

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 028945/2022

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

28 August 2023	E VAN DER SCHYFF
DATE	SIGNATURE

In the matter between:

**WATERKLOOF BOULEVARD HOMEOWNERS ASSOCIATION
(ASSOCIATION INCORPORATED UNDER SECTION 21)**

APPLICANT

and

BEVERLYN RUTH YUSUF

FIRST RESPONDENT

THE ESTATE LATE SAMUEL SUNDAY YUSUF

SECOND RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] The applicant is a homeowner's association that levies certain payments against the account of its members for, amongst others, the administration of the

association, security, and upkeep in its area of business. The respondents are the lawful owners of an immovable property situated within the applicant's business area. Levies were raised against the account of the respondents.

- [2] The first respondent is the executor of the second respondent. The first respondent and her late husband were married in community of property. It is evident that the first respondent is struggling to finalise the estate of her late husband. This in itself, however, does not justify the respondents' sequestration.
- [3] The applicant obtained summary judgment against the respondents on 27 October 2020 due to their failure to pay levy amounts due to the applicant. In this application, the applicant seeks the provisional sequestration of the respondents' estate.

The first respondent indicated that she is not in a position to obtain legal representation since the attorneys of record who assisted her since the inception of the litigation on a *pro bono* basis could not continue to assist her on a *pro bono* basis. To facilitate the finalization of this application and to provide the respondents with a fair hearing, I requested advocate H. Marais to represent the respondents on a *pro bono* basis. The court is indebted to advocate Marais for honouring the request.

Legal Requirements

- [4] It is trite that to succeed with a sequestration application, a creditor must establish a claim against the debtor, that the respondent is insolvent or committed an act of insolvency, that there is reason to believe that the sequestration will be to the advantage of creditors if the debtor's estate is sequestrated.¹

¹ Bertelsman, E *et al.* *Mars: the Law of Insolvency in South Africa*, JUTA, 9th ed, 134.

- [5] However, A court is not bound to grant a final sequestration order even if the court is satisfied that the proper case has been made out but has the discretion to grant or refuse a sequestration order.²

Discussion

- [6] I am aware that a provisional liquidation order is sought, but with the respondents being party to the proceedings, the court is already *au fait* with both sides' version and evidence.
- [7] It is common cause that the respondents' estate is a judgment debtor of the applicant, and that the judgment date remains unsatisfied. Due to the finding I come to regarding the third requirement, the advantage to creditors, it is not necessary to determine whether the respondents committed an act of insolvency.
- [8] The main issue for determination is whether the applicants succeeded in making out the case that there is reason to believe that it will be to the advantage of creditors of the debtor if the estate is sequestrated.
- [9] As I indicated to counsel representing the applicant, I find it difficult to understand why the applicant did not proceed with the attachment of the respondents' immovable property and its sale instead of the present proceedings. Burger J stated in *Mamacos v Davids*:³

'This (the attachment and sale of the property) would be to his own advantage in that he does not have to incur the further costs of sequestration, especially as he already has a judgment of the Court.'

² *Amod v Khan* [1947] 2 All SA 370 (N) at 372; *Braithwaite v Gilbert (Volkskas Bpk Intervening)* [1984] 4 All SA 495 (W).

³ 1976 (1) SA 19 (C) at 20C.

[10] In *Gardee v Dhanmanta Holdings and Others*,⁴ Didcott J dealt with the question as to whether there is reason to believe that the sequestration of a partnership would be to the advantage of the partnership's creditors. He explained:

'While there may be no reason in principle why a debtor with only one creditor should not have his estate sequestrated, the potential advantages in that situation are inherently fewer, and the case for it is correspondingly weaker. Then it is really no more than an elaborate means of execution, and because of its costs, an expensive one too. That the applicant himself is convinced of its benefits to him is not decisive, even when he is the only creditor. It is for the court to decide the question.... What is more, he must demonstrate some reasonable expectation that it will exceed the likely proceeds of ordinary execution. Unless he does that, the laborious and substantially more expensive remedy of sequestration can hardly be thought advantageous.'

[11] Didcott J elaborated:⁵

'Sequestration, it is true, has been described on occasions as a legitimate form of execution. That does not however mean that the judgment creditor has the same automatic right to it which ordinarily governs execution of the routine kind.'

[12] In *Zikalala v Body Corporate of Selma Court and Another*,⁶ the court said the following concerning the situation where an owner of a sectional title property is in arrears with the payment of levies:

'Bearing in mind that sectional title ownership is premised on the notion of a collective or community ownership, the ultimate sanction that the body corporate can resort to in the collection of a debt is to obtain judgment and pursue the attachment and sale in

⁴ 1978 (1) SA 1066 (N) 1067.

⁵ *Supra*, 1069.

⁶ 2022 (2) SA 305 (KNP) at para [31].

execution of the unit. A precondition for any sale in execution would be a settlement of the outstanding levies owing to the body corporate from the proceeds of the sale. Failing that, transfer of the property would not take place without a levy clearance certificate being issued.'

[13] *In casu*, no case is made out that impeachable transactions, the concealment of assets, and other irregularities can be detected, exposed, and remedied by using the machinery of the Insolvency Act.

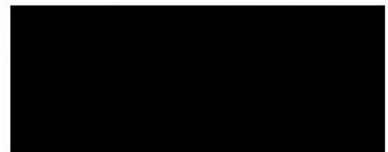
[14] The applicant failed to make out a case that sequestration proceedings would benefit itself more than a sale in execution. Counsel submitted that it would probably take another year to obtain an order in terms of rule 46 of the Uniform Rules of Court. This is a consequence of the applicant's decision to execute its judgment debt through a sequestration application.

[15] The respondents were represented *pro bono*, and counsel for the respondents submitted that in these circumstances, there is no justification for granting a costs order in their favour.

Order

In the result, the following order is granted:

- 1. The application is dismissed.**



**E VAN DER SCHYFF
JUDGE OF THE HIGH COURT
PRETORIA**

For the Applicant:	Adv. R van Schalkwyk
Instructed by:	KIRCALDY PEREIRA INC
For the Respondent:	Adv. H Marais <i>Pro bono</i> at the court's request
Date heard:	23 August 2023
Date of judgment:	28 August 2023