THE TIMING OF A PROPOSED SETTLEMENT IN INSOLVENCY CAN BE A GAMBLE:

Corruseal Corrugated KZN v Zakharov [2023] ZAWCHC 48

1 Introduction

In *Corruseal Corrugated KZN v Zakharov* ([2023] ZAWCHC 48 (*Corruseal Corrugated*)), the court considered whether a donation made to a debtor after a provisional sequestration order (but before the final order of sequestration) with a view to enabling the debtor to settle debts against their estate did in fact settle the debtor's debts to the sequestrating creditor, thereby leaving the sequestrating creditor without *locus standi* to pursue a final order of sequestration. The court also enquired whether the respondent debtor was factually insolvent. The general legal position is that, upon sequestration of a person's estate, all their assets at the date of sequestration and all assets acquired after (during) sequestration (except for exempt or excluded assets) vest in the Master of the High Court, and thereafter in the trustee once appointed (s 20 of the Insolvency Act 24 of 1936 (Insolvency Act); Smith, Van der Linde and Calitz *Hockly's Law of Insolvency* (2022) par 5.2). Thus, a donation accepted and received by the insolvent after sequestration also vests in the insolvent estate (Bertelsmann, Evans, Harris, Kelly-Louw, Loubser, Roestoff, Smith, Stander, Calitz, De la Rey and Steyn *Mars: The Law of Insolvency in South Africa* 10ed (2019) par 9.5).

This case note discusses the judgment in *Corruseal Corrugated*, focusing on whether the court should have granted the final sequestration order under the circumstances, and if the matter should or could have been approached differently. The pertinent aspect to be addressed in this case note is, however, to consider the construction to be used if a third party, perhaps a family member or a friend, wants to give financial assistance to a debtor to avoid the final sequestration of their estate following an order of provisional sequestration.

In *Corruseal Corrugated*, the respondent, Mr Zakharov, was at the helm of a company called Exotic Fruit (Pty) Ltd (Exotic), which was in the business of exporting local fruit to various overseas destinations. The applicants, Corruseal KZN and Corruseal Gauteng, supplied packaging materials to Exotic in terms of a credit facility in respect of which, on 21 April 2016, Zakharov put up a personal suretyship for Exotic's future indebtedness to both applicants. By October 2019, in respect of goods sold and delivered under the credit facility granted, Corruseal KZN and Corruseal Gauteng were owed more than R16 000 000 and R1 200 000 respectively by Exotic (par 2).

In an application made by one of Exotic's creditors, Morgan Cargo (Pty) Ltd, Exotic was liquidated on 25 October 2019. On 27 November 2019, after the respondent, Mr Zakharov, had failed to satisfy a demand for payment, Corruseal KZN and Corruseal Gauteng, relying on the suretyship, issued summons against the respondent in the current application for compulsory sequestration in the amounts of R16 759 921.66 and R1 209 839.10 respectively (par 3). After the respondent filed his plea opposing the claims, Corruseal KZN and Corruseal Gauteng each sought summary judgment against him (par 4). In opposing that application, the respondent alleged that his suretyship with Corruseal KZN and Corruseal Gauteng was limited to R500 000 in respect of each company, and that Corruseal Gauteng had granted Exotic credit over that amount and, in so doing, had prejudiced him as surety (par 4).

On 25 May 2021, the court granted summary judgment against the respondent in this application in the sum of R500 000 in each case, and allowed the respondent to defend the claims on the balance. The court did not provide any reasons in the summary judgment proceedings, and applications for leave to appeal the judgments were refused in the High Court and also, on 3 November 2021, by the Supreme Court of Appeal (par 5). Subsequently, two warrants of execution were issued against the respondent by Corruseal KZN and Corruseal Gauteng for payment to each of the amount of R601 232.95, being capital of R500 000 plus interest (par 6).

On 1 December 2021, when the Sheriff attended at the respondent's home in Hout Bay demanding payment of the two judgment debts, the respondent informed the Sheriff that he was unable to pay the amounts claimed. He alleged that the movables in his residence belonged to Chestnut Hill (Pty) Ltd. Therefore, the Sheriff filed *nulla bona* returns on each of the writs (par 6).

On 14 March 2022, Corruseal KZN and Corruseal Gauteng jointly applied for the provisional sequestration of the respondent's estate (par 7). As the application was opposed, it was sent to the semi-urgent roll for hearing on 3 August 2022, when the provisional order was granted. The return day of the provisional order of sequestration was originally set for 3 September 2022 but, by agreement, was extended to 22 February 2023 (par 7). However, when the provisional order was granted on 3 August 2022, no judgment was delivered, and neither party requested reasons (par 1). Thus, on the return day, the court did not know the basis for the provisional finding that the respondent was insolvent (par 1).

On 20 October 2022, the respondent filed a supplementary answering affidavit, to which the applicants (collectively, Corruseal) replied in a supplementary affidavit filed early in February 2023 (par 8). Although the applicants' replying supplementary affidavit was out of time, the court accepted it (par 8). Subsequently, on 22 February 2023, Humansdorp Co-Operative Ltd, another creditor of Exotic, applied to intervene in this matter based on a suretyship it held from the respondent. However, that application was withdrawn (par 9).

On the return day, the respondent argued that, in the time since the

provisional order had been made, Corruseal's claims had been paid in full and that Corruseal accordingly no longer had the requisite *locus standi* to move for a final order. Furthermore, Corruseal had failed to establish beyond reasonable doubt that the respondent was factually insolvent (par 10).

2 Issues before the court

On the return day, the issues before the court were:

a) whether Corruseal had *locus standi* to apply for a final sequestration order against the estate of the respondent; and

b) whether the respondent was factually insolvent.

3 Judgment

Gamble J referred to the respondent's supplementary answering affidavit of 18 October 2022, which stated:

> "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).
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> 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".
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> 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." (par 11)

The material portion of the letter from Dockrat Attorneys referred to by the respondent as Annexure SA 1 in the supplementary answering affidavit stated:

"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." (par 12)

The material portion of the reply by Werksmans Attorneys to Dockrat Attorneys (referred to by the respondent as Annexure SA 2) stated:

"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." (par 13)

In the further reply by Dockrat Attorneys (referred to by the respondent as Annexure SA 3 in the supplementary answering affidavit), the material portion stated:

"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.
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. …
6. A copy of the proof of payment into your trust account is annexed hereto.
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*.
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." (par 14)

Gamble J said that, even though there was no reply to the last letter, it was fair to infer that the postponement of the matter to 2 September 2022 was to allow the parties to assess their respective positions in light of the developments (par 15). He held that Corruseal's response to the respondent's *locus standi* argument was set out in their replying affidavit of 7 February 2023 in Annexure SR 10, which was a letter from Werksmans Attorneys to Dockrat Attorneys dated the same day (par 16). The material portion of the letter stated:

"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." (par 17)

Furthermore, Gamble J held that neither the supplementary affidavit nor the correspondence attached thereto informed the court of the current status of the money paid into Werksmans Attorneys' trust account (par 17). Therefore, the court asked the parties about the state of affairs, and it appeared that, on 25 August 2022, Dockrat Attorneys paid R1 283 286.88 into Werksmans Attorneys' trust account, which payment was verified by a "proof of payment" attached to Annexure SA 3. However, the source of the funds was not verified by any document (par 17). Gamble J said that it was only the say-so of the respondent, in paragraphs 10 and 11 of the supplementary answering affidavit, that Evergreen had paid the money into Dockrat Attorneys' trust account. The amount remained in Werksmans Attorneys' trust account and had not been paid to any party (par 17).

The applicants contended that the position was fairly straightforward: Evergreen had made a donation to the respondent, which the respondent had accepted (par 18). They reasoned that a donation is a contract like any other, and requires the donee to accept the benefit bestowed upon him/her, notwithstanding that the donor intended it to be an act of sheer generosity (par 18). Gamble J said that there was no debate that the money that Evergreen allegedly put up was an out-and-out donation to the respondent, intended 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 (par 18).

The applicants further contended that the money was paid by Evergreen to Dockrat Attorneys, who received it on behalf of the respondent (par 19). Thereafter, the respondent's attorneys paid the money to Werksmans Attorneys, believing that the respondent's indebtedness to Corruseal would be wiped out *pari passu.* However, the applicants argued, that the problem was that the respondent's acceptance of the alleged donation from Evergreen and the alleged payment of the donation into his attorneys' trust account, meant that he acquired property after his provisional sequestration (par 19). That conduct, the applicants argued, fell foul of the provisions of section 20 of the Insolvency Act (par 19). Section 20 provides:

> "20 Effect of sequestration on insolvent's property
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> (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 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) all 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."

Gamble J held that it was not argued that the donation was saved by the provisions of section 23 of the Insolvency Act (par 19). Gamble J referred to *Ex parte Vrey* (1947 (4) SA 648 650 (C)), where Herbstein J had to determine whether a donation made to an insolvent during sequestration

vested in him personally (par 20). It was held unequivocally in that case that it did not, but vested in his trustee. The decision was cited with approval by Meskin *Insolvency Law* ((2023) 5.39 par 1.13 (par 20)). Therefore, Gamble J held that the issue was not controversial, a donation made to the insolvent during insolvency falls and vests in the provisional trustee. He held that the only issue was whether the money held in trust by Werksmans Attorneys had been donated to the respondent (par 21).

The respondent then argued that, notwithstanding what Dockrat Attorneys and he had said, the court should have had regard to what the parties really intended (par 22). He said that the evidence continuously indicated that Evergreen wished to spare the respondent the spectre of a final order of sequestration, hence Evergreen's undertaking to settle the respondent's debts to Corruseal, which is permissible in law (par 22).

In support of the applicant's contention, Gamble J held that it was clear to him that Evergreen did not make payment to the creditor in settlement of its claim against the insolvent. Instead, it donated money directly to the insolvent, and that resulted in the payment falling into the hands of his trustee. Consequently, Gamble J concluded that Corruseal's debt had not been settled and it retained the requisite *locus standi* to move for a final order of sequestration (par 23).

Gamble J then addressed the second issue in the case, which was whether the respondent's insolvency had been established. He held that it is trite that on a return day, an applicant must establish the criteria required for a final order of sequestration on a balance of probabilities (par 24). He referred to Meskin *Insolvency Law* (2.1.13 (par 24)), wherein the criteria are described as follows:

> "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'." (par 24)

With regard to the first criterion – that a claim over R100 must exist against the respondent – Gamble J held that it had been dealt with conclusively in the finding about Corruseal's *locus standi* (par 25).

As regards the second criterion – that the respondent must have committed an act of insolvency or been actually insolvent – Gamble J held that Corruseal addressed it by relying on section 8(*b*) of the Insolvency Act and presentation of the Sheriff's *nulla bona* returns (par 25). He held that the respondent did not engage with the allegation, nor did he in any manner attack the validity of the *nulla bona* returns in his answering affidavit. The respondent did not even answer Corruseal's conclusion in par 30 of its founding affidavit that he had committed an act of insolvency in terms of section 8(*b*) of the Insolvency Act. Therefore, Gamble J held that the allegation must be taken as admitted (par 25).

With regard to the respondent's argument concerning the *ratio* in *Duchen v Flax* (1938 WLD 119 125) – 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 – Gamble J said that that argument did not apply in this matter because it had been found that the payment by Evergreen fell into the hands of the respondent's provisional trustee. Thus, the debt was not settled (par 26). Gamble J held that Corruseal was therefore permitted to continue to rely on the *nulla bona* returns and that it had been conclusively established that the respondent had committed acts of insolvency as contemplated in section 8(*b*) of the Insolvency Act (par 27).

As to whether it had been established on a balance of probabilities that the respondent was in fact insolvent, Gamble J held that it was true that Corruseal was unable to furnish the court with a comprehensive list of the respondent's assets and liabilities (par 28); Corruseal was able to indicate some of the respondent's liabilities that they were aware of and some assets of which the respondent had disposed; however, actual insolvency could only be established through inference as indicated in *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* (1993 (4) SA 436 (C) 443B–F):

> "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 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.
>
> 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." (par 28)

The judge in *Rhebokskloof* also cited a well-known passage in a judgment from the former Transvaal Republic, which still holds good more than 115 years on:

> "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 insolvent.'" (par 30)

Gamble J held that, in this matter, the respondent did not even try to convince the court by attempting to demonstrate that his assets exceeded his liabilities, notwithstanding the *prima facie* case of insolvency set up by the undisputed *nulla bona* returns (par 29). Gamble J also said that there was enough evidence in this case to infer the respondent's insolvency (par 31). Gamble J referred to 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 of which is around R4.6 million) was granted against the respondent under a suretyship he put up with Morgan Cargo (Pty) Ltd for its exposure to Exotic (par 31). He referred also to the respondent's allegations in his answering affidavit:

> "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 jewellery. 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 those funds cannot be patriated to South Africa easily and used here." (par 31)

Gamble J further referred to the correspondence between Dockrat Attorneys and Werksmans Attorneys in August 2022 – in particular, the respondent's explanation in his 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." (par 32)

Thus, Gamble J held that in addition to Corruseal's entitlement to continue relying on section 8(*b*) of the Insolvency Act, Corruseal had also established that the respondent was factually insolvent (par 33).

In relation to the third criterion – that there is reason to believe that "it will be to the advantage of creditors of the debtor if his estate is sequestrated" – Gamble J said that the phrase "benefit to creditors" should be interpreted widely (par 34). He referred to the observation by the learned Judge in *Meskin & Co v Friedman* (1948 (2) SA 555 (W) 559), which was cited with approval by the Constitutional Court in *Stratford v Investec Bank Limited* (2015 (3) SA 1 (CC) 43):

> "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, some may be revealed or recovered for the benefit of creditors, that is sufficient." (par 34)

Gamble J held that an investigation into the respondent's affairs under an enquiry sanctioned by the Insolvency Act might yield some pecuniary benefit for creditors (par 35). This is because the respondent's financial affairs seemed to be controlled by a web of entities and trusts – for example, his furniture and appliances at his home in Hout Bay are owned by Chestnut Hill (Pty) Ltd, a company allegedly controlled by his daughter (para 35). Also, there was already an amount of R1 283 286.88 in the hands of the respondent's trustee that was available for distribution to creditors (par 36). Therefore, Gamble J held, a benefit to creditors had already been established (par 36).

Lastly, Gamble J discussed the court's discretion to refuse to sequestrate the respondent (par 37). He referred to *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd* (2015 (4) SA 449 (WCC)), where Rogers J, after noting that a creditor whose claim has not been settled is entitled to demand the liquidation of the debtor *ex debito justitiae*, discussed how such a discretion ought to be exercised (par 37). In that case, Rogers J said 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 must be some particular reason why, despite the making out of the requirements for liquidation, an order is withheld." (par 37)

In this matter, Gamble J agreed with the applicants that there was no reason to exercise his discretion in favour of the respondent (par 38). However, in the circumstances in which the creditors seemed to be circling, it was imperative that the order be granted, and the respondent's financial affairs be investigated (par 38). Therefore, the rule *nisi* was confirmed and the respondent's estate was placed under final sequestration.

4 Commentary

4 1 Vesting of assets and the status of the money

As indicated, section 20 of the Insolvency Act is clear that property acquired by the insolvent before and during sequestration falls into the insolvent estate and vests in the provisional trustee. The estate remains vested in the trustee until the acceptance by creditors of an offer of composition made by the insolvent or until the insolvent's rehabilitation (Bertelsmann *et al Mars: The Law of Insolvency in South Africa* par 9.3; Smith *et al Hockly's Law of Insolvency* par 5.1). This also applies to donations adiated or accepted and received by the insolvent before and during sequestration (Evans "Should a Repudiated Inheritance or Legacy Be Regarded as Property of an Insolvent

Estate?" 2002 14(1) *SA Merc LJ* 688 693). In the present matter, the respondent accepted the donation offered by Evergreen, and this can be ascertained from the respondent's supplementary affidavit, in which he explains that the money paid by Evergreen to Werkmans Attorneys was a donation to himself intended to discharge his debts with the applicant. Adiation can be express or implied (Evans 2002 *SA Merc LJ* 699). It is however submitted that Gamble J was correct in finding that the money paid into Werkmans Attorneys' trust account by Evergreen was not a settlement by Evergreen of the applicants' claim against the insolvent but was a donation to the respondent and thus fell into the insolvent estate. Gamble J's finding aligns with the *ratio* in *Wessels v De Jager* (2000 (4) SA 924 (SCA)) that a right to a benefit vests in the insolvent estate immediately upon acceptance by the beneficiary. In this case, Werkmans Attorneys were simply a conduit for the money donated to the respondent.

One of the consequences of sequestration of an insolvent is a limitation on their capacity to dispose of assets in their insolvent estate (Smith *et al Hockly's Law of Insolvency* par 5.4). Once property vests in the trustee, the insolvent no longer has a say as to how the property can be used. For the purposes of the vesting provisions in section 20 of the Insolvency Act, the respondent's contention (that the court should have had regard to the intent of the donation, which was to enable the respondent to settle his debts with Corruseal and avoid the indignity of sequestration) was thus irrelevant. This is because once a donation vests in the trustee, the trustee becomes the owner (*De Villiers v Delta Cables* 1992 1 SA 9 (A); Evans and Steyn "Property in Insolvent Estates: *Edkins v Registrar of Deeds*, *Fourie v Edkins*, and *Motala v Moller*" *PER* 2014 17(6) par 2); the trustee steps into the shoes of the respondent and the respondent no longer has control over that donation. Thus, Gamble J was correct in finding that the donation made by Evergreen to the respondent did not settle the respondent's debt, and that Corruseal retained *locus standi* to move for a final order of sequestration.

Furthermore, even if the donation by Evergreen had been made to the insolvent immediately before his sequestration (3 August 2022), and he had subsequently used that money to pay Exotic's debt with Corruseal, that money would have vested in Exotic's insolvent estate because Exotic had been placed in liquidation on 25 October 2019 by one of its creditors (Morgan Cargo (Pty) Ltd). This is because once the winding-up of an estate commences, a *concursus creditorum* is established (*Walker v Syfret* 1911 AD 141; Boraine and Swart "*NCA Plant Hire CC v Blackfield Group Holdings (Pty) Limited* [2021] JOL 51810 (GJ): Some Critical Observations on the Legal Effect of a Provisional Winding-Up Order" *De Jure* 125–132); the result is that a debtor is then not at liberty to pay a creditor. However, although the debtor or his estate would still have benefited from the donation, it would have been a different situation had Evergreen paid the money directly to Exotic on behalf of the respondent after the sequestration of the respondent's estate, instead of donating it to the respondent via the attorneys as his representatives. As the money would not have been paid to the respondent directly (or indirectly through his attorneys), thus vesting in his estate, the respondent's debt would have been settled and his argument, based on the ratio in *Duchen v Flax* (*supra*) 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, could have applied. On face value, therefore, the party who receives the payment makes a difference to the legal position.

Although not placed in issue in this case, it may be noted in passing that a creditor-applicant is not compelled to accept an offer of settlement from an insolvent debtor, since it could amount to a voidable preference that may be at risk to be set aside after the sequestration of such debtor's estate (see *Harvey NO v Theron* [2023] ZAWCHC 157 par 47).

4 2 Final Order of Sequestration and the Court's Discretion

In order to determine the respondent's insolvency, Gamble J had to ascertain that the applicants had established on a balance of probabilities that their claim against the respondent was more than R100, that the respondent had committed an act of insolvency or was actually insolvent, and that there was a reason to believe that the sequestration would be to the advantage of creditors.

As regards these three criteria, Gamble J was correct in finding that the first criterion had been dealt with conclusively in the finding about Corruseal's *locus standi*, since the applicants each claimed R601 232.95, an amount that is clearly more than R100. As the donation by Evergreen to the respondent was not paid directly to Corruseal in settlement of the respondent's debt, Gamble J was correct in finding that the ratio in *Duchen v Flax* (*supra*) did not apply to these facts; the debt had not been settled, since the donation fell into the insolvent estate. Gamble J was thus also correct in finding, in relation to the second criterion, that Corruseal had addressed the question of whether the respondent had committed an act of insolvency by relying on section 8(*b*) of the Insolvency Act, and by presenting the Sheriff's *nulla bona* returns. Once a creditor has established that a debtor has committed one or more acts of insolvency, a creditor may seek an order of sequestration without having to prove that the debtor is actually insolvent (Smith *et al Hockly's Law of Insolvency* par 3.1.2). In this case therefore, the court did not have to determine whether Corruseal had established that the respondent was actually insolvent because Corruseal had already established that the respondent had committed an act of insolvency. Nonetheless, the court was correct in finding that the respondent was actually insolvent, since insolvency could be inferred from the evidence of the *nulla bona* return.

As regards the third criterion, Gamble J was correct in finding that the term "advantage to creditors" should be interpreted widely. The meaning of the word "advantage" is broad and should not be rigidified (*Stratford v Investec Bank Limited supra* 19). It is true that a further investigation into the respondent's financial affairs would yield some pecuniary benefit to creditors, and that an amount of R1 283 286.88 was already in the hands of the respondent's trustee and was available for distribution to creditors. However, these are not the only factors to be considered in determining advantage to creditors. The term "creditors" means all creditors, or at least the general body of creditors (Smith *et al Hockly's Law of Insolvency* 52). If a debtor has only one creditor, there would be no conflicting interests between

creditors that must be equitably resolved. Furthermore, if the debtor's assets are not sufficient to cover the costs of sequestration, there could be no advantage to creditors unless, for instance, the sequestration became necessary to trace estate assets. That was seemingly not the case here, and thus sequestration would merely amount to a waste of time and money. However, the court could have been influenced by the possibility that there were more claims than those brought forward by Corruseal. As regards the court's discretion on whether to grant a final order of sequestration, it is true that a court should not on a whim decline to grant a final order (see Gamble J's reference to *Orestisolve supra*); there has to be some particular reason, despite the making out of the requirements for liquidation, for withholding an order. However, the reason provided by the court for granting the final sequestration order (that there was already the amount of R1 283 286.88 in the estate) could also be the particular reason a court exercises its discretion against the granting of a final order of sequestration. It must be remembered that sequestration is a drastic procedure and should not be granted if it is not essential. As indicated by the respondent, a certain indignity is attached to sequestration. Sequestration not only affects the insolvent's property, but also limits his status for up to 10 years if rehabilitation is not granted earlier, and it exposes the debtor to numerous statutory restrictions and disqualifications (ss 124 and 127A of the Insolvency Act; Bertelsmann *et al Mars: The Law of Insolvency in South Africa* par 8.4; Roestoff "Insolvency Restrictions, Disabilities and Disqualifications in South African Consumer Insolvency Law: A Legal Comparative Perspective" 2018 81 *THRHR* 395–417; Mabe *A Comparative Analysis of an Insolvent's Capacity to Earn a Living Within the South African Constitutional Context* (2022) par 1.1.1 (Mabe *Comparative*)). Since the effects of sequestration on a debtor affect his dignity as a member of society (Mabe *Comparative* par 4.3), sequestration is a remedy of last resort, and the first option would be to explore other available remedies. In this case, the donation was intended to avoid the indignity caused by sequestration, but the respondent was either not advised or ill-advised on the available procedures or alternatives that would have assisted him in avoiding a final order of sequestration.

4 3 Various options to consider to prevent an applicant-creditor from continuing with an application to obtain a final sequestration order following the granting of a provisional order

In view of the discussion above, the question is whether there are legal constructs that could be used to prevent an applicant-creditor (who has obtained a provisional sequestration order against the estate of a debtor) from moving for a final sequestration order – in other words, are there options to avoid final sequestration of the estate? It is submitted that the following options could be considered:

a) A third party – for instance, a family member or a friend – could consider paying the debt directly to the applicant-creditor, thus settling the debt and eliminating the possibility of the money vesting in the insolvent estate (by virtue of it having been received by the insolvent

directly or through a legal representative). In such an instance, the creditor would no longer be able to rely on a *nulla bona* return as an act of insolvency for a final order of sequestration (*Duchen v Flax supra*) since the debt on which it was based would have been extinguished. If the debt is settled in this way, the basis for the application may fall away. However, it remains important that the full facts be considered on a case-by-case basis since there may be other factors that still warrant the continuation of the application. Nevertheless, the approach followed by the court in the matter under discussion seems to support this viewpoint as well.

It must be noted as a side issue that the third party – in this case, Evergreen – could have been advised to donate the money strictly subject to a condition that the money only be used to settle the respondent's debt with the applicants. Although not raised in this case, it may be asked if the donation was not in any event made subject to a *modus*, in that the condition was that the donated money be used to settle the debt of the applicants in the matter to prevent final sequestration of the respondent-debtor's estate. In *Benoni Town Council v Minister of Agricultural Credit and Land Tenure* (1978 (1) SA 978 (T) 992A), the court specifically ruled that a donor has a sufficient interest in the donation to be entitled to recover the gift if the donee fails to comply with the conditions of the *modus.* In the present case, the respondent's supplementary affidavit of 18 October 2022, stated:

> "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."

It therefore remains questionable whether Evergreen ever intended the donation to be used for the payment of the respondent's creditors at large.

b) Attorneys for the respondent and the applicant respectively could, of course, settle the debt by mere negotiation, including withdrawing the application if the debt is paid. However, within the context of insolvency law and civil litigation, a common law compromise may also be of assistance.

The debtor may enter into a composition with their creditors; in particular, a common-law compromise would have been apt here since the first meeting of creditors – as is required in terms of the Insolvency Act (*Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 241; Smith *et al Hockly's Law of Insolvency* 241) – had not yet happened. The common-law compromise is based on a contractual principle of consent and is binding on all the creditors who have consented to the agreement (*Prinsloo v Van Zyl* 1967 (1) SA 581 (T) 583; Bertelsmann *et al Mars: The Law of Insolvency in South Africa* par 24.2). Thus, there is no agreement unless all the creditors have consented, and they will

probably only consent if the terms of the composition are to their benefit. However, if all the creditors consent, the debtor will be released from all their debts to the extent that the compromise allows and the provisional sequestration order should in principle then be discharged without the debtor being subjected to all the restrictions and disqualifications imposed on unrehabilitated insolvent debtors (Bertelsmann *et al Mars: The Law of Insolvency in South Africa* par 24.1; Smith *et al Hockly's Law of Insolvency* par 18.1). In such an instance, a debtor will be able to continue with his trade if in business, and creditors may receive higher dividends, earlier, than in sequestration, which saves on sequestration costs (Bertelsmann *et al Mars: The Law of Insolvency in South Africa* par 24). Although a common-law composition requires consensus among all the respondent's creditors, the existence of a promise to donate R1 283 286.88 could have assisted the respondent in convincing his creditors, Corruseal KZN and Corruseal Gauteng, that a composition would be beneficial to them. If the concern was that since a provisional order had already been granted, sequestration costs had already been incurred, the debtor could have been advised to ask a friend or a family member to pay for the costs of sequestration as part of an agreement to stay out of sequestration. Because of the R1 283 286.88 donation to the insolvent, the court could have exercised its discretion against granting the final order, and have advised the parties to enter into a common-law compromise on the return date. However, although this is a possible route to follow where there is a need for a post-provisional sequestration order to prevent final sequestration, it must be conceded that the consent requirement for such a composition may be a problem – especially if there are more creditors than just the applicants.

c) Alternatively, as the court proceedings had already commenced, the statutory mediation process provided for by High Court Rule 41A could in principle also have provided a basis to deal with the matter at hand. This alternative procedural option would have avoided increasing the legal costs and, if a settlement had been reached between all interested parties, it would have become unnecessary for the court to make a final order of sequestration, because the application would probably have been withdrawn.

5 Conclusion

In summary, the court refused, on this particular set of facts, to allow the intent of the donation (which was to enable the respondent to settle his debts with Corruseal and avoid the indignity of sequestration) to sway its decision to grant the final sequestration order. The main reason for this approach was that it was the respondent who accepted the donation, which then became property in his insolvent estate. The court's disregard of the respondent's contention may be indicative that South African insolvency law is still very much creditor-friendly, placing the interests of creditors above those of debtors. However, at the same time, it must be conceded that the court merely ensured that the process was concluded in terms of the law as it

stands, and on the particular set of facts before it. The more important issue raised by this judgment is that, in extraordinary circumstances such as the facts in *Corruseal Corrugated,* a third party wishing to assist a debtor to avoid the final sequestration of their estate needs to be advised to make any donation subject to a condition that the money only be used to settle the insolvent's debt and be paid over to the creditor rather than to the debtor. The money should thus not be paid to the insolvent debtor directly, or to their legal representatives, as it then vests in the insolvent estate. Instead, the money should be paid directly to the applicant-creditor, thereby settling the insolvent's debt.

Alternatively, the attorneys could attempt to negotiate a settlement with the applicants to avoid a final sequestration order. If there is no possibility of other creditors coming forward, the debtor could consider also entering into a common-law compromise with the applicant-creditors. Otherwise, a voluntary and consensual considered mediation in terms of High Court Rule 41A could in principle provide a solution; if a settlement is then reached, a final sequestration order would become unnecessary. In these kinds of arrangements, the interests of the creditors nevertheless remain important.

This case illustrates that something as technically simple as the legal construction used to try to settle a debt that is the subject of an application for compulsory sequestration may determine if a respondent-debtor is successful in preventing an applicant-creditor from obtaining a final sequestration order against the estate. It is submitted that sequestration orders should not be granted where the reason for their granting may fall away before the final sequestration order is granted, since it remains a drastic debt-collecting measure with far-reaching consequences for the debtor.

On the one hand, it can be argued that the court in this instance acted correctly on the given set of facts, and since it also found that all the requirements for the granting of a final sequestration order had been met in principle – especially since there was apparently more debt, and other creditors involved than just the sequestrating applicants. However, the judgment serves as a reminder that even if the facts were different in this regard, the construction used to effect the settlement of the debt of the applicant-creditor remains crucial, and can determine the outcome of an attempt by the respondent-debtor to ward off final sequestration. To this end, this case note attempts to provide some constructions that could be employed to assist the respondent-debtor to avoid final sequestration when external funding becomes available to assist him in such a quest.

Prof Andre Boraine
University of Pretoria, Pretoria, South Africa
https://orcid.org/0000-0003-4115-4287

Dr Zingapi Mabe
Department of Mercantile Law, Faculty of Law
University of Pretoria, Pretoria, South Africa
https://orcid.org/0000-0002-4106-2385