IN THE HIGH COURT HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: M108/2023

Reportable: **YES**

Circulate to Judges: **YES**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates: **NO**

In the *ex parte* application of:

EDWARD CHRISTO DE VILLIERS **FIRST APPLICANT**

Identity Number: 6[...]

MELINDA DE VILLIERS **SECOND APPLICANT**

Identity Number: 6[...]

Coram: Petersen J

Heard: 23 November 2023

The judgment was handed down electronically by circulation to the applicants' representative *via* email. The date and time for hand-down is deemed to be **09 February 2024** at 14h00pm.

ORDER

(i) The application for the rehabilitation of the joint insolvent estate of the applicants is refused.

(ii) The petitioning creditor ODCS (Pty) Ltd is solely liable for the costs of sequestration (contribution) as set out in the Final Liquidation and Distribution Account of the Trustees.

JUDGMENT

PETERSEN J

Introduction

[1] This is an application for the rehabilitation of the joint insolvent estate of the applicants. The applicants seek an order that they be re-invested with their insolvent estate in terms of s129(2) of the Insolvency Act 24 of 1956 ("the Insolvency Act"), and that "any and all funds" be paid into the trust account of the attorneys of record.

Background

[2] The applicants' estate was finally sequestrated by order of this Court on **12 April 2018** under case number **M265/2017**. The petitioning creditor in the application was ODCS (Pty) Ltd ('ODCS').

[3] The first meeting of creditors was convened by the Master on **6 June 2018**. Only one claim was proven against the joint insolvent estate, by the petitioning creditor, ODCS. On **7 August 2018**, Ms ME Symes and Mr KC Monyela were appointed by the Master as trustees in the joint insolvent estate. The second meeting of creditors was convened on **28 November 2018**. No further claims were proven.

[4] The present application was launched on **7 March 2023** and set down on the unopposed roll of **11 May 2023**. On **8 May 2023** a notice of postponement dated **4 May 2023** was filed with the Registrar of this Court. The notice recorded that a postponement of the matter would be sought, *sine die*, with reasons to be furnished verbally by counsel, if deemed necessary. On **11 May 2023**, per order of Reddy AJ, the matter was postponed to **29 June 2023** for the reports of the trustees of the joint insolvent estate and the report of the Master.

[5] On **26 June 2023**, the applicants once again filed with the Registrar a notice of postponement dated **22 June 2023.** This notice recorded that a postponement would be sought as per agreement with the trustees, to facilitate settlement negotiations for payment of the contribution that would become due and payable. On **29 June 2023**, per order of Mfenyana J, the matter was duly postponed to **24 August 2023**, on the same terms as the order of **11 May 2023**.

[6] A dispute arose regarding liability for the costs of sequestration (the contribution issue). This prompted a further postponement on **24 August 2023**, to **23 November 2023**. On this occasion, Mfenyana J ordered the filing of written submissions by the Master, the trustees of the joint insolvent estate, the applicants and ODCS as the petitioning creditor in the sequestration application of **12 April 2018**. The purpose of the directive was to enable the Court to make an appropriate order regarding liability for the contribution, since the contribution would become due and payable upon confirmation of the first and final liquidation and distribution account in respect of the joint insolvent estate. The reports of the trustees and the Master remained outstanding at the time.

[7] The Report of the Master was duly completed by **26 September 2023** and incorporated, *inter alia*, a submission on the contribution issue. ODCS and the applicants filed their submissions on the contribution issue on **23 October 2023** and **25 October 2023**, respectively.

The application for rehabilitation

[8] Section 127(2) of the Insolvency Act provides, in the case of an application for rehabilitation, that:

> "Whether the application be opposed or not, the Court may refuse an application for rehabilitation or may postpone the hearing of the application or may rehabilitate the insolvent upon such conditions as it may think fit to impose and may order the applicant to pay the costs of any opposition to the application if it is satisfied that the opposition was not vexatious."

[9] Section 127(2) vests this Court with a wide discretion to refuse or grant an application for rehabilitation. The sentiments expressed in *Charmaine Purdon* (53894/2013) [2014] ZAGPPHC 95 (24 January 2014) by Makgoka J are apposite in this regard:

> "[5] In terms of s 127(2) of the Act, the court has a discretion to grant or refuse an application for rehabilitation. The insolvent has no right to be rehabilitated in any particular situation. The discretion is dependent upon the conduct of an insolvent in relation to the business affairs which led to his insolvency. See for example Ex parte Hittersay 1974 (4) SA 326 (SWA) at 326H-327D and Ex parte Fourie [2008] 4 All SA 340 (D) paras [23] - [25]."

[10] The first applicant deposed to the founding affidavit in support of the application for rehabilitation, the contents of which the second applicant confirmed in a confirmatory affidavit. In the preparation of this judgment, I called for the sequestration file under case number **M265/2017** to fully appreciate the facts relied on by ODCS when the sequestration application was made. This was done to enable this Court to appreciate the reasons proffered by the applicants in the present application, as to why their estate was sequestrated.

[11] In the present application, the applicants very tersely state the reasons for the sequestration of their joint estate (which they allege, they were only informed

was applied for and granted), as follows:

"5.1 I respectfully submit that we have become insolvent by misfortune and due to circumstances beyond our control, without fraud or dishonesty on our part.

5.2. Our financial challenges started mainly due to the economic problems experienced in the Rustenburg area as a direct result of the mine strikes and downsizing as a result thereof.

5.3 We could no longer keep up with our bond repayments and the vehicle instalments. We tried to sell the property and there was complications with the transfer.

5.4 Later we had no choice but to approach our creditors to arrange alternative or smaller repayment terms, which was unsuccessful.

5.5 We were later informed that a Sequestration Application was brought against our joint estate, which the above-mentioned Honourable Court subsequently granted…"

[12] The applicants' state that the cause of the present application is predicated on their inability to secure a mortgage loan or vehicle finance, despite earning sufficient income for payment of any monthly instalments. They further assert that their investment opportunities are very limited, and they therefore have restrictive planning for their old age. To this end, the applicants maintain that their only viable course of action is the present application, which is brought more than five (5) years since the sequestration of their joint estate, which is ten (10) times longer than the required six (6) month period.

[13] The single most dominant reason, however, which must be considered against an agreement reached with ODCS, the petitioning creditor (which is dealt with below), is stated in the concluding paragraph of the cause of the present application. The applicants state as follows in this regard: ***"Once we***

***are rehabilitated, <u>we will be released from our pre-sequestration debt and relieved of any disability resulting from the sequestration and will therefore be provided with the opportunity of a new start</u>. It will also allow us to participate in the economy again and help us secure proper and gainful employment**."* This assertion by the applicants constitutes the nub of the application, that is, that they will be released from their pre-sequestration debt.

[14] Against the reasons proffered by the applicants as aforesaid, this Court had regard to the reasons put forward by ODCS, in the sequestration application. Dionne Rohan Lamprecht, who in the present application describes himself as the appointed Executive Collections Officer of ODCS, is also the Chairman of the Board and Chief Executive Officer of ODCS and the only shareholder. The reasons, deposed to in an affidavit by Mr Lamprecht for the compulsory sequestration of the joint estate of the applicants in 2017, was as follows:

*"**<u>BACKGROUND OF APPLICANT'S CLAIM</u>***

7.1The First Respondent had run into financial difficulties, mainly due to the economical problems experience in the Rustenburg area as direct result of the mine strikes and downsizing as a result thereof.

7.2 The first respondents main financial issue pertained his inability to properly service his bond repayments and vehicle installments. Once he had fallen in arrears, the first respondent approached the applicant and informed him that he could not service his debt repayments under date review order and needed assistance in renegotiating his financial obligations.

7.3 The applicants then proceeded to A to do a comprehensive analysis at which time the first respondent furnished the applicant with a self-made six page inventory of the respondents joint assets, written in his own hand with his estimated values, … with a total value indicated as R63,200 on the final page.

7.4 The applicant advised respondents to proceed with the sale of the immovable property, which had been in the market for almost two years without any offers. The applicant devised a new marketing strategy on the basis that the respondents consent to a sole mandate for the sale in its favor, with an all inclusive limit of R65,000 for the services being rendered on which only R15,000 has been paid. The respondents unconditionally agreed to the terms and with the explicit understanding that the applicant had been granted the sole mandate to market and sell the property, the applicant proceeded with an extensive marketing program by utilizing aerial drone photos and videos as well as social media in order to highlight the property and its unique setting.

7.5 It was the opinion of the applicant that previous marketing campaigns had failed due to the various local agents inability to upload decent photos of the property revealing its full potential. As a result of its setting only a double garage could be viewed on the normal photos previously taken by agents and this had the result of making the property seem considerably smaller and very overpriced.

7.6 By utilizing the aerial drone and high definition photos taken unrestricted at various inflight angles, the property could be shown to have three different phases and that's in fact much larger than any potential buyer would otherwise have assumed. The applicant also liase with the relevant bondholder in order to ascertain an acceptable selling price given the accrued arrears on the property and negotiated an acceptable repayment plan on the anticipated shortfall.

7.7 Once the sale price had been negotiated, the applicant was informed that within 48 hours of the aerial photos and video being finalized and uploaded to the Internet, the local agent approached the first respondent on behalf of a third party with an offer to purchase in the amount of R1.5 million agreed, in order to accommodate the first respond and not to lose the potential buyer, that the sale would proceed and the applicant would not invoke his sole mandate to sell, but rather settle for Commission split in order to finalize the

matter…

7.8 It was also agreed that the relevant agents Commission payout would be capped at R50,000 in order to facilitate everyone, specifically payment to the applicant, to R50,000 was still owed…

7.9 The respondents were initially only have vacated the premises upon registration of the property in the buyer's name however the respondents suddenly informed the applicant that they would be leaving for the Eastern Cape and the buyer took occupation of the property at which time occupational reigned in the amount of R10,509 per month became due and payable.

7.10 Only once the transfer occurred, was the applicant notified telephonically that no Commission would be paid towards the relevant agent or agency, capital otherwise, because of the resulting shortfall and the fact that the relevant agent was not in possession of a valid fidelity fund certificate at the time of the sale, although her agency was.

7.11 Further investigation where the applicant confirmed that occupational rent was indeed paid for three month period by the buyer for the period preceding the transfer of the property, which seems to have remained unaccounted for. The first respondent then notified the applicant of his current diminished income and inability to effect any payments with regard to the applicants account.

7.12 The applicant has already informed the parties involved that it intends to proceed with the sequestration in order to request an inquiry, which would have the added advantage of being held at the Rustenburg Magistrates Court as opposed to chasing after the respondents and other parties involved.

8. CAUSE OF ACTION

8.1 It are therefore content that the applicant is a creditor of the respondents

for services rendered, expenses incurred, amounting to a current outstanding balance of R50,000.

8.2 The applicant is already demanded payment in writing of the aforementioned amount… which respondents have not disputed or in, but to no avail as payment as no payment had been affected.

8.3 I contain therefore, that the aforementioned amount owed, constitutes a unsecured liquidated claim.

8.4 The respondents have committed at least one act of insolvency and or are insolvent, as discussed more comprehensively under and in light of the above mentioned the applicant is entitled in terms of section 9 sub one of the installments here, to petition the court for this accusation of the respondents joint estate."

[15] It is apposite to quote the extracts of minutes of a meeting and resolution of **22 November 2017**, which Mr Lamprecht uses as authority to launch liquidation and sequestration applications against debtors of ODCS, where he as Chairman of the Board and the only shareholder, and sole Director, would have been the only person present when the resolution was taken:

*"**EXTRACT OF MINUTES OF MEETING & RESOLUTION***

As held by the Board of Directors of ODCS (Pty) Ltd on the 22nd day of November 2017 at the offices of Dionne Lamprecht Inc, Rustenburg.

PRESENT

1.1 D.R. Lamprecht (CEO) as Chairman of the Board and only shareholder.

NOTED: DEBTORS IN ARREARS & COLLECTION THEREOF

2.1 It was noted that several of the company's outstanding debtors owed large amounts and have failed to effect payments as agreed upon. Therefore the board authorises launching liquidation or sequestration applications (as the case may be), with a view to invoke the remedies offered in terms of the

Companies Act, in conjunction with Insolvency Act, specifically relating to inquiries and interrogations with a view to ascertain personal liability with regards to legal entitities- and invoking Section 23(5) as well as Section 24 of the Insolvency Act once sequestrated.

2.2 It was also noted that for purposes of this meeting, Section 57(3) of the Companies Act, 2008 applies and the director may therefore exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities.

RESOLVED

It is therefore resolved and confirmed that Dionne Rohan Lamprecht is hereby appointed and authorised on behalf of the company, at his sole exclusive discretion, with power of substitution:

- *to initiate legal action by way of summons for the collection of overdue accounts of the company's debtors, and/or initiate and pursue motion applications for the winding-up/sequestration of the estate of any debtor of the company;*

- *to institute, lodge and prove any claim on the half of the company against any debtor's estate at any convened creditors' meeting;*

- *to specifically to appoint a trustee at his own exclusive choice, to propose and vote on any resolution allowed by law, specifically applying (but not limited thereto) to the appointment of an attorney to assist with:*

    - *the collection of funds in terms of Section 23(5) of the Insolvency Act, if applicable; and/or*

    - *claiming assets in terms of Section 24(2), 26 to 32 of the Insolvency Act if applicable; and/or*

- *conduct an insolvency interrogation in terms of the Companies Act or the Insolvency Act, as the case may be."*

[16] The applicants, as shown above claim to have only heard about the sequestration of their joint estate. This is very peculiar since service of the application on the applicants was peremptory, and in fact the application was served on the applicants. It must be accepted that they did nothing to oppose the relief sought and essentially acquiesced in the reasons for the application put forward by the ODCS.

[17] Other than the disconcerting issues inherent in this application and the initial application for sequestration dealt with below, the applicants have met all the formal requirements for rehabilitation. The formalities include compliance with s124(2) of the Insolvency Act by publishing in the *Government Gazette* a notice of their intention to bring this application. Albeit, that the Master and the Trustees filed their respective reports late, it has been filed.

[18] **The Master submits that the rehabilitation of the joint insolvent estate of the applicants should not be granted**. It is apposite to quote from the report of the Master which was completed in compliance with the order of Mfenyana J on the contribution issue, but also in compliance with s127(1) of the Insolvency Act. In the report of the Master, he raises several concerns why this application should be granted. He, *inter alia*, calls into question the report of the Trustees for not addressing very valid concerns regarding a motor vehicle in the insolvent asset and the sale of the immovable property as a possible disposition without value. His report (verbatim) reads as follows:

"Notice of motion, founding affidavit and annexures has been lodged with me.

2.

The Honourable Madam Justice Mfenyana I, on the 24 August 2023 ordered that the Master, among other parties, should cause written

submissions to be delivered between them regarding the question who would be liable to pay contribution that will become due and payable upon confirmation of the first and final liquidation and distribution account.

3.

The Master would like to deal with this aspect as raised by the court and finalize by stating reasons why the Liquidation and Distribution Account has not yet been confirmed.

4.

Who is liable to contribute in this specific case?

4.1.

This was a compulsory sequestration of the applicant's estate by OCDS (PTY) LTD and the estate was finally wound up on 12 April 2018.

4.2.

On the 06 June 202018, ODCS (PTY) LTD at Rustenburg Master Magistrate Court proved its claim against the estate.

4.3.

In paragraph 5.9 of the founding affidavit, the applicant states that the claim was withdrawn.

4.4.

In terms of section 14(3) and 106 of the Act, read with decided case of ***FirstRand*** *v* ***The Master of the High Court*** 2021 (4) SA 115 (SCA) (which dealt with the interpretation of these section), it was decided that the petitioning creditor was solely responsible for contribution for the costs of administration.

4.5.

ODCS (PTY) LTD, which is the petitioning creditor in this instance, should be

solely contributor in this case.

4.6.

As stated above, the ODCS (PTY) LTD withdrew its claim; such a withdrawal does not vitiates its responsibility of contributing towards the shortfall.

5.

Why the first and final liquidation and distribution account has not been confirmed?

5.1.

The Master has asked the trustee, in his query sheet which he uses to give guidance to the trustee when the account is lodged, why they had not complied with paragraph 15.6 to 15.9 of the founding affidavit for sequestration of the estate.

5.2

Further the Master wanted to know what happened to the motor vehicle stated in the founding affidavit in paragraph 7.2 and

5.3

Lastly, whether disposal of the house on the 20 February 2017 whilst the sequestration took place on the 08 March 2018 does not constitutes disposition without value. Both the query sheet and the part of the founding affidavit are attached.

5.4

The Master has not been provided with convincing response in this regard.

6.

Recommendation.

6.1

The applicant creditor in this case should pay contribution.

6.2

The applicant in this case should not be rehabilitated as a full disclosure has not been made…"

[19] The Master in this regard raises very valid concerns about an immovable property sold by the applicants one year prior to the sequestration of the joint estate; and the fact that it is unknown what has happened to a motor vehicle in the insolvent estate. The Trustees Final Liquidation and Distribution Account, provided to the Master reflects, *inter alia*, movable assets in the joint insolvent estate, to the amount of R55 000.00 with a contribution to the costs of sequestration due of R86 328.43. Further, since 24 April 2018, an annual bond of R9200.00 in favour of Shackleton Risk was disbursed, totalling R55 200.00. The trustees' fees amount to R6332.98 and the Masters fee R1000.00. Advertising costs for the second meeting of creditors amounts to R744.60, registered mail costs to R67.20 and **the taxed bill of costs of Dionne Lamprecht Attorneys was capped at R75 000.00**; and an amount for Gear Up of R123.97 and meeting attendance R125.00. Lastly amounts for destruction of records R37.82, storage of records R1030.00 and petties, postage and stationery R600.00.

[20] The applicants as required by the peremptory requirements of section 126 of the Insolvency Act, make the following submissions. They submit that they have made a complete surrender of their entire estate as it existed on the date of sequestration. The applicants aver that they have not granted or promised any benefit whatsoever to any person **or entered into any secret agreement with the intent to induce any creditor of their insolvent estate** or another person not to oppose their rehabilitation application. There is, however, a disconcerting issue in this application, which along with the single most dominant reason for the application highlighted above, merits closer scrutiny.

[21] ODCS was the petitioning (sequestrating) creditor in the sequestration application under case number **M265/2017**. ODCS was the only creditor to prove a claim in the insolvent joint estate of the applicants. No other creditors proved claims. During November 2022, a cession agreement was entered into between ODCS and the applicants (as represented by the first applicant). The salient terms of the Agreement of Cession entered into on **23 November 2022** are as follows:

Agreement of Cession

Entered into between:

Name: ODCS (Pty) Ltd Registration No.: 2014/120750/07

Address: 1[...] B[...] Drive, Rustenburg ("the Cedent")

And

Name: Edward Christo Villiers ID: 6[...]

Address: 8[...] P[...] R[...], Botharus, Dispatch, Eastern Cape ("the Cessionary")

WHEREAS the Cedent has an undisputed liquidated claim against the debtors (see paragraph 2 below), for services rendered in the current amount of R15,000.00 ("the Claim");

AND WHEREAS the Cedent has sold the right, title and interest in and to the said claim, to the Cessionary subject to certain terms and conditions contained in a separate confidential agreement;

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. Cession

   The Cedent hereby cedes, transfers and makes over to the Cessionary all right, title and interest the Cedent has in and to the said claim.

2. Authority

The Cedent hereby authorises the Cessionary to notify the debtors of this cession,

The names of the debtors are Edward Christo and Melanda de Villiers.

The address of the debtors is 8[...] P[...] R[...], Botharus, Dispatch, Eastern Cape.

3. Warranty and liability for damage

It is hereby agreed that the Cedent does not provide any guarantee or warranty in respect of the validity of the said claim and shall not be liable to the cessionary for any damages sustained as a result of the said claim proving irrecoverable for any reason whatsoever; or in respect of any fees, costs or charges which may be incurred as a result of prosecuting the said claim.

4. Acceptance

The cession is hereby accepted by the Cessionary upon and subject to the terms and conditions of this agreement.

[22] On **24 November 2022**, the first applicant, following the cession agreement of **23 November 2022** addressed a letter to the trustees, the content of which reads as follows:

Your ref.: M11/2018 *Our ref.: EC & M de Villiers*

TO; MARYNA SYMES
C/O ZEBRA LIQUIDATORS
3[...] C[...] Road
Impala Park, Boksburg
PER REGISTERED POST
& E-MAIL: *msymes@zebraliq.co.za*

AND TO: MASTER OF THE HIGH COURT
PRIVATE BAG X42
MMABATHO
2735

PER REGISTERED POST

& EMAIL: M[...]

M[...] 24 November 2022

Dear Sir / Madam,

RE: INSOLVENT ESTATE OF EDWARD CHRISTO & MELINDA DE VILLIERS – M11/2018

I refer to the above matter and to my claim in the amount of R150,000.00 which was proven against the insolvent estate of Edward Christo & Melinda de Villiers at the First Meeting of Creditors which was held on the 06th of June 2018 at the Magistrate's Court, Rustenburg.

Kindly take note that I have taken over the claim from ODCS (Pty) Ltd, proof of the same is attached to this letter.

It is my intention to have the claim withdrawn and that notice of my intention is hereby furnished to both the Trustees and the Master of the High Court of Mahikeng.

Should you have any objections thereto, written objections must be filed within 14 (FOURTEEN) days from date hereof, at the Master of the High Court, Mahikeng under the abovementioned Master's Reference Number and send to my attorney of record's office situated at 1[...] B[...] Drive, Rustenburg,0299."

[23] These events, together with the reasons highlighted above for the present application, cannot be ignored. The position is thus; ODCS proved a claim in the joint insolvent estate of the applicants, which was essentially the only basis for the grant of the order sequestrating the joint estate in 2018 and that claim has now been withdrawn by the very applicants, who were unable to pay their debts in 2018. ODCS as will be shown below, appear, in the absence of some confidential agreement being disclosed in the papers in this application, to have believed that it would not be responsible for the costs of sequestration, and further appears will still receive the amount that the applicants are indebted to

it. This is clearly to the detriment of the other creditors, who were clearly placed in an invidious position when the applicants' joint estate was declared insolvent in this Court. It militates against the principle of *concursus creditorium* which is central to sequestration proceedings. I propound on this below.

[24] In the cession agreement ODCS refers to **a separate confidential agreement in which certain terms and conditions have been agreed to between ODCS and the first applicant regarding the sale of the right, title and interest in the claim of ODCS**. The content of the confidential agreement is not disclosed to this Court. This confidential agreement contradicts the allegation on oath by the applicants that they have not granted or promised any benefit whatsoever to any person **or entered into any secret agreement with the intent to induce any creditor of their insolvent estate** or another person not to oppose their rehabilitation application. It militates against section 126 of the Insolvency Act and begs the question why ODCS in its submission on the contribution question, which is considered below, fights tooth and nail for the rehabilitation of the applicants. The aforesaid circumstances alone do not engage the wide discretion of this Court in favour of the relief sought. It is important, however, to deal with further anomalies in the application.

[25] As stated above, the only proven claim in the joint insolvent estate of the applicants was from the petitioning creditor, ODCS and no other claims were proven. The creditors ran a risk of contribution to the joint insolvent estate. This contradicts the assertion by the petitioning creditor in the application for sequestration that, *prima facie*, there was reason to believe that the sequestration would be to the advantage to the creditors. In fact, the only creditor who stood to benefit from the sequestration was ODCS through it proving its claim. ODCS remained adamant in the sequestration application that the respondents owned assets of more than sufficient value not only **to defray the administrative costs**, but also to ensure a beneficial divided payable to their creditors.

[26] As in the *Purdon* matter, the immovable property does not form part of the final liquidation and distribution account. And there is no explanation what happened to the transfer of the property after the buyer took occupation of the property. This issue impacts the benefit to the creditors. Whilst the allegation surrounding the immovable property was made by ODCS, the applicants did nothing to gainsay the allegation or correct same. The applicants continue to be evasive on the issue of the immovable property in the present application, by simply stating that whilst they tried to sell the property there was complications with the transfer. This Court is therefore left in the dark on what the position is regarding the immovable property, for which Shackleton Risk has been paid R9200.00 per annum since the surrender of the estate in the hands of the Master.

The contribution issue

[27] The submissions on the contribution issue are put paid to by the Master, with reference to the Supreme Court of Appeal judgment in **FirstRand Bank Limited v Master of the High Court (Pretoria) and Others (1120/19) [2021] ZASCA 33; 2021 (4) SA 115 (SCA) (7 April 2021)**. The appeal as identified by Mabindla-Boqwana AJA (as she then was) writing for a unanimous Court, concerned the interpretation of s106 read with ss 89(2) and 14(3) of the Insolvency Act which deals with the liability of creditors to pay a contribution where there is insufficient or no free residue in an insolvent estate to meet expenses, costs and charges connected with the sequestration. The issue it was said has been a subject of controversy for a while within the insolvency law academic circles. Such costs it was stated are a charge against the free residue in terms of s 97(2)(c) of the Insolvency Act. Mabindla-Boqwana AJA stated as follows:

[2] …The debate centres on the question of which creditors are liable to pay a contribution for costs where there is a shortfall in the free residue. Does the burden to contribute lie with all creditors who have proved claims against the estate? Does that include secured creditors who have proved their claims but relied solely on their security? And what about the petitioning creditor who

applied for the sequestration of the estate in the first place?...

[18] The need for a contribution to be made towards the costs of sequestration arises in the following way. Section 44(1) of the Act provides that any person or representative of a person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may at any time before the financial distribution of the estate, prove that claim in the manner provided. A claim is proved by way of an affidavit as envisaged in s 44(4) detailing among other things, the nature and particulars of the claim and, if a creditor holds a security, the nature of that security.

…

[22] Section 106 provides the mechanism for determining which creditors must make a contribution towards the costs of sequestration, when there is no free residue or it is insufficient. It reads as follows:

'Where there is no free residue in an insolvent estate or when the free residue is insufficient to meet all the expenses, costs and charges mentioned in section ninety-seven, all creditors who have proved claims against the estate shall be liable to make good any deficiency, the non-preferent creditors each in proportion to the amount of his claim and the secured creditors each in proportion to the amount for which he would have ranked upon the surplus of the free residue, if there had been any: Provided that –

(a) if all the creditors who have proved claims against the estate are secured creditors who would not have ranked upon the surplus of the free residue, if there had been any, such creditors shall be liable to make good the whole of the deficiency, each in proportion to the amount of his claim;

(b) if a creditor has withdrawn his claim, he shall be liable to contribute in respect of any deficiency only so far as is provided in section fifty-one, and if a creditor has withdrawn his claim within five days after the date of any resolution of creditors he shall be deemed to have withdrawn the claim before anything

was done in pursuance of that resolution.' (My emphasis.)

[23] This section must be read together with ss 14(3) and 89(2) which provide:

Section 14(3)
'In the event of a contribution by creditors under section one hundred and six, the petitioning creditor, whether or not he has proved a claim against the estate in terms of section forty-four, shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition.'

…

[25] The academic controversy about the interpretation of these sections referred to in para 2 of this judgment is well expressed in the following passage from Meskin's Insolvency Law:

'The controversy relates to the correct interpretation of section 106 read with sections 14(3) and 89(2), and more particularly, whether by the reference in section 106 to "all creditors who have proved claims" the intention is that for the purposes of determining the sequestrating creditor's liability to contribute, he is to be regarded as a creditor who has proved a claim as envisaged by section 106, or whether his liability to contribute arises independently, under section 14(3), and that accordingly he is liable, together with those creditors who have actually proved claims and who are liable to contribute under section 106. In relation to the liability of a secured creditor or secured creditors envisaged by proviso (a) to section 106, the controversy is whether, where there is a sequestrating creditor who is as such liable to contribute, the entire contribution is payable by the sequestrating creditor alone, or whether the secured creditor, or creditors, envisaged by proviso (a) and the sequestrating creditor are liable for the entire deficiency proportionately to the amounts of their respective claims (the sequestrating creditor being treated as if he had proved the claim upon which the sequestration order was obtained).'

…

[37] The next question is what happens if the only other creditor (in addition to the secured creditors who rely solely on their security) is a petitioning creditor who has not proved its claim such as in this case? Then s 14(3) comes into play. When there is no free residue or it is insufficient and a contribution is required in terms s 106, a creditor who instituted the sequestration proceedings is required to contribute, whether or not it has proved a claim, not less than they would have had to contribute if they had proved the claim stated in his petition.

[38] Section 14(3) must be read with s 106. That much is clear from the wording of the actual provision. ***Even though the petitioning creditor has not proved a claim, it is compelled to contribute 'in the event of a contribution by creditors under section one hundred and six whether or not he has proved a claim against the estate'. In terms of s 14(3), the petitioning creditor will always have to contribute.*** *The section contains no exceptions. The petitioning creditor is placed in the same position as it would have been in had it proved its claim. This means its liability would be calculated in proportion to the amount of its claim as stipulated in the main part of s 106.*

[40] That interpretation strains the proviso in s 106(a) and does violence to s 89(2) and its purpose. It also overlooks the provisions of s 14(3). Construed properly, while not 'deemed' to have proved a claim stricto sensu, the provisions of s 106 apply to the petitioning creditor 'whether or not he [it] has proved a claim'. Because of that it should be treated in the same manner as a creditor who has proved its claim. Consequently, when there is no free residue, or it is insufficient, the first port of call would be look to the petitioning creditor to contribute along with concurrent creditors who have proved their claims and secured creditors who would have ranked upon the surplus of the free residue. That is the consequence of reading the enacting part of s 106, together with ss 14(3) and 89(2).

…

[45] In conclusion, having determined the meaning of ss 106, 89(2) and 14(3),

it is clear that the Body Corporate as the petitioning creditor is solely liable to pay the costs of sequestration as the other two creditors (FNB and Nedbank) are secured creditors who relied solely on their security. Had there been other creditors found to have been liable to contribute, it would have had to contribute in proportion to the amount of its claim in the petition (R22 000). It is however not necessary to have regard to that amount, as the Body Corporate has been found to be solely liable for payment of the entire R43 680.35 in respect of the taxed bill of costs…"

[28] ODCS as the petitioning creditor remains solely liable for payment of the costs of sequestration. The cession by ODCS to the first applicant of its right and title to the claim which was proven in the joint insolvent estate is undoubtedly questionable. The withdrawal of the claim by the first applicant, immediately upon cession to him, hints at contrivance or scheme. The papers point to an arrangement aimed at securing the rehabilitation of the applicants, and the return of their estate to them, with the contribution amount which ODCS believed it was not liable for, being paid to ODCS, by the applicants. It speaks to *quid pro quo* arrangement or symbiotic relationship, which would be mutually beneficial to ODCS and the applicants, but to the detriment of other creditors. It ultimately defeats the purpose or notion behind sequestration which should be to the benefit of creditors. I deal with this in more detail below.

Discussion

[29] It is inexplicable why ODCS did not vigorously pursue the winding up of the sequestration process, after proving its claim. It raises concerns analogous to those raised by Satchwell J in **Esterhuizen v Swanepoel and Sixteen Other Cases 2004 (4) SA 89 (W) at 91G-92D**:

"The collusion is frequently found in the following pattern of behaviour or modus operandi:

(a) A debtor owes money, frequently insignificant amounts(s), to creditors(s) who expect and rely upon the anticipated repayments of this outstanding debt. The debtor cannot make payment of the debt;

(b) He seeks the assistance of a third party who agrees to initiate sequestration proceedings to "aid or shield [the] harassed debtor' from his genuine and perhaps demanding creditor(s). (Epstein v Epstein 1987 (4) SA 606 (C));

(c) A friend or relative masquerades as a 'creditor' then avers that the 'debtor' has not only failed or refused to repay this 'debt' but has written a letter advising of his inability to pay the 'debt';

(d) An act of insolvency in terms of s 8 (g) of the Insolvency Act 24 of 1936 has now purportedly been committed and the 'creditor' proceeds with sequestration proceedings against the 'debtor';

(e) This 'friendly' application (or sequestration) procures an order declaring the respondent insolvent. The respondent is then relieved of his or her legal, financial and moral obligations to the original and genuine creditor(s) save to the extent that the insolvent estate is able to satisfy such debt(s). The balance of the genuine indebtedness remains unsatisfied and, with the connivance of another, the insolvent has been 'enabled to escape payments of his just debts'.
To avoid any manipulation or abuse of the process, I take a view that an applicant for rehabilitation is obliged to demonstrate how the sequestration of his or her estate had been to the advantage of creditors, and if it had not, the reasons therefor. It should make no difference that the sequestration resulted from voluntary surrender or compulsory sequestration, for, in both instances, the benefit to the body of creditors, is the overarching and key consideration. Courts have a particular responsibility to ensure that people who have in the past failed in managing their financial affairs, and in the process caused financial loss to others, are not without more, unleashed back into the economic mainstream."

(emphasis added)

[30] The mere compliance with the statutory formalities for rehabilitation does not suffice in the face of a failure to make full and frank disclosure of all relevant facts (a substantive disclosure of fact) to assist a Court to exercise its discretion. As Makgoka J put it in *Purdon:* "An application for rehabilitation is not a formality. It requires frankness and a full disclosure of all relevant facts. At the very least, the applicant has to satisfy the court of three aspects. First, a full and frank disclosure of the circumstances that led to his or her sequestration. Second, a demonstration that he or she had learnt lessons from the insolvency, and third, that he or she is rehabilitated and ready to re-enter the commercial world and the economic mainstream. For the latter requirement, it does not suffice that since sequestration, the insolvent had lived strictly on a cash basis. That is a forced, natural, and intended, consequence of insolvency, and it is by no means an indication of prudence on the part of the applicant for which he or she should be applauded."

[31] As was stated in *Purdon* in the Gauteng Division, Pretoria, a similar trend exists in this Division for applicants to place the *"barest minimum details before court, coupled with generalised statements. This is clearly not sufficient…"* The circumstances attendant in the application in *Purdon* is demonstrated in the presented application, where the applicants' and ODCS, I hasten to add, in its fierce defence of the application being granted, fail to appreciate that the sequestration of their estate at the instance of ODCS, purportedly acting in the best interest of the creditors, has not had any advantage for their creditors, many of whom held considerably higher claims that that of ODCS. ODCS, in my view, having regard to its very miniscule claim could have pursued same by civil claim other than sequestration.

[32] I can do not better than repeat what Makgoka J said in *Purdon* regarding the creditors who saw no advantage in her sequestration, as *in casu*: *"If rehabilitated, the applicant, freed of her debts, would 'cock a snook' at her creditors and start on a clean state, incurring more debts. Indeed, of the reasons she seeks rehabilitation of her estate, the applicant states that she needs to obtain credit in the form of a home loan."* As stated *supra*, the main reason for the present application is that the applicants' wish to obtain credit

for a home loan and a motor vehicle, in circumstances where they will be freed from the noose, they have allegedly created prior to their sequestration according to ODCS. The applicants', as with the Trustees and ODCS I may add, fail to address the valid concerns raised by the Master regarding the motor vehicle and to that must be added the immovable property. They have further failed to show to this Court that they appreciate the conduct of their financial affairs that led to the sequestration of their estate. Nothing is stated on how they will avoid similar conduct in future, if rehabilitated. The fact that their creditors have suffered substantial losses evades the applicants, who are motivated in this application by their own interests.

Conclusion

[33] The applicants' have failed to make a full and frank disclosure of material facts impacting their joint insolvent estate. They have engaged in an agreement with ODCS, which *prima facie* appears to have been contrived to make the only proven claim by ODCS, disappear, to pave the way for the mere taking an order from this Court.

[34] As in *Purdon*, I am not satisfied that the applicants have mustered the test enunciated in **Kruger v The Master and Another NO; Ex Parte Kruger 1982 (1) SA 754 (W) at 762A**, where Slomowitz AJ stated as follows:

> 'As have been at pains to point out, what the Master should asked himself was not whether the applicant's insolvency causes him hardship, which it patently does, but rather whether the applicant had shown that he had shown that he was indeed a man who had rehabilitated himself in the sense that he understood her obligations to society in general and the business world in particular, or whether, in all the circumstances, she needed the lesson of time.'

[35] In the exercise of my discretion as envisaged in section 127(2) of the Insolvency Act, for the reasons stated above, the application for rehabilitation stands to be refused.

Order

[36] In the result, the following order is made:

(i) The application for the rehabilitation of the joint insolvent estate of the applicants is refused.

(ii) The petitioning creditor ODCS (Pty) Ltd is solely liable for the costs of sequestration (contribution) as set out in the Final Liquidation and Distribution Account of the Trustees.

A H PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

FOR THE APPLICANTS': ADV CJ ZWIEGELAAR
Instructed by : Grobler Malope Inc
c/o Herman Scholtz Attorney
Lanric 59, Shippard Street Ext
MAHIKENG