

SOUTH AFRICA / JUDGMENT

## Lourens N.O and Another v De Cerff N.O and Others (18727/2024) [2024] ZAWCHC 326 (22 October 2024) [2024] ZAWCHC 326

COURT

Western Cape High Court, Cape Town

BEFORE

A Bhoopchand

CASE / FILE NUMBER

18727/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NUMBER: 18727/2024

In the matter between

ELIZNA LOURENS N.O.

FIRST APPLICANT

AVIWE NTANDAZO NDYAMARA N.O.

SECOND APPLICANT

and

ANTHEA NICOLETTE DE CERFF N.O.

FIRST RESPONDENT

CRAIG DOUGLAS HOMAN N.O.

SECOND RESPONDENT

DEON PEROLD & ASSOCIATES INCORPORATED THIRD RESPONDENT

MASTER OF THE HIGH COURT, CAPE TOWN FOURTH RESPONDENT

DEBRA VIRGINIA HEINRICH

INTERVENING PARTY

## JUDGMENT

Date of hearing: 17 October 2024

Date of judgment: 22 October 2024

BHOOPCHAND AJ:

1. This is an opposed application for the provisional sequestration of the ADC Family Trust (“the ADC Trust”, “the Trust”). The First and Second Applicants are the joint Trustees of the insolvent estate of Alan Charles De Cerff (“De Cerff”, “the insolvent”). The intervening party, Debra Virginia Heinrich (“Heinrich”), is the sister of De Cerff. Heinrich has joined the application for the sequestration of the Trust. De Cerff and his wife, Anthea Nicolette De Cerff (the First Respondent), who were married out of community of property, were the trustees of the ADC Trust, along with Carol Brenda De Cerff (“Carol”), another sister of the insolvent. Carol has since resigned as a Trustee. The Second Respondent, Craig Douglas Homan, was appointed as a Trustee by the Fourth Respondent on 21 August 2024. The Third Respondent is the Trust’s attorney.
2. Heinrich’s husband, Kevin Alexander Heinrich, was a joint shareholder in a business with De Cerff until his death on 17 January 2009. De Cerff retained an insurance policy intended for Heinrich on her husband’s death. Protracted litigation, commencing in October 2012, ended when the Honourable Pangarker AJ of this division awarded Heinrich R5 847 000 on 13 September 2022. The award was made effective from 1 October 2009. An appeal to the Supreme Court of Appeal was dismissed with costs. With interest, the amount De Cerff owes to his sister has been estimated at R15 million. During the litigation process, De Cerff’s businesses collapsed.
3. On 31 October 2023, Heinrich obtained an anti-dissipation order from the Honourable Baartman J (“the Baartman order”) to retain R7 million of the proceeds of the sale of a property in Constantia owned by the ADC Trust, pending her application for the sequestration of De Cerff’s estate. The Constantia property was sold for R8 750 000 in November 2023, and approximately R5 400 000 has been transferred recently to the trust account of Heinrich’s attorney, Vaughan Ulyate Inc., following the Baartman order. The final sequestration of De Cerff’s estate was granted by Nziweni J on 26 March 2024.
4. The Applicants were appointed joint Trustees of the insolvent estate on 15 May 2024. They investigated the circumstances of De Cerff’s insolvency and tabled their section 81 report at the second meeting of creditors on 11 July 2024. They identified a loan account of

approximately R9 152 000 as an asset in favour of De Cerff in the ADC Trust. The insolvent's concurrent liabilities amounted to approximately R14 659 000, of which R14 494 000 was due to Heinrich. Three other creditors were identified. Their investigations revealed that De Cerff had been insolvent since October 2009.

5. The Applicants turned their attention to De Cerff's financial contributions to the ADC Trust. They identified from the Trust's annual financial statements that De Cerff's credit loan account stood at R3 598 008 in 2009, R3 668 459 in 2010, R3 996 034 in 2011, R3 691 823 in 2012, and R2 994 697 in 2013. The Trust did not have a bank account. Apart from the rental allegedly paid by De Cerff for the Constantia property, the Trust had no other source of income. The Trust owned three properties, of which the Constantia property was the last remaining asset of value.
6. De Cerff admitted that the First Respondent did not earn an income. He paid all the expenses relating to the properties owned by the Trust, including the payment of their mortgage bonds, municipal services, and maintenance. The financial statements reflect that De Cerff and the First Respondent have donated R100 000 annually to the Trust since at least 2009. The Applicants questioned how the First Respondent could have made the donations without earning an income.
7. The Trust's accountant explained that the De Cerffs paid the monthly mortgage instalments, which increased the loan account, but then donated R200 000 annually to reduce it. The Applicants contend that the loan account was that of De Cerff, whereas the First Respondent owed money to the Trust. De Cerff provided documentary evidence at the sequestration application that his loan account in the Trust had decreased by 28 February 2023 to R173 065. The Applicants dispute the correctness of the arithmetic employed in the document and several alleged reductions, including the terms of repayment of the loan account, that are unexplained in the financials and intend to investigate these aspects.
8. De Cerff's mortgage bond repayments amounted to approximately R3 767 616. The annual financial statements from 2014 to 2021 were finalised on 23 November 2021. The Applicants allege that De Cerff and the First Respondent defrauded the South African Revenue Service. As the amount owing to Heinrich was effective from 1 October 2009, the Applicants contend that all dispositions subsequently made were without value and strand to be set aside.
9. The Applicants contended that De Cerff's insolvent estate is the main creditor of the Trust. They contend the Trust is *prima facie* insolvent as its liabilities exceed its assets by over R3 million. The Trust has concurrent creditors for about R1 096 437, and that payment to them would effectively amount to preferential payments.

#### THE ANNUAL FINANCIAL STATEMENTS AND FINANCIAL INFORMATION

10. The Court considered the annual financial statements. The Court kept in mind that the 2009 to 2013 financial statements were prepared by the Trust's accountant during that period, Knoetze &

Associates, and the financial statements from 2014 to 2021 were prepared by PKF Accountants. The latter statements were finalised in one batch on 23 November 2021. They contained the cautionary from the accountant that De Cerff and the First Respondent had provided the information and that its accuracy and completeness were their responsibility.

11. De Cerff's loan account to the Trust increased from 2009 to 2011 and then decreased non-arithmetically from 2012. It had reduced to R2 994 697, a reduction of R697 126 in 2013 under the stewardship of the previous accountant. The donations of R100 000 from De Cerff and the First Respondent were constantly recorded each year between 2009 and 2013.

12. The 2014 financials show a reduction in the value of the Trust's

assets from R12 048 120 in 2013 to R7 848 014. The rental income had reduced from R144 000 in 2013 to zero. An asset sale of R2 703 000 was reflected for 2014. De Cerff's loan account was reduced to R2 414 373 in 2014 and R1 745 777 in 2015. The financial statements for 2016 to 2020 were not included. De Cerff's loan account had been reduced to R573 065 by 2021. A loan account of R471 960 attributed to Riodor Marine (Pty) Ltd appeared in the 2015 financials and remained extant in the 2021 financials. A loan of R183 170 to the DAK Trust has been reflected in the financials since 2014.

13. The mortgage bond repayments on the Trust property ceased on 17 February

2017. The Langebaan property was alienated sometime after

2021. Municipal charges and homeowners' levies were allowed to accumulate. The last record of rental income for the Trust occurred in 2013.

#### APPLICANTS AVERMENTS

14. After their section 81 report, the Applicants obtained further information, which was incorporated into the First Applicant's founding affidavit. In addition, Heinrich's taxed costs arising from the anti-dissipation order decided in her favour was determined. She has a judgment debt of R212 331.64 against the Trust.

Heinrich was inexplicably omitted as an Applicant in this application, but that situation was remedied on 12 September when her

application to intervene was granted. In addition, the parties agreed to certain relief in this application. The Court understands that the issue of whether the Trust is a sham or the alter ego of De Cerff is not for decision in this application. The attorney for the Applicants confirmed this in oral argument. Regrettably, the founding affidavit is replete with allegations that the Trust is either a sham (unsustainable on the facts relating to its establishment) or the alter ego of De Cerff. The Applicants and Heinrich relied on the latter allegations to bolster their applications.

The Applicants provided the requisite Master's report, proof of service, and proof of security for the sequestration costs.

15. The Applicants state that their investigations of the insolvent and the Trust are incomplete. They refer to the three immovable properties owned by the Trust, two of which in Langebaan and Cape Town were already alienated. The Constantia property had been transferred to the purchasers when this application was heard. The Constantia property was purchased in March 2001 for R395 000, and improvements of R3 005 000 were made to the property in 2006 and 2009. De Cerff paid for the purchase and the improvements, totalling R3 400 000. In addition, De Cerff paid

bond instalments, levy payments to the Homeowners Association, and municipal charges since 2010, which amounted to R3 087 461.32.

The amounts were extracted from documents obtained duces tecum and attached as proof to the founding affidavit.

16. The Applicants assert that the minimal value of De Cerff's loan account in the Trust is R7 200 420.32. The only asset of value was the Constantia property. The latter allegation has to be interpreted to mean the proceeds of the sale of the Constantia property, which was alienated when the application was heard. As disclosed by the Third Respondent, the net proceeds realised from the sale was R5 639 431.89. The amounts owed to concurrent creditors, including the estate agent, the purchaser, the municipality, the homeowners association, and the costs relating to compliance certificates, had been deducted from the selling price of R8 750,000. The liabilities of the Trust include the loan account of R7 200 420, capital gains tax of R1 721 925, and other liabilities of R3 470 945.69 totalling R12 393 291. Heinrich has a judgment debt against the Trust for R212 331.64. The Trust also owes legal fees that may be substantial.

#### THE LOAN ACCOUNTS

17. The Applicants premised De Cerff's loan account in the Trust on two bases. The first component related to the improvements made on the Constantia property, which amounted to R3 598 008 in

2009. This loan is accounted for in the financials and has been reduced by annual donations up to the permissible limits tax-free

from De Cerff and the First Respondent. The Court understands this to be a permissible accounting practice in terms of section 56(2)(b) of the Income Tax Act 58 of 1962 for couples to reduce their loan account in a Trust. De Cerff's loan account is an asset in his estate, so he has shielded it from creditors by reducing it through permissible accounting means.

18. The Applicants contend that as the De Cerffs were married out of community of property, the First Respondent could not use her donations exemption to reduce De Cerff's loan account in the Trust. They allege further that as the First Respondent was unemployed, she

could not have donated R100 000 per year since 2009 to the Trust to reduce De Cerff's loan account. The Applicants confuse the perception that actual payments need to be made as donations with an accounting practice of a loan write-down disguised as a book entry. The propriety or legality of this practice is beyond the scope of this judgment and is certainly an aspect that is subject to further investigation. The upshot of this is that the latest financials of the Trust, as referred to by the Applicants, whether contrived or not, means that their computation of the loan account as a liquidated claim cannot be accepted. The First and Second Respondent's Counsel accepted that R173 065, as reflected in the loan reduction document till 28 February 2023, can be considered the balance of the loan account owing to De Cerff, arising from the improvements he effected to the Trust's properties.

19. The second component of the loan account, stemming from the payment of mortgage bonds, municipal services, and homeowners levies, amounts to R3 531 961.20[1]. This amount was extracted from credible source documents. The latter amount is a liquidated claim that De Cerff's insolvent estate has against the Trust. The First Respondent did not challenge this aspect of the loan account.
20. The Trust's minimal liabilities thus amount to R3 531 961.20, plus R1 721 925 (capital gains tax), plus R173 065 (loan amount admitted on behalf of the Trustees) plus R212 331.64

(Heinrich's judgment debt), for a total of R5 639 282.80. The amount remaining from the proceeds of the sale of the Constantia property is R5 400 000. The Trust is insolvent, even without considering its other liabilities, like legal costs.

#### THE FIRST AND SECOND RESPONDENTS ANSWER TO THE APPLICANTS ALLEGATIONS

21. The First Respondent deposed to the answering affidavit on 11 September
2024. The answering affidavit is startlingly inadequate. Seasoned practitioners represent the First and Second Respondents. The First Respondent answered the first forty paragraphs of the founding affidavit, providing responses equivalent to bare denials.

There is, inexplicably, no answer to paragraphs 41 to 125 of the founding affidavit. The failure of the First Respondent to answer 85 paragraphs of the founding affidavit is adversely construed against the First and Second Respondents.

22. The First and Second Respondents challenge the legal standing of the Applicants, their failure to prove a liquidated claim, or that the Trust is insolvent or has committed an act of insolvency. The First and Second Respondents allege that the Applicants have not proved even a prima facie case, that they have inappropriately applied the provisions of the Act, and have not made out a case for insolvency of the Trust.
23. The First and Second Respondents have failed to engage the averments made in the founding affidavit meaningfully. They have not displaced the Applicant's contention that the Trust is insolvent.

The First and Second Respondents did not challenge the assertion that De Cerff paid the expenses of the Trust properties or that they could settle Heinrich's judgment debt against the Trust. The First Respondent failed to explain the loans she received from the Trust or how they were discharged. She failed to deny any of the Applicants' allegations that the Trustees and the Third Respondent intended to dissipate the proceeds from the sale or that the occupational rental had been paid to De Cerff and her. She did not deny that De Cerff paid the mortgage bonds and municipal charges for the Trust properties.

24. Counsel for the First and Second Respondents submitted that the failure to address the allegations in the founding affidavit arose from the circumvented time the Respondents had to provide an answer.

The application was served on the Third Respondent on 27 August 2024 and set for hearing on 18 September 2024. The Respondents were given till 2 September 2024 to file their notice of opposition and till 13 September 2024 to file their answering affidavits. The First and Second Respondents filed their answering affidavits on 11 September 2024, and the parties agreed to settle certain aspects of the orders sought by the Applicants on 12 September 2024. The First and Second Respondents did not arrange or attempt to augment their papers after 12 September 2024.

25. The First and Second Respondents submitted further that the Applicants had been aware of the judgment debt against De Cerrf since 13 September 2022, of the proposed sale of the Constantia property since November or December 2023, and of his insolvency since 19 March
2024. Despite having this knowledge, the Applicants only raised this application in August 2024. This argument has no merit as the Fourth Respondent formally appointed the Applicants on 19 May
2024. The Applicants received their directions from the creditors at the second meeting of the creditors held on 11 July 2024. Applicants then investigated the extent of the Trust's indebtedness to De Cerff. The Applicant's attorney discovered that the Third Respondent intended to settle concurrent creditors of the Trust and reduce the sale proceeds beyond that permitted in the Baartman order. It was also discovered on 14 August 2024 that the occupational interest had not been secured but paid to the Trust. As the Trust had no bank account, it meant that the payments were made to De Cerff and the First Respondent.
26. Urgency in terms of Rule 6(12) contains two requirements, form in subrule 6(12)(a), and substance in subrule 6(12)(b). The first part dispenses with forms and service, and the second part requires an explicit rendition of the circumstances triggering urgency and why the relief sought could not be obtained at a hearing in due course. The Court accepts that the Applicants have complied with the requirements. The Court rejects the proposition that the circumvented periods caused the First Respondent to file an inadequate answering affidavit.
27. The technical aspects raised by the First Respondent in the answering affidavit shall be addressed, where necessary, in the following evaluation.

## EVALUATION

28. The Applicants urgently seek the provisional sequestration of the ADC Family Trust. Section 9 of the Insolvency Act of 1936 (“the Act”) applies to a petition for the sequestration of an estate. The prerequisite is that one or more creditors or their agents must have a liquidated claim of a relatively minor amount (50 or 100 pounds) in current-day value against a debtor who has committed an act of insolvency or is insolvent. The creditor may then petition the Court to sequester the debtor's estate. Section 10 of the Act applies to provisional sequestration. If the Court to which the petition for the sequestration of the estate of a debtor has been presented believes that *prima facie*:

28.1. The petitioning creditor has established against the debtor the required claim referred to in subsection (1) of section nine, and

28.2. If the debtor has committed an act of insolvency or is insolvent, and

28.3. 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.

29. In opposed provisional sequestration proceedings, the requirements are satisfied *prima facie*. They are determined by assessing whether the balance of probabilities across all the affidavits favours the applicant's case.[2] There is a duty on litigants and their legal representatives to engage with disputed facts and to reflect that dispute fully in the affidavit that denies the allegation. A litigant who deposes to an affidavit is committed to the version contained therein, inadequate though it may be.[3]

30. The Applicants rely on the dictum in *Wightman* to suggest that the Court adopt a robust approach to determining the facts in dispute. The test for opposed provisional sequestration is settled, i.e., a

balance of probabilities across the affidavits. The dictum in *Wightman*, amplifying the *Plascon Evans* rule in the context of final relief, does not apply to interim or provisional orders being sought. As alluded to, the answering affidavit fails to engage meaningfully with the averments made in the Applicant's founding affidavit. To that extent, the Court is inclined to accept the allegations made by the Applicants. The First and Second Respondents speak of disputes, but there are none on scrutiny of their incomplete affidavit.

31. The Court engaged the Applicants' attorney, who represented them in the argument, to determine whether the loan accounts, as

constituted by them, comprise a liquidated claim for an application for sequestration. The attorney responded in the affirmative. After carefully considering the arguments presented and the allegations supported by the documents, the Court is persuaded that the loan account has two components, as canvassed above. In addition, Heinrich has a judgment debt fixed by a taxed order of costs against the Trust.[4]

32. The Applicant's attorney holds approximately R5,4 million rand of the proceeds of the sale of the Constantia property in his trust account. R1.7 million has to be paid as capital gains tax, reducing

the remaining amount to R3 700 000. The minimal value of the first component of the loan account, the second component, and Heinrich's judgment debt equates to R3 917 357.84. Certain aspects of the Applicants' allegations need further investigation. The Court accepts that the Trust's liabilities exceed its assets, and it is factually insolvent. The Applicants did not have to rely on any of the recognised acts of insolvency contained in section 8 of the Insolvency Act to prove that the Trust is insolvent.

33. The third consideration concerns whether it is in the interest of the creditors that the Trust is provisionally sequestrated. Creditors encompass the body of creditors taken as a single entity who would benefit from the Trust's sequestration. Once the capital gains tax is paid, the remaining proceeds of the sale of the Constantia property held by the Applicant's attorney will, after the costs of the sequestration have been paid, still yield a reasonable prospect that some pecuniary benefit will accrue to its remaining creditors, including the insolvent estate and Heinrich.[5] Further investigation of the Trust for concealed assets, particularly the alleged relocation of movables to the DAK Trust, may benefit the Trust's creditors.

34. The Applicants' concern that the Respondents would deplete the proceeds of the sale of the Constantia property is no longer extant. The proceeds are in the safekeeping of the Applicants' attorney. Counsel for the Respondents argued that transferring the sale proceeds to the Applicants' attorney is sufficient security for the Applicants pending the resolution of the outstanding issues in the final sequestration of De Cerff's estate. Whilst

the First and Second Respondents rely upon the Baartman order to avoid the sequestration of the Trust, they, together with the Third Respondent, have used the proceeds of the sale of the Constantia property beyond that permitted by the order. Although the Baartman order specified the retention of R7 million, only R5 400 000 was transferred to the trust fund of the Applicant's attorney. The Third Respondent paid the property's occupational rental to the Trust, meaning it was paid to the De Cerffs, as the Trust does not have a bank account. A perusal of the counterclaim envisaged by the Third Respondent to apply for the reduction of the amount set by Baartman J further bolsters the Applicants' case that there was an orchestrated attempt to exploit the sale proceeds and disobey the court order. The correspondence between the attorneys on this point bears testimony to the latter.

35. The fact that a creditor holds security for his claim does not prevent him from applying for the debtor's sequestration, even if the security value exceeds the claim amount. It is also apparent

that the outstanding issues in the final sequestration of De Cerff's estate, which includes whether the Trust is a sham or the alter ego of De Cerff, concern the Trust and would be a prelude to an unnecessary further application for its provisional sequestration.

36. The First and Second Respondents contended that the Insolvency Act primarily deals with the sequestration of the estates of natural persons. The Applicants had not addressed the specific legal considerations that apply to the sequestration of a trust as opposed to a natural person. The First and Second Respondents did not elaborate on these specific legal requirements. It is settled law that sequestration proceedings can be instituted against a trust, although it is not cited as the Respondent, but in the name of its Trustees.[6] A trust falls within the definition of debtor in section 2 of the Insolvency Act.[7] Nothing further needs to be said in this regard.
37. The Applicants have satisfied the requirements for obtaining a provisional sequestration of the ADC Trust. The Court is satisfied that the order thus granted will benefit the Trust's creditors.

#### ORDER

38. The estate of the ADC Family Trust, number IT957/2001, represented by its Trustees, namely Anthea Nicolette De Cerff (identity number 6[...]) and Craig Douglas Homan (identity number 6[...]), is placed in provisional sequestration under the Master of the High Court,
39. That a rule nisi does issue calling upon the Trustees of the ADC Trust and all interested persons to appear and show cause, if any, to the Cape High Court at 10h00 on a date to be allocated by the Registrar or so soon thereafter as Counsel may be heard as to why:
- 39.1. The estate of the ADC Family Trust should not be placed under final sequestration;
- 39.2. The costs of the application should not be costs in the sequestration of the estate of the ADC Family Trust
40. That a copy of this order shall be served:
- 40.1. By email to the attorneys of the ADC Trust,
- 40.2. By hand on the Master of the High Court,
- 40.3. By the Sheriff, on the South African Revenue Services.

Ajay Bhoopchand

Acting Judge of the High Court

Western Cape Division

Cape Town

## Judgment

was handed down and delivered to the parties by e-mail.

Applicant's Representative: V Ulyate

Instructed by Vaughan Ulyate Attorneys Inc.

Counsel for the Respondents opposing this application: P Tredoux

Instructed by Deon Perold & Associates INC.

[1] Paragraph 42, Founding Affidavit

[2] Reynolds NO v Mecklenburg (Pty)Ltd 1996 (1) SA 75 (W) at 80G -81A, Kalil v Decotex (Pty)Ltd and another 1988 (1) SA 943 (A) at 978D-E

[3] Wightman t/a JW Construction v Headfour and Another (Pty) Ltd 2008 (3)SA 371 (SCA) at para 13

[4] Kleynhans v Van der Westhuizen NO 1970 (2) SA 742 (A), ex Parte Berson; Levin and Kagan v Berson 1938 WLD 107 115-116

[5] Trust Wholesalers and Woolens (Pty)Ltd v Makan 1954 (2) SA 109 (N) at 111, Meskin & Co v Friedman 1948 (2) SA 555 (W) at 558, ex Parte Bouwer and similar applications 2009 (6) SA 382 (GNP) at para 13

[6] Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly and Another  
NNO 1984(1) SA 160 (W) at 162

[7] Magnum Financial Holdings supra at 162

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