IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 15012/2021

In the matter between:

NEIL GORE N.O.	First Applicant
CHRISTINA MARIA VERSTER N.O.	Second Applicant
[In their capacities as the joint liquidators of UKHANA PROJECTS CC (in liquidation)]	

and

ANELE HAMMOND N.O.	First Respondent
NINA HAMMOND N.O.	Second Respondent
[In their capacities as the Trustees of HAMMOND AND HAMMOND TRUST IT1769/2010(G)]	

REASONS (HANDED DOWN ELECTRONICALLY on 02 NOVEMBER 2022)

HOCKEY, AJ

INTRODUCTION

[1] On 23 February 2022, De Wet AJ placed the estate of Hammond & Hammond Trust ("the trust") under provisional sequestration on the application of the joint

liquidators of Ukhana Projects CC ("Ukhana"). The matter came before me on 7 September 2022 as an application to make the provisional order absolute and to place the trust under final sequestration. The application is opposed by the trustees of the trust ("the trustees"). Towards the end of the hearing of the matter, counsel for the applicants requested that I hand down an order immediately and provide reasons later. Having considered the appropriateness of this request, I made the following order:

"*IT IS ORDERED:*

That the rule nisi granted on 23 February 2022 is made absolute and the estate of the Hammond & Hammond Trust ("the trust") is placed under Final Sequestration."

I now proceed to give my reasons for the order.

[2] Both the application for provisional sequestration as well as final sequestration are based on the averments that the trust is indebted to Ukhana in the liquidated amount of R3 780 347.58. The indebtedness allegedly arose as a result of amounts due and owed to Ukhana by the Bitou Municipality ("Bitou") which monies were unlawfully diverted to the trust. It is further alleged that the trust has committed acts of insolvency in terms of section 8(c) of the Insolvency Act, 24 of 1936 ("the Act") in that it made certain dispositions of its assets with the effect of prejudicing its creditors. It is further alleged by the applicants that there is reason to believe that it will be to the advantage of creditors if the estate of the trust is placed under sequestration.

BACKGROUND

[3] As previously mentioned, the applicants are the joint liquidators of Ukhana which was placed under a final winding-up order on 13 April 2021. Ukhana conducted business as a construction company. It was placed under a winding-up order at the instance of one of its sub-contractors who had not been paid for work on a project in Paarl.

[4] During 2020, Ukhana responded to a tender by Bitou for the construction of 169 top structures in Qolweni, Plettenberg Bay ("the Qolweni project").

[5] Ukhana and Hammond and Hammond Incorporated ("H&H Inc")[1] concluded a joint venture agreement on 1 November 2020 in terms of which they agreed "*to bundle their skills to create effort (sic) for the planned activities stated in [the] agreement*." Ukhana notified Bitou in writing on 4 December 2020 that it has entered into a joint venture agreement with H&H Inc, the salient terms of which were recorded to include:

> "*1. Ukhana Projects will focus all of its attention on the construction and civil components of the projects;*
>
> *2. Hammond and Hammond Inc.'s enterprise development wing will take over all the financial injection and financial management of all our current and future contracts for the next 3 (Three) years; and*
>
> *3. Hammond and Hammond Inc. will also manage all of Ukhana Projects' transactions and commitments to ensure that each contract they undertake is managed competently and concluded professionally and timeously.*"

[6] Ukhana was awarded the tender for the Qolweni project and concluded the building contract with Bitou on 1 December 2021. A few days later, on 7 December 2021, Ukhana and H&H Inc informed Bitou, in a document signed by both parties on the letterhead of Ukhana, that the two entities had concluded a cession of the Qolweni contract in favour of H&H Inc "*in full*" ("the cession letter"). Bitou was requested to make all payments through H&H Inc's bank account and that "*all matters concerning the contract should henceforth be directed to Hammond and Hammond Incorporated*".

[1] This entity is also referred to as Hammond and Hammond – Transactional Law Clinic, with registration number 2020/261423/08 and abbreviated as "TLC", but I shall refer to it as "H&H Inc".

[7] On 22 January 2021, Ukhana and H&H Inc concluded an addendum to their cession letter wherein they agreed "*that all payments made by Bitou Municipality in accordance with the tender will not be paid to Ukhana Projects CC but will be paid to Hammond and Hammond Incorporated with the following banking details: . . .* " The banking details provided, it transpired on investigation by the applicants, were that of the trust and not that of H&H Inc.

[8] On 25 January 2021, Ukhana and H&H Inc entered into a further agreement styled "*Cession and Subcontract Agreement*". The purpose of the agreement was recorded to be as follows:

> "*The main purpose of this Agreement is for Ukhana to transfer all its rights to the Contract to [H&H Inc], and for [H&H Inc] to accept the cession of all the rights to the Contract and to also accept to fund and manage the Contract as a Project Officer of the contract for the benefit of the Qolweni Community. The Secondary purpose of the Agreement is to appoint Ukhana as the Contractor responsible for the Technical execution of the Contract for a monthly remuneration. The third purpose is to jointly commit all Profit generated from the Contract, to be ploughed back to the community of Qolweni. [H&H Inc] and Ukhana agreed after consultation with the community of Qolweni that the profit will be contributed towards building a junior school for the children of Qolweni Informal Settlement.*"

[9] On 14 December 2017, long before Ukhana purportedly ceded its rights under the Qolweni contract to H&H Inc, it entered into a deed of pledge and cession with Nedbank Limited ("Nedbank") in terms whereof Ukhana ceded to Nedbank as security "*all debts now owing or which may hereafter become owing to [Ukhana]*" ("the Nedbank cession").

[10] In terms of clause 21 of the Nedbank cession, Ukhana is not permitted "*to cede, assign, make over and pledge to anyone else or to realise, alienate, receive or exercise, or in any other manner deal with the security or any interest, dividends, rights (including voting rights), income and benefits however named or described without any exception rising from the security, without first obtaining Nedbank's*

written consent." There can be no doubt that the Nedbank session constitutes a *pactum de non cedendo* with the effect that Ukhana's book debts became non-transferable.[2]

[11] According to the applicants, Nedbank's claim against Ukhana at the date of the provisional liquidation amounted to R4 102 056.76. Notably, the trustees did not dispute either of the Nedbank cession, nor the debt owing to Nedbank by Ukhana as at the date of the latter's provisional liquidation, neither did they so afterwards.

[12] Notwithstanding clause 21 of the Nedbank cession, Ukhana executed a cession in favour of Standard Bank of South Africa Limited ("Standard Bank") on 4 July 2019 without Nedbank's consent. In terms of the cession Ukhana ceded its book debts to Standard Bank. At its winding up, Ukhana was indebted to Standard Bank in the amount of R372 047.80. This cession and the amount owing to Standard bank is likewise not disputed by the trustees.

[13] Despite the prohibition in clause 21 of the Nedbank cession, Ukhana entered into cessions with two others – Standard Bank and H&H Inc, without Nedbank's consent. In addition to clause 21 of the Nedbank cession, the purported cession by Ukhana to H&H Inc is thwarted by further legal problems. That is, the fact that public monies are involved in the Qolweni project and the purported cession, which is akin to H&H Inc being awarded the contract in relation to the project, did not follow a public procurement process. The award of these types of contracts, which involves public funds, are subject to public finance management principles and can only be awarded in accordance with the requirements set out in section 217 of the Constitution, the provisions of the Local Government: Municipal Finance Management Act 56 of 2003, the Supply Chain Management Regulations and Bitous own supply chain management and procurement policies.

[14] Bitou made payments in accordance with the cession agreement (which it seems to have accepted) totaling R3 780 347.58 into the bank account as specified in the cession agreement in favour of H&H Inc before cancelling the Qolweni contract (which I shall discuss below). The payments were made in on 26 February 2021,

[2] See **Bornfree Investments 364 (Pty) Ltd v Firstrand Bank Limited** [2014] 2 All SA 127 (SCA) at paras 14 and 15.

25 March 2021, and 25 May 2021 in the amounts of R1 553 661.83, R1 296 320.21 and R930 365 respectively. It is apparent from the papers that the latter two payments (on 25 March 2021 and 25 May 2021) were made after the winding up of Ukhana commenced on 9 March 2021. The investigation by the applicants revealed that the bank account into which the three payments were made did not belong to H&H Inc, but rather to the trust.

[15] According to the trustees, they only became aware that it was not permitted for Ukhana to enter into the cession with H&H Inc when they were informed of the Nedbank cession during the course of proceedings which was instituted by H&H Inc against Bitou and others for specific performance to compel Bitou to perform under its obligations in accordance with the Qolweni contract. This application was instituted after Bitou issued a letter to H&H Inc on 12 April 2021 purporting to terminate the Qolweni contract. H&H Inc considered the termination letter as a repudiation which it refused to accept. On becoming aware of the Nedbank cession, according to the trustees of the trust, H&H Inc. withdrew its application and adopted the view that Ukhana had committed fraud against it (as well as Standard Bank) by entering into a cession with it without Nedbank's authorisation.

[16] The trustees correctly acknowledged that the cession from Ukhana to H&H Inc was unlawful. The effect of the Nedbank cession, as pointed out by counsel for the applicants, was that the payments which Ukhana was entitled to in terms of the Qolweni contract, was ultimately supposed to be transferred to Nedbank. With the liquidation of Ukhana, the right to debts in favour of Ukhana vests in the applicants who are entitled to administer it in the interest of all its creditors.[3]

[17] The applicants point out that neither the joint venture agreement, nor the cession between Ukhana and H&H Inc included the trust. Qolweni contract payments however, were deposited into the trust's bank account. Ukhana as the successful bidder in the Qolweni procurement process, was entitled to these funds as the entity who participated in and was awarded the contract in a competitive bidding process in terms of section 217 of the Constitution and the provisions of the Local Government: Municipal Finance Act, 56 of 2001.

[3] See **Millman NO v Twiggs and Another** 1995 (3) SA 674 (A) at 676 H – I .

[18] The trustees raised, for the first time in the papers relating to the application to place the trust under final liquidation, that the trust and/or H&H Inc had loaned money to Ukhana and that the two entities thus have a claim against Ukhana. The first respondent, who deposed to the answering affidavits in opposition to the application, attached bank statements to her affidavit which she alleges reflects loan amounts, totaling R2 916 814, extended to Ukhana "*for purposes of decanting and cleaning the Qolweni site in preparation for construction*", etc.[4].

[19] The trustees accept that the cession of the Qolweni contract in favour of H&H Inc. was of no force and effect. In addition they allege that as of 2 September 2021 (the date when this application was issued) the ceded contract had not commenced and "*no payments were ever effected for and on behalf the ceded contract*".[5] Instead, the first respondent claims that Bitou requested H&H Inc to extend secured loans to Ukhana and its owners, to pay the outstanding salaries of Ukhana staff members from previous Ukhana contracts, and to "*decant*" the Qolweni site for preparation of the ceded contract. The first respondent attached two separate loan agreements, both dated 8 December 2020, to her affidavit opposing the final sequestration of the trust. The first loan agreement appears to be a personal loan agreement between H&H Inc and the members of Ukhana in their personal capacities for an amount of R500 000.00, and the second is a loan agreement between H&H Inc and Ukhana, purporting to be a revolving credit facility in terms of which Ukhana may access an amount to a maximum of R5 000 000.00.

[20] The applicants noted in a subsequent affidavit that they have examined the financial records of Ukhana and found no evidence of any payments paid by the trust to Ukhana. It was further pointed out that the bank statements of the trust which were attached to the first respondent's answering affidavit only reflect deposits which were made into the account of the trust and not payments made by the trust to Ukhana. The trustees responded that in terms of the agreement between Ukhana and H&H Inc, Ukhana was not entitled to handle any finances, and that H&H Inc was responsible for all financial transactions on behalf of

[4] Page 717 of the record.
[5] Record p 1369, para 7.4

Ukhana.[6] Furthermore, the first respondent avers that all payments made by H&H Inc on behalf of Ukhana in terms of all agreements between these parties were duly paid out by the trust and similarly all receivables, including loans and reimbursements on behalf of the Ukhana - H&H Inc agreements were received by the trust.

[21] Regarding the first respondent's averment that no payment was effected under the ceded contract by 2 September 2021, I have already addressed the fact that payments were made by Bitou on 26 February 2021, 25 March 2021 and 25 May 2021, totaling R3 780 347.58. It would appear from the records that there is no proof whatsoever that the trust ever made payments to Ukhana.

[22] In her affidavit resisting the final order of sequestration[7], the first respondent takes issue with paragraph 13 of the judgment of De Wet AJ where the learned judge dealt with the purchase of two properties by the trust. It is appropriate to quote the relevant portion of paragraph 13:

> "*Shortly after receipt of the aforesaid payments[8], the H&H Trust purchased two immovable properties in Plettenberg Bay being Erf 3738 in the amount of R1.8 million and unit 9, SS Monk View in the amount of R999 000. These properties were bought by the H&H Trust from the previous directors of Ukhana, Mr and Mrs Le Roux on 16 March 2021 . . .*"

[23] According to the first respondent, the paragraph is untrue in that;

[23.1] the properties were bought in October 2020 and December 2020, five and three months before last payment from Bitou respectively, as reflected on the title deeds; and

[23.2] the second property (which is used as an office) was bought from Blaina and Associates, an independent company that has nothing to do with Ukhana.

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[6] Record p 1267, para 8.
[7] Record p 703.
[8] The payments referred to are the payments made by Bitou to the trust on 26 February 2021, 25 March 2021 and 25 May 2021 totaling R3 780 347.58

[24] It would appear that the transfers of the two properties took place respectively on 19 March 2021 after Bitou made the first payment to the trust, and on 15 June 2021, after Bitou made the last payment to the trust. The ineluctable conclusion that must be drawn is that the trust used the payments received from Bitou to pay for the properties on registration of their transfers.

[25] It is necessary to mention for the sake of completeness, that the first respondent claims that the trust also made a payment of R2 million to Engadin Developers NPC, ("Engadin") which is a public benefit organisation under the control of the first respondent. She attached the bank statements of Engadin to show "*numerous transactions paying salaries to all staff and buying building materials for the duration of the project*."[9]

[26] It is evident that Ukhana was not authorised to cede its rights it had obtained under the Qolweni contract to H&H Inc. This is so because of the constricts of section 217 of the Constitution read with the laws that govern procurement when public funds are involved, and also because of the Nedbank cession. Ukhana was the only party entitled to the proceeds of the Qolweni contract, who in turn, is obliged under the Nedbank cession to make payments to Nedbank.

[27] According to the version provided by the respondent, the trust is factually insolvent. In her affidavit resisting the final sequestration of the trust, the first respondent averred that the trust "*has no money or assets except an office and a house in the Township of New Horizons in Plettenberg Bay, that all collectively worth R1 280 000.00 (One Million Two hundred and Eighty Thousand Rand)*."[10] This is less than the quantum of Ukhana's claim against the trust.

[28] In terms of section 12 of the Insolvency Act, 24 of 1936 ("the Insolvency Act"), the court may sequestrate the estate of a debtor if the court is satisfied that:

> *"(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and*

[9] Record p 736 para 120.3
[10] Record p 738 at para 126.

(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".

[29] The difference between the test for a provisional and final order of sequestration was discussed in **Meskin & Co v Friedman**[11] where it was stated by Roper J:

"Section 10 and 12 *of the Insolvency Act 24 of 1936, cast upon a petitioning creditor the onus of showing, not merely that the debtor has committed an act of insolvency or is insolvent, but also that there is 'reason to believe' that sequestration will be to the advantage of creditors. Under s 10, which sets out the powers of the Court to which the petition for sequestration is first presented, it is only necessary that the Court shall be of the opinion that prima facie there is such 'reason to believe'. Under s 12, which deals with the position when the rule nisi comes up for confirmation, the Court may make a final order of sequestration if it 'is satisfied' that there is such reason to believe. The phrase 'reason to believe', used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the Court must be 'satisfied', it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so."*

[30] In an oft-quoted paragraph, Roper J in **Friedman** explained further[12]:

[11] 1948 (2) SA 555 (W)
[12] Ibid at p 559

"*The facts put before the Court must satisfy it that there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary 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 enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient."*[13]

[31] The trust, on its own version already alluded to earlier, is factually insolvent. It has also committed an act of insolvency in terms of section 8(c) of the Insolvency Act, which provides that a debtor commits an act of insolvency "*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.*"

[32] The cash resources held by the trust were used to purchase two properties for R1.8 million and R999 000 respectively. Despite the acquisition of these properties, the first respondent, to bolster an argument that it would not be to the advantage to creditors to finally sequestrate the trust, values the net assets of the trust at R 1 280 000.00. What is more disconcerting, is the expressed intention of the trust to use the proceeds from the Qolweni project for the benefit Qolweni community to build a junior school for that community.[14] This may be an honourable intention, but one should not detract from the fact that the trust is not entitled to the monies that would be so expended for the reasons already discussed. These factors lead me to conclude that the trust has committed various acts of insolvency in terms of section 8(c) of the Insolvency Act.

THIS CONTRACT IS NO LONGER IN FORCE; HOW CAN THIS BE RELIED ON?

INCORRECT

[33] This brings me to the question as to whether or not it would be to the advantage of the creditors if the trust is finally sequestrated. In this regard it was held in **Stratford**[15] that "*it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from*

[13] This paragraph was quoted with approval by the Constitutional Court in **Stratford and Others v Investec Bank Ltd and Others** 2015 (3) SA 1 (CC)
[14] Record p 1268 para 9.
[15] Supra fn 13

which the creditors cannot get payment, except through sequestration; or that some pecuniary benefit will redound to the creditors."[16]

[34] Given that the trustees have, through their actions, expressed no intention of making payment to Ukhana, and that, despite the trustees' admission that the cession of the Qolweni contract by Ukhana was a fraudulent act on the part of Ukhana, they continued to hold onto the proceeds of the contract. It is obvious that the only option is to sequestrate the trust. The trustees also had the intention to expend the proceeds of the Qolweni project for another purpose (albeit an honourable one), instead of making payments to Ukhana in order for the latter to meet its obligations under the Nedbank cession.

REIMBURSEMENTS

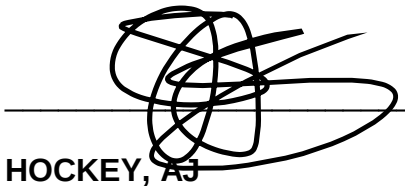
NOT ENTITLED TO THESE MONIES

[35] The trust does have assets, which include the two properties that it purchased and that were transferred to it after it received payments under the Qolweni contract. These are assets which can be liquidated, which gives me reason to believe that it would be to the advantage of its creditors for the trust be finally sequestrated.

[36] Under the circumstances, when I made the order which I did, I was satisfied that all the requirements for a final order of sequestration of the trust have been met. I exercised my discretion guardedly, and given the attitude adopted by the trustees and their actions discussed above, exercised my discretion to finally sequestrate the trust.

WHAT DOES THIS MEAN

[37] These are the reasons for my order to place the trust under final sequestration.



HOCKEY, AJ

ACTING JUDGE OF THE HIGH COURT

[16] Ibid para 44