



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2021/58945

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

23/3/2023
DATE

J Moorcroft
SIGNATURE

In the matter between –

RICHFIELD BODY CORPORATE

APPLICANT

AND

MPOFU, JABULANI

1st RESPONDENT

MPOFU, LETTY

2nd RESPONDENT

JUDGMENT

MOORCROFT AJ:

Summary

*Respondent passes away after provisional sequestration order but before final order –
 Executor to be substituted in terms of Rule 15 before final order made*

*Community of property arising out of marriage in community of property is terminated by death
 of spouse*

Order

[1] I make the following order:

1. *In respect of the 1st respondent:*
 - 1.1. *The estate of the 1st respondent is placed under final sequestration;*
 - 1.2. *The costs of this application are costs in the sequestration of the 1st respondent's estate;*
2. *In respect of the 2nd respondent:*
 - 2.1. *The rule nisi in respect of the provisional sequestration of the 2nd respondent is extended to 23 January 2024, subject to the matter being set down on an earlier date in the event of an executor being appointed on notification to all known creditors;*
 - 2.2. *Any party who wishes to avoid such an order being made final, are called upon to advance the reasons, if any, why the court should not grant a final order of sequestration of the said estate on the return day;*
 - 2.3. *A copy of this order is must forthwith be served –*
 - 2.3.1. *on the executor of the 2nd respondent's estate when appointed;*
 - 2.3.2. *on the Master*
 - 2.3.3. *on the South African Revenue Service.*
 - 2.4. *The costs of this application are costs in the sequestration of the 2nd respondent's estate.*

[2] The reasons for the order follow below.

Introduction

[3] The Court granted a provisional sequestration order against the two respondents on 23 August 2022. Provisional trustees were appointed to the insolvent estate. The two respondents were married in community of property and the debt arose out of levies and

charges owed to the applicant, a homeowners' association. The respondents were the joint owners of residential property in the complex.

[4] The respondents filed an answering affidavit after the provisional order had been granted. In the affidavit the 1st respondent refers to a pending magistrates' court action between the parties and say that they are not insolvent as they own properties far in excess of the disputed debt. The answering affidavit is devoid of any detail, particularly in respect of the debts of the joint estate arising out of the holding of other assets, and any defence as to why the debt is disputed, and the fate of the other properties.

[5] The 2nd respondent passed away in November 2022, after the appointment of provisional trustees. No executor has been appointed and no evidence of what has been done to obtain the appointment of an executor is before the Court.

[6] I raised the question of the effect of the death of the 2nd respondent on the application and the matter was stood down for two days to enable the legal teams to prepare supplementary heads of argument, and to enable the applicant to file affidavits in terms of section 9(4A)(b) of the Insolvency Act, 24 of 1936.

[7] Counsel for the 1st respondent argued that the application can not be finalised until an executor has been appointed to the estate of the 2nd respondent. At that time the executor should be substituted for the 2nd respondent in terms of Rule 15. He elected not to submit argument on the merits of the application.

[8] The attorney for the applicant was of the view that the joint estate should be sequestrated.

[9] The estate of a deceased debtor cannot be sequestrated until an executor has been

appointed.¹

[10] The death of a spouse terminates a marriage in community of property and thus terminates the consequences of marriage including community of property.² There was one estate when the provisional order was granted and there are now two separate estates.

[11] When the joint estate was provisionally sequestrated the two respondents were divested of their estate and it vested first in the Master and then in the provisional trustees.³

[12] It is stated in *Mars*:⁴

“If the debtor dies after the granting of the provisional order, but before the return day of the rule nisi, the court will extend the return day thereof so as to allow for the appointment of an executor in his estate, whose name should be substituted⁵ on the record for that of the debtor.”

[13] The correct therefore in my view is that a final order be granted in respect of the estate of the 1st respondent, and that the rule nisi be extended in respect of the estate of the 2nd respondent so that an executor can be appointed by the Master.

¹ *Hassim v Mohideen* 1930 TPD 562.

² *Hay v Hay* 1910 NPD 90 at 91; *Lubbe v O'Dwyer* 1942 WLD 137 at 137; *Danielz NO v De Wet* 2009 (6) SA 42 (C); Voet *Commentary on the Pandects* 23.2.90; Heaton et al “Marriage” *The Law of South Africa* 2nd ed. 2006 para 85.

³ Section 20(1)(a) of the Insolvency Act, 24 of 1936. A sequestration order includes a provisional sequestration order.

⁴ De la Rey *Mars: The Law of Insolvency in South Africa* 8th ed. 1988, p 99. Reference is made to *Liebermann, Bellstedt & Co v Dall* 1912 EDL 304, referred to in *Koller, NO v Steyn, NO en 'n Ander* 1961 (1) SA 422 (A). The *Liebermann* judgment is however a very cryptic one and not much assistance can be derived. The quoted statement is repeated in the 10th edition of *Mars* but the reference to *Liebermann* as authority was abandoned. The citation is Bertelsmann et al, *Mars: The Law of Insolvency in South Africa* 10th ed. 2019, p 141.

⁵ In terms of Rule 15 of the Uniform Rules.

[14] I therefore make the order in paragraph 1 above.


J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **23 MARCH 2023**.

APPEARANCE FOR THE APPLICANT:

I T ALLIS

INSTRUCTED BY:

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COUNSEL FOR THE RESPONDENT:

B T NGQWANGELE

INSTRUCTED BY:

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DATE OF THE HEARING:

6 & 8 MARCH 2023

DATE OF JUDGMENT:

23 MARCH 2023