

SOUTH AFRICA / JUDGMENT

Zoomlion Capital South Africa (Pty) Ltd v Ferreira and Another (1710/2023) [2024] ZAECQBHC 78 (10 December 2024) [2024] ZAECQBHC 78

COURT

Eastern Cape High Court, Gqeberha

BEFORE

G Appels

CASE / FILE NUMBER

1710/2023

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FLYNOTES:

INSOLVENCY – Sequestration –
Arbitration award –
Respondents dispute that sale of
cranes was bona fide – Nothing alleged which proves that
parties are not independent
of each other – No factual basis
for contention that sales of cranes were not bona fide –
Existence of debt is
not genuinely disputed – Respondents do
not possess sufficient assets to discharge debt owed –
Liabilities exceed
assets – Factually insolvent –
Placed under provisional sequestration – Insolvency Act 24
of 1936, ss 9(1) and 10.
IN
THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, GQEBERHA)
NOT/
REPORTABLE
Case
no: 1710/2023

In
the matter between: ZOOMLION
CAPITAL SOUTH AFRICA (PTY) LTD
Applicant
and
BRUCE
KENNETH FERREIRA
First Respondent
ANETHEA
FERREIRA
Second Respondent

JUDGMENT

APPELS AJ

- [1] This is an opposed application in terms of section 9(1) of the Insolvency Act 24 of 1936 ("the Insolvency Act") for the provisional sequestration of the joint estate of the First and Second Respondents, who are married in community of property.
- [2] The Applicant brought the application in its capacity as a creditor of the First Respondent and on the basis that (a) the Respondents are financially insolvent; (b) the First Respondent committed an act of insolvency; and
- (c) the sequestration of the Respondents' joint estate will be to the benefit of their creditors. It is alleged that the First Respondent is indebted to the Applicant in the amount of R17 657 658.02, in respect of damages flowing from the breach of an instalment sale agreement which the First Respondent had signed as guarantor.
- [3] The parties have filed two affidavits (a supplementary affidavit filed by the Respondents and a surrebuttal affidavit filed by the Applicant) in addition to the ordinary three affidavits that are permitted in motion court proceedings. Mr. Vorster, on behalf of the Applicant, submitted that both parties had ample opportunity to consider the additional affidavits and that the court therefore ought to exercise its discretion in terms of Rule 6(5)(e) of the Uniform Rules of Court to permit the affidavits. Mr. Mullins, on behalf of the Respondents, agreed and submitted that the additional affidavit should be permitted. The Respondents' supplementary affidavit and the Applicant's surrebuttal affidavit are therefore permitted in terms of Rule 6(5)(e) and an order in such terms will ultimately form part of the order that will be made at the end of this judgment.
- [4] The issue to be decided in this matter is whether all the requirements of section 10, read with section 9(1), of the Insolvency Act have been met. These requirements are that:

- (a) the Applicant has a liquidated claim of at least R100, i.e that it has the necessary locus standi which entitles it, in terms of section 9(1) of the Insolvency Act, to apply for sequestration of the Respondents' joint estate;
- (b) the First Respondent has committed an act of insolvency or is factually insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors if the Respondents' joint estate is sequestrated.

THE

FACTS

- [5] During September 2012, Nexor 519 CC, trading as Protec Crane Hire (in liquidation) ("Nexor"), purchased twelve cranes from Cranelink Zoomlion SA (Pty) Limited (now liquidated) ("Cranelink").

The Applicant is a financier that provides financial assistance to purchasers of Zoomlion products in South Africa. Nexor required

financing to purchase the twelve cranes and consequently concluded twelve instalment sale agreements with the Applicant for the purchase of the cranes. The First Respondent was at all relevant times a director of Nexor and signed the instalment sale agreements as guarantor.

- [6] In May 2016, Nexor defaulted on all the instalment sale agreements and failed to remedy its default, despite demand by the Applicant. In July 2016, Nexor purported to terminate the instalment sale agreements and instituted a High Court action against the Applicant and Cranelink, which was referred to arbitration. In the arbitration proceedings, the Applicant was cited as First Defendant and Cranelink as Second Defendant.
- [7] The Applicant caused a letter of demand to be sent to Nexor in which it accepted repudiation of the instalment sale agreements. The Applicant also instituted a counterclaim against Nexor and the First Respondent for damages flowing from the breach of the instalment sale agreements. Therefore, in the arbitration proceedings, Nexor was cited as the First Defendant in reconvention and the First Respondent was cited as the Second Defendant in reconvention.
- [8] The arbitration was resolved in favour of the Applicant. Nexor's claim was dismissed and the Applicant's counterclaim for damages flowing from the breach of the instalment sale agreements succeeded. In terms of the arbitration award, which was made an order of court on 6 December 2023, Nexor (the Plaintiff in the arbitration proceedings) and the First Respondent (the Second Defendant in reconvention in the arbitration proceedings) are indebted to the Applicant as follows:

"3. The Plaintiff and the Second Defendant in reconvention, Mr. Bruce Ferreira, are ordered to pay jointly and severally the one to pay the other to be absorbed damages caused by the Plaintiff's failure to pay the outstanding instalments due and payable under each respective agreement and penalty interest on such outstanding amounts to the First Defendant calculated as follows:

- a. In respect of the mobile crane referred to in 1a above: R3,904,429.87.
- b. In respect of the mobile crane referred to in 1b. above: R3,904,429.87.
- c. In respect of the mobile crane referred to in 1c above R750,489.00.
- d. In respect of the mobile crane referred to in 1d above R567,036.21.
- e. In respect of the mobile crane referred to in 1e above: R3,083,522.45.
- f In respect of the mobile crane referred to in one 1f above: R3,083,522.45.
- g. In respect of the mobile crane referred to in 1g above: R2,025,357. 24.
- h. In respect of the rough terrain crane referred to in 1h above: R4,001,602. 85.
- i. In respect of the rough terrain crane referred to in 1i above: R3,024,752. 56. •
- j. In respect of the rough terrain crane referred to in 1j above: R3,024,752. 56.
- k. In respect of the mobile crane referred to in 1k above: R2,084,528.35; and
- l. in respect of the mobile crane referred to in 1l above: R2,084,58.35.
4. Interest at the penalty interest rate of prime plus 4% upon each amount set out in 3a to 3l, calculated from 5 August 2020 until the date of final payment.
5. The amounts set out in 3a. to 1l above, plus the penalty interest calculated upon each such amount ought to be reduced by the amount that the First Defendant is able in each instance to realise through a bona fide sale or properly arranged public auction of the crane concerned, to which amounts the costs, expenses and/or charges related to any sale, public auction, valuation, maintenance and safekeeping of the aforesaid crane incurred by the First Defendant

until the disposal of the said crane must be added.

6. Cost of suit on the scale of attorney and client, including the costs incumbent upon the employment of two counsel as well as the costs of the application launched by the First Defendant against the plaintiff

and the case number 22847/2017 in the Gauteng Division of the High Court of South Africa, as agreed in those proceedings. "

[9] In accordance with the arbitration award, the cranes were returned to the Applicant. As of 1 June 2024, ten of the twelve repossessed cranes have been sold by the Applicant. It is alleged that the total amount due and payable by the First Respondent to the Applicant in respect of

those ten cranes, is R17 657 658.62. The amount of R17 657 658.62 is the sum total of the amounts due in respect of each individual crane after deducting the proceeds of the sale of those cranes as depicted in a table appearing in paragraph 17.7 of the Applicant's surrebuttal affidavit as follows:

Model Chasis Number Amount due in terms of the award Purchase Price Amount due and owing after sale Zoomlion QY25V L[...] D[...] R 2,025,357.24 R 473,374.00 R1 ,551.983 .24 Zoomlion QY25V L[...] D[...]2 R 750,489.00 R355,932.00 R394,557.00 Zoomlion QY30V L[...] D[...]3 R2,084.528.35 R594,933.00 R1,489,595.35 Zoomlion Q30V L[...] D[...]3 R2,084.528.35 R594,933.00 R1,489,595.35 Zoomlion RT55 R[...] R4,001,62.85 R1,177,862.00 R2,823,740.85 Zoomlion QY50V L[...]2 D[...]4 R3,083,522.45 R933,814.00 R2,683,708.45 Zoomlion QY50V L[...]2 D[...]5 R3,083,522,45 R933,814.00 R2,683,708.45 Zoomlion RT350 R[...]2 R3,024,752.56 R906,048.00 R 2118,704.56 Zoomlion RT350 R[...]3 R3,024,752.56 R906,048.00 R2,118,704.56 Zoomlion QY16H L[...] D[...]6 R 567,036.21 R263,676.00 R303,360.21

- [10] The repossessed cranes were sold by the Applicant to an entity by the name of ZLT Tower Cranes (Pty) Ltd ("ZLT"), of which Mr Robert Norman Cook is the sole director. ZLT is a dealer in heavy mobile cranes and is the exclusive distributor of Zoomlion Mobile Cranes in South Africa. The Applicant made use of the services of Mr Mark Bates ("Bates") to assist it with the sale of the cranes.
- [11] The involvement of Bates in the sale of the repossessed cranes is one of the main reasons why the Respondents dispute the Applicant's claim as creditor. The Respondents contend that Bates has a "very close relationship" with the Applicant. Bates was the sole director of Cranelink and is now a sales professional working at ZLT. Cranelink was represented by Bates when Nexor purchased the twelve cranes from Cranelink.
- [12] In the arbitration proceedings, the Respondents contended that Bates was acting as an agent for and on behalf of the Applicant in Nexor's dealings with the Applicant. However, in terms of the award, the Arbitrator found that Bates was not the Applicant's agent. The result of the arbitration proceedings is not being challenged by the Respondents.

THE FIRST REQUIREMENT OF SECTION 9(1): DOES THE APPLICANT HAVE LOCUS STANDI?

- [13] To prove that it has locus standi to bring this application, the Applicant must prove that it has a liquidated claim of not less than R100 against one of the Respondents. In terms of section 9(3)(a)(iii), the amount of the claim, the cause and the nature of the claim must be stated by the Applicant.
- [14] The amount of the claim stated by the Applicant in its papers is the amount of R 17 657 658.02 and is the sum total of the outstanding instalments payable under each respective instalment sale agreement in terms of the arbitration award in respect of the ten cranes sold, less the amount realised through the sale of those ten cranes as set out in the table above.

[15] The Respondents do not contest the terms of the arbitration award or the First Respondent's indebtedness in terms thereof. It was however argued that, until the amount of the claim has been finally determined, the Applicant's claim is unliquidated and therefore the first requirement of section 9(1) of the Insolvency Act, i.e. proof of a liquidated claim, has not been met. Accordingly, the Respondent argue that the Applicant lacks locus standi to bring the application.

[16] The bases on which the Respondents contend that the amount of the Applicant's claim has not yet been determined (and is therefore unliquidated) are the following:

- (a) The sale of the ten cranes was not bona fide; and
- (b) The application for sequestration is brought prematurely because not all the cranes have been sold yet.

[17] Each of these contentions is dealt with separately hereunder.

Bona fide sale

[18] The amounts payable to the Applicant in terms of the arbitration award were subject to the proviso in paragraph 5 of the arbitration award that the outstanding amounts in respect of each crane ought to be reduced by the amount the Applicant is able to realise through a bona fide sale or properly arranged public auction.

[19] It is common cause that the cranes were not sold through a public auction. The Applicant contends that the proviso in paragraph 5 had been met because the cranes were sold in terms of bona fide sales.

[20] The Respondents dispute that the sale of the cranes was bona fide. They contend that the transactions in terms of which the cranes were sold were not "at arm's length". This contention is underpinned by the following allegations:

- (a) The cranes were sold to ZLT with the assistance of Bates, who was previously the director of Cranelink but is now an integral part of the business of ZLT.
- (b) ZLT operates from the same premises previously occupied by Cranelink and ZLT took over Cranelink's equipment and staff.
- (c) There is a "close relationship" between Bates and the Applicant.
- (d) The First Respondent "verily believes" that three of the cranes repossessed by the Applicant in terms of the arbitration award (or at least similar cranes), are now advertised for sale by ZLT as follows: 2013 Zoomlion QY50V for R2 700,000.00; 2013 Zoomlion RT35 for R2 575,000.00 and 2013 Zoomlion QY25V for R1 450,000.00. Cumulatively, the three cranes were sold by the Applicant to ZLT for R2 313,236.00 but are now allegedly advertised for a total amount of R6 725,000.00, which is a difference of R4 411,764.00.

(e) The stark difference between the price for which the cranes were purchased and the advertised price is, in the Respondents' view, evidence that the cranes were sold below their value. It is also, according to the Respondents, evidence that ZLT stands to make a profit from the sale of the cranes. That profit, so it is contended by the Respondents, should be for the benefit of Nexor or the First Respondent, not ZLT.

[21] Based on the foregoing allegations, the Respondents contend that the sales of the cranes were not at arm's length and that ZLT colluded with the Applicant to the detriment of the Respondents.

[22] The Applicant does not dispute Bates's involvement in the sales of the cranes, nor does it dispute Bates's connection with Canelink or ZLT. Instead, the

Applicant explains why there is nothing untoward in Bates's involvement in the sales. In its replying affidavit, the Applicant explains that Bates has been involved in selling, registering and repairing Zoomlion Cranes in South Africa since 2006 and is therefore qualified to determine what repairs must be undertaken to the repossessed cranes, to estimate the reasonable selling price and to find suitable buyers.

[23] The factual allegations pertaining to the connection between Canelink and ZLT is also not disputed. The Applicant explains why it decided to sell to ZLT and states that ZLT is the exclusive distributor of Zoomlion Cranes in South Africa and is therefore the most suitable to refurbish cranes and find suitable buyers for the cranes. The Applicant stated that the repossessed cranes were in a poor condition and required refurbishment. The Applicant explained that since it is a finance provider, not a manufacturer of cranes, it does not have the expertise to refurbish cranes to make them suitable to be sold. Therefore, the cranes were sold to ZLT, an experienced dealer in heavy mobile cranes.

[24] The Applicant states that the Respondents incorrectly assume that the three cranes advertised by ZLT are the same cranes repossessed by the Applicant. It stated that the Zoomlion QY50V advertised for R2 700 000.00 belongs to a client of ZLT, that the 2013 Zoomlion RT35 advertised for R2 575 000.00 previously belonged to a company known as Axton Matrix and was acquired by ZLT, and that the 2013 Zoomlion QY25V advertised for R1 450 000.00 previously belonged to a business known as Cubenco and was bought by ZLT.

[25] The Respondents admit that they do not have any personal knowledge about whether the three repossessed cranes are the same cranes advertised by ZLT. In fact, the First Respondent states in his answering affidavit that " ...without the vin numbers I cannot say with absolute certainty that these are the same cranes that were repossessed by Zoomlion, but given the timing I verily believe this to be the case."

[26] It should be noted that in application proceedings, affidavits take the place of not only pleadings in an action but also the essential evidence which would be le at trial. It follows that affidavits must contain admissible material, i.e. facts of which the deponent has personal knowledge.[1] The allegation that the cranes advertised are the same cranes sold

by the Applicant is indeed mere speculation on the part of the Respondents. It is of no evidentiary value and cannot be considered as a fact which has given rise to a factual dispute in this matter.

[27] There are therefore in effect no genuine factual disputes in this matter. There is only the assertion by the Respondents, which the Applicant disputes, that the sale of the cranes was not at arm's length. This assertion should be examined based on the common cause

facts.

[28] In *Hicklin v Secretary for Inland Revenue*, [2] the court provided a useful guideline in assessing whether an agreement was concluded at arm's length. The court stated the following:

"For dealing at arms' length ... connotes that each party is independent of the other and in dealing will strive to get the utmost possible advantage out of the transaction for himself." [3]

[29] The court stated further that:

"Hence in an arms' length agreement the rights and obligations it creates are more likely to be regarded as normal than abnormal ... " [4]

[30] Therefore, in considering whether there is evidence that the sales were not at arm's length, one should consider whether ZLT I Bates and the Applicant:

- (a) are independent of each other;
- (b) each strived to get the utmost possible advantage out of the transaction for itself; and
- (c) the rights and obligations created by the transactions are more likely normal than abnormal.

[31] Furthermore, due regard should be had to the surrounding circumstances of the matter. [5]

[32] The two contracting parties whose independence of each other ought to be evaluated are ZLT and the Applicant. Nothing was alleged which proves that the Applicant and ZLT are not independent of each other. There is for instance no factual allegation to the effect that ZLT and the Applicant were so closely connected to each other that they did not both intend to obtain the best benefit for themselves out of the transaction or that one has a controlling interest in the other. In fact, on the papers it is clear that ZLT and the Applicant are two distinct and separate juristic persons.

[33] There are vague allegations about a "close relationship" between Bates and the Applicant, but the exact nature of the relationship and how it affects the independence of the contracting

parties are not stated. These allegations pertaining to the the close relationship between Bates and the Applicant and the Applicant and ZLT appear to be a rehash of the same allegations that were made and rejected in the arbitration proceedings regarding the relationship between Bates and the Applicant or the Applicant and Canelink (the Second Defendant in the arbitration proceedings). In this regard, the arbitrator stated the following in paragraph 89 regarding the allegations pertaining to the relationships between Bates, the Applicant (the First Defendant in the arbitration proceedings) and Canelink (the Second Defendant in the arbitration proceedings):

"No evidence was therefore presented of an actual agreement between Mr. Bates and/or the Second Defendant on the one hand and the First Defendant on the other in terms of which the Second Defendant and/or Mr. Bates was appointed as an agent or representative of the Second Defendant, nor is there any evidence to show that the First and Second Defendants were not distinct and separate judicial personalities. There is consequentially no basis for finding that the Second Defendant was a duly authorised agent or representative of the First Defendant."

- [34] The fact that ZLT makes a profit from refurbishing and reselling the cranes is not evidence of collusion or evidence that it is closely related to the Applicant. In fact, it is evidence that ZLT strived to obtain the best advantage out of the deal for itself.
- [35] The rights and obligations created by the transactions also appear more normal than abnormal. The fact that cranes of the same make and model as the repossessed cranes have been advertised by ZLT for much higher prices than for what they have been sold to ZLT cannot be considered as abnormal in the circumstances of this case. It is not disputed that the cranes that were returned to the Applicant by Nexor were in a poor condition and that many panels of the cranes were rusted away completely. It is also not disputed that, for the cranes to be suitable for reselling to users thereof, ZLT had to refurbish the cranes.
- [36] In such circumstances, the difference between the advertised price of similar cranes in make and model and the price for which the cranes were sold by the Applicant to ZLT, is more likely normal and cannot be regarded as evidence of collusion or of evidence of an agreement that is not at arm's length. The advertised price is in any event only the asking price and is not necessarily the price for which the cranes will eventually be sold.
- [37] In fact, nothing about the circumstances regarding the repossession, refurbishments and sale of the cranes as alleged by the Applicant nor any of the allegations contained in the Respondents' papers regarding the surrounding circumstances is suggestive of transactions which are not at arm's length. There is therefore no factual basis for the contention advanced by the Respondents that the sales of the cranes were not bona fide.

Was the application brought prematurely?

- [38] The Respondents contend that the application was premature because not all the cranes have been sold. Therefore, it is submitted that the First Respondent's indebtedness to the Applicant had not yet finally been determined. The Respondents also contend that if a claim is disputed, as in the present case, it cannot be regarded as a liquidated claim.
- [39] The Insolvency Act does not define "liquidated claim". In *Kleynhans v Van der Westhuizen* NO[6] ("*Kleynhans*"), it was held that the amount claimed must have been determined or fixed by agreement, or court order or otherwise. If the amount has not yet been determined or fixed when the application is heard by the court, the application for sequestration cannot succeed. The court in *Kleynhans* further held that by requiring that a creditor should establish a "liquidated claim", the Legislature intended that there must be certainty in connection with the amount of the claim. This means that to satisfy the requirements of section 9(1), there must be certainty, based on the allegations in the Applicant's papers that the amount of the claim is at least R100.[7]
- [40] In the heads of argument, it was submitted that the Applicant ought to have issued summons and obtained a judgment sounding in money once the cranes have been sold. It is for this reason that the Respondents allege that the Applicant's claim is not liquidated as required by section 9(1) of the Act. As authority of the argument that the debt is not liquidated, the Respondents cite the following passage from *Kleynhans*:
- "Liquidated claim" in section 9(1) of the Act 24 of 1936 means a claim whereof the amount is fixed either by agreement, or by an order of court or otherwise. The Legislature intended that there should be certainty in connection with the amount of the claim; the legal basis and nature thereof do not affect the applicant's local standi to apply to Court."
- [41] The quoted passage does not assist the Respondents. *Kleynhans* does not provide authority for the proposition that a creditor ought to issue summons and obtain judgment sounding in money for a claim to be regarded as liquidated. What is required is that there ought to be certainty that the amount of the claim is at least R100.
- [42] In terms of the arbitration award, the First Respondent was ordered to pay the Applicant a stipulated amount outstanding in respect of each of the twelve individual cranes as set out in paragraph 3 of the award. There is therefore a debt payable in respect of each individual crane. The fact that not all the cranes have been sold yet is of no consequence.
- [43] Furthermore, the amount due and payable in respect of each individual crane that has been sold has been ascertained in accordance with paragraph 5 read with paragraph 3 of the award. In this regard, the Applicant has set out what the outstanding amount is in respect of each of the ten cranes that was sold and what the proceeds of the sale is in respect of each of those cranes.

- [44] The amount owed in respect of the ten cranes has therefore been fixed or determined and there is certainty, as contemplated in Kleynhans about the amount owed by the First Respondent to the Applicant in respect of those cranes.
- [45] The Respondents further argued that if the claim is disputed, as in the present case, it cannot be regarded as liquidated. In this regard, the Respondents relied on the "Badenhorst principle", which is a principle named after one of the leading cases on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd*.^[8]
- [46] In *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd*^[9] the Constitutional Court stated the position, with reference to the "Badenhorst principle", as follows:
- "...That principle is less of a principle than a sensible rule of practice. It says that if you want to claim a debt you know is disputed, you should not bring liquidation proceedings to do it. You should claim the debt by way of action - and only once your claim has been established may you, if necessary, seek to liquidate or sequester."^[10]
- [48] The crux of the Badenhorst principle is that liquidation proceedings are inappropriate to resolve a dispute as to the existence of a debt. It was however emphasised in *Kleynhans* that the mere fact that a claim is disputed is not sufficient to affect the liquidity of the claim. The claim must be disputed on reasonable and bona fide grounds. One should have regard to the nature and extent of the dispute that was raised. If no genuine factual disputes are raised regarding the amount due, it cannot be said that there is a bona fide dispute.^[11]
- [48] The onus rests upon the Respondents to show on a balance of probabilities that its indebtedness to the Applicant is disputed on bona fide and reasonable grounds.^[12]
- [49] In this matter, the existence of the debt is not genuinely disputed. In circumstances where there is an arbitration award which is unchallenged, (a) which stipulates the amounts owed by the First Respondent to the Applicant;
- (b) to which interest at a penalty interest rate still has to be added; (c) in terms of which the First Respondent has been ordered to pay the legal costs of the Applicant on an attorney and client scale; and (d) which to date hereof has remained unsatisfied; it is untenable for the First Respondent to contend that he is not indebted to the Applicant at all.
- [50] The Respondents have not made any factual allegations which created a genuine dispute of fact or any uncertainty about the amount that was owed in respect of the sale of the ten cranes. The assertion that the sale of the cranes was not bona fide is not a factual allegation, it is the Respondents' own conclusion for which no factual foundation was provided. It is trite that the evidence on which a party relies must consist of factual allegations as opposed to "mere assertions".^[13] It is only when the assertion amounts to a conclusion which may reasonably be drawn from the factual allegations that it can have any relevance.^[14]

- [51] The conclusion which the Respondents draw and which they assert in their papers, i.e. that the sale was not bona fide, cannot be reasonably drawn from the facts which they have alleged.
- [52] The Applicant has therefore established on a prima facie basis that it has a liquidated claim of at least R100 and has succeeded in establishing its standing.

FACTUAL INSOLVENCY OR ACT OF INSOLVENCY

- [53] Where a debtor has not committed an act of insolvency, an unpaid creditor seeking sequestration of the debtor's estate has to prove actual insolvency on a balance of probabilities i.e. that his total liabilities (fairly valued) exceed his total assets (fairly valued). Therefore, to prove the second requirement of section 9(1) of the Insolvency Act, the Applicant either has to show that the Respondents are factually insolvent or that the First Respondent committed an act of insolvency.[15]
- [54] Although the Respondents disputed that an act of insolvency has been committed, no evidence was presented to genuinely dispute factual insolvency. In fact, during oral argument, Mr Mullins on behalf of the Respondents conceded that should the Applicant succeed in establishing locus standi, i.e. that it has a claim for the amount alleged, it follows that the Respondents will find it difficult to dispute their factual insolvency.
- [55] The Applicant has set out the assets of the Respondents and their value, from which it appears prima facie that the Respondents do not possess sufficient assets to discharge the debt owed to the Applicant and that their liabilities exceed their assets. It was incumbent on the Respondents to rebut this prima facie case and show that their assets have a value exceeding their total liabilities.[16] The Respondents have failed to do so.
- [56] The Applicant has therefore succeeded in establishing that the Respondents are factually insolvent.

ADVANTAGE TO CREDITORS

- [57] A court may only grant a sequestration order if it is satisfied that there is reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated.
- [58] An applicant may establish advantage to creditors on the grounds that there are reasonable prospects that assets may be revealed or recovered as a result of an investigation into the insolvent's affairs. In *Meskin & Co v Friedman*, [17] the court held that the right to an investigation is a possible means of securing ultimate material benefit for the creditors, for example in the form of property disposed of by the insolvent.[18] In this regard, the Insolvency Act provides creditors with mechanisms for the investigation of the affairs of the First Respondent pursuant to the sequestration of the joint estate. Therefore, a court needs only to be satisfied that there is reason to believe - not necessarily a likelihood, but a prospect not too remote - that as a result of investigation and inquiry, assets might be recovered that will benefit creditors.[19]

- [59] The Applicant has alleged that the First Respondent is a member or a director of several incorporated juristic entities and that it is likely that he has a pecuniary interest in those companies. Two of the companies mentioned by the Applicant of which the First Respondent is a director were incorporated after the commencement of the litigation that resulted in the arbitration awards. The Applicant has also adduced facts to indicate that the First Respondent owned assets that were disposed of. It is alleged that if the transactions surrounding the dispositions are investigated it may lead to recoveries for the benefit of the Respondents' creditors; that those transactions may be impeached in terms of sections 26 to 31 of the Insolvency Act and it may lead to the repayment of dissipated funds and assets.
- [60] The Respondents did not genuinely dispute the Applicant's factual allegations pertaining to the advantage to creditors.
- [61] The Applicant therefore succeeds in establishing the third requirement for provisional sequestration.

CONCLUSION

- [62] The Applicant has succeeded in proving the requirements of section 10, read with section 9(1), of the Insolvency Act and has established a prima facie case for the provisional sequestration of the Respondents' joint estate.

The Order:

Accordingly, it is ordered that:

- (a) The supplementary affidavit of the Respondents and the surrebuttal affidavit of the Applicant are permitted in terms of Rule 6(5)(e) of the Uniform Rules of Court.
- (b) The joint estate of the First Respondent, Bruce Ferreira with identity number 5[...], and the Second Respondent, Anethea Ferreira with identity number 5[...], is hereby placed under provisional sequestration in the hands of the Master of the High Court, Gqeberha.
- (c) A rule nisi is issued calling upon all persons with a legitimate interest in the affairs of the Respondents' joint estate to show cause, if any, at 09h30 on 28 January 2025, why the provisional order should not be made final.
- (d) A copy of the provisional order of sequestration be:
 - i. Served by the Sheriff on the First and Second Respondents at 7[...], E[...], Drive, Summerstrand, Gqeberha;
 - ii. Served electronically on the South African Revenue Services via email at 1[...];
 - iii. Delivered to the Master of the High Court;

- iv. Served by the Sheriff on any employees of the First and Second Respondents by affixing a copy to a notice board to which the employees have access or to the front gate or door of the First and Second Respondents at 7[...], E[...], Drive, Summerstrand, Gqeberha;
 - v. Served by the Sherrif on any registered trade unions representing employees of the First and Second Respondents; and
 - vi. Published in the Government Gazette and in the Herald Newspaper circulated in Gqeberha;
- (e) That the costs occasioned by this application be cost in the sequestration.

G APPELS AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant: Adv J Vorster SC and Adv F Storm

Instructed by:

C/O Aukett Attomeys

Gqeberha

Counsel for the Respondents: Adv N J Mullins SC

Instructed by:

Gregory Clark & Associates Inc

Attorneys

Date heard: 7 November 2024

Date delivered: 10 December 2024

[1] Erasmus. Superior Court Practice Vol 2. D1 Rule 6-13

[2] 1980 (1) SA 481 (AD).

[3] Hicklin, supra at p495A

[4] Hicklin, supra at p495A - B

[5] Hicklin, supra at p495B-D

[6] 1970 (2) SA 742 (A) at 749 D.

[7] Kleynhans, supra at p749 F.

[8] 1956 (2) SA 346 (T).

[9] 2017 (12) BCLR 1562 (CC).

- [10] Trinity, supra at para 86.
- [11] Kleynhans, supra at p750 E-F.
- [12] Kalil v Decotex (Pty Ltd and another 1988 (1) SA 943 (A) at 980 B-D.
- [13] Hulse-Reutter and Others v Godde 2001 (4) SA 1336 (SCA) at para 14.
- [14] Hulse-Reutter, supra at para 14.
- [15] ABSA Bank Ltd v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C) at p443B-E
- [16] Absa Bank Ltd v Rhebokskloof (Pty) Ltd, supra at p443F
- [17] 1948(2) 555 WLD.
- [18] Meskin & Co v Friedman, supra at 559.
- [19] Commissioner for SARS v Hawker Air Services (Pty) Ltd; In Re Commissioner for SARS v Hawker Aviation Services Partnership and others,
- [2006] ZASCA 51; 2006 (4) SA 292 (SCA) at p306D

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