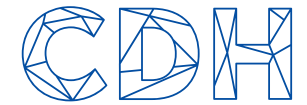


Dispute Resolution

ALERT | 18 November 2025



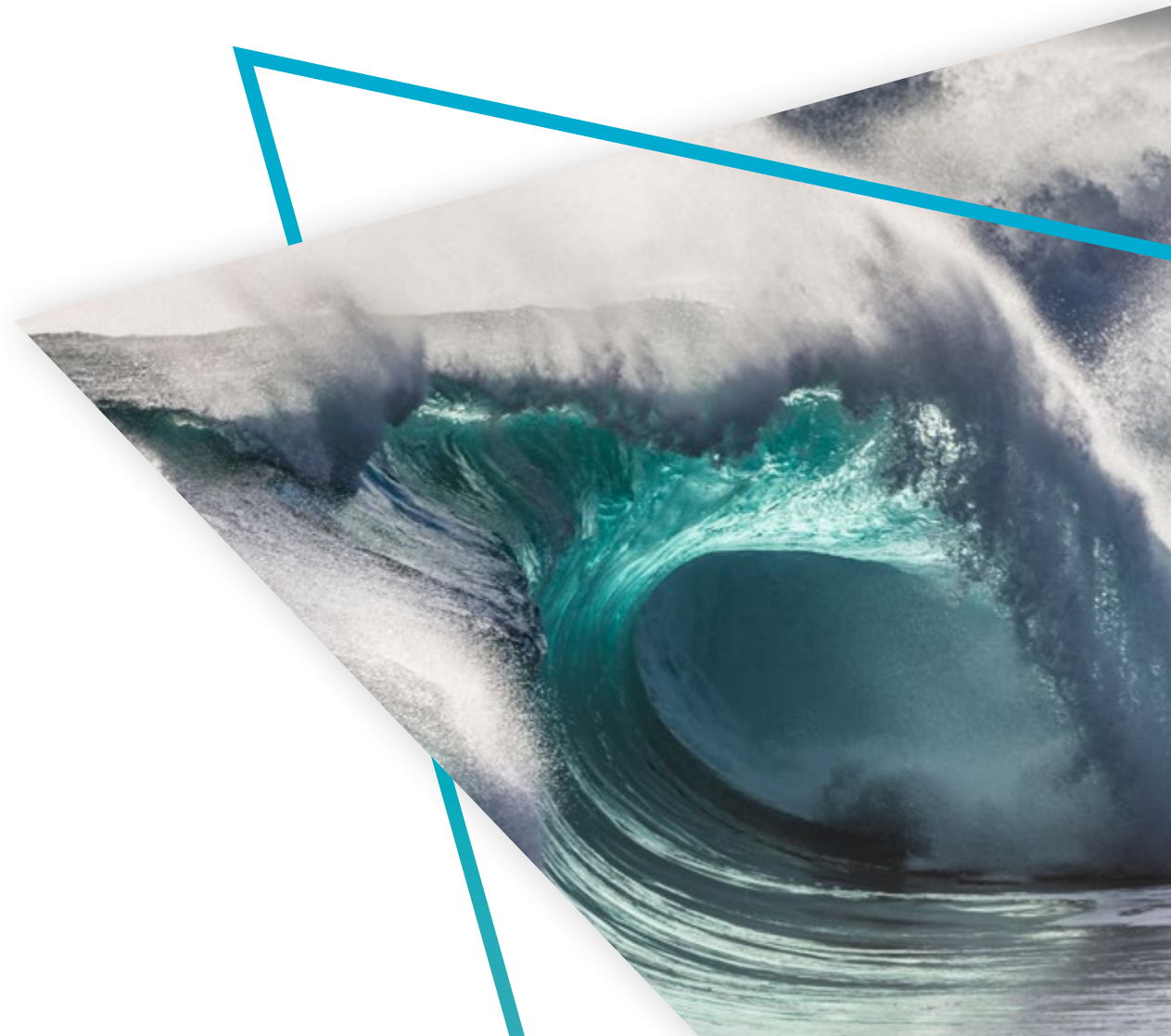
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SOUTH AFRICA

When a trust can't, and shouldn't,
protect ill-gotten assets



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**DISPUTE RESOLUTION
ALERT**

When a trust can't, and shouldn't, protect ill-gotten assets

The recent Supreme Court of Appeal (SCA) decision of *Van Rooyen N.O and Another v Mokwena N.O and Another* (63/2023) [2025] ZASCA 130 reinforces the important principle that trusts, while offering legitimate estate planning and asset structuring benefits, do not provide protection where their purpose is aimed at abusing their structure. When the solvency of a trust is questioned the applicable legislation is the Insolvency Act 24 of 1936 (Act). Where creditors can establish the standard statutory requirements (such as indebtedness and advantage to creditors), courts are likely to grant provisional sequestration. What is relatively unique about this decision is that the SCA granted the provisional sequestration, on appeal, without requiring oral argument.

Background

The appellants were the duly appointed joint liquidators in the insolvent estate of law firm Tumi Mokwena Incorporated (TMI). They applied for the sequestration of the Dikwenanyana Trust (Trust), as well as the piercing of the Trust's veneer. It was argued that the Trust was indebted to TMI for a sum of over R7 million, was insolvent, and was the alter ego of TMI and Mr Mokwena (being a director of TMI).

After TMI's liquidation, Mokwena had also been sequestrated at the hands of the appellants. Neither TMI nor Mokwena were able to pay their own creditors. The liquidators commissioned an expert forensic report to look into their affairs. The report reflected that the only source of income for the Trust was payments received from both TMI and Mokwena. No valid cause for these payments was shown by either the Trust, TMI or Mokwena. As the assets (which comprised multiple high-value properties) remained within the Trust, there seemed no immediate recourse for the creditors of TMI and Mokwena against those assets. The appellants accordingly applied for the liquidation and piercing of the legal identity of the Trust on the basis that it was used to abuse its separate legal status and as a fraudulent vehicle to conceal assets and money of TMI, pillaged by Mokwena.

The Trust admitted that all payments were received from TMI funds, but its defence was that Mokwena, as a director of TMI, was entitled to use the funds of TMI for whatever purpose he wished, including the TMI trust money which belonged to defrauded trust creditors. The shortfall in the TMI trust account was in excess of R16 million.

The High Court dismissed the application for the sequestration of the Trust, and also dismissed the application for leave to appeal. However, the SCA granted the petition to appeal the High Court's decision.

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Prior to the original hearing of the appeal, the appellants and the Trust concluded a settlement agreement designed to resolve indebtedness. The settlement agreement included a clause that if the Trust defaulted, the appeal proceedings could continue on an unopposed basis. Unsurprisingly, the Trust breached the settlement terms, prompting the continuation of the appeal before the SCA.

Findings of the SCA

Due to the circumstances of the matter, and in line with section 19(a) of the Superior Courts Act 10 of 2013, the SCA decided that oral argument was not required for it to make its decision.

In making its decision the SCA, *inter alia*, (i) upheld the appeal; (ii) granted the provisional sequestration order; and (iii) ordered a return date (in the High Court) regarding the final liquidation of the Trust and the piercing of its veneer so that the assets vesting in the Trust would be vested jointly in the Trust, the insolvent estate of Mokwena and the insolvent estate of TMI, and be applied to the satisfaction of the debt of all three parties.

This decision by the SCA was based on the following legal points:

- Section 10 of the Act provides that if a *prima facie* case is made out, the court may provisionally sequester the debtor and issue a *rule nisi* calling upon the debtor and all other interested parties to show cause on the return date why a final order should not be granted. In this case, the appellants demonstrated that sequestration would be to the advantage of the Trust's creditors, and this was not disputed by the Trust. There was no reason why this case should be treated any differently.
- In upholding previous appeals of this nature, the SCA has issued a provisional sequestration order with a *rule nisi* in accordance with the Act, and therefore the SCA was empowered to do the same in this case.

Conclusion

This is a robust decision from the SCA, emphasising that it will not tolerate separate legal entities being employed as vehicles to conceal fraud. It shows that courts are prepared to deploy insolvency mechanisms to protect collective creditor interests and to enable the statutory investigation of dispositions, preferences and potential recoveries.

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