Think your assets are untouchable in a trust? Think again.

Insolvency law consistently requires courts to balance the protection of creditors with the preservation of trust integrity. The Supreme Court of Appeal's decision in Van Rooyen N.O and Another v Mokwena N.O and Another vividly illustrates this tension, confirming the circumstances under which South African courts will pierce the veil of a trust and order sequestration thereof.

At the heart of the matter was the misuse of a trust structure by an attorney to conceal assets embezzled from his law firm's trust account, thereby frustrating the claims of creditors. The court emphasized that trusts must not be abused as fraudulent vehicles to hide assets. Where trustees blur the line between personal affairs and trust administration, courts are empowered to disregard the trust to protect creditors. This principle, long recognized in South African jurisprudence, was applied decisively in this case.

The court was willing to pierce the trust veil in this matter, as the Trust in question was funded entirely by embezzled monies and operated as the alter ego of the attorney. The court found that allowing it to retain assets under such circumstances would unjustly insulate them from creditors.

The case underscores that trustees carry a fiduciary duty to manage trust assets properly, and when that duty is compromised, the courts will not hesitate to intervene.

Damian Vosloo