IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION,

CAPE TOWN

Case No.: 22301/2023

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED	Applicant
and	
RAYMOND LEONARD MOODY N.O.	First Respondent
(In his capacity as trustee for the time being of Erf 10190 Fernkloof Investment Trust)	
GRANT GREGORY MACLENNAN PISTOR N.O.	Second Respondent
(In his capacity as trustee for the time being of Erf 10190 Fernkloof Investment Trust)	
MARK MICHAEL MACLENNAN PISTOR N.O.	Third Respondent
(In his capacity as trustee for the time being of Erf 10190 Fernkloof Investment Trust)	
CHRISTOFFEL JOHANNES ERASMUS N.O.	Fourth Respondent
(In his capacity as trustee for the time being of Erf 10190 Fernkloof Investment Trust)	

IAN DE LANGE N.O. Fifth Respondent

(In his capacity as trustee for the time being of

Erf 10190 Fernkloof Investment Trust)

CLAYTON MICAEL LAUE N.O. Sixth Respondent

(In his capacity as trustee for the time being of

Erf 10190 Fernkloof Investment Trust)

PENELOPE ANNE LAUE N.O. Seventh Respondent

(In his capacity as trustee for the time being of

Erf 10190 Fernkloof Investment Trust)

JUDGMENT

ANDREWS, AJ

Introduction

[1] The Applicant initially sought the provisional sequestration of Erf 10190 Fernkloof Investment Trust (the "Trust") on the basis that it was *de facto* insolvent and further that it committed an act of insolvency as envisaged in Section 8(c) of the Insolvency Act No. 24 of 1936 ("the Insolvency Act"). This matter concerns the issue of costs in the sequestration application pursuant to the Trust having settled the full outstanding balance together with accrued interest on the loan agreement in June 2024. The Trust, in a counter-application, seeks the dismissal of the sequestration application and a cost order against the Applicant for not persisting with the application.

Factual Background and Chronology

[2] The Applicant's claim against the Respondent's (hereinafter referred to as the Trust) is predicated upon a written home loan agreement that was concluded between the parties on or about March 2007 ("the loan agreement"). The Trust breached the loan agreement by failing to make payment of the monthly instalments under the loan agreement timeously or at all, which resulted in the Trust's facility with the Applicant being called up.

[3] The full outstanding balance together with interest in terms of the loan agreement became due and payable. The Applicant sought the sequestration of the Trust's estate on the basis that it was *de facto* insolvent and further that it committed an act of insolvency as envisaged in section 8(c) of the Insolvency Act in that it preferred its other creditors above the Applicant.

[4] The application was served on the Second Respondent ("Mr Pistor") during December 2023. Subsequent to service of the application being affected on the Second, Third and Seventh Respondent's, the Applicant's Attorneys of record were contacted by an Attorney, acting on behalf of the Trust, who indicated that the Trust wished to explore the possibility of settling the matter. The matter was initially enrolled for hearing on 25 January 2024 and adjourned until 9 February 2024, for the parties to enter into settlement negotiations.

[5] The Trust's erstwhile Attorneys did not formally oppose the application. Settlement negotiations failed. On 5 April 2024, Mr Pistor delivered a "Notice of Intention of Defend *(sic)*". On 9 February 2024, the matter was adjourned until 8 March 2024 to effect further and better service of the application. On 8 March the matter was

postponed for hearing until 19 April 2024, with service directions in respect of service on the First, Fourth, Fifth and Sixth Respondent's. The Order also provided a timetable for the exchange of pleadings. On 19 April 2024, the matter was adjourned until 30 July 2024 for hearing on the semi-urgent roll, with a further timetable regulating the exchange of pleadings.

[6] Mr Pistor appeared in court on behalf of the Trust on 8 March 2024 and 19 April 2024, respectively. On both occasions, he indicated that the Trust intended to appoint legal representation, but ultimately no legal representative was appointed. The Trust delivered its Answering Affidavit on 29 April 2024. The Applicant's Replying Affidavit followed on 3 June 2024. The Trust settled the full outstanding balance on the loan agreement together with the accrued interest in June 2024.

Dismissal of the Application

[7] During June 2024, the Trust settled the full outstanding balance on the loan agreement which founded the Applicant's *locus standi* in this application, together with accrued interest. The Applicant no longer persists with its application for the provisional sequestration of the Trust's estate and approaches this court to make a determination on the limited matter of costs. The Trust seeks an order dismissing the application, which is essentially founded on the basis that the application for its provisional sequestration was not meritorious.

[8] The question to be answered is whether the Applicant was obliged to withdraw its application in these circumstances or whether the Trust could approach the court for the dismissal for want of prosecution. It is evident that the Trust does not approach

the court on the basis that the application was not prosecuted, but rather that the application was unmeritorious.

[9] It is manifest that the Applicant, no longer persist with the application on the basis that the relief it sought has become moot, by virtue of the Trust having settled its indebtedness to the Applicant. The doctrine of mootness has been explained by the Constitutional Court in ***Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others*** [1] as follows:

> *'Mootness is when a matter "no longer presents an existing or live controversy".*[2] *The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical".*[3]'

[10] It is trite that a High Court does not have any discretion relating to mootness which has been aptly demystified in ***Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others*** [4]**:**

> *'The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination.*[5](my emphasis)

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[1] (CCT195/19) [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) (24 March 2020), at para 47.

[2] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21.

[3] *J T Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15. See also Loots "Standing, Ripeness and Mootness" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2014) at 7-19 and Du Plessis et al *Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) at 39.

[4] (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (6 December 2016), at para 25.

[5] See also *VINPRO NPC v President of the Republic of South Africa and Others* [2021] ZAWCHC 261 para 42; *South African Breweries Proprietary Limited and Others v President of the Republic of South Africa and Another* [2022] 3 All SA (WCC) at para 36.

[11] It is therefore unequivocal that the function of a High Court is to determine cases that present a live issue. Therefore, since the Trust settled the full outstanding balance on the loan agreement it is apparent that there is no longer a live issue for determination, other than the matter of costs.

Has the Trust committed an Act of Insolvency?

[12] As the only live issue remaining is the matter of costs, the question to be answered is whether the Applicant would have succeeded to satisfy the Court that it had made out a *prima facie* case for the sequestration of the Trust as envisaged in Section 10 of the Insolvency Act which stipulates:

> *'If the Court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie—*
>
> *(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section 9; and*
>
> *(b) the debtor has committed an act of insolvency or is insolvent; and*
>
> *(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,*
>
> *it may make an order sequestrating the estate of the debtor provisionally.'*

[13] Reliance is placed on an act of insolvency envisaged in Section 8(c) of the Insolvency Act which states as follows:

> *'A debtor commits an act of insolvency—*
>
> *...*
>
> *(c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another...'*

[14] It is not in dispute that a loan agreement was concluded between the Applicant and the Trust. Evident from the Answering Affidavit, the Trust conceded that it was in arrears in respect of the loan agreement in the amount of R1 081 493.68. In

augmentation of the Applicant's assertion that the Trust was factually insolvent, the Applicant asserted *inter alia* that:

> [14.1.] the Trust did not have a transactional / cheque account with the Applicant in order for the Applicant to register or place a debit order for payment of the monthly instalment in terms of the loan agreement;
>
> [14.2.] in terms of the transaction history statement for the period from inception to 31 July 2023, a total amount of R20 210 362.03 was paid into the account by a third party/ies, whereas during the same period an amount of R23 445 383.78 was paid out of the account by the Trust;
>
> [14.3.] despite the amount of R20 210 363.03, having been paid into the account the Trust remained in arrears with the obligations towards the Applicant in the amount of R1 081 493.68 as at 1 December 2023 and
>
> [14.4.] the Trust failed to apply the funds received towards servicing the monthly instalments of the loan agreement.

[15] The Applicant, submitted that there is reason to believe that it would be to the advantage of the Trust's general body of creditors if the estate were to be sequestrated. In this regard, the estimated market value of the Trust's immovable property was in the amount of R10 050 000, which is the only tangible asset of the Trust. The Trust's indebtedness to the Applicant was in the amount of R5 090 968.14 and the Trust's indebtedness to third party creditors was in the amount of at least R20 210 362.03. It was argued that the Trust was factually insolvent in an amount of

R15 251 330.17. This conclusion was furthermore underscored by the balance sheet prepared by Mr Pistor which reflected that the Trust held a cash amount of R558 which is further suggestive that the Trust is also commercially insolvent.

Trust's Grounds of Opposition

[16] The Trust denied being factually insolvent and denied having committed an act of insolvency. In an endeavour to demonstrate to the Court that the Trust is not commercially or factually insolvent, various disputes of fact were raised, which included *inter alia*:

(a) That there was a current account registered in the name of the Trust;

(b) That the Trust did not have any other debt, other than its indebtedness to the Applicant;

(c) Whether the entire debt was due;

(d) Whether the Trust was solvent;

(e) Suspicious dealings with Mrs Pistor;

(f) The manner in which the account was conducted;

(g) Method of payment.

[17] It is trite that where the facts are disputed the court is not permitted to determine the balance of probabilities on the papers, but must apply the ***Plascon-Evans*** rule[6]:

> *'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an*

[6] *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (AD) at 634H-635C.

order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155 (T), at pp 1163-5; Da Mata v Otto, NO, 1972 (3) SA 585 (A), at p 882 D - H).[7]

[18] Corbett JA further held that a Respondent's version might not always be accepted:

'There may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.'

[19] There are however two exceptions to the general rule. The one is where a denial by Respondent of a fact alleged by Applicant is not such as to raise a real, genuine or *bona fide* dispute of fact.[8] It is now trite that a bare denial of Applicant's material averments cannot be regarded as sufficient to defeat an Applicant's right to secure relief by motion proceedings in appropriate cases.[9]

Other debt

[20] The Applicant asserted that the third party/ies "financier" was a creditor of the Trust in an amount of at least R20 210 362.03 as suggested by the Applicant. Mr Pistor refuted any reference to a third party or "financier", emphasising that the only liability the Trust had was its debt to Standard Bank. The Applicant in its Replying Affidavit stated that it came to the Applicant's knowledge that the Trust was indebted to the Hillside Village Property Owner's Association in the amount of R54 000 as at 1

[7] At para 8 – 9.
[8] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 35.
[9] Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 155 (T).

March 2023. The balance sheet upon which Mr Pisto places reliance, omits the Trust's indebtedness to the Hillside Village Property Owner's Association.

[21] In addition, the Applicant illuminated that the Trust failed to disclose that the claims of the trustees in respect of the payments made on the Trust's behalf, exceeded R20 million. According to the Applicant, the Trust adopted a pattern of preferring its other creditors according to the Applicant.

Linked current account

[22] Mr Pistor in the Opposing Affidavit explicated that the Trust was formed 16 years ago. The Trustees purchased the plot and built a home that they could visit for holidays and rent it out over weekends, seemingly to generate an income. Mr Pistor explained that the access bond facility was set up in 2007 and linked the current account and the home loan account. The Trust did not opt for a debit order to be signed and instead the trustees paid larger lump sums into the account from time to time. In this regard, it was submitted that no debit order was in place or required for 16 years. Although Mr Pistor vehemently denied the assertion that payments were received by way of Autobank Transfers since the inception of the Loan Agreement, he confirmed the fact that there was no transactional account linked.

[23] Mr Pistor took issue with the assertion by Mr Gouws that *"the Trust would not hold a transactional / cheque account with the applicant in order for the applicant to register / place a debit order for payment of the monthly instalments in terms of the loan statement."* Mr Pistor was at pains to demonstrate the existence of the current account, to the extent that it was checked for FICA compliance and email correspondences associated therewith. In further augmentation, Mr Pistor

demonstrated, the link by way of connecting transactions using colour coding for each statement linked to the Home loan transaction record and current account transactional record.

[24] In the Applicant's Replying Affidavit, Mr Gouws confirmed that the Trust holds a current account with the Applicant. He explained that there was a *bona fide* misunderstanding on the part of Mr Lang, the Attorney who drafted the affidavit, who understood his instructions to mean that there was no current account held in the name of the Trust which to place a monthly debit order. Mr Gouws further explicated that he in fact meant that there was no current account from which a monthly debit order was being collected.

[25] To my mind, this does not change the admitted fact by the Trust that there was no debit order in place against the Trust's current account for payment of the monthly instalments under the loan agreement as and when they fall due. In my view, the attack on Mr Gouws, insofar as it relates to the existence of a current account is not fatal as the error was later corrected in the Replying Affidavit. The existence of the two independent accounts can therefore be accepted as this is no longer in dispute.

[26] The veracity of what Mr Gouws stated in his affidavit regarding the basis on which an access bond works, was bought into question. Mr Pistor explained that when the loan agreement was concluded, *"no repayment instalments were apparently agreed. The borrower was merely obliged to open a so-called "current account".*[10]

[10] Second Respondent's opposing affidavit, para 35.

Terms of the repayment, whether the entire debt was due and the manner in which the account was conducted

[27] The Applicant contended that the Trust failed to make regular and timeous payment of the monthly instalments due. This was not disputed; however, Mr Pistor raised a dispute regarding the repayment terms. Furthermore, Mr Pistor takes issue with the fact that the Applicant stopped the Trust's access facility in July without any notice. The Trust's access to funds on its access bond was indeed terminated pursuant to its default. The Trust having been in arrears in respect of the access bond account since at least July 2022.

[28] Mr Pistor however contended that the loan period was 240 months and that it was not yet due at the time of the sequestration application. The terms of the contract with the Applicant is clear:

> *'5.3 Notwithstanding any other provision by the loan agreement the AccessBond Facility is granted to the Borrower at the Bank's sole discretion. The Bank may, at any time, cancel the Accessbond Facility (or any part thereof) and/or the right to the advancement or transfer of any amount under the Accessbond Facility, without giving the Borrower any notice or reasons.'*[11] [Emphasis added]

[29] In addition, there is an exit clause that allows the Applicant to withdraw from the agreement at any time.[12] The monthly instalments payable in respect of the loan was in the amount of R59 220.75 as recorded in the loan agreement.[13] The fact that the agreement makes provision for a minimum instalment as well as an acceleration clause in the agreement, underscores this court's conclusion that Mr

[11] Application Bundle, page 46, para 5.3.
[12] Application Bundle, page 49, para 16.
[13] "Disclosure Annexure", para 2.

Pistor's understanding of the agreement does not align with the terms of the written contract. I am of therefore of the view that it is improbable that the bond account would not require a minimum monthly instalment, as suggested by Mr Pistor. Thus, it is apparent that the transaction schedule on the loan agreement demonstrated that there was no effort made to reduce the Trust's indebtedness to the Applicant

[30] On Mr Pistor's own version, the payments towards the Trust's loan indebtedness with the Applicant were made by the trustees by paying *"larger lump sums when [their] finances allowed or when* [they] *received a good booking for example over December holidays."* This was done in order to settle the minimum payment due and then shortly thereafter withdrawing the funds which would then be utilized elsewhere.

[31] The Applicant submitted that the manner in which the accounts of the Trust were conducted, had caused prejudice to the Applicant. The Applicant illustrated this by way of example where an amount of R12 000 was transferred to the Trust's access bond account in April 2021. The same amount of R12 000 was transferred back into the Trust's current account from the access bond account and on the same date paid to an entity called Fernkloof Construction.

[32] Despite significant amounts being transferred to and from the access bond account, the outstanding indebtedness to the Applicant was not reduced. This, it was argued, whilst the Trust's other creditors received substantial payments from the Trust during the same period.

[33] Mr Pistor confirmed that over the last 16 years, around R20 million has been paid into the bond account, while at least R23 445 383.78 has been drawn down, however, Mr Pistor contended that this is exactly what an access bond facility allows. Mr Pistor describes this as *"an instrument of cash flow, which the borrower may manage **as he wishes**, depending on whether he has a cash requirement at the time, or whether he want to pay cash in again."*[14] [Emphasis added]

[34] The history insofar as how the Trust operated the account for 16 years, without a debit order facility is furthermore, in my view, no justification for holding that the Trust could operate to "manage as he wishes, depending on whether he has a cash requirement at the time, or whether he just want to pay cash in again", is in my view, clearly untenable, improbable and unrealistic.

Suspicious dealings with Mrs. KJ Pistor

[35] Mr Pistor highlighted a specific transaction dated 28 November 2020 in the amount of R500 000 that was withdrawn from the bond and transferred to the current account. He explained that his ex-wife had gained access to the bank accounts without authority. This unauthorised transfer was reported to the Applicant's fraud department and the South African Police Services. It was also reported, by way of email correspondence to Adrion Gouws at Standard Bank. In essence the complaint concerned the questionable behaviour on the part of a Senior Manager who allowed Mr. Pistor's ex-wife to load herself as a beneficiary, despite Mr. Pistor having withdrawn her former access by changing codes in July 2020. Allegations of purported collusion was denied.

[14] Second Respondent's Opposing Affidavit, para 55.

[36] According to Mr Pistor, Mrs. Pistor owes the Trust R676 427.28. He averred that the R500 000 transferred by Ms KJ Pistor caused and/or contributed towards the arrears. It appears that Mr Pistor accords a measure of blame onto the Applicant for not assisting him with the reversal of the amount of R500 000 that was unauthoratively withdrawn by his ex-wife. Mr Pistor, explained that this incident made the Trust reluctant to put extra money into the account out of concern that it could be stolen. Mr Pistor has indicated that action has been taken by the Trust against his ex-wife Mrs Pistor for the recovery of the R500 000.

[37] Mr Pistor also questioned why Mrs Pistor would be copied into an email communication on 21 June 2023.[15] It is noteworthy, that Mr Pistor submitted that the withdrawal of the R500 000 by Mrs Pistor, had a direct bearing on why the account fell into arrears, however, it is evident that the email correspondence alerted Mr Pistor to an arrear amount of R298 205.76.

[38] According to the Applicant, the assessment or valuation of between R8 000 000 and R8 500 000, was provided to Mr Lang by Mr Pistor's ex-wife, Mrs Pistor. Mr Gouws confirmed that that he instructed a valuation to be conducted in respect of the Trust's property which was done pursuant to the fact that the Trust was significantly in arrears in respect of the instalments on its access bond account. It appears that Mrs Pistor is a surety for the Trust's indebtedness to the Applicant and engaged with Mr Lang regarding the pending litigation in his capacity.

[15] Annexure "RA5".

[39] While much has been made of the unauthorised withdrawal by Mrs Pistor of the R500 000, this matter is being pursued by the Trust in separate proceedings. In my view, this aspect does not affect the Trust's liability to the Applicant, nor does it arm the Trust with a defence to this application, as has been pointed out by the Applicant.

Method of payment

[40] Mr Pistor refuted any reference to ATM payments and stated that all deposits and withdrawals on the home loan access bond were channelled through the current account. The Applicant, has demonstrated that the payment of funds into the account were made from third parties and not the Trust. These transactions are referenced "AC", to denoted Autobank Transfers. Mr Pistor, vehemently challenged this as being factually incorrect and went so far as to accuse Mr Gouws of perjury.

[41] This court, after being referred to Annexure "AG7" is able to take judicial notice of the various transactions with a reference "AC" showing numerous deposits of varying amounts, into the account. These credits are consistently referenced "AC". It bears mentioning that the statement "AG7" is a bank generated document. Mr Gouws, in referring to the reference term used "AC" was essentially transposing the information from the statement as it appears thereon.

[42] To my mind, the reference to "AC", ("Autobank Transfer"), denotes reference to a transfer that occurs between bank accounts. Mr Pistor demonstrated that the payments were made from the Business current account to the Bond Account.

Whether the Trust was solvent

[43] The outstanding loan amount fluctuated over the years. Mr Pistor, challenges the methodology used in deriving at the conclusion that the Trust is *de facto* insolvent. In this regard, he suggested that the calculations ought to be simple formula, namely assets minus liabilities. In this regard, it was submitted that the estimated market value of R10 050 000 minus the amount owing to the Applicant yields a positive balance of R4 959 031.86. I interpose to state that the Applicant in the Replying Affidavit submitted that the market assessment that was conducted in respect of the property in March 2023, indicated that the property had a market value of R8 000 000 to R8 500 000. The figures do not appear to be consistent as at some point it was suggested that the Trust's nett value was said to be R5 253 478 which is based on the estimated windeed valuation report of the property, less the outstanding amount then owed to the Applicant.

[44] It was argued that there is no plausible reason proffered by Mr Pistor why the account fell into arrears. Although Mr Pistor challenges the assertion that the Trust made payments to other creditors on the basis that the Applicant has not provided any proof to this effect, the bank statements undoubtedly show amounts moving out of the account frequently. This in my view, supports the Applicant's contention that the Trust was utilising the account as a vehicle to facilitate various payments to and from third parties. Furthermore, the Trust's balance sheet indicated that the Trust was not generating an income by renting out the property or otherwise. In fact, it did not refute that Mr Pistor permanently resides in the property.

[45] Therefore, how the monies found its way into the account is not of critical importance, what is of importance is the fact that a significant amount of money had

passed through the account; sufficiently so to service the monthly instalment. The oft quoted dictum of Innes CJ in ***De Waardt v Andrew & Thienhaus Ltd*** [16] is apt where the following was stated:

> *'Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him. ... Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities. 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.'*

Conclusion

[46] After considering the version of the Respondent I am of the view that in certain respects, it is clearly untenable, improbable or unrealistic to justify the rejection thereof on the papers.[17] The Trust's understanding of the terms does no align with the terms of the loan agreement. Mr Pistor's assumption for the Applicant's underlying reason for the drastic action being based on a failure to agree to a debit order, is also not supported by way of evidence. Certain allegations made by Mr Pistor are highly speculative.

[47] On a conspectus of the evidence, I am satisfied that the movement of funds out of the account is demonstrative that payment was made to other creditors to the detriment of the Applicant. This supports the Applicant's assertion that the Trust appeared to have preferred one creditor above another. I interpose to mention that

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[16] 1907 TS 727 at 733.

[17] *Truth Verification Testing Centre CC v PSE Truth Detection* CC 1998 (2) SA 689 (W) at 699F-G, *NDPP v Geyser* [2008] 2 All SA 616 (SCA) (25 March2008) at para 11.

there are 8 different acts of insolvency upon which a creditor can rely. The creditor merely has to prove one such act of insolvency.

[48] It bears mentioning that the granting of a provisional sequestration order is based on a court exercising its judicial discretion. In my view, the conduct of the Trust is indicative of an act of insolvency in terms of Section 8(c) of the Insolvency Act and as such, the Application, would have had merit if regard is had to the requirement that the Applicant merely had to show that *prima facie*, there was an act of insolvency.

[49] I am furthermore satisfied that *prima facie*, the Trust's own balance sheet, demonstrated commercial insolvency. Moreover, I am satisfied that the Applicant has shown that there was *prima facie* reason to believe that the sequestration would have been to the advantage of the Trust's creditors if the estate had to be sequestrated. Therefore, I am persuaded that the Application was meritorious which is further underscored by the fact that the Trust elected to settle its indebtedness to the Applicant under the loan agreement in full during 2024, after the Applicant's Replying Affidavit was filed.

[50] Consequently, I find that the Trust had no *bona fide* defence to the relief sought. The application for dismissal falls to be dismissed. The effect of this refusal does not mean that the Trust was sequestrated as no order in this regard has been made.

Applicable Legal Principles

[51] It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs.[18] The fundamental rules

[18] *Meyer v Abramson* 1951 (3) SA 438 (C) at 455.

pertaining to costs were stated as follows by the Constitutional Court in ***Ferreira v Levin NO and Others***[19]:

> *'The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.'*

[52] The Applicant argued that it was put to the expense of prosecuting the sequestration under circumstances where the Trust admitted its indebtedness to the Applicant. In addition, the Applicant asserted that the Trust's opposition to the sequestration was aimed at achieving a delay in order for it to arrange payment of the Applicant's claim.

[53] The Trust laboured under the impression that it had paid off the debt in full on 8 July 2024. An account in the amount of R116 000 for legal fees was received. The Trust argued that the Applicant had other remedies at its disposal other than following the process of sequestration. In this regard, it was argued that the Applicant could have pursued the Sureties. Mr Pistor holds the view that Mrs Pistor's untoward relationship with Standard Bank may have informed the Applicant's decision to pursue the Trust by way of Sequestration proceedings.

[19] 1996 (2) SA 621 (CC) at 624B—C at par 3.

[54] This court is mindful that these proceedings concerns the narrow issue of whether the Applicant is entitled to costs in circumstances where it had applied for the sequestration of the Trust consequent upon the Trust having fallen into arrears with the repayment of the loan. I am alive to the fact that there is pending litigation involving the allegations levelled against Mrs Pistor. I emphasise that this court is not seized with the matter involving Mrs Pistor. There are a number of factual disputes that were not fully ventilated that would have been dealt with had the sequestration application proceeded.

[55] This court further takes into consideration that the notice to terminate the bond was sent to the Applicant on 16 March 2024. These proceedings were launched in December 2023. The Respondents engaged the Applicant's Attorneys requesting a settlement amount, which according to Mr Pistor, turned out to be an arduous process and took over a month. The settlement amount was received via email on 29 April 2024 after several reminders. The Trust made a payment in full and final settlement of the Applicant's claim. After receiving the amount, the Trust is now being mulct with an additional bill of R116 056.02 in respect of legal fees. This, it was contended, came as a nasty surprise more especially as the Trust requested a settlement figure.

[56] In ***Fusion Hotel and Entertainment Centre CC v eThekwini Municipality and Another*** [20] the court held:

> *'It is common cause that in this matter the issues at hand remained undecided and the merits were not considered. When the issues are left undecided, the court has a discretion whether to direct each part to pay its own costs or make a specific order as to costs. A decision on costs can on its own, in my view, be made irrespective of the non-consideration of the merits. I am stating this on the basis that an award for costs is to*

[20] [2015] JOL 32690 (KZD) at para 12.

indemnify the successful litigant for the expense to which he was put through to challenge or defend the case, as the case may be...'

[57] The guiding principle is that *'...costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.'*[21] It is also trite that the award for cost is in the discretion of the court.[22]

[58] In circumstances where a litigant attempts to reach settlement and is provided with a settlement figure, it would ordinarily be expected that the settlement figure would be inclusive of legal costs. This court has a measure of understanding as to why the Trust holds the view that it is being mulcted for costs. In as much as the Trust is dissatisfied that the Applicant sought to pursue sequestration proceedings, they were at liberty to choose which legal process to follow. There were various aspects raised by the Trust, which did not advance their defence but in fact supported the assertion that an act of insolvency was committed thereby satisfying the statutory requirements for the sequestration by and large on their own version. It must further be borne in mind that the threshold test is to persuade the court that *prima facie*, the statutory requirement has been met. It bears mentioning that the Trust placed reliance on a "balance sheet" and provided no credible evidence to show that it was in fact factually solvent. There is no disputing that the Trust had breached the terms of the Agreement. The highwater mark of this matter is the fact that the Trust admitted its

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[21] Cilliers AC *'Law of Costs'* Butterworths page 1-4; *Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others; Thusi v Minister of Home Affairs and 71 Other Cases* (2011) (2) SA 561 (KZP) 605-611.

[22] Ibid page 2-16(1).

indebtedness to the Applicant and in my view, had no *bona fide* defence to the relief sought.

[59] In the matter of ***Cooper N.O and Others v Markert Fisheries (Oudtshoorn) CC*** ("Cooper")[23] Kusevitsky J, stated:

> *'[23] The general rule in matters of costs is that a successful party should be given their costs and this rule should not be departed from except where there are good grounds for doing so. Various grounds have been advanced in circumstances where this has been deviated from, such as misconduct on the part of the successful party in exceptional circumstances.[24] The question that first needs to be asked is who is the successful party? In this instance, the Respondent is of the view that they were the successful party since it is the Applicants that are requesting the application for the winding-up to be withdrawn. The Applicants on the other hand are of the view that the winding-up application had the desired result of obtaining the repayment of monies from the Respondent that it had unlawfully received from the insolvent.*
>
> *[24] In my view, given the fact that by virtue of the declaratory orders, all monies claimed therein, including the costs thereof, had been paid, there can be no question that the successful party are the Applicants herein and there is no reason why the usual order for costs should not follow in their favour.[25]*

[60] What distinguishes this matter *in casu* to that of ***Cooper*** *(supra)* is the Applicant's decision not to apply for a withdrawal of the application. That apart, the matter appears to be on all fours with ***Cooper.*** Even without the withdrawal of the application, the Applicant has achieved success as the Trust paid the debt in full prior to the hearing, which left the only remaining issue being that of costs. I am of the view, that the decision to pay the debt in full by the Trust, has rendered application moot

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[23] (13845/2022) [2023] ZAWCHC 56; 2023 (5) SA 212 (WCC) (9 March 2023) at para's 23 – 24.
[24] Erasmus, Superior Court Practice; Costs in General, D5-7
[25] See also *Bidvest Bank Limited v Moeng* 2022 JDR 3355 (GJ) at para's 32, 36, 37, 47 and 48.

without a live issue to be argued apart from costs. For reasons already stated, I am satisfied that the Applicant was substantially successful in this application.

[61] Although the Applicant argued that the Trust's conduct and spurious opposition of the application constitutes an abuse of the court's process which is worthy of sanction, I am not inclined to make a punitive costs order in circumstances where the intention of the Trust was clear, namely to settle the matter in full. For reasons unknown to the court, the full amount due was not provided. In the exercise of my judicial discretion, cost must follow the result. However, it is my view that the Trust should not be mulcted with unnecessary costs. Consequently, it is my view that it will be just and equitable for the Trust to only pay the party and party costs of the application, which costs are to be taxed.

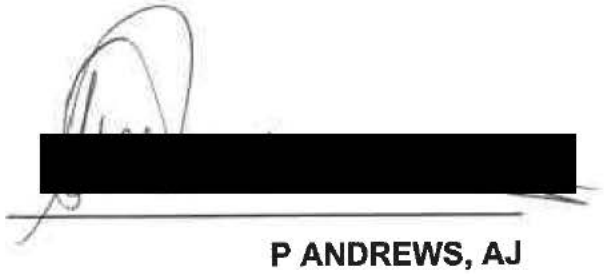
[62] It is trite that Rule 67A of the Uniform Rules requires that party and party costs in the High Court be awarded on one of three scales. The scales set a maximum recoverable rate for work having regard to the importance, value and complexity of the matter. After having carefully considered the complexity of the matter, its value and importance to the parties, in the exercise of my discretion, I am of the view that costs on Scale A are justified.

Order:

[63] In the result, the Court, after having heard counsel for the Applicant and the Second Respondent in person on behalf of the Trust, and having read the papers filed of record make the following orders:

1. The Respondents, jointly and severally, the one paying the other to be absolved, are to pay the cost of the application on a party and party scale, to be taxed at scale A.

2. The Counter-Application brought by the Respondents to dismiss the Application is refused with costs, on a party and party scale, the one paying the other to be absolved, on a party and party scale, to be taxed at scale A.



P ANDREWS, AJ

Acting Judge of the High Court
Western Cape Division

APPEARANCES

For the Applicant:	Advocate L Van Dyk
Instructed by:	Tim Du Toit & Company Inc.
For the Second Respondent:	Mr. G G M Pistor
Instructed by:	In Person (Representing the Trust)

CASE NO.: 22301/2023

Date of Hearing: 28 August 2024

Date of Judgment: 25 September 2024

NB: The judgment is delivered by electronic submission to the parties and their legal representatives.