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

**REPORTABLE**
**CASE NO: 2108/2021**

In the matter between:

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| **CORRUSEAL CORRUGATED KZN (PTY) LTD** | First Applicant |
| **CORRUSEAL CORRUGATED GAUTENG (PTY) LTD** | Second Applicant |

and

| | |
|---|---|
| **EVGUENI VICTOROVITCH ZAKHAROV** | First Respondent |
| **IRINA PETROVNA KARAVAEVA** | Second Respondent |

Bench: P.A.L. Gamble, J

Heard: 22 February 2023

Delivered: 6 March 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be at 14h00 on Monday 6 March 2023.

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**JUDGMENT**

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**GAMBLE, J:**

INTRODUCTION

1. This is the extended return day of a provisional order of sequestration granted against the first respondent ("the respondent") on 3 August 2022 in this Division.[1] Despite the matter having been fully argued before the court which granted the provisional order, no judgement was delivered nor did either party ask for reasons therefor. This Court thus does not know what the basis was for the provisional finding that the respondent was insolvent.

2. The facts are nevertheless uncomplicated. The respondent is a businessman who was at the helm of a company called Exotic Fruit (Pty) Ltd ("Exotic") whose business was the export of local fruit to various overseas destinations. The first and second applicants ("Corruseal KZN" and "Corruseal Gauteng" respectively) supplied packaging materials to Exotic from time to time. On 21 April 2016 the respondent applied for credit facilities with the applicants on behalf of Exotic and in so doing put up a personal suretyship for Exotic's future indebtedness to both applicants. By October 2019 Corruseal KZN was owed more than R16m by Exotic in respect of goods sold and delivered under the credit facility granted by it. Corruseal Gauteng was similarly owed in excess of R1, 2m.

3. On 25 October 2019, Exotic was liquidated at the request of Morgan Cargo (Pty) Ltd, one of its other creditors. On 27 November 2019, after the respondent had failed to satisfy demands for payment, Corruseal KZN issued summons out of this court under case no 21281/2019 to recover R16 759 921,66 from him under the aforesaid suretyship. A similar summons was issued by Corruseal Gauteng under case no 2182/2019 for recovery of the sum of R1 209 839, 10.

4. When the respondent opposed the claims, and after he had filed his plea, Corruseal KZN and Corruseal Gauteng each sought summary judgment against him.

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[1] Mr. Evgueni Victorovitch Zakharov was cited as the first respondent in the application and his wife, Ms. Irina Petrovna Karavaeva, to whom he is married out of community of property in accordance with the laws of Russia, was cited as the second respondent in accordance with the Practice Directions of this Division. No relief was sought against Ms. Karavaeva, hence the convenient reference hereinafter to Mr. Zakharov as the respondent.

In opposing that application, the respondent took a host of points, including that his suretyship was limited to the amount of R500 000 in respect of each company. That allegation was founded, not upon any express term in the suretyship, but on the suggestion that Exotic had a credit limit with Corruseal Gauteng of only R500 000, that it had granted Exotic credit in excess of that amount and that, in so doing, he had been prejudiced as surety.

5. On 25 May 2021, in each case the court granted summary judgment against the respondent in the sum of only R500 000 and gave him leave to defend the claims on the balance. Unfortunately, no reasons were handed down in the summary judgment proceedings either. Applications for leave to appeal those judgments were refused in this Division and ultimately by the Supreme Court of Appeal on 3 November 2021.

6. On 24 November 2021 two warrants of execution were issued by respectively Corruseal KZN and Corruseal Gauteng against the respondent for payment to each of the amount of R601 232, 95, being capital of R500 000 plus interest. On 1 December 2021 the Sheriff attended at the respondent's home in Hout Bay and demanded payment of the 2 judgment debts. The respondent was in attendance and he personally informed the Sheriff that he was unable to pay the amounts claimed. He went on to allege that the movables in his residence belonged to an entity known as Chestnut Hill (Pty) Ltd. The Sheriff thus filed *nulla bona* returns on each of the writs.

7. On 14 March 2022 Corruseal KZN and Corruseal Gauteng jointly moved for a provisional order of sequestration against the respondent in the Motion Court. The application was opposed and the matter was sent to the semi-urgent roll for hearing on 3 August 2022 when the provisional order referred to was made. That order was returnable on 3 September 2022 but, by agreement, the rule *nisi* was extended to 22 February 2023 when the matter came before this Court.

8. The respondent filed a supplementary answering affidavit on 20 October 2022 and early in February 2023 the applicants (hereinafter collectively referred to as "Corruseal" for the sake of convenience) filed a supplementary replying affidavit in

which they dealt, *inter alia*, with certain developments which had occurred in the interim and to which I shall refer more fully hereunder. The supplementary replying affidavit was way out of time but no attempt was as made to strike it out. To the extent that it seeks to deal with allegations made in the supplementary answering affidavit I am in any event of the view that it is properly before the Court.

9. Further, during the afternoon of 22 February 2023, another creditor of Exotic, Humansdorp Co-Operative Ltd, filed an application to intervene in this matter on the basis of a suretyship it held from the respondent. That application was summarily withdrawn by counsel when the matter was called in Court the following day and thus nothing more needs to be said in that regard.

RESPONDENT'S ARGUMENT ON THE RETURN DAY

10. The respondent took two main points on the return day. Firstly, it was said that Corruseal's claims had been paid in full since the provisional order had been made and that it accordingly no longer had the requisite *locus standi* to move for a final order. Secondly, it was said that Corruseal had failed to establish beyond reasonable doubt that the respondent was factually insolvent. I shall deal with the *locus standi* point first.

LOCUS STANDI

11. In the supplementary answering affidavit of 18 October 2022, the respondent said the following –

> "5. After the provisional Order was granted in this application, I took further legal advice and mentioned my provisional sequestration to a number of my friends and family. During the course of my discussions with a business associate and friend of mine, he informed me that he was in the position to assist me by making a payment to the Applicants in order to discharge the amounts comprising the judgments granted against me in case numbers 21281/2019 and 21282/2019 in the above Honourable Court.

6. I have not disclosed the identity of that friend and business associate of mine as he does not wish his name to be disclosed in these papers. That associate is the director and shareholder of an entity incorporated in Dubai, namely, Evergreen LLC ('Evergreen').

7. On 12 August 2022, my attorneys of record wrote a letter to the Applicants' attorneys in which they asked for a calculation of the interest that accrued on the judgment debts which I have referred to above. A copy of that correspondence is attached marked **"SA 1"**.

8. On 23 August 2022, my attorneys received a response from the Applicants' attorneys. A copy of that correspondence is attached marked **"SA2"**. In that correspondence, the Applicants' attorneys:

8.1 Asked whether I would be making payment, alternatively, that my attorneys provide the identity of the person or entity which would be making the payment concerned.

8.2 Stated that they proposed that an interest calculation be performed by my attorneys but, without prejudice to their rights, attach an interest calculation by the Applicants.

9…

10. Thereafter, Evergreen made payment into my attorneys' of record's trust account and on 25 August 2022 an amount of R1 283 286, 88 was paid by my attorneys into the Applicant's attorney's trust account. That amount comprised the capital in respect of the judgments together with interest as calculated by the Applicants' attorneys.

11. On 25 August 2022, my attorneys sent a letter to the Applicants' attorneys. A copy of that letter is attached marked **"SA 3"**. I ask that the contents of that

letter be read as if specifically incorporated into this affidavit. In that letter, my attorneys:

11.1 Gave details of the entity which paid the amount in question on my behalf and that the amount paid for constituted a donation by Evergreen to myself.

11.2 Stated that I had no interest in Evergreen and that I am not a director and shareholder of that entity.

11.3 Tendered unconditionally payment of all costs as provided for in the judgments as taxed or agreed together with any execution costs incurred by the Applicants to date.

11.4 Stated that in the event that the Applicants disputed the interest calculation that they should advise my attorneys as a matter of urgency.

11.5 Attached proof of payment of the amount into those attorneys' trust account.

11.6 Called upon the Applicants to withdraw this application, failing which the supplementary affidavit would be delivered and that I would asked that the application be dismissed and the Rule *nisi* discharged.

12. As is apparent from that correspondence, payment of the amount of the judgments in question together with interest has been paid. Costs in respect of that application has (sic) also been tendered. Accordingly, there is no liquidated amount which is still owing to the Applicants.

13. My attorneys did not receive any response to that correspondence, despite requesting a response on 26 August 2022. I point out that to the extent to which the payment and tender is not satisfactory to the Applicants, and any further amounts that they demonstrate they are legally entitled to by virtue of the judgments can and will be paid to them.

14. Furthermore, I have not incurred any liability in respect of Evergreen and the amount which is being paid is a donation in order to avoid the indignity of sequestration. I have not incurred any liability to Evergreen or any other person or entity in respect of that amount.

15. Accordingly, liquidated amounts upon which the applicants bring this application have been discharged. I am advised that the balance of the amounts the Applicants allege are owned by me to them (which I deny) are the subject matter of dispute in the action proceedings which have been launched by the First and Second Applicant respectively. Those disputes will be dealt with in those proceedings in respect of which, I point out, the Applicants have not taken any further steps."

12. The material portion of Annexure SA 1 (the letter from Dockrat Attorneys referred to by the respondent in the supplementary answer) is to the following effect.

"2. Kindly, and as a matter of urgency provide us with a calculation of the interest that will have accrued on the judgment debt up to and including 15 August 2022, and up to and including 22 August 2022.

3. Kindly also furnish us with your trust account details."

13. In Annexure SA 2, the material part of the reply by Werksmans Attorneys to Dockrat Attorneys is as follows.

"2. We note that you have requested our trust account details, and we assume that same is requested for purposes of making payment. In this regard, kindly advise whether your client would be making such payment, alternatively furnish us with the identity of the person or entity which will be making such payment, and the basis upon which such payment is being made.

3…

4. Our client's rights remain expressly reserved herein."

14. In Annexure SA 3 to the supplementary answering affidavit Dockrat Attorneys replied as follows.

> "1…
>
> 2. It is correct that we requested your trust account details in order to make payment of the full amount of the judgment debts under the above case numbers, together with interest.
>
> 3. We have been instructed to make such payment by an entity incorporated in Dubai, namely Evergreen AZ Incorporated ('Evergreen') on the basis that such payment constitutes financial assistance in the form of a donation by Evergreen to Mr. E.V. Zakharov. Mr. E.V. Zakharov has no interest in Evergreen and is not a director nor a shareholder of that entity.
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> 4. We have in addition been instructed to tender unconditionally as we hereby do, payment of all costs provided for in the judgments, forthwith upon agreement or taxation together with all execution costs incurred by the judgment creditors to date.
>
> 5…
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> 6. A copy of the proof of payment into your trust account is annexed hereto.
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> 7. Arising from this payment, your clients' lack *locus standi* to proceed with the sequestration application against our client under case number 2108/2022. We accordingly court upon your clients to withdraw that application and discharge the rule *nisi.*
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> 8. In the event that your clients do not agree to withdraw the sequestration application, we propose that it be postponed to the semi-urgent roll and a timetable agreed for the further conduct of the matter. Should your clients not agree to that sensible proposal our client shall deliver a supplementary affidavit and seek an order on 2 September 2022 that the application be dismissed and

the rule *nisi* discharged, alternatively that the matter be postponed as proposed and that your clients pay the costs occasioned by the hearing on 2 September 2022…"

15. There is no reply to this last letter before the Court but it seems fair to infer that the agreed postponement of the matter on 2 September 2022 was to enable the parties to assess their respective positions in light of these developments.

16. The basis of Corruseal's response to the *locus standi* argument and the position adopted that the debt had been settled is succinctly set out in the replying affidavit of 7 February 2023 and in particular Annexure SR 10 thereto, a letter from Werksmans Attorneys to Dockrat Attorneys dated the same day. The initial part of the letter covers a dispute about the calculation of the various bills of costs and continues as follows –

"4. We in any event point out that, as a consequence of your client's provisional sequestration, your client cannot validly tender payment personally in respect of the aforementioned bills of cost as your client's estate vests in the Master of the High Court, Cape Town.

5. Likewise, any amounts paid and/or donated by or on behalf of your client, subsequent to his provisional sequestration, vested in the Master and could not be used so as to extinguish any debt owed to our client. Accordingly, receipt of such payments were received by our client without prejudice to any of its rights, as per previous discussions between our offices.

6. Our client's rights remain reserved…."

17. Neither of the supplementary affidavits nor the correspondence attached thereto informs the Court of the current status of the money paid into Werksmans Attorneys trust account. The Court enquired of the parties as to the state of affairs and it appears that the position is as follows. On 25 August 2022 Dockrat Attorneys paid the sum of R1 283 286, 88 into Werksmans Attorneys' trust account: the payment is

verified by a "proof of payment" computer printout attached to Annexure SA 3. The source of those funds is not verified by any document: there is only the say–so of the respondent in para 10 of the supplementary answering affidavit, as reproduced in para 11 above, that Evergreen paid the money into Dockrat Attorneys' trust account. The said sum remains in Werksmans Attorneys' trust account and has not been paid out to any party.

18. Counsel for the applicant, Mr. L.M. Olivier SC, submitted that the position was fairly straight forward. Evergreen made a donation to the respondent, which the respondent accepted. A donation is a contract like any other which requires the donee to accept the benefit bestowed upon him/her notwithstanding that the donor intended it to be an act of sheer generosity.[2] There is no debate here that the money which Evergreen allegedly put up was an out-and-out donation to the respondent to be immediately available for his benefit and with no obligation on the latter, having accepted same, to repay either the whole or part thereof.[3]

19. Counsel further submitted that the money was paid by Evergreen to Dockrat Attorneys who received same on behalf of the grateful respondent. Thereafter, the respondent's attorneys paid the money over to Werksmans Attorneys believing that the respondent's indebtedness to Corruseal would be wiped out *pari passu*. But, argued counsel, the problem for the respondent is that by accepting the alleged donation from Evergreen and the alleged payment into his attorneys' trust account, he acquired property after his provisional sequestration, conduct which falls foul of the provisions of s20 of the Insolvency Act, 24 of 1936 ("the Act").

**"20 Effect of sequestration on insolvent's property**

(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

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[2] G.B. Bradfield Christie's Law of Contract in South Africa (7th ed) at 70 para 2.3.1; Union Free State Mining and Finance Corporation ltd v Union and Free State Gold and Diamond Corporation Ltd 1960 (4) SA 547 (W) at 549E.

[3] Avis v Verseput 1943 AD 331 at 364

> trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him…
>
> (2) For the purposes of subsection (1) the estate of an insolvent shall include –
>
> (a) or property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment;
>
> (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three."

It is not in contended that the donation is saved by the provisions of s23 of the Act.

20. In *Ex parte* Vrey[4] Herbstein J was called upon to determine whether a donation made to an insolvent during sequestration vested in him personally. His Lordship held unequivocally that it did not, but vested in his trustee. The decision is cited with approval by Meskin [5]

21. In the result, I conclude that the issue is not controversial – a donation made to the insolvent during insolvency falls vests, in this case, in his provisional trustee. The only issue then is whether the money now held in trust by Werksmans Attorneys was in fact donated to the respondent or not.

22. Counsel for the respondent, Mr.A.R. Sholto-Douglas SC (who appeared with Mr. D van Reenen), submitted that, notwithstanding what Dockrat Attorneys and the respondent say in their own words, the Court should have regard to what the parties really intended. He said that the evidence sustained a scenario where Evergreen wished to spare the respondent the spectre of a final order of sequestration. To that

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[4] 1947 (4) SA 648 (C) at 650.
[5] Meskin Insolvency Law at 5.39 para 5.13

end Evergreen undertook to settle the respondent's debts to Corruseal. This, said counsel quite correctly, was entirely permissible in law.[6]

23. But, however one might seek to construe the position, it is in my view clear that Evergreen did not make payment to the creditor in settlement of its claim against the insolvent. Rather, it donated money directly to the insolvent and that resulted in the payment falling into the hands of his trustee. In the result, I conclude that Corruseal's debt has not been settled and it retains the requisite *locus standi* to move for a final order of sequestration.

HAS THE RESPONDENT'S INSOLVENCY BEEN ESTABLISHED?

24. It is trite that on the return day an applicant must establish the criteria required for a final order of sequestration on a balance of probabilities[7]. The criteria are usefully described as follows in Meskin[8].

> "On the return day of the provisional order the Court has a discretion to finally sequestrate the respondent's estate provided it is satisfied as to the three essential elements of the applicant's case, i.e. that the applicant 'has established against [the respondent] a claim' upon the basis of which one is able competently to seek sequestration, that the respondent has committed an act of insolvency or is actually insolvent and that there is reason to believe that 'it will be to the advantage of creditors of the debtor if his estate is sequestrated'." (internal references omitted)

25. The first criterion, a claim against the respondent in excess of R100, has been dealt with conclusively in the finding in relation to Corruseal's *locus standi*. In the founding papers the second criterion is addressed by Corruseal through reliance on s8 (b) of the Act[9] and the presentation of the Sheriff's *nulla bona* returns to which I

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[6] See, for example, Duchen v Flax 1938 WLD 119 at 125, Ex parte Bruce 1956 91) SA 480 (SR)
[7] Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 All SA 185 (SCA) at [3]
[8] *Op cit* at para 2.1.13
[9] "**8 Acts of insolvency**
A debtor commits an act of insolvency –
(a)…

have already referred. In the answering affidavit the respondent does not engage with the allegation nor does he in any manner attack the validity of the *nulla bona* returns. Importantly, he does not even answer Corruseal's conclusion in para 30 of its founding affidavit that he has committed an act of insolvency as contemplated in s8(b) of the Act. The allegation must thus be taken to be admitted.[10]

26. In line with his argument on the *locus standi* point, Mr. Sholto-Douglas submitted, with reference to the *ratio* in Duchen[11], that a creditor could no longer argue for a final order of sequestration based on a *nulla bona* return once the debt had been settled. Interesting as that argument may be, it finds no application in this matter where it has been found that the payment by Evergreen falls in the hands of the respondent's provisional trustee and the debt has thus not been settled.

27. In the result, I am of the view that Corruseal is permitted to continue to rely on the *nulla bona* returns and that it has been conclusively established that the respondent has committed acts of insolvency as contemplated in s8(b) of the Act.

28. Turning to the question of whether it has been established on a balance of probabilities that the respondent is in fact insolvent, it is true that Corruseal is unable to furnish the Court with a comprehensive list of his assets and liabilities. It has pointed to certain liabilities of which it is aware and has mentioned assets which the respondent has disposed of which suggest financial embarrassment. But actual insolvency may be established inferentially as the following passage in Rhebokskloof[12] makes plain.

> "A case for the sequestration of a debtor's estate may be made out from the commission of one or more specified acts of insolvency or on the grounds of

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(b) if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment…"

[10] Plascon-Evans paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E – 635C; Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and another 2015 (4) SA 449 (WCC) at [9] *et seq.*

[11] Duchen v Flax 1938 WLD 119 at 125. See also Sithole N.O. v Mahlangu 2017 ZAGPJHC 134 and Lundy v Beck 2019 (5) SA 503 (GJ)

[12] ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and others 1993 (4) SA 436 (C) at 443B-F

> actual insolvency, i.e. that his total liabilities (fairly valued) exceed his total assets (fairly valued). The Legislature appreciated the difficulty which faces a creditor, whose dealings with his debtor might fall within a restricted ambit of business activity, in ascertaining the assets versus liabilities position of the latter. In alleviating this difficulty, the statutory provision was made for recognizing certain conduct on the part of the debtor as warranting an application to sequestrate his estate, this by way of introducing the concept of an act of insolvency.
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> Even, however, where a debtor has not committed an act of insolvency and it is incumbent on his unpaid creditor seeking to sequestrate the former's estate to establish actual insolvency on the requisite balance of probabilities, it is not essential that in order to discharge the *onus* resting on the creditor if he is to achieve this purpose that he set out chapter and verse (and indeed figures) listing the assets (and their value) and the liabilities (and their value) for he may establish the debtor's insolvency inferentially. There is no exhaustive list of facts from which an inference of insolvency may be drawn, as for example an oral admission of the debt and the failure to discharge it may, in appropriate circumstances which are sufficiently set out, be enough to establish insolvency for the purpose of the *prima facie* case which the creditor is required to initially make out. It is then for the debtor to rebut this *prima facie* case and show that his assets have a value exceeding the total sum of his liabilities…"

29. In this matter, the respondent has not taken the Court into his confidence by attempting to demonstrate that his assets exceed his liabilities, this notwithstanding the prima facie case of insolvency set up by the undisputed *nulla bona* returns.

30. The learned Judge in Rhebokskloof went on to cite[13] the well-known passage in a judgment from the former Transvaal Republic which still holds good more than 115 years on.

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[13] At 446J

"A debtor's unexplained failure to pay his debts is… a fact to which the Court has always attached much weight in determining the question of solvency. The oft-repeated and, with respect, eminently commonsensical and practical statement of Innes CJ in *De Waard v Andrews &Thienhans Ltd* 1907 TS 727 at 733 is a singularly apt in the instant context, viz:

'*To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes'*

words which were echoed by Bristowe J in his judgment in the same case, in which he said at 739:

"*After all, the prima facie test of whether a man is solvent or not is whether he pays his debts; and if he cannot pay them, that goes a long way towards proof that he is solvent*."

31. In this matter, there is ample evidence from which the respondent's insolvency can be inferred. For example, there is the fact that on 4 July 2022 an order for summary judgment in the amounts of R644 193,63 and US$254 648 (the present value whereof is around R4,6m) was granted against the respondent pursuant to a suretyship he put up with Morgan Cargo (Pty) Ltd for Exotic's exposure to it. Then, there are the following allegations by the respondent in the answering affidavit herein-

"22.20 The events which resulted in the liquidation of… Exotic Fruit severely set back my financial position. To pay for living expenses in South Africa my son and I both sold our cars and my wife has sold some valuable jewelry. She has been supporting me in South Africa using her funds.

22.21 I do to earn foreign income in Russia through consultancy work which I performed for a company there, but I do not need to explain why in the present

> environment[14] those funds cannot be patriated to South Africa easily and used here."

32. When all is said and done, one need look no further than the correspondence between Dockrat Attorneys and Werksmans Attorneys in August 2022, to which reference has already been made, and, in particular, the respondent's explanation under oath in the supplementary answering affidavit for the purported benevolence of Evergreen -

> "14… (T)he amount which has been paid is a donation **in order to avoid the indignity of a sequestration**."

33. In the circumstances, I can safely conclude that, in addition to its entitlement to continue rely on s8 (b) of the Act, Corruseal has established that the respondent is factually insolvent.

BENEFIT TO CREDITORS

34. The phrase "benefit to creditors" is to be interpreted widely. In Meskin & Co[15] the learned Judge made the following observation.

> "Sequestration confers upon the creditors of the insolvent certain advantages… which, though they tend towards the ultimate pecuniary benefit of creditors, are not in themselves of a pecuniary character. Among these is the advantage of full investigation of the insolvency affairs under the very extensive powers of inquiry given by the Act… In my opinion the court must satisfy itself that there is a reasonable prospect - not necessarily a likelihood that the prospect which is not too remote - that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of inquiry under the Act,

[14] The respondent appears to be referring to the so-called "special operation" in which Russia invaded Ukraine in February 2022.
[15] Meskin & Co v Friedman 1948 (2) SA 555 (W) at 559

some may be revealed or recovered for the benefit of creditors, that is sufficient."

This passage was cited with approval by the Constitutional Court in Stratford[16].

35. In the answering affidavit the respondent describes a web of entities and Trusts through which his financial affairs seem to have been controlled. For example, when the Sheriff sought to attach the furniture and appliances in the respondent's home, it was said that these items were the property of Chestnut Hill (Pty) Ltd, a company allegedly controlled by his daughter. It is thus apparent in the circumstances that an investigation of the respondent's affairs under an enquiry sanctioned by the Act may yield some pecuniary benefit for creditors.

36. Lastly, it must be borne in mind that there is already an amount of R1 283 286, 88 in the hands of the respondent's trustee which is available for distribution to creditors. There is thus already an established benefit for creditors.

DISCRETION

37. Lastly, it is trite that this Court has an overriding discretion to refuse to sequestrate the respondent. In Orestisolve[17], Rogers J discussed the manner in which such a discretion ought to be exercised.[18] After noting, as has repeatedly been said, that a creditor whose claim has not been settled is entitled to demand the liquidation of the debtor *ex debito justitiae*, his Lordship remarked that although the maxim did not imply an inflexible limitation on a court's discretion, he considered that it -

"conveys no more than that, once a creditor has satisfied the requirements for a liquidation order, the court may not on a whim decline to grant the order…To borrow another judge's memorable phrase, the court 'does not sit under a palm tree'…There

[16] Stratford and others v Investec Bank Limited and others 2015 (3) SA 1 (CC) at [43]
[17] At [18]
[18] While that matter involved the liquidation of a company, the approach is equally applicable in insolvency applications.

must be some particular reason why, despite the making out of the requirements for liquidation, an order is withheld." (Internal references omitted)

38. I agree with Mr. Olivier that there is no reason to exercise my discretion in favour of the respondent. On the contrary, the current circumstances, in which the creditors seem to be circling, it is imperative that the order be granted and the respondent's financial affairs be investigated.

**ORDER OF COURT**

In the circumstances, the following order is made.

A. The rule *nisi* granted on 3 August 2022 is confirmed and the first respondent's estate is placed under final sequestration.

B. The costs of this application will be costs in the administration of the insolvent estate.

**GAMBLE, J**

APPEARANCES

For the applicants:

Adv. L.M Oliver SC
Instructed by Werksmans Inc
Cape Town

For the respondents:

Adv. A.R Sholto-Douglas SC and
Adv D Van Reenen

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