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

Case Number: 5167 / 2022

In the matter between:

MARKRAM JAN KELLERMAN First Applicant

GERT ERASMUS BURGER N.O. Second Applicant

ANTON KEET N.O. Third Applicant

WILLEM JACOBUS CRONJE N.O. Fourth Applicant
(As the joint trustees of the HNP Trust IT 1310/2001)

And

LAMBERTUS VON WIELLIGH BESTER N.O. First Respondent

JOHNNY BASSON N.O. Second Respondent
(*As the joint trustees of the Insolvent estate of the HNP Trust Master's Reference: C42/2019)*

THE MASTER OF THE HIGH COURT Third Respondent

Coram: Wille, J
Heard: 1 February 2023
Further Submissions: 10 February 2023
Delivered: 17 February 2023

JUDGMENT

WILLE, J:

Introduction:

[1] This is an application to remove the first and second respondents as the duly appointed joint trustees of the finally sequestrated estate of a trust (the insolvent estate)[1]. The third respondent takes no part in these proceedings. The second, third and fourth applicants were initially the joint 'trust-trustees' of the insolvent estate.[2] The first applicant is a creditor who took a cession from a third-party creditor.[3] The second, third and fourth applicants were the appointed 'trust-trustees' of the insolvent estate appointed in terms of duly issued letters of authority issued by the third respondent. The application is not for the removal of the first and second respondents in terms of any of the provisions as set out in the Act.[4] By contrast the applicants seek the removal of the first and second respondents strictly in terms of the common law. They do so on the basis of alleged misconduct on the part of the first and second respondents. The relief sought is discretionary and is final in nature.

[2] The first and second respondents deny that they are guilty of any misconduct. They say that after they considered all the relevant facts and obtained extensive legal advice, they acted appropriately and in the interests of the general body of creditors of the insolvent estate. Further, they argue that this application has yet to be supported by any of the other creditors of the insolvent estate. Further, there is no suggestion of any complaint by the second respondent against the first respondent, who appears to be the focus of the first applicant's attention. Further, the first and second respondents say they are always required to act together and in the best interests of the creditors. This they say, they did.

Context:

[3] The first applicant is a chartered accountant, and his brother-in-law is a chartered accountant.[5] I suspect this relationship is where the trouble started for the first applicant. The first applicant's brother-in-law was an accounting firm's founding member and senior director.[6] For many years, his fellow director in this

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1 The HNP trust.
2 These applicants were the trustees in terms of their appointment under their 'Letters of Authority'.
3 Absa Bank Limited.
4 The Insolvency Act 24 of 1936.
5 Mr. Louw.
6 Louw and Cronje Incorporated.

accounting firm was the fourth applicant. The fourth applicant is also a chartered accountant.

[4] The initially appointed 'trust-trustees' of the insolvent estate were the first applicant's brother-in-law, the first applicant's sister and the fourth applicant. The beneficiaries of the insolvent estate were the first applicant's brother-in-law, the first applicant's sister, the fourth applicant, and their descendants. The applicant's brother-in-law took a wrong turn in life and defrauded his erstwhile clients, amongst others, through questionable investment schemes to the sum of about R110 million. He has since been convicted and is serving a lengthy prison sentence.

[5] Several discrete companies were registered some years ago to facilitate this irregular investment scheme by the first applicant's brother-in-law.[7] Initially, the first applicant was appointed as the sole director of a discrete farming company, the registered owner of a valuable farm. In equal shares, the insolvent estate and another family trust owned the shares of the farming company. The first applicant agreed to give his brother-in-law *carte blanche* to conduct a farming business in the name of the farming company as a separate business. Any profit or loss would result in adjusting his brother-in-law's loan account in the farming company.

[6] A fraudulent tax evasion scheme was hatched, with the participants all farming businesses. The scheme was a fraud on the fiscus and it is averred that the first applicant was aware of and participated in the scheme. I make no findings concerning the first applicant's participation in or knowledge of this fraudulent scheme. The first applicant's brother-in-law was subsequently appointed as a director of the farming company and became the latter's executive director. In an apparent attempt to advance this irregular tax evasion scheme, the positive loan account in the name of the first applicant's brother-in-law in the farming company was converted into a specific category of shares which were in turn invested into the insolvent estate. This for no consideration. By the accountant's pen stroke,

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[7] One of these companies being Quintado (Pty) Limited (the 'farming company').

this loan account was effectively euthanized. In addition, the loan account in favour of the family trust that held the remaining shares was also deleted from the records of the farming company. To further advance this scheme several further discrete companies made a guest appearance.[8] The insolvent estate held a share stake in some of these discrete companies.[9]

[7] It is alleged that the insolvent estate funded these discrete companies from the funds embezzled by the first applicant's brother-in-law. The accounting firm controlled by the first applicant's brother-in-law conveniently provided all the necessary professional accounting services to the various entities to keep the scheme functional and concealed.

[8] The subsequent sequestration of the joint estate of the first applicant's brother-in-law and the first applicant's sister revealed the extent of the fraud perpetrated against the investors and creditors.[10] This no doubt prompted the first applicant to revisit the financial statements of the farming company to attempt to remove the tax fraud transactions from the accounting records of the farming company. This is because this was the entity that owned the farm, and this is where some value was located.

[9] Shortly before the sequestration of the joint insolvent estate, the insolvent estate entered into a cession and pledge arrangement in terms of which the insolvent estate would assume the liabilities of the first applicant's brother-in-law to the first applicant for repayment of the monies loaned and advanced by the first applicant to his brother-in-law.

[10] As security, the shares and loan accounts in the farming company and some other discrete companies were ceded and pledged to the first applicant in terms of a security arrangement. Notably, the fourth applicant was the only signatory to this security arrangement on behalf of the insolvent estate.

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[8] Pholaco (Pty) Limited, Tomlo (Pty) Limited and Tomlo Commodities (Pty) Limited (collectively 'Tomlo').
[9] The insolvent estate held a ninety (90) percent share stake in Pholaco.
[10] The insolvent estate of Mr. and Mrs. Louw shall be referred to as the 'joint insolvent estate'.

Predictably, the insolvent estate defaulted on its payments, and in terms of the pledge and cession, almost the entire share portfolio of the insolvent estate was transferred to the first applicant. After that, the first and second respondents embarked on litigation to set aside the transfer of these shares and loan accounts in terms of this security arrangement.

[11] This litigation was settled, and the shares and loan accounts were restored to the insolvent estate. Thus, the first applicant was left only with a concurrent claim against the insolvent estate of the monies he loaned and advanced to his brother-in-law.[11] After the insolvent estate was finally sequestrated, an application for leave to appeal was launched and refused. A further application for leave to appeal to the Supreme Court of Appeal was refused. In addition, a further reconsideration application to the Supreme Court of Appeal was also declined. Finally, a visit to our apex court was not met with any success.

The complaints by the applicants:

[12] The first applicant complained to the third respondent concerning the first and second respondents' conduct. The first applicant complained: (a) that a paternal relationship existed between the first respondent and his son (who was a third joint provisional trustee of the sequestrated joint estate); (b) that the holding of a joint enquiry into the joint insolvent estate and the insolvent estate was misplaced and wrong; (c) that the first and second respondents submitted a false claim against one of the discrete companies; (d) that the first and second respondents failed to object to the claim upon which the insolvent estate was sequestrated alternatively, they failed to expunge this claim and, (e) that the first and second respondents acted inappropriately and incorrectly in relation to the affairs of the farming company.

[13] Following this complaint the third respondent reported that: (a) regarding the claim of the joint estate, the remedy was to have had the decision to admit the claim reviewed; (b) regarding the paternal relationship complaint, both father and son had joint trustees and the trustees were obliged to act together; (c) no severe

[11] In the sum of R17.68 million.

bias to any of the estates was uncovered, and, (d) the complaints by the first applicant failed to address this issue of the joint appointments in each of the estates and that the joint trustees were obliged to act together.

The insolvency enquiries:

[14] The third respondent authorized the insolvency enquiries, and they were held together. The first applicant, his brother-in-law and the fourth applicant gave evidence at the enquiries. The first applicant's brother-in-law and the first applicant's sister had been the 'trust-trustees' of the insolvent estate before their removal once their joint estate was sequestrated. Accordingly, I cannot imagine any difficulty by the adoption of the procedure for a joint enquiry. I say this because the explanation given by the first and second respondents is that the affairs of these estates were connected, and they wanted to avoid calling the same witnesses on different occasions to traverse similar issues. This was done to be practical, to save costs and in the interests of the creditors.

The alleged false claim:

[15] Turning now to the alleged false claim against one of the discrete companies.[12] The complaint is that the first applicant's brother-in-law did not have the authority when he made an affidavit supporting the insolvent estate's claim against this company. However, attached to his affidavit was a ledger account detailing the loans made by the insolvent estate to this company. After that, at a creditors meeting an attempt was made to withdraw this claim and not submit the same for proof. This attempt was made by an attorney acting on behalf of the first applicant's brother-in-law.

[16] The reason advanced was that the first applicant's brother-in-law had recanted and advised that his affidavit supporting the claim was false and a lie. The first and second respondents resisted this course of action because the joint estate had been sequestrated at this time, and the insolvent estate had been

[12] Pholaco (Pty) Limited.

provisionally sequestrated. The first and second respondents accordingly persisted with this claim. I find nothing sinister or untoward in the conduct of the first and second respondents persisting with this claim.

[17] I say this because the first and second respondents viewed this attempted withdrawal of the claim for proof as suspicious because: (a) the first applicant's brother-in-law was a fraudster and he had an interest in diverting assets away from the insolvent estate, and (b) the first applicant's brother-in-law had in a different meeting independently confirmed that he had advanced monies to this company via the insolvent estate.

[18] The applicants advance that the only reason for the claim being submitted for proof was to promote the final sequestration of the insolvent estate. This bears scrutiny. The first and second respondents say that they persisted with the claim because they perceived the sudden withdrawal of the claim as strategic. They say this because accepting the claim could only result in a potential benefit to the general body of creditors of the insolvent estate. It is difficult to discern why the applicants would not support a claim to the possible benefit of the general body of creditors in the insolvent estate unless they wanted to divert assets away from the insolvent estate.

[19] Further, the fourth applicant in his capacity as a 'trust-trustee' of the insolvent estate had signed the then-annual financial statements of this company as its auditor. These annual financial statements reflected the loan of these funds by the insolvent estate to the company. Finally, the corollary to the loan by the insolvent estate to the company was the loan by the applicant's brother-in-law to the insolvent estate.

The joint insolvent estate's claim:

[20] The claim by the joint insolvent estate was submitted for proof at the first meeting of the creditors of the insolvent estate. This was the same claim advanced by the petitioning creditor for the sequestration of the insolvent estate. The objections, complaints and shields advanced by the applicants are the same ones traversed in the vigorously opposed sequestration application of the insolvent estate. Moreover, the applicants, in this case, were the identical parties in the

sequestration application of the insolvent estate. The judgment granting the final sequestration order (and thus dealing with this claim), has been the subject of vigorous scrutiny and was not overturned on appeal. The applicants contend that no findings have yet been made in connection with this claim. Furthermore, the applicants advance that in the light of these current proceedings, which according to them, establish no indebtedness by the insolvent estate to the joint insolvent estate, an investigation into the joint insolvents estate's claim falls to be progressed by the respondents.

[21] The first and second respondents say that the court's final judgment in the sequestration of the insolvent estate was a factor that the first and second respondents were entitled to consider when they decided to accept the claim against the insolvent estate. On this, I agree. I say this because the applicants are attempting to re-litigate the claim upon which the insolvent estate was finally sequestrated. Further, the argument is that the first and second respondents needed to investigate whether the records of the insolvent estate reflected the joint insolvent estate's claim. Again, this issue was fully ventilated in the sequestration application of the insolvent estate and decided accordingly. The judgment dealing with the sequestration of the insolvent estate fully referenced the records and admissions connected to the joint insolvent estate's claim. This judgment has since been the subject of much scrutiny by various courts.

[22] The applicants have yet to demonstrate that the first and second respondents relied solely on the sequestration judgment in determining the validity of the joint insolvent estate's claim. The core question is whether the first and second respondents are guilty of misconduct in not adopting the 'applicants-suggested' approach in assessing the validity or otherwise of the joint insolvent estate's claim. It is challenging to discern how this failure(if any) would amount to misconduct by the first and second respondents.

The application for the liquidation of the farming company:

[23] The first and second respondents did not launch this liquidation application. The applicants launched this application. The third respondent appointed the first respondent as one of the joint provisional liquidators with two other liquidators.

The first respondent was thus one of three (3) joint provisional liquidators appointed by the third respondent. At the time of the appointment of the first respondent, the third respondent was aware that the first respondent was a co-trustee of the insolvent estate.

[24] The complaint is raised that the first respondent was in a position of conflict. However, the disputes at the time were between the first and second respondents and the first applicant. At this time, there was no mention of any possible conflict between the first respondent in his role as a trustee in the insolvent estate and as a provisional joint liquidator in the farming company. Most significantly, the insolvent estate was not reflected as a registered shareholder of the farming company at the time of the first respondent's appointment as a provisional joint liquidator of the farming company. Most significantly, any live disputes were between the first respondent and second respondent and the first applicant personally, not the farming company. No conflict existed, and no disputes were brewing between the insolvent estate and the farming company.

The alleged promotion of joint insolvents estate's interests:

[25] The applicants aver that the first and second respondents took steps to bolster the joint insolvent estate's position in the insolvent estate's sequestration by launching the application to set aside the security-share transfer arrangement. However, through the share-security arrangement, the first applicant had ostensibly acquired a host of assets to secure a liability in his favour to repay his alleged loan to his brother-in-law.

[26] The context is that the first and second respondents' demanded a return of the shares under the share-security agreement. The first applicant refused to adhere to this demand and stood by his position that he had realized his security by effecting the transfer of the shares to himself. Under these circumstances, the first and second respondents had sufficient reason to believe that they would succeed in obtaining an order for the return of these shares. This was ultimately achieved to the benefit of the creditors of the insolvent estate.

[27] A further complaint is that the first and second respondents were advancing

the joint insolvent estate's interests by opposing the rescission of the provisional sequestration order of the insolvent estate. The applicants sought a personal costs order against the first and second respondents, irrespective of whether or not they opposed the rescission application. In these circumstances, the first and second respondents had no choice but to resist granting such an order. They did not oppose the relief to rescind the provisional sequestration of the insolvent estate.

The cession in favour of the first applicant:

[28] After the matter hearing, I requested the respective counsel for the parties to file a further written note concerning the issue of the *locus standi* of the first applicant, given the cession of a creditor's claim to him. Further notes were submitted in this connection.

[29] It is my view, based on my understanding of our law of cession, that *locus standi* to enforce the principal debt (owed by the principal debtor to the cedent under the agreement between the cedent and the principal debtor) vests in the cessionary only in respect of the rights to the claim so ceded, and not in respect of any other rights to claims that are not the subject of the cession document.

[30] The rights to claims not forming the subject of the cession document remain vested in the cedent and form part of the cedent's estate. Thus, a cessionary would not ordinarily, in my view, have standing to litigate against third parties who have contractual or statutory relations against the cedent where the claims in question are not the subject of the cession document unless the parties so agreed.[13] In this event, the principles of the law of cession will have to be complied with to give effect to such intention.

[31] The cession would have to deal expressly with a cession of the right to apply for the first and second respondents to be removed as trustees of the insolvent estate. The ceded rights, in this case, were limited and did not confer any other rights to claims that were not the subject of the cession document.

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[13] Dr Adnaan Kariem – PhD Thesis (Commercial Law) – 6 June 2022.

Thus, I am unpersuaded that the first applicant had the necessary *locus standi* to have pursued this application under and in terms of the cession document. I say this also because, by way of legislative intervention, a creditor may not vote in respect of any claim which was ceded to him after the commencement of the proceedings by which the estate was sequestrated.[14] The first applicant took cession of a creditor's claim after the commencement of the proceedings to sequestrate the insolvent estate. This happened about three years after the event. The question arises if this makes any difference given the other applicants to the application.

[32] I say it does because the applicants seek an order that the first and second respondents be removed as the trustees of the insolvent estate. If the court grants such an order, it will only be the remaining proven creditors who can vote for any replacement trustees. None of the remaining proven creditors support the application for the removal of the first and second respondents. The second, third and fourth applicants also have no rights to vote on this issue as they retain only a residual interest in the administration of the insolvent estate.

[33] The first applicant advances that he does have *locus standi* because the cession that he concluded was an 'out-and-out' cession. It is so that the cession document records that the cession is an 'out-and-out' cession. Curiously, the cession document expressly also records the following:

'….In the event that the Cessionary receives a payment of a dividend from the HNP Trust in respect of the Claim ceded to him in terms of this Agreement ("the dividend payment"), the Cessionary shall effect payment of 50% of the dividend payment to the Cedent within 1 (one) Business Day of receipt of payment of the dividend payment by the Cessionary, confirmation of payment to be provided….'

[34] Thus, despite the wording of the cession to be an 'out-and-out' cession, it is not. Further, the claim is defined explicitly in the definition section as only the claim submitted for proof at the creditor's meeting. Nothing more and nothing less

[14] Section 52(4) of the Insolvency Act.

is ceded. The agreement of cession also has a non-variation clause and a sole memorial clause. Accordingly, the cession agreement itself, strictly interpreted, clearly exhibits that the cedent ceded only limited rights to the cessionary. The ceded rights did not confer any other rights that were not the subject of the cession document. The rights ceded were limited to the claim as defined in the agreement and in respect of which the first applicant enjoys no voting rights. In my view, the first applicant did not have the requisite *locus standi* to bring this application.

Conclusion:

[35] Even if I am wrong on the cession point, I have been persuaded that the applicants did not meet the stringent test required for removing the first and second respondents on the grounds of misconduct. They have been unable to discharge the onus of showing that the conduct of the first and second respondents will prejudicially affect the future welfare of the insolvent estate.

[36] In addition, they have failed to show any conduct which has been prejudicial to the insolvent estate. The test for the removal of trustees is generally that their continuance in office would prejudicially affect the future welfare of the estate entrusted to them.[15]

[37] Similarly, the test for removing a liquidator is that the removal will be to the general advantage and benefit of all persons concerned or otherwise interested in the winding-up of the company in liquidation.[16]

[38] As a general proposition, those circumstances must include recognizing that a trustee or a liquidator in insolvency cannot always be even-handed. These circumstances must, of necessity, include the recognition that the first applicant may have an axe to grind against the first and second respondents. I say this because the first and second respondents have via extensive litigation, successfully opposed the first applicant's attempts to retain assets transferred to him by the insolvent estate shortly before its sequestration. The first and second

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[15] *Fey N.O. and Whiteford N.O. v Serfontein and Another* 1993 (2) SA 605 (SCA) at 609 G-H.

[16] *Standard Bank v The Master of the High Court* 2010 (4) SA 405 (SCA) at [126] and [143].

respondents were successful in setting aside the cession and pledge agreement for the ultimate benefit of the insolvent estate and to the detriment of the first applicant. This seems to have been the main motivation for the removal of the first and second respondents.

[39] The test for removing liquidators and trustees in insolvency is stringent. This is because:

'…*the removal of a liquidator is a radical form of relief which will not be granted unless the Court is satisfied that a proper case is made out therefor. In this regard it will not be sufficient merely to show that there is an apprehension or perception of bias, partiality, lack of independence or unfairness on the part of the liquidator. Nor will it suffice to establish, even if prima facie, that the liquidator has not performed satisfactorily, has made questionable decisions or permitted errors of judgment…*'[17]

[40] The second to fourth applicants, as the 'trust-trustees' appointed by the third respondent, retain only a residual interest in the administration of the insolvent estate. They have limited rights to approach the court where there has been an irregularity or an absence of good faith on the part of any trustees appointed to an insolvent estate.[18] Most importantly, this application was heard about four (4) years after the sequestration of the insolvent estate and the appointment of the first and second respondents. The sequestration of the insolvent estate was a complex sequestration in which a great deal of water has since flowed under the bridge.

[41] The liquidation and distribution account has already been filed. The third respondent is satisfied that the first and second respondents have discharged their duties and no other creditors supported the application. The removal of the first and second respondent at this stage of the process, given the alleged misconduct

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[17] *Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell NNO* 1997 (1) SA 547 (CPD) at 566 A-D.

[18] *Mookrey v Smith N.O. and Another* 1987 (1) SA 232 (CPD) at 335 E–G.

which is long since historical, would also not be in the interests of the general body of creditors in the insolvent estate.

Order:

[42] For all these reasons, an order is made in the following terms:

1. The application is dismissed.

2. The applicants (jointly and severally, the one paying the others to be absolved) shall be responsible for the first and second respondents' costs of and incidental to the application on the scale as between party and party as taxed or agreed (such costs shall include the costs of two counsel where so employed).

E D WILLE
Judge of the High Court
Western Cape