IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.35/2015

In the matter between

TRENCON BUILDING WORLD BELELA JOINT VENTURE	**1ST APPELLANT**
BUILDING WORLD (PTY) LTD	**2ND APPELLANT**
MCT HOLDINGS (PTY) LTD AND 16 OTHERS	**3RD TO 19TH APPELLANTS**

and

ANJU CIVILS (PTY) LTD	**1ST RESPONDENT**
TRENCON CONSTRUCTION (PTY) LTD	**2ND RESPONDENT**
BELELA CONSTRUCTION (PTY) LTD	**3RD RESPONDENT**

CORAM : FARLAM, AP
LOUW, AJA
CHINHENGO, AJA

HEARD : 13 APRIL 2016

DELIVERED : 04 AUGUST 2016

SUMMARY

Sequestration of partnership not competent where sequestration of estates of two individual partners not sought despite the fact that, being foreign companies not registered in Lesotho, they could be sequestrated under the Insolvency Proclamation – question as to whether non-sequestration of a third partner, a local company, also rendered order for the sequestration of the partnership incompetent left open.

JUDGMENT

FARLAM AP:

[1] I have had the advantage of reading the judgment prepared by my Brother, Chinhengo AJA. In that judgment the facts, relevant statutory provisions and the contentions of the parties are fully set out and my Brother proposes that the appeal should be dismissed. In my view, however, the appeal should be allowed for the reasons that follow.

[2] In para [20] of his judgment my Brother refers to a point, which he says 'may be dispositive of the whole appeal', namely whether the order for the sequestration of the partnership should not be set aside because the

estates of the members of the partnership were not also sequestrated, and he concludes that the point must be decided in favour of the respondents.

[3] I do not agree. Two of the respondents, Trencon and Belela, being South African companies not registered in Lesotho, qualify, as my Brother points out in para 25 of his Judgment, as debtors under the Proclamation and can accordingly be sequestrated in terms of its provisions. No application has, however, been made for their sequestration and the first respondent, the petitioning creditor, has made it clear that it does not seek a sequestration orders in respect of at least one of them. It follows from the clear wording of section 13 of the Proclamation that the court cannot sequestrate the partnership either. In this regard I agree with what was said by Ogilvie Thompson J in **Cloete v Senekal and Roux 1950 (4) SA 132 (C) at 134E-F**, viz.: '(I)n terms of section 13 (1) of the Insolvency Act [which is virtually identical to our section] – and subject always to the proviso of that section – it is necessary, once it is decided to sequestrate the partnership estate, that the private estates of the partners should also be sequestrated.' (In that case it was not necessary to consider the decisions in which it was held that a partnership estate could be sequestrated

without orders sequestrating the estates of individual partners where there was what was described as 'a lawful bar' to the sequestration of such estates: that factor was not present in the **Cloete** case nor, as I have said, does it exist as regards the estates of Trencon and Belela in this case. The decisions to which I refer are cited in **Commissioner**, **SARS v Hawker Aviation Partnership and Others 2006 (4) SA 292 (SCA)**, in which it was held that a sequestration order could be made for the sequestration of a partnership estate alone, where the partners were a bank, which was an *en commandite* partner, and two companies, one of which was liquidated in the same application and the other, a local company whose estate could not be sequestrated under the Insolvency Act.)

[4] In the **Cloete** case the judge granted an order for the sequestration of the partnership as well as an order for the provisional sequestration of the deceased estate of one of the partners (the estate of the other partner having already been sequestrated). Such an order is not sought in the present case and in the circumstances it would not be appropriate for the court to grant such an order *mero motu.*

[5] The conclusion to which I have come renders it unnecessary to decide whether the omission to apply for the winding up of the Lesotho company, Building World (Pty) Ltd (the second appellant), would be a further basis for refusing the sequestration order sought in this case. This means we can leave a decision as to whether the **Hawker** case was correctly decided, and whether it should be followed in Lesotho, for another day. In this regard I do not agree with my colleague's statement (in para 27 of his judgment) that 'the general principle that comes out of **Hawker** is that it is possible and permissible to sequestrate the estate of a partnership without sequestrating the estates of the partners despite the apparently mandatory provisions of s 13.' What **Hawker**'s case decided (as appears from para 27 of the judgment (at 305F – 306A)) was that on what the court held to be a correct interpretation of s 13 it requires 'the sequestration of only those partners whose estates are capable of sequestration'.

[6] In the circumstances I am satisfied that the application for condonation and the appeal must succeed.

[7] The following orders are made:

1. The application for condonation of the late noting of the appeal is granted.

2. (a) The appeal succeeds with costs, such costs to be paid by the respondents, jointly and severally, one paying, the others to be absolved.

   (b) The order of the court below is set aside and in its place is substituted the following:

   'The petition for the sequestration of Trencon Building World Belela Joint Venture is dismissed with costs, such costs to be paid by the applicants, jointly and severally, one paying, the others to be absolved'.

_____

I G FARLAM

Acting President

I agree.

_____

W J LOUW

Acting Justice of Appeal

CHINHENGO AJA:

Introduction

[8] This is an appeal against the judgment of the High Court (Molete J, sitting in the Commercial Division) handed down on 8 April 2015. The appellants are nineteen in number consisting of two groups of parties aggrieved by the judgment. The first group consists of the 1st and 2nd appellants and the second group consists of the 3rd to 19th appellants. The latter group was granted leave, by consent, to intervene in the matter between the 1st and 2nd appellants on the one hand and the 1st respondent on the other.

[9] The judgment appealed against granted a petition by the 1st respondent for the sequestration of the 1st appellant, a partnership of three companies. I will refer to the parties in this appeal as follows: the 1st appellant as the "JV Partnership"; the 2nd appellant as "Building World"; the 3rd to 19th appellants as "the Intervening Creditors"; the 1st respondent (Anjul Civils) as "the petitioner"; the 2nd respondent as "Trencon", and the 3rd respondent as "Belela".

[10] The appellants did not file the notice of appeal within the time prescribed by the rules of court. Consequently they applied for condonation of late noting of the appeal. That application was opposed. With the agreement of counsel, this Court directed that argument on the condonation application and on the merits of the petition would be heard together. At the hearing the parties were in general agreement that the explanation for the delay was acceptable and the issue for decision was whether the appellants had a reasonable prospect of success on appeal. Respondent's counsel submitted that condonation should be refused because the appeal is not important for the reason that the issues between the contractor and the employer have been referred to arbitration and that reference will not be affected by the decision in the appeal; the partnership cannot be brought back to life because the partners cannot work together; the project for which the partnership was formed has already been completed by others and as such the partnership has no future role to play. In applications of this kind, the submissions on the application for condonation are invariably similar to, if not the same as, those made on the merits. It is an accepted principle of law that for such an application to succeed, the applicant must show, among other things, that he has reasonable prospects of success on the merits. See **Melane**

v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532 C-D. For this reason it is not necessary, in my view, for this Court to base its decision on the condonation application after it has heard argument of the merits. The decision will therefore be based more on a consideration of the merits that on a finding on the condonation application.

Background

[11] The Government of the Kingdom of Lesotho signed a Compact with the Government of the United States of America in terms of which the USA provided funding for development assistance to Lesotho. The funding was channelled through the Millennium Challenge Corporation of the United States of America. In Lesotho, this funding was given effect to by the enactment of the Millennium Challenge Account- Lesotho Authority Act. One of the programmes funded under the agreement was the Lesotho Health Infrastructure Program consisting of "Botsabelo Complex, fourteen Outpatient Departments and the construction of 137 Health Centres". This appeal is concerned only with the construction of the Health Centres.

[12] The Millennium Challenge Account- Lesotho ("the MCA-L") put out a tender for the "design, renovation, re-configuration expansion and construction to fully functional, hygienic and structurally fit for purpose health centres in Lesotho". A partnership of three companies, Building World (Pty) Ltd, Trencon Construction (Pty) Ltd and Belela Construction (Pty) Ltd, known as Trencon Building World Belela Joint Venture ("the JV Partnership"), won the tender to construct 102 of the 137 health centres. The partnership is registered in Lesotho as required by the Partnership Proclamation 78 of 1957. Building World is a Lesotho registered company. Trencon and Belela are South African registered companies.

[13] Following the award of the tender, the JV Partnership signed a construction contract with MCA-L. The amount that was to be paid to the partnership on completion of the works was M 568 483 031.20. The commencement and completion dates of the contract were 21 October 2010 and 27 August 2012, respectively. In order to carry out the construction works, the JV Partnership could and did, in the normal course of business, sub-contract some of the works to third parties. In the result it entered into about

90 sub-contracting agreements. The petitioner was one such sub-contractor.

[14] The JV Partnership does not seem to have started off very well. This is what the petitioner says in its affidavits. Whilst I make no finding of fact in this regard, it seems that that averment is correct because, by May 2012 the JV Partnership was experiencing cash flow problems and the works were not progressing as scheduled. Those problems grew in severity such that by the end of the year the JV Partnership owed its sub-contractors M 48 136 513. 25. The petitioner said that it was owed M 959 464.50 and that the JV Partnership was unable to pay, not only this amount, but also the amounts owed to other subcontractors. Alleging that the JV Partnership was insolvent, the petitioner successfully petitioned the High Court for the provisional sequestration of the JV Partnership in terms of s 9 (1) of the Insolvency Proclamation 51 of 1957. Section 9 reads:

> *"A creditor (or his agent) who has a liquidated claim for not less than one hundred Maloti, or two or more creditors (or their agents) who in the aggregate have liquidated claims for not less than two hundred Maloti against a debtor who has committed an act of insolvency or is insolvent, may petition the Court for the sequestration of the estate of the debtor."*

[15] The petition was lodged as an urgent *ex parte* application together with a prayer for interdictory relief against the JV Partnership and its partners. The High Court granted the order for the provisional sequestration of the JV Partnership and the interdictory relief as sought. That order reads –

> *"Having considered the papers filed of record and having heard counsel for the Petitioner, it is ordered:*
>
> *1. The forms and service provided for in the rules are dispensed with and the matter is to be dealt with as one of urgency.*
>
> *2. The 1st Respondent (JV Partnership) is hereby placed under provisional sequestration in the hands of the Master of the High Court.*
>
> *3. The Respondents (JV Partnership and the partners) and all other persons are interdicted from removing:*
>
> > *3.1 Any Contractor's Equipment (meaning all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects), Materials and Plant on all and any construction sites, at any depots, at 1st Respondent's offices or elsewhere; including but not limited to those listed in the 1st respondent's monthly progress reports;*
> >
> > *3.2. Any Contractor's Documents, including but not limited to these listed below … (then follows the list of documents)*
>
> *without the prior written consent of the Master or the Provisional Trustees once they are appointed.*

4. A rule nisi is issued calling upon the respondents to appear and show cause if any to this court on 9 August 2013 at 09H30 or as soon thereafter as the matter may be heard why:

4.1. The provisional sequestration of the 1st respondent should not be confirmed and made final; and

4.2. Why the estates of the 2nd to 4th respondents in Lesotho should not be sequestrated.

5. The Master is authorized and directed to appoint provisional trustees on an urgent basis, to include at least two persons with experience in the administration of large commercial estates to be selected from a list of names submitted to the Master which may include the names Mr Roberts and Mr Cooper and Ms Tau-Thabane and Mr Matsau. They are to be appointed as the joint provisional trustees of the 1st Respondent, with the power and duty to exercise the powers provided for trustees in the Insolvency Proclamation 51 of 1957 and with authority, pending such appointment, to take control of the assets of 1st Respondent's estate and exercise such of the powers as may be necessary. The powers of the provisional trustees will include inter alia the following:

5.1. To carry on or abandon any business of the 1st respondent;

5.2. To retain employment contracts of employees of the 1st respondent insofar as reasonably possible;

5.3. To raise money on the security of the assets of estate;

5.4. To pay the costs of administration as and when they are incurred;

5.5. To exercise any powers as contemplated in the Insolvency Proclamation in respect of trustees, and in the Companies Act 2011 in respect of liquidators.

> *6. Directing that if the respondents or any of them wish to show cause why the rule nisi should not be confirmed, they shall deliver and file answering affidavits at least 7 court days prior to the return day or extended return day.*
>
> *7. This order, together with the petition and annexures thereto, are to be served on the respondents at their main place of business in Lesotho at Moshoeshoe Road, Maseru Industrial Area, Maseru.*
>
> *8. The costs of this petition, including the costs consequent upon the employment of two counsel, shall be recognised as costs in the administration of the estate."*

[16] It is readily apparent that the provisional order placed the JV Partnership under provisional sequestration and did not do so in relation to the partners but only called upon them to show cause on the return day why their estates in Lesotho should not be sequestrated. One partner, Building World, opposed the granting of the final order of sequestration on the return day on 9 December 2014. The other partners did not oppose the granting of the final sequestration order. In fact they supported it. The return day had been extended several times. The Intervening Creditors also opposed the confirmation of the provisional order. The opposition as a whole failed and the court confirmed the provisional sequestration order on 8 April 2015 in the following terms-

> *"(a) The final order of sequestration of the 1st Respondent is granted.*
>
> *(b) The estate of the 1st Respondent is placed in the hands of the Master of the High Court to be wound up.*
>
> *(c) No order is made regarding the Estates of the Second, Third and Fourth respondents.*
>
> *(d) The First and Third Respondents are ordered to pay the costs of these proceedings in equal shares. The costs to include costs of two counsel."*

[17] In terms of this order only the estate of the JV Partnership was sequestrated and those of the partners, Trencon, Building World and Belela were not. A costs order was made against the JV Partnership and Building World because they had opposed the granting of the final order of sequestration. The order did not advert to the interdictory relief that had been granted to preserve assets and documents presumably because the court considered that the purpose of interdict was now served by placing the affairs of the JV Partnership in the hands of the provisional trustees. In reaching the decision that it would not make any order regarding the estates of the partners the court merely observed that –

> *"No real case was made for the sequestration or liquidation of the individual partners; so I will not bother with that."*

[18] The judgment of the court *a quo* rested on the understanding that only one issue was before the court for its determination. This is reflected at paragraphs 13 and 14 of the judgment where the Judge stated –

> *"[13] After some postponements and several extensions, the matter came before the court; and the parties all agreed that the Court should limit itself to decide on the sequestration relief only; presumably because it would be decisive on the other matters or could determine their validity either directly or indirectly.*
>
> *[14] This simplified the task of this Court and was appreciated. It greatly facilitated my understanding of the issues and what I should not bother with in the complex and bulky record of these proceedings."*

[19] Despite recognising and accepting that the single issue before him was whether or not the sequestration relief sought should be granted, and therefore whether the requirements of s 12 of the Insolvency Proclamation were satisfied, the learned judge considered several other issues which have incidentally given rise to some of the grounds of appeal not directly related to the single question before the court *a quo,* as delineated by it.

Section 13 of Insolvency Proclamation

[20] The granting of the provisional and final sequestration orders against the JV Partnership and not

against the members of the partnership is one of the grounds of appeal. It raises a question the answer to which may be dispositive of the whole appeal. It calls upon this Court to consider the correctness of the sequestration orders in light of s 13 of the Insolvency Proclamation. The answer to this question is important because, if the correct legal position is that the estates of the partners should have been placed under provisional sequestration simultaneously with that of the partnership, and were not, and only the partnership estate was finally sequestrated then, the final sequestration orders would be liable to be set aside. The parties have made extensive submissions on this point.

[21] The answer to the question posed is also obliquely relevant to the position taken by Trencon and Belela to the sequestration proceedings as a whole and to which the petitioner consented. The learned judge in the court *a quo* recorded that position at paragraphs [28] and [29] of the judgment as follows –

> *"[28] …. the Petitioner and the two Respondents (Trencon and Belela) reached an agreement. They chose not to continue litigation in return for a promise that no adverse order of costs will be made against them; and provided that the estates of the second and fourth Respondents (Trencon and Belela) will not be affected by the order of final sequestration.*

[29] An order in that regard was made, and accordingly only 1st and 3rd Respondents (JV Partnership and Building World) remained; together with the intervening parties."

[22] Building World submitted that the judge *a quo* erred in not attaching significance to s 13 of the Insolvency Proclamation and thus failed to recognise that a company cannot be sequestrated in terms of that section. No final sequestration order was made against Building World and there would seem to be no reason for it to have appealed on this ground. However if it is correct that it was wrong at law to sequestrate the partnership estate without at the same time sequestrating the estates of the partners, then Building World would have scored a major victory in this matter because the final order of sequestration would have to be set aside. The correct interpretation of s 13 is also important to the future conduct of sequestration proceedings in this country.

[23] Subsections (1) and (2) of s 13 provide that-

"(1) If a Court sequestrates the estate of a partnership (whether provisionally or finally or on acceptance of surrender) it shall simultaneously sequestrate the estate of every member of that partnership other than a partner en commandite who has not held himself out as an ordinary or general partner of the partnership in question; provided that if a partner has undertaken to

> *pay the debts of the partnership within a period determined by the Court and has given security for such payment to the satisfaction of the registrar, the separate estate of that partner shall not be sequestrated by reason only of any fact forming a ground for the sequestration of the estate of the partnership.*
>
> *(2) Save as in the last preceding sub-section provided, every fact which is a ground for the sequestration of a partnership shall be a ground for the sequestration of every partner other than a partner en commandite."*

[24] Section 13 provides, in clear terms, that if a partnership estate is sequestrated, the estates of the partners, except those excluded by that section, shall simultaneously be sequestrated. The partners in the JV Partnership were neither *en commandite* partners or qualified for exclusion by reason of an undertaking by them to pay the debts of the partnership. On the face of it, the partners were supposed to have been placed under provisional sequestration and finally sequestrated simultaneously with the partnership. The judge *a quo* did not make an order for the sequestration of the estates of the partners because "no real case was made for their sequestration or liquidation …" yet subsection (2) provides that every fact which is a ground for the sequestration of a partnership shall be a ground for the sequestration of every partner except a partner *en commandite* or a partner that has made an undertaking, and given security, to pay

the debt. This means that once the requirements of s 12 of the Insolvency Proclamation have been fulfilled in respect of the partnership, those requirements are deemed to have been fulfilled in respect of the individual partners also. This to me is perfectly understandable because a partnership is not a legal *persona*. Its liabilities are liabilities of the partners jointly and severally. Section 4 of the Partnership Proclamation No. 78 of 1957 makes this perfectly clear. It provides that: "Nothing in this Proclamation contained shall confer upon any partnership the status of a body corporate…", and then proceeds to specially empower a partnership under the style or firm under which the business of such partnership is registered to sue or be sued, hold property or assets etc. Building World opposed the granting of a sequestration orders against itself in addition to opposing the granting of the same orders against the partnership. It did not give an undertaking to pay the partnership debts.

[25] In order to answer the question of the applicability of s 13 to the facts of the present case, the starting point is to look at the definition of "debtor" in s 2 of the Proclamation. In terms thereof-

> *" 'debtor', in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or a partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies."*

[26] The definition of "debtor" in South African legislation is similar the above but it is more specific in that excludes corporate bodies or companies which may be wound up under the law of South Africa. The Proclamation excludes bodies corporate or companies that may be wound up under the law in relating to companies. It does not specify the law as being that of Lesotho. In my opinion the law referred to can only be the law of Lesotho because legislation generally has no extra-territorial effect. Trencon and Belela are South African companies and are not registered as such in Lesotho. The question is whether they covered by the exclusion in the definition of debtor? I think not. Section 9 of the Proclamation provides that a creditor who has a liquidated claim in an amount specified therein against a **debtor** who has committed an act of insolvency or is insolvent, may petition the court for the sequestration of the estate of the **debtor**. No doubt this provision applies to a debtor who is not a body corporate or a company or other association of persons that may be placed in liquidation under the law of Lesotho relating to

companies. Building World is a locally registered company and may be placed in liquidation in terms of the Companies Act 2011. Trencon and Belela are South African companies and qualify as debtors because they are not registered in Lesotho. It therefore seems to me that, merely going by the definition of "debtor" and the provisions s 9 of the Proclamation, Trencon and Belela, are liable to be sequestrated under the Proclamation. See **Lawclaims (Pty) Ltd v Rea Shipping Co SA 1979 (4) SA 747 N** at 755A-C. In this case however the petitioner did not move for the sequestration of Trencon and Belela and this Court cannot take up the cudgels for their sequestration without an application therefor by the petitioner. In any event a partnership can be sequestrated without necessarily sequestrating the estates of the individual partners, see **Commissioner, SARS v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA).**

[27] In **Hawker** the issue before the court was whether an application for the sequestration of a partnership that was not accompanied by an application for the liquidation of a corporate partner was fatally defective. In that case the appellant had applied for the liquidation and sequestration, respectively, of the respondent [Hawker

Aviation Services (Pty) Ltd (HAS)] and a defunct partnership of which HAS had been a partner. The application for sequestration of the partnership did not embrace an application for the liquidation of one of the partners, Man Co, which was a corporate entity. The question thus arose whether it was competent to sequestrate the partnership in those circumstances. The South African court considered s 13 of the South African insolvency legislation (Act No. 24 of 1936). It is similar in all material respects, if not word for word, to s 13 of the Insolvency Proclamation. The court came to the conclusion that it was permissible and perfectly in order to sequestrate a partnership even if one of the partners, being a corporate entity could not be sequestrated because of a legal impediment. The court accepted as correct the decision in **Partridge v Harrison and Harrison 1940 WLD** 265. In that case Greenberg JP held that where there is a legal impediment to the sequestration of one of the partners, the partnership could still be sequestrated without simultaneously liquidating the corporate partner. The court in **Hawker's** case did not approve of the reasoning and conclusion in **P De V Leklame (Edms) Bkp v Gesamentlike Onderneming van SA Numismatise Buro (Edms) Bkp en Vitaware Bkp** 1985 (4) SA 876 (C) in which the judge decided that, because of the *concursus*

creditorum created by statute, s 13 could not effectively operate without sequestrating the estates of all the partners. In **Hawker** (at 305E-304A) the court stated the position, with which I agree, as follows-

> *"That the concursus the statute envisages is incomplete and that it would operate incompletely where a partnership sequestration excludes the estate of one of the partners, is correct. Yet the criticism is not persuasive. It proceeds from the premise that a complete concursus is imperative, when the exceptions s 13 itself creates show that this is not so. The interpretation favoured by Greenberg JP and the decisions that followed him achieve a pragmatic, if partial, result, which is compatible with the language of s 13 when interpreted, as Greenberg JP did, as requiring the sequestration of only those partners whose estates are capable of sequestration. Even though this means that, in such situations, the statutory concursus will be incomplete, it seems to me to offer the more practical and coherent approach to the difficulties that would result if s 13 were interpreted to render sequestration of a partnership impossible where one of the partners cannot be sequestrated."*

[28] The general principle that comes out of **Hawker** is that it is possible and permissible to sequestrate the estate of a partnership without sequestrating the estates of the partners despite the apparently mandatory provisions of s 13. In a case such as the present where no application was made for the sequestration of Trencon and Belela, this general principle is also applicable. The judge in the court *a quo* was therefore correct to order the sequestration of

the estate of the JV Partnership without simultaneously sequestrating the estates of the partners. In so far as Building World is concerned, there was a lawful bar to the sequestration of its estate. It is a company excluded by s 9 of the Proclamation as read with the definition of "debtor" in s 2. My conclusion on this aspect of the case is that the High Court order sequestrating the estate of the partnership without sequestrating the estates of the partners was in order. In this regard I embrace the decision in **Hawker** as good law and should be followed in Lesotho in respect of companies registered therein.

Other grounds of appeal

[29] The other grounds of appeal were broadly classified by the appellants as falling under the following main heads, namely, the status of the partnership, procedural compliance, exercise of discretion, insolvency, mistake of law, *mala fides*, termination of construction contract, collusion between the petitioner and the MCA-L, advantage of sequestration to creditors and costs. Some of these grounds overlap in substance. I will deal with each of them of separately so far as it is necessary to do so. I agree with counsel for the respondents that not all these

grounds of appeal are critical to the fair and just determination of this appeal.

Status of JV Partnership and lack of standing of Petitioner

[30] The appellants contended that the court *a quo* misdirected itself in finding that the JV Partnership was a partnership under the law of Lesotho. They contended that, as at the date of the provisional order, the JV Partnership had been dissolved and a new partnership consisting of Building World and Trencon had been established as an unregistered partnership. It was this new partnership that had entered into the sub-contract with the petitioner and lodged claims with MCA-L for the work done. For the first contention the appellants relied on an averment by the petitioner, at paragraph 2 of the petition, that the JV Partnership was not a registered partnership under the laws of Lesotho. For the second, the appellants did not place evidence before the court that the new partnership was the one that entered into a sub-contract with the petitioner or that it is the one that lodged claims with MCA-L. As part of this ground of appeal the appellants said that the petitioner did not establish its standing as a creditor of the JV Partnership. They

contended that the JV Partnership contracted with Anju Civils (Pty) Ltd, a South African and not with Anju Civils (Pty) Ltd, a Lesotho registered company as set out in paragraph 1 of the petition.

[31] The learned judge *a quo* found that the only partnership registered in Lesotho was that consisting of Building World, Trencon and Belela and that, whether or not the partners had later established another partnership consisting of the first two partners only, was not a matter recognisable in Lesotho. This finding cannot be impugned. In opposing the sequestration, Building World attached to its affidavit two performance guarantees ("SOM1" and "SOM2"), issued by Lombard Insurance Group both of which reflect that the performance guarantees were in respect of the JV Partnership and not any other partnership.

[32] The evidence before the court *a quo* clearly established that the partnership that was registered in Lesotho is the JV Partnership consisting of the three companies. The Dissolution and Reconstruction Agreement as well as the Recorded Agreement found in the

record, Vol.4, p. 265, were internal arrangements of the JV Partnership and were not brought into the public domain. For instance the Dissolution and Reconstruction Agreement was not registered in the Deeds Registry as required by s 2(1) of the Partnership Proclamation 1957 which provides that –

> *"The terms of every partnership agreement entered into after the commencement of this Proclamation shall be recorded in a deed of partnership, which shall be signed by all the partners before a notary or administrative officer, who shall attest the same accordingly. Such deed shall be registered within sixty days from the date of such signature and attestation, in the office of the Registrar, into whose custody the original deed shall be delivered."*

[33] Sections 6 and 7 of the Partnership Proclamation provide for the registration of any renewal, continuation, alteration or dissolution of any registered partnership in the same manner. Subsection 7(2) further provides that where a partnership is dissolved other than because of the death of a partner, lapse of time, completion of purpose for which partnership was formed, insolvency or order of court, the dissolution shall be published in a newspaper giving at least thirty days' notice of the intention to dissolve the partnership and the date upon which the dissolution is to take place. The JV Partnership was,

according to the deponent of Building World's opposing affidavit, registered in the Deeds Registry under number 29685. That registration has not been changed in any manner. The judge *a quo* was therefore correct in holding that the JV Partnership registered in terms of the law of Lesotho, and not any other, was not only the partnership that signed the construction contract with MCA-L but also the one subject of the sequestration proceedings. **Motlomelo v Mathe, LAC (2005-2006) 143**, is further authority for the proposition that recognition of a partnership is possible only with registration in the Deeds Registry.

[34] The other contention by Building World that the JV Partnership entered into a sub-contract with Anju Civils (Pty) Ltd South Africa and not Anju Civils (Pty) Ltd Lesotho is not supported by any evidence and must be rejected. The petitioner performed the sub-contract and nowhere in its papers did Building World or the JV Partnership raise the point about the petitioner's identity nor did Building World ever contend that the bill sent by the petitioner was liable to be rejected on the basis that the claimant was unknown to Building World or the partnership. This issue was in any case not canvassed in the court below and

there is no justification for raising it for the first time on appeal.

Procedural Compliance

[35] The appellants raised two issues in regard to procedural compliance. The first is that the judge *a quo* misdirected himself in failing to recognise that the Insolvency Proclamation does not permit *ex parte* applications. The second is that if the urgent *ex parte* sequestration petition was based on the High Court rules relating to urgent interdicts then the petitioner should have established all the requirements for the granting of a final interdict before it could be granted a final order of sequestration.

[36] What in my view the appellants failed to appreciate is that the petitioner moved two matters at the same time – an urgent application for interdictory relief in order to protect and preserve assets and documents and a petition for the provisional sequestration of the JV Partnership and the individual partners, both without notice to the parties affected by the orders sought. In my opinion an *ex parte* urgent application for the granting of an interim interdict

was perfectly in order. It is permissible to make such an application under the rules of court provided a basis is laid for the *ex parte* approach. To obtain it all that the petitioner had to establish are the requirements for such a temporary interdict, namely, that the right sought to be protected is *prima facie* established; that there is a well-grounded apprehension of irreparable harm if interim relief is not granted and applicant ultimately succeeds in establishing it; that the balance of convenience favours the granting of interim relief, and that the applicant has no other satisfactory remedy. An application for a temporary interdict will succeed if the above requirements are met. And it will succeed even where a clear right has not been established. See generally **Setlogelo v Setlogelo 1914 AD 221**. In addition it will succeed if it is made on an *ex parte* if the applicant is able to demonstrate that although another will be affected by the order, notice may precipitate the very harm that the applicant is trying to forestall.

[37] In the founding affidavit, the petitioner showed that the JV Partnership and the other respondents were in possession of equipment, construction materials and documents, which were required for the continuation of

the project. It adduced some evidence that the respondents had previously removed some materials from construction sites and that if the materials on site, estimated to be worth M 15 million, were removed, the continuation of the project would be gravely jeopardised and the creditors of the JV Partnership would be prejudiced. On these facts it cannot be said that the court *a quo* was wrong in issuing the temporary interdict.

[38] It is with respect to the granting of the provisional sequestration order that the appellants' contention requires some detailed consideration. The appellants contend that the Insolvency Proclamation "does not permit *ex parte* applications." They do not identify a provision in the Proclamation to that effect. In my view this contention overstates the position. The Proclamation does not prohibit the institution of sequestration proceedings by way of an *ex parte* petition. A reading of s 9 of the Proclamation suggests that such an *ex parte* petition may in fact be in order. Subsection (4) provides that a copy of every petition and every confirming affidavit shall be lodged with the Master of the High Court for him to report on it as necessary. The court will consider the petition and the Master's report thereon and may dismiss the petition

or postpone its hearing or make any other order as appears to it to be just. In terms of s 10 the court may make an order sequestrating the estate of the debtor if in its opinion the requirements of that section are *prima facie* established. Section 11 is important. It provides for the first instance when the service of the petition on the debtor is required. Subsection (1) thereof reads:

> *"If the Court sequestrates the estate of a debtor provisionally, it shall simultaneously grant a rule nisi calling upon the debtor to show cause why his estate should not be sequestrated finally."*

[39] Subsection (3) of s 11 appropriately provides that –

> *"Upon the application of a debtor the court may anticipate the return day for the purpose of discharging the order of provisional sequestration if twenty-four hours' notice of such application has been given to the petitioning creditor."*

[40] It seems to me that the Insolvency Proclamation neither permits nor prohibits in direct terms an *ex parte* petition in sequestration proceedings. What is critical, and that is what the Proclamation requires, is that after the provisional order is granted, a *rule nisi*, which must be granted simultaneously with the provisional sequestration

order, must be served upon the debtor and that the debtor is entitled to anticipate the return day on notice to the petitioning creditor. In interpreting sections 9 and 10 of the Proclamation it is important to note that in relation to a petition for the surrender of an estate in terms of s 3 of the Insolvency Proclamation the petitioner shall, pursuant to s 4, cause to be published in the *Gazette* and a newspaper circulating in the area where he resides a notice of surrender in the prescribed form and, within seven days after such publication, deliver or post a copy of the notice to everyone of his creditors whose address he knows or can ascertain. The lawmaker was thus quite alive to the need to give notice in these circumstances but did not provide for any notice to be given to debtors in compulsory sequestration proceedings. The lawmaker must have considered that, for the purpose of a provisional order of sequestration, it was sufficient if the debtor was served with the rule *nisi* and was permitted to anticipate the return day on short notice to the petitioning creditor.

[41] The practice in many jurisdictions is that the petition for an order of provisional sequestration is invariably served on the debtor so that if he wishes, he may oppose

the issuance of the provisional order. The Insolvency Proclamation in this country does not require such service before a provisional order is granted. Whilst it is a salutary practice that notice should be given to a debtor, that practice is, unfortunately, not presently the law in this country. Section 15 of the Insolvency Proclamation appears to be the answer to any prejudice that the debtor may suffer as a result of an unmeritorious petition for sequestration. It provides that –

> *"Whenever the Court is satisfied that a petition for the sequestration of a debtor's estate is malicious or vexatious, the Court may allow the debtor forthwith to prove any damage which he may have sustained by reason of the provisional sequestration of his estate and award him such compensation as it may deem fit; provided that nothing in this section shall debar the debtor from claiming any other relief open to him in law."*

[42] Section 15 finds application on the return day of the rule *nisi* because if the debtor has received notice of the petition and appears at the hearing of the provisional order, he can at that stage show the court that the petition is malicious or vexatious but will not be able to claim any damages "which he may have sustained by reason of the provisional sequestration of his estate." At that stage his estate will not have been provisionally sequestrated. All he

has to do at that stage is to satisfy the court that the petition is either malicious or vexatious and obtain an order dismissing it with costs. Section 15 to my mind is a clear indicator that a petition for the provisional sequestration of a debtor's estate may be lodged *ex parte*. And where, as in the present case, there is justification for proceeding on an urgent basis for other allied relief, the provisional order of sequestration can be obtained on the same urgency and on an *ex parte* basis as the interdictory relief. I see no harm in that. In fact the institution of both proceedings together saves costs.

[43] On the facts of the present case there is another answer to the objection that the proceedings were improperly commenced on urgency and on an *ex parte.* It is that it is pointless to raise such objection at the appeal stage in the hope of securing the setting aside of the order made in those circumstances. The urgent *ex parte* proceedings were launched on 30 May 2013. The provisional order was issued on the following day on 31 May 2013. The appellants did not anticipate the return day, which they should have done if they were aggrieved by the *ex parte* procedure. The final sequestration order was issued two years later on 8 April 2015. It is not at all

a viable proposition to hope that the order issued in these circumstances can be set aside for the reason that at their inception the proceeding resulting in that order should not have been brought on an *ex parte* basis or that they lacked urgency. Condemning such a contention the court in **Hawker**'s case supra said –

> *"Urgency is a reason that must justify deviation from the times and forms the Rules prescribe. It relates to form and not substance and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the Rules of Court permit a Court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet'…. This, in effect, permits an urgent application, subject to the Court's control, to forge its own Rules (which must 'as far as practicable be in accordance with the Rules'). Where the application lacks the requisite element or degree of urgency, the Court can, for that reason, decline to exercise its powers…. The matter is then not properly on the Court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance….*
>
> *In this Court, the respondents persisted in submitting that the application was not urgent when it was brought in December 2003 (and now it was in 2006), but, even if that were so, there is nothing now to be made of that… Whether or not it was urgent in December 2003, it is immaterial to the question now before us, which is whether the application ought to have been dismissed."*

[44] The above sentiments apply with equal force to these proceedings and generally to proceedings commenced *ex parte* in similar circumstances. The Court has sufficient control over any matter brought on urgency or *ex parte*. In appropriate cases commenced *ex parte* the court may direct the applicant or petitioner to serve the originating process on the other party or parties. The appellants in this case filed their affidavits without immediately protesting that the procedure adopted was wrong or otherwise inappropriate. The matter was heard some two years later. This appeal is heard another year later. Borrowing a phrase from **Hawker** case all I can say, as did the judge in that case, is that "there is nothing now to be made of …" the fact that the proceedings were improperly commenced on urgency and/or *ex parte* when the question now before us is whether the final sequestration order should have been granted.

Insolvency

[45] It is a prerequisite of a sequestration petition that the debtor should have committed an act of insolvency or is in fact insolvent. The learned judge *a quo* found as a fact that the JV Partnership was insolvent and granted a final order for its sequestration. In support of his conclusion,

the learned judge relied on a number of factors, which, in his opinion, pointed inexorably to the fact that the JV Partnership was insolvent. These are –

(a) the other partners, Trencon and Belela, supported the view not only that the JV Partnership was insolvent but also that it should be sequestrated basing themselves on the same sets of financial statements as those parties opposing the sequestration;

(b) the affidavit of the deponent to the Building World's opposing affidavit, Moosa, portrays that the JV Partnership was "a sinking ship";

(c) the petitioner's claim was liquidated as required by s 9 of the Insolvency Proclamation;

(d) the JV Partnership's current liabilities exceeded its current assets by M 12 623 637.93;

(e) the JV Partnership could not fund the project from its own resources, as it should have been able to do,

and was feverishly seeking funding from MCA-L and one of the partners, Trencon; and

(f) when challenged or required to produce, in terms of Rule 34(11) of the High Court Rules, its audited financial statements and other documents to prove its viability, the JV Partnership failed to do so.

The learned judge summarised the position at paragraph [55] of the judgment as follows –

> *"In this case, in a Joint Venture of three parties, two of them support the sequestration of the Joint Venture. The Joint Venture or Partnership has already lost the contract which was cancelled by the employer. The employer has already completed the works using other contractors and all that remains is really to wind up the affairs of the Joint Venture being the 1st Respondent (JV Partnership)."*

[46] The appellants took issue with these findings of the judge. They contend that the petitioner relied on a delayed payment and not proven insolvency to sequestrate the JV Partnership, and that a delayed payment does not prove insolvency. They submitted that the court erroneously disregarded the fact, as established by the petitioner's own document, PET-02 that the JV Partnership was poised to receive a total of M 68 million that would have given it

surplus funds considering that the creditors' claims were M 48 million. It also wrongly disregarded the evidence of Sunday Adache to the effect that the management accounts that the petitioner relied upon had not been approved by the JV Partnership's "board of directors"; the accounts did not include the value of work in progress and stock on hand as current assets, and that the JV Partnership's assets (at M 21 667 834.91) exceeded its liabilities (at M 21 298 678.88) by M 369 156.03. The appellants further criticised the judge's findings on the ground that he had wrongly presumed that the partners had used the same sets of accounts in deciding whether to oppose or support the sequestration. They also criticised him on a further ground that he had placed undue reliance on Trencon's view that the JV Partnership was insolvent.

[47] The finding that the JV Partnership was insolvent is one of the decisive factors in sequestration proceedings. The requirements for a final order of sequestration are set out in section 12 of the Insolvency Proclamation as follows-

> *"(1) If at a hearing pursuant to the aforesaid rule nisi the Court is satisfied that -*

> *(a) the petitioning creditor has established against the debtor a claim such as is referred to in subsection (1) of section nine; 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 sequestrate the estate of the debtor.*
>
> *(2) If at such hearing the Court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die."*

[47] Paragraphs (a), (b) and (c) of subsection (1) of s 12 must be read conjunctively, which means that all the three requirements must be satisfied before a final order of sequestration may be issued. The learned judge *a quo* was satisfied that the three requirements had been met and issued the final sequestration order.

[48] It is appropriate to examine the appellant's grounds of appeal and submissions in respect of the three requirements all at once. I have briefly set out in paragraph 27 above, the appellant's contentions on the

question whether or not the JV Partnership was insolvent. I will consider this question at once.

[49] Paragraphs (a) of subsection (1) of s 12 of the Insolvency Proclamation require a petitioning creditor to establish against a debtor a liquidated claim as mentioned in s 9 of the same Proclamation. **Fattis Engineering Co. (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736 (T)** is one of many cases which define a liquidated claim as a claim capable of speedy and prompt ascertainment. That is why a claim for ejectment ***(Morris v Steyn_1970 (1) SA 246 (R); Brooks & Anor v Martin Bros Plumbing (Pvt) Ltd 1974 (20 SA 39 (R))***, a claim for work done and materials supplied **(Fattis Engineering Co. (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736 (T)**, a claim for stolen money ***(Kleynhans v Van der Westhuizen NO 1970 (10 SA 565 (O); 1970 (2) SA 742 (A); International Hardware Corp (Rhod) (Pvt) Ltd v Appleton 1970 (2) RLR 158))***; a claim on *quantum merit* basis if the claim is capable of speedy ascertainment **(Windsor Diesels Ltd v Shangani Sawmills 1969 (2) RLR 128)**, a claim for collection commission **(Claude Neon Lights (SA) Ltd v Schlemmer 1974 (1) SA (143 N),** a claim on an untaxed attorney-and-client bill of costs **(Deeb v Pinter 1984 (2)**

SA 501 (W), and a claim on a foreign judgment **(National Milling Co v Mohamed_1966 (3) SA 22 (R); Continental Ore Africa (Pty) Ltd v Croukamp 1962 (2) SA 273 (SR)**, have been accepted by the courts as liquidated claims. Thus a liquidated claim is one whose exact money value has been rendered certain e.g., where the amount is admitted by the debtor or has been determined by a judgment of a court. The Insolvency Proclamation does not define a liquidated claim but defines an unliquidated claim as "a claim the amount of which has not been determined by agreement or by judgment of a Court and includes a claim for damages". It seems to me therefore that the meaning of "liquidated claim", as accepted by the courts and as it is understood under common law, applies. A claim for rental has also been accepted as a liquidated claim.

[50] In the present case the petitioner alleged that it had, as against the JV Partnership, a liquidated claim in the sum of M 959 464.50 for construction work done and materials supplied as well as equipment rentals. On the authority of **Fattis**' case *supra* the petitioner had a liquid claim. Even if I am wrong that the claim is sufficiently liquidated, it is trite that a claim for rentals is a liquidated

claim and the petitioner would still meet the requirement that the claim must be liquidated. The appellants' contention that the claim is not liquidated is therefore without merit.

[51] The second requirement for a final sequestration order relevant to this appeal is that the debtor is insolvent. As already stated the appellants' contention is that the JV Partnership was not insolvent because it was just about to receive to two payments, one from MCA-L of M 46 million retention money and another from Trencon of M 20 million. The evidence is clear that the payment from MCA-L was conditional upon the JV Partnership providing a satisfactory guarantee in place of the retention arrangement and that the JV Partnership failed to procure such guarantee. The payment was therefore not forthcoming, at least not immediately, as the appellant would want this Court to believe. The appellants did not disclose what they had done to meet the condition so as to assert that the retention money was to be released in a matter of days. In any event MCA-L was already contemplating terminating the contract because of other breaches by the partnership. It was quite proper for the

court *a quo* to disregard this alleged source of money as tending to prove that the partnership was not insolvent.

[52] The payment from Trencon was equally not assured. It was entirely in the discretion of Trencon to pay or not to pay. It had paid only M9 million by the time the petition was lodged and there was no indication that it was going to the balance of the M20 million it had said it would pay in its discretion. The general tenor of the Recorded Agreement signed by Trencon and Building World on 1 May 2013 confirms the discretionary nature of the payments that Trencon undertook to make. It had already paid just over M 9 million of the M 20 million it had conditionally undertaken to pay to the JV Partnership. The undertaking was itself some proof that the JV Partnership was in dire straits and could not pay its debts as and when they fell due. In the words of the judge *a quo*, the JV Partnership "could not fund the project on its own and was constantly seeking to raise funds to be able to pay its creditors: initially from the employer and later from one of the partners." In the opposing affidavit the deponent thereto, Shabar Osman Moosa for the JV Partnership, admitted, almost without equivocation, that the partnership was insolvent hence the judge *a quo* said that

the partnership was “a sinking ship”. The other partners, Trencon and Belela were of the firm view that the JV Partnership was insolvent and should accordingly be sequestrated. The judge *a quo* cannot be justly criticised for giving weight to Trencon’s position. Trencon was the managing partner of the JV Partnership and was in charge of the financial affairs of the partnership. Its view carried weight, indeed more weight than the views of the other partners that were not *au fait* with the partnership finances.

[53] The appellants also contended that a proper reading of the management accounts as at the end of December 2012 showed that the JV Partnership was not insolvent; it had an excess of assets over liabilities to the tune of M 369 156.03 per the evidence of Sunday Adache. A financial statement or any set of accounts is capable of being understood by any business-minded person. Trencon understood the financial statements as showing that the JV Partnership was insolvent. So did Belela. The petitioner understood them in the same way. Sunday Adache was not shown to possess any particular expertise as would tend to prove that his understanding of the financial statements was superior to that of others persons closely

associated with the partnership, especially Trencon whose duty it was to manage the finances of the partnership. He was rightly criticised for failing to take into account loans advanced to the partnership in his calculations. The financial statements produced by Mr. Roberts (Vol.22 of the record page 1765, 1767 and 1777) show a deterioration of the partnership financial position from a shortfall of M 17.8 million as at the end of December 2012 to M 25.2 million as at end of February 2013 and to a shortfall of M 36.2 million as at the end of March 2013. As at this last date, per Rob Schunke's affidavit (Vol. 1 p. 6) who was the partnership's project manager, the partnership owed M48 136 513,25 to its creditors and M 230 000 to the petitioner. These are figures produced by the partnership's own project manager.

[54] The common thread that runs through the affidavits filed on behalf of the JV partnership and Building World is that 'Yes partnership owed several millions of Maloti to its sub-contractors; Yes the partnership was not paying what it owed: it was going to pay its debts from funds that it hoped to receive from MAC-L and Trencon. Yes the partnership owed some money to the petitioner for work done and materials supplied and for rental of equipment,

but that amount was not liquidated as required by s 9 of the Proclamation. Yes a fairly large part of the amount owed to the petitioner was for rentals of equipment but that amount, though also exceeding the minimum required for a sequestration petition, was not liquidated as well.' The intervening creditors also admit that they were owed large sums of money and that they were not being paid but had been advised that funds would be forthcoming from MAC-L and Trencon. Actual insolvency may be established directly by evidence of the debtor's liabilities and the market value of its assets but it may also be established indirectly by adducing evidence indicative thereof, such as facts that the respondent's debts remain unpaid. As such factual insolvency may be inferentially established. See **Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd intervening) [1998] All SA 433(W)** at paragraph 51. The inference of actual insolvency can be drawn when all the evidence is looked at cumulatively. Looking at all the evidence in this case, the court *a quo*'s conclusion that the JV Partnership was insolvent, becomes quite unimpeachable. Perhaps the strongest basis for making an inference that the JV Partnership was actually insolvent by the time that the petition was lodged is to be found in the preamble portion of the Recorded Agreement.

Therein it is stated as a clear acceptance of the financial situation of the partnership that –

> *"1. The Employer, MCA, are indicating an intent to terminate the contract with TBWB Joint Venture.*
>
> *2. The joint Venture is in need of urgent funding in order to prevent any such termination and in order to proceed with the works, which have currently come to an almost standstill due to insufficient funding.*
>
> *3. Building World have stated that they are unable to provide funds at this point in time.*
>
> 3. *In order to avoid termination Trencon have agreed to fund the project, as per the cash flow requirements of works, at its discretion, subject to the following…".*

[55] Against the above overwhelming evidence of factual and commercial insolvency, the evidence adduced by the appellants before the Court, it must be apparent, does not show that the JV Partnership and Building World discharged the evidential *onus* on them of showing that the partnership assets, fairly valued, exceeded its liabilities. They did not set out precisely what the partnership's financial position was nor specifically state what its liabilities were, see **ABSA Bank Ltd v**

Rhebokskloof (Pty) Ltd and Others 1993 (4) SA 436 at 44E. They relied on the set of accounts which elsewhere in their papers they disowned as not having been approved by the board of directors. In my view the court *a quo*'s finding of that the partnership was actually insolvent cannot be faulted.

Advantage to Creditors

[56] The next requirement for the issue of a final order of sequestration is that the court must be satisfied that there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated. Joubert, **The Law of South Africa**, 2nd ed. Vol. 11 para. 225 has this to say about this requirement –

> *"The words 'reason to believe' are of particular significance because they absolve the applicant from having to furnish, either prima facie when applying for a provisional order, or to the satisfaction of the court when applying for a final order, positive proof that sequestration will be to the advantage of creditors. In the nature of things, it is difficult for a creditor to obtain detailed information regarding the debtor's financial position, so the legislature has come to the assistance of creditors by requiring something less than positive proof."*

[57] Another point that has to be made at the outset is that if there are special circumstances that make sequestration disadvantageous to the creditors, then the onus would lie upon those who set up this contention to establish it, ***Amod v Khan*** **1947 (2) SA 432 (N)** at 437. The Intervening Creditors have appealed the decision of the court *a quo* on this point -that the judge erred in coming to the conclusion that the sequestration was to the advantage of creditors when the creditors expressed the opinion that it was not and actually opposed the placing of the JV Partnership under sequestration. The appellants partly relied on facts that were not in existence as at the date that the order was made. For instance, they stated that the judge ignored the fact that if the sequestration order was granted the partnership would be saddled an additional liability of M 259 000 000 plus administration fees; he ignored that the sequestration, as "the facts clearly show" benefited only the trustees and MCA-L "with some M18 million in Trustees fees generated on the new sub-contracts" and the fact that the creditors' sub-contracts were unfairly terminated and given to the new sub-contractors. These factors could only have arisen after the sequestration order was made. As of the day of its making the judge would not have known how the work would be proceeded with, how much it would cost to

employ new sub-contractors or how much the trustees would charge as their fees. It is unfair to criticise the decision of the High Court basing such criticism on facts that emerged, if facts they are, after the order was made. The point that the position of creditors, especially if they happen to be in the majority, should be taken into account in deciding whether or not to place a debtor under sequestration, cannot be brushed aside. The position here is not entirely clear. The affidavits show that there were as many as 90 sub-contractors and only nineteen of them opposed the confirmation of the order. In **Puzna v Puzna 1962 (1) SA 165 46** out of 143 creditors attended and purported that the debtor's sequestration would not be to the advantage of creditors. The other creditors had not replied to a letter sent to them stating that absence from the meeting of creditors would be taken as a decision to fall in line with the decision of the majority of those in attendance. The judge held that the failure to attend could not be held to mean that the absentee creditors agreed with the views of the minority which attended. Similarly in the present case while those creditors who have filed affidavits have opposed the sequestration as not being to the advantage of the creditors, it cannot be said that they represent the view of the majority. Meskin, *Insolvency Law*, Service Issue No 13 at para. 2.1.4 says -

> *"… the court will have regard to the creditors' wishes as sufficiently proved to it; it is not bound by those of even the majority but generally it accepts that each creditor must be taken best to know what is in his own commercial interest."*

[58] The learned judge a quo was therefore not wrong when he observed that the court retains discretion and does not sheepishly follow the wishes of the creditors, even if they should constitute the majority of those opposed to the sequestration. In deciding whether there is reason to believe that it will be to the creditors' advantage to sequestrate a debtor, it is the law that "actual advantage need not be proved. If there are facts which indicate that there is a reasonable prospect, not necessarily a likelihood, but a prospect which is not too remote, that some pecuniary benefit will result to the creditors", the requirement is fulfilled – **Meskin & Co. v Friedman 1948 (2) SA** 555 at 559. In that case the court was satisfied that an investigation into the affairs of the debtor which resulted in the discovery of assets which might become available to creditors, constituted an advantage to the creditors but after noting that the investigation was not to be viewed "as an advantage itself but as a possible means of securing ultimate material benefit for the creditors in the form, for example, of the recovery of property disposed

of by the insolvent or the disallowance of doubtful or collusive claims." (at 559).

[59] The petitioner herein stated that the debtor was making preferential payments to some creditors to the exclusion of others when Trencon paid creditors from the amount it had provided as agreed in the Recorded Agreement, and there was a reasonable fear that if any other amounts were received by the partnership whether from the retention funds or from Trencon, they would not be distributed fairly amongst the creditors. The position of the JV Partnership as a whole was such that sequestration was the surest way in which if any funds became available, they would be paid out in a way that was fair to all the creditors. In exercising his discretion in the manner he did the learned judge *a quo*, again, cannot be faulted.

Collusion between Petitioner and MAC-L

[60] The appellants allege collusion on the part of the petitioner and MAC-L in seeking the sequestration of the partnership. There is no dispute over the fact that these two entities co-operated in order to procure the provisional sequestration of the JV Partnership. The point of

departure is the interpretation to be placed on the admitted co-operation. The appellants say it was collusion to bring down the partnership and the petitioner and MCA-L say that it was open co-operation between them that designed and intended to protect their respective interests. In ***Cohen****'s* case, *supra* at paragraph 65, the following seminal point is made about collusion:

> *"The most frequently quoted definition of collusion in our law is that given by Curlewis J in Bevan v Bevan and Ward 1908 TS 193 at 197:*
>
> > *'Ordinarily speaking, in our law, collusion is akin to connivance, and means 'an agreement or mutual understanding between parties that the one shall commit or pretend to commit an act in order that the other may obtain a remedy at law as for a real injury.' Williamson AJ in Kuhn v Sharp 1948 (4) SA 825 (T) at 835 approved and applied the view "… for there to be collusion, there had to be some agreement express or implied, between the parties to mislead the Court by withholding or concealing material facts or suppressing a possible defence. It involves a fraudulent intent towards the Court". Roper J in the same judgment at 827 said "In my view collusion consists in our law in an agreement between the parties to a suit to suppress facts, or to put false evidence before the Court, or to manufacture evidence, in order to make it appear that one of the parties has a cause of action or a ground of defence, which in fact he has not.'"*

[61] The appellants alleged collusion between only the petitioner and MCA-L and not between these two and all or any of Trencon and Belela. There probably might have been something closer to collusion if Trencon or Belela were accused of it arising from their dogged and unequivocal support for the sequestration of a partnership of which they were members. But to raise the issue about parties who co-operated openly and legitimately in the protection of their respective interests is hardly the stuff of which collusion is made. There was no evidence placed before the court tending to show that MCA-L and the petitioner entered into any agreement, express or implied, with a view to misleading the court or withholding or concealing or suppressing facts or evidence in order to make it appear that the petitioner had a good basis for petitioning the court when in fact he did not have such a basis. The alleged colluding parties were candid and open about their mutual dealings. The mere fact that the petitioner and MCA-L utilised the services of the same legal practitioners and that that they both desired the sequestration of the JV Partnership is not sufficient proof of collusion, especially when the respective interests they each sought to protect are discernible and they are open about how they cooperated. The information that they made available is the same that the appellants relied on

for some of their submissions. It should be noted that Building World or the JV Partnership did not place before the court financial statements or accounts of their own. They were content to rely on those produced by the petitioner. A concurrence of interests does not necessarily connote collusion. I therefore reject, as did the judge *a quo*, the contention that the petitioner and MCA-L acted in collusion not only to bring down the partnership but also to put an end to disputed claims that should have been adjudicated upon by an expert or failing that by arbitration. The process of dealing with claims is still open to the parties to pursue.

[62] The appellants contended that the issue of collusion should have been referred to trial so that the parties would have had the opportunity to establish the alleged collusion. This contention was based on the submission that there was a dispute of fact which could not be resolved on the papers. In my opinion the appellants did not show the existence of a genuine dispute of fact. Their evidence consisted of opinion and bald conclusions that were not based on any acceptable or cogent evidence of collusion in the face of denials of collusion by Sophia Mohapi of MCA-L, Louis Fourie and DG Roberts and the

lawyers involved on their side. The appellants failed to set out a real, genuine and bona fide dispute of fact. See in this regard the cases referred to by counsel for the respondents, **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at 375 D-F** and **Roberts N.O. and Others v Angel Diamond Mining (Pty) Ltd, C of A (CIV) No. 36 & 37/2012**, in which the point is made that a dispute of fact must be a real, genuine and bona fide dispute of fact if the court is to refer a matter for oral evidence.

Conclusion

[63] I have considered all the key grounds of the appellants' objection to the decision of the court below and I am satisfied that they have no merit. I have gone beyond what counsel for the respondent considered to be the only issues for decision, namely whether the partnership was insolvent and whether the petitioner was guilty of collusion with MAC-L. The urgent protective relief that was required to ensure that materials and equipment were not removed necessitated the institution of proceedings on an urgent and *ex parte* basis and no challenge was immediately mounted against that procedure. There was nothing irregular in proceeding in this manner. The JV

Partnership was a registered partnership and it was the entity, and no other, that entered into the construction contract with MCA-L and became insolvent before it fully performed the contract. In resisting the sequestration the JV Partnership and the appellants did not disprove that the partnership was insolvent. They sought to show that there were funds that it would have received but for the provisional sequestration order, even though, clearly, the receipt of such funds was not certain. In my view it failed to show that the partnership was solvent. In substance they conceded that it was in serious financial difficulties and, as submitted at paragraph 86 of its heads of argument, the works "grinded" to a halt. The sequestration was to the advantage of the general body of creditors as determined by the judge *a quo*. Counsel for the appellants said that the respondents were not defending the costs order against Building World but in his submissions to us counsel for the respondents prayed for costs against all the appellants. In my view Building World opposed the final sequestration of the partnership unsuccessfully and against the wishes of the other two partners. There is no reason why it should not be ordered to pay the costs. I however do not agree with the respondents' submission that only Building World, "the clear driver of the opposition", should be ordered to pay the costs, because

as contended, a costs order against the partnership will prejudice the general body of creditors. The partnership opposed the granting of the sequestration order through Building World and the other partners did not raise an objection. Accordingly the partnership was a party to the litigation and because it has been unsuccessful, it must pay the costs together with the other appellants.

[64] For the reasons set above I would have dismissed the appeal.

I agree.

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MH Chinhengo

Acting Justice of Appeal

For 1st & 2nd Appellants : Mr Henry Selzer

For 3rd to 19th Appellants: Adv K Ndebele

For the Respondents : Adv C S Edeling & Adv N Mafisa