unchallenged. To the extent that the applicant opposed this application and poked holes in his version, it would be just and fair for this Court to admit the latter two (2) sets of affidavits on record. The fourth and fifth sets of

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[7] (33541|/2017) [2018] ZAGPJHC 412; 2019(1) SA 267 at para 16
[8] 1980 (3) SA 275 (W) at 282C

affidavits are admitted, despite the fact that the first respondent has not explained convincingly why he omitted to include this information in his answering affidavit. In any event, no prejudice has been cited by the applicant should the supplementary affidavit be admitted.

Merits

[47] It is common cause that a tender to pay is a promise or an undertaking. It does not constitute performance. It is further common cause that despite this tender being made, there was no proof that the amount tendered was readily available at the disposal of the applicant. In my opinion, the applicant was justified in rejecting it. In any event, in *Salkow and Ozinsky (supra)* it was stated that a tender of payment under a promissory note is not an answer to the claim for sequestration. A creditor is not compelled to accept a payment of debt, where payment is offered at a time where the debtor is in insolvent circumstances, and the payment to him in full will constitute an undue preference.

[48] The tender by the first respondent was offered only after the applicant had file and served this application for sequestration, and after the applicant and her attorneys forwarded numerous demands for payment. The failure or inability to pay on the part of the first respondent was enough reason to proceed with this application. The suggestion that the applicant does not have *locus standi* to proceed with this claim, by virtue of the tender that was made after he was unable to pay his debts, is simply baseless. In addition, the supposition that the allegations of the first respondent's indebtedness to the third parties should be rejected on the basis of hearsay as they were not joined as parties to these proceedings, is equally absurd.

[49] In this application, the applicant sought a provisional order of sequestration. Section 10 of the Insolvency Act – Provisional sequestration -:

> If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* –

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) section *nine;* and

(b) the debtor has committed has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
it may make an order sequestrating the estate of the debtor provisionally.

[50] The first respondent has not disputed that he made an unauthorised withdrawal of the deceased estate applicant's father in an amount of R520 000.00. Though, he sought to pose as the agent of the deceased estate, the bottom line is that he is the creditor of the deceased estate. In this instance, the applicant has established a *locus standi* to sequestrate the first respondent. Therefore, the first requirement has been met. The second factor to consider is whether the first respondent committed an act of insolvency or is in fact insolvent. Much was said about the third party creditors which constitute a bulk of the alleged claims. In responding to these allegations, the first respondent stated that he owns 80% members' interest in Kajon Investment CC, which CC is the registered owner of Erf 1[…] Caledon commonly known as Voogdy Woonstelle; which consists of a block of flats valued at R6 100 000.00 (first respondent's 80% = R4 880 000.00); he owns 100% of Erf 6[…], residential property in Kleinmond presently valued at R3 600 000.00. The valuations of these assets were provided by a certain Petrus Johannes Rust who was said to be the first respondent's friend and colleague. The first respondent did not dispute the latter allegations.

[51] I tend to agree with the applicant that the first respondent's 80% member interest cannot be determined only on the value of the property, as the first respondent want this Court to believe. On this property, the first respondent owns 80% members' interest, which consist of nine (9) block of flats. These flats are utilized as an investment property which generate monthly rentals of different amounts as the valuation demonstrate. It is not demonstrated in this valuation how much income and liabilities the first respondent generates monthly. The first

respondent, in this regard, has not been up front with the Court in respect of these calculations. In my view, not much credence can be given to this valuation. The applicant was correct in stating that bank statements and financial statements can provide more clarity in this investment portfolio. This valuation, as it stands has to be rejected.

[52] Third, the first respondent said this Court should deem him to be the 100% owner of Erf 6[…] Kleinmond, whereas in his own words, he pointed out that the Deeds Office registry reflects him as the 40% owner and the second respondent as 60% owner of this property that was valued at R875 000.00 in August 2020. When the first respondent's friend and colleague conducted a valuation of this property in May 2022, it has appreciated more than four times in a space of 21 months. This defies logic as every sector of the economy experienced a decline due to the Covid-19 pandemic.

[53] The first respondent wanted this Court to deem him as the 100% owner of this property. Although he is currently struck off the roll of attorneys, based on his legal training, he is aware that what he suggested to this Court is inept. The second respondent who is party to these proceedings, the 60% owner of this property, has not disputed nor supported this allegation. It would be irresponsible and negligent of this Court to allow itself to be strung along by the first respondent in his unlawful suggestions. Fourth, there was a mention of cash in hand to the sum of R50 000.00. That amount was not proved by a bank statement and or any documentary evidence for that matter.

[54] It is this Courts view that the property valuations seem to be inflated and or overstated without having sight to the comparative valuations. In addition, no proof was provided by the first respondent of his alleged ownership of the stake in the property and or investment property. He failed to place this Court in his confidence to prove his solvency.

[55] However, even if this Court could adopt a pragmatic approach and accept the say-so of the first respondent, this would mean his assets are as follows:

Assets

Erf 1[…] Caledon Kajon Investment (100% ownership = R6 100 000.00)

(80% ownership) = R4 880 000.00

Erf 6[…] Kleinmond (100% ownership = R3 600 000.00)

(40% ownership) = R1 440 000.00

Cash in hand	=	R50 000.00
Total Assets	**=**	**R6 370 000.00**

Liabilities

The Applicant	=	R520 000.00
Estate Late CF Thomson	=	R350 000.00
Estate Late JB Geldenhuys	=	R53 265.00
Estate Late CJ Du Preez	=	R52 000.00
Estate Late RL Taylor	=	R150 000.00
Estate late ER David	=	R90 000.00
Estate Late SA Kotze	=	R2000 000.00
Nedbank	=	R67 582.00
Estate Late De Jager	=	R4 458 374.23
Total Liabilities	**=**	**R7 741 221.23**

[56] In the said circumstances, clearly the first respondent has committed an act of insolvency or he is insolvent. His liabilities far exceed his assets.

[57] The first respondent seemed to argue that the third party creditors as referred to above, should have joined and / or intervened in the proceedings. The third requirement is not a stringent one and does not require any creditor to join the

sequestration proceedings. The only requirement is that *'the court should have a reason to believe that it will be to the advantage of the creditors of the debtor if his estate was placed under sequestration'*. There is no requirement that direct evidence should be placed before Court in order to ascertain whether sequestration would be to the advantage of the general body of creditors.

[58] The first respondent submitted that the applicant and her attorneys conjured up allegations that there are various third party creditors. These claims are placed in serious doubt. The allegations of insolvency based on alleged debts by third parties raise serious factual disputes. As stated above, the test in an application for provisional sequestration is not a stringent one. The Court should be of the opinion that *prima facie,* the requirements of section 10 have been satisfied. Stricter and stringent requirements are at the final sequestration stage, where a creditor is required to establish a claim against the debtor.

[59] In my view, the actual proof by the third party creditors that the first respondent owes them, would be required at that stage when he is called upon to show cause why his estate should not be sequestrated finally. In any event, if the first respondent was serious about these dispute of facts, he could have requested the Court to refer his stated case for oral evidence. Even then, that would be premature as there is no claim that is required to be established at this stage. It appears that the first respondent lost sight of the fact that there is no requirement that the provisional sequestration proceedings should be proceeded with by action proceedings when he relied on the fact that there is a dispute of fact with regards to the third party creditors. These submissions in my view lacks merit.

[60] In the result, I am satisfied that the applicant has made out a case for provisional sequestration.

[61] I therefore make the following order:

61.1 The estate of the first respondent is placed under provisional sequestration in the hands of the Master of the High Court of South Africa, Cape Town;

61.2 A *rule nisi* is issued calling upon all interested parties to show cause on **31 July 2023**

61.2.1 why the first respondent's estate should not be placed under final sequestration; and

61.2.2 why the cost of this application should not be costs in the administration of the first respondent's insolvent estate;

61.3 A copy of the order should be served by the sheriff of this Honourable Court on:

61.3.1 The first respondent at his residential address at 3[…] F[…] A[…], Kleinmond, Western Cape;

61.3.2 The South African Revenue Service, Cape Town.

61.4 A copy of the order must be published once in each of *'The Cape Times'*
and *'Die Burger'* newspapers.

MANTAME J
WESTERN CAPE HIGH COURT