



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NUMBER: 20166/2023

In the matter between:

CRYOLIVING (PTY) LTD

Applicant

and

AMINA FARZEE

Respondent

Date Heard: 20 May 2024

Date Reasons delivered electronically: 13 June 2024

**REASONS FOR GRANTING A FINAL ORDER OF SEQUESTRATION AND
REFUSING A POSTPONEMENT**

NZIWENI J
Introduction

- [1] This was an application by the respondent [sequestrating debtor] to postpone a sequestration application for a final order of sequestration. On 24 November 2023, the matter was heard by Gamble, J and he granted an order placing the

respondent's estate under provisional sequestration. A rule *nisi* was issued amongst others, directing the postponement of the matter until 31 January 2024. The provisional order was not granted *ex parte*.

- [2] On the return date of the rule *nisi* [31 January 2024], Kusevitsky, J, postponed the matter, whereby the rule *nisi* was further extended until 20 May 2024 and a timetable for the conduct of the sequestration proceedings was agreed upon by the parties.
- [3] On the return day [20 May 2024] of the rule *nisi*, calling upon the respondent to show cause why a final order of sequestration should not be made against her estate; the respondent sought that the sequestration application be postponed until the finalisation of a rescission application that she had launched in the Wynberg Magistrates' court. This is because the respondent seeks to apply for rescission for the second time.
- [4] She [the respondent] contended that she had recently obtained proper legal advice that triggered a rescission application for a second time. Once she was advised by her recent counsel, she realised that she has a *bona fide* defence [a remedy] against the action that was entered against her by default, on 20 June 2019.
- [5] For purposes of clarity, I shall refer to the parties in the same manner as they appeared in the sequestration application.

- [6] During the hearing of the application to postpone the hearing of the sequestration application, Mr Walters, counsel on behalf of the respondent intimated that he did not prepare for the sequestration application. As such, nothing was delivered in opposition to the sequestration application. In response to a question put by the Court at the hearing, Mr Walters submitted that should this Court be inclined to refuse the postponement sought, the decision as far as the scheduled hearing of the sequestration application that would be left to the hands of this Court.
- [7] The postponement application stems from sequestration proceedings that were initiated by the applicant [sequestrating creditor] against the respondent. The applicant vigorously contested the postponement and asserted that the hearing for the sequestration should proceed as scheduled.
- [8] After I had heard the parties' oral submissions, I granted the final order for sequestration of the respondent. In essence, denying the postponement sought. In that order I intimated that my reasons would follow. These are the reasons for having granted a final order of sequestration against the respondent, notwithstanding the request for the adjournment of the sequestration application.

History of the matter

- [9] For ease of reference, I consider it necessary to trespass into developments and the procedural history of this matter, leading up to this point of this application.
- [10] As has been noted earlier, on 20 June 2019 the applicant obtained a default judgment against the respondent. In the papers it emerged as common ground that

the claim of the applicant is premised on the default judgment. The applicant by virtue of that default judgment, was able to initiate the sequestration application against the respondent.

[11] As previously stated, on 31 January 2024, the respondent appeared in court, before Kusevitsky J. A court order ("the 31 January order") was obtained by agreement between the parties, scheduling the hearing of the sequestration application for 20 May 2024. The order of 31 January 2024 also captured the dates agreed upon by the parties relating to the timeframes for the delivery of pleadings. This application to adjourn the proceedings comes on the heels of the 31 January order.

[12] The applicant's opposing papers and submission during the hearing of this application reveal that the respondent was present in court during the hearing of 24 November 2023. It was also asserted on the applicant's behalf that at the hearing of 24 November 2023, the court was made aware of the first rescission application ("the first rescission application").

The chronology of events.

[13] It is not clear from the papers of the applicant as to when the papers of the first rescission application were delivered. In this application, the applicant asserts that she was advised to lodge an application for the first rescission application around April 2023. On 23 January 2024, the applicant filed a notice to oppose the first rescission application.

- [14] On 25 January 2024 the respondent filed a notice to oppose the sequestration application. As mentioned previously, on 31 January 2024, the sequestration application was postponed until 20 May 2024 by an order of the court embodying an agreement of the parties.
- [15] In February 2024, the first rescission application was removed from the Wynberg Magistrates' court roll. It perhaps bears mentioning, further that, before me the parties gave conflicting versions as to why the first rescission application was removed from the roll. It is, however, apparent to this Court that when this instant application was postponed for the hearing, the respondent's first rescission application had already been struck off the roll.
- [16] On 01 March 2024, a notice of withdrawal from the sequestration application was served on the applicant's attorneys by the respondent's erstwhile firm of attorneys. Thereupon, she [respondent] instructed a new firm of attorneys that also withdrew from the sequestration application. Currently, in the sequestration application she is represented by another firm of attorneys.
- [17] The respondent's new attorneys informed the applicant of their intention to launch an application for rescission of the judgment and the stay of the sequestration application pending a ruling on the application for rescission.
- [18] On 09 May 2024, the respondent served the applicant with a second notice of opposition to the sequestration application.

- [19] On 14 May 2024, the respondent served the applicant with a notice of a withdrawal of the first rescission application and tendered the applicant's costs. On the next day, to wit; 15 May 2024, the respondent served the applicant with an application to postpone the sequestration and with a second rescission application. The two new applications were not served at the same time to the applicant.
- [20] On 15 May 2024, pursuant to this matter being enrolled for hearing, the respondent delivered a substantiated application to postpone the hearing of the sequestration application until the finalisation of the second application for rescission. The application for the postponement was further clarified with an application for rescission.
- [21] Accordingly, the issue before me was reduced to the very narrow question of whether, in the circumstances, I ought to grant the postponement that was sought by the respondent. The applicant also raised a question of the respondent's *locus standi* to bring the application for postponement.

The effects of provisional sequestration

- [22] It is settled that a provisional order for sequestration sets in motion a series of events that ultimately result in the debtor's estate being liquidated. See in this regard the matter of *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) on page 265 at 275A-B.

[23] In terms of section 2 the Insolvency Act 24 of 1936 ("The Act"), a provisional sequestration order is an order whereby an estate is sequestrated. Hence, an order granting provisional sequestration leads to various consequences, for instance, the debtor's estate is provisionally sequestrated.

[24] Additionally, section 18 of the Act expressly stipulates that the Master may appoint a provisional trustee to the estate. Section 20 of the Act states that the effect of the sequestration of an insolvent is to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed. Furthermore, as noted, section 20 (1) (b) of the Act states the following regarding the effect of sequestration on insolvent's property:

" to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent save such proceedings as it may, in terms of section twenty-three, be instituted by the insolvent for his own benefit or instituted against the insolvent: Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of section *forty -four* or *seventy- eight*, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate."

[25] Thus, as at the date of the provisional sequestration order, by virtue of section 20, the entire estate of the debtor vested in the Master and thereafter, once the trustee/s are appointed it vests in the trustees.

- [26] In the case of *Fischer v Wessel & Co (Pty) Ltd* 1943 TPD 71, on page 74, the following is succinctly stated in relation to what the effect of a provisional order of sequestration is:

“This involves, in turn, the consideration of what the effect is of a provisional order of sequestration. Except as to the period, a provisional order has the disabling effect of a final order of sequestration. It affects the person against whom it is granted, by depriving him of status to a certain extent, by depriving him of ownership of his property, and naturally by depriving him of the right to deal with such property. There may be other effects also. But it is limited as to time. . . [I]n my opinion is only operative until the return date. On the return day one of the three things may happen: the provisional order may be set aside, which puts an end to the disabling effects on the respondent of the order; it may be confirmed, and it then has actually the exact effect which this word connotes; or the provisional order may be extended, which means that it has the same effects, that it had until that date, for the further period covered by the extension. Any extension has an effect against the respondent; it is a civil legal remedy, because as from the date of extension until the date to which it is extended it continues the disabilities created by the original order.” Emphasis added.

- [27] When the above is considered in connection with the respondent’s *locus standi*, it becomes particularly clear that the operation of a provisional sequestration order cannot be suspended for the purposes of bringing a rescission application, by the same debtor who is under a disabling order. It is thus not competent for the respondent to bring an application for a postponement or a rescission application during the currency of the provisional order.
- [28] For that matter, a postponement of an application for a final order of sequestration, brought by a competent party, does not suspend or stay the effects of a provisional order of sequestration. According to the case of *Fischer*

(supra), the effects of a provisional sequestration order can only be suspended if the order is set aside or declared in some form or the other to be inoperative.

[29] The effectiveness of a provisional order is manifested through the disabilities it imposes upon the debtor. I think, therefore, if indeed the magistrate told the respondent that she should deal first with the sequestration application, before bringing the first rescission application, that would make sense.

[30] In the *Investec* matter, supra, the following is stated at paragraph 31G:

“Section 9 (2) of the Insolvency Act indeed makes it clear that the sequestrating creditor’s claim need not even be due, that is, need not yet be enforceable. An application for sequestration may be made on the strength of a claim which is not yet enforceable, because a sequestration order is not an order for enforcement of the claim. Its purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally. An applicant for sequestration must have a liquidated claim against the respondent, not because the application is one of enforcement of the claim, but only to ensure that applications for sequestration are only brought by creditors with a sufficient interest in the sequestration. Once the sequestration order is granted, the enforcement of the sequestrating creditor’s name is governed by the same rules that apply to the claims of all the other creditors in the estate. Emphasis added.

[31] So far as is relevant for the purposes of this sequestration application, the effect of a default judgment granted in favour of the applicant is that it signifies that the applicant has a *prima facie* liquidated claim for an amount that falls within

the ambit of section 9 (1) of the Act. On the facts of the instant case, the applicant has established a liquidated claim that satisfies the requirements of section 10. The *prima facie* liquidated claim bestowed a right upon the applicant to apply for the sequestration of the respondent.

[32] Thus, it is not in issue in this case that when the applicant obtained the provisional sequestration order, it had a liquidated claim against the respondent. Notwithstanding the foregoing, I bear very much in mind that in terms of section 44 of the Act, the applicant still needs to prove its claim against the insolvent estate. That being so, it means that at the meeting of the creditors the claim of the applicant may still be rejected.

[33] Based on the foregoing, I do not think for a moment that the respondent has a *locus standi* to bring the second application for rescission. It was argued by Mr. Walters on behalf of the respondent that the respondent has a *locus standi* to bring the application as no trustee has been appointed yet for the estate.

[34] The difficulty with the argument proffered by Mr Walters is twofold. Firstly, the proposition rests upon an incorrect premise. The mere fact that no trustee had been appointed yet, does not suffice to establish a possible *lacuna*. Thus, even though the trustee might not have been appointed, that does not give the respondent a *locus standi*. This is so because in the interim the estate of the insolvent would still vest with the Master. Secondly, it goes contrary to the provisions of the Act, particularly section 20 (1) of the Act, because it seeks to ignore the role of the Master.

[35] In the case of *Fourie v Magistrate of Harrismith and Kemp* 1939 OPD 202, the debtor [Fourie] was provisionally sequestrated, when the creditor [Kemp] sought to apply for a final order of sequestration of the debtor's estate, the rule *nisi* was extended and the matter was postponed to the magistrate court for a rescission application to rescind the default judgment upon which the debt on which the application for sequestration was based. In the magistrates' court the creditor demanded upon the debtor to furnish security based on the fact that the debtor has already been declared an unrehabilitated insolvent. The creditor argued before the magistrate that the debtors action was suspended by the provisions of section 20 of the Act.

The debtor refused to furnish any security on ground that he was not yet an insolvent and that the order that extended the rule *nisi* rendered the furnishing of the security unnecessary. The magistrate dismissed the rescission application on grounds that the debtor failed to furnish any security.

The debtor took the decision of the magistrate on High Court review on the ground of gross irregularity. Van Den Heever, J with De Beer, J concurring stated the following:

"The terms of the statute seem to be absolute and unqualified. A judgment is presumed to be correct until the contrary be shown. It may be, however, that the Court has a discretion in a different sense, *i.e.* where the judgment sought to be set aside is the foundation of the claim on which sequestration proceedings were brought, and circumstances can be adduced to weaken the presumption arising out of *res judicata*; for in such circumstances prosecution may be regarded as a step in the determination of the question whether the judgment debtor has actually committed an act of insolvency or is insolvent . . . In any event the new summons for review sued out of this Court is not covered by the order of the Court of the 11th August and is a step in a civil proceedings such as contemplated in sec 20 of the Insolvency Act and which that statute stays. It seems to me that the reviews should be struck off the roll, with costs."

- [36] Even if I were to err regarding the *locus standi* aspect; I still hold the firm view that the applicant must still make out a clear case for postponement.

The purpose of the postponement

- [37] It seems to me possible to distill the following from what Van Den Heever, J states [in *Fourie v Magistrate of Harrismith and Kemp*]. That a court has a discretion to postpone sequestration proceedings where the judgment sought to be set aside is the foundation of the claim on which sequestration proceedings were brought, and circumstances can be adduced to weaken the presumption arising out of *res judicata*; for in such circumstances prosecution of an appeal may be regarded as a step in the determination of the question whether the judgment debtor has actually committed an act of insolvency or is insolvent.
- [38] The question that aptly arises in these proceedings is whether the prosecution of the application for rescission of the default judgment can be regarded as a step in the determination of the question whether the debtor has actually committed an act of insolvency or is insolvent.
- [39] In total, the respondent has launched two rescission applications to have the default judgment that bestows *locus standi* to the applicant in this sequestration application, rescinded. The essence of the respondent's submission is to the effect that she would suffer irreparable harm if the indulgence she is seeking is not granted.

- [40] The respondent's counsel set out his arguments at some length. *Inter alia*, he submitted that the applicant has recently received correct legal advice from him. Hence, the second rescission application was recently launched. Mr. Walters on behalf of the respondent argued that the respondent should not have signed an Acknowledgment of Debt Agreement ("AOD") upon which the amount constituted the debt on which the application for sequestration is based with the applicant. Mr. Walters in his submissions stated that when the respondent came to him, it became clear that the applicant ought not to have entered into an AOD. According to Mr Walters this is so because *inter alia*, the applicant repudiated the agreement that led to the conclusion of the AOD agreement. It was argued on the respondent's behalf that the AOD upon which the default judgment is based, is not valid. Not that I am trying to prejudge the decision of the rescission application; however, I find it quite difficult to understand this line of reasoning. Particularly, in light of the fact that it does not deal with the fact that the respondent does not dispute that she freely signed the AOG.
- [41] The parties have agreed on a timetable for the conduct of the sequestration proceedings. According to the respondent, new circumstances have arisen to justify rescheduling of the agreed upon date. The respondent hopes that the rescission application would render this application moot.
- [42] In the rescission application the respondent admits that she received the summons. In the same breath, however, the respondent in the same affidavit mentions that a default judgment was granted against her without her knowledge.

- [43] It appears from the papers of the respondent's application that the respondent on 09 July 2021, made an offer to the applicant's attorneys amongst others, stating that the respondent would sell her immovable property and the applicant would be paid with the proceeds of the sale.
- [44] In my mind, I do not think that the respondent, by bringing the second rescission application, is taking a step to determine the question of whether the judgment debtor has actually committed an act of insolvency or is insolvent. To that end she wants to raise a new defence. Putting it in another way, it appears that the respondent wants a second bite of the cherry, that would afford her a further opportunity to relitigate. The fact that the respondent instructed a new legal team and belatedly discovered a new defence she can raise to the applicant's claim does not entitle her to a postponement. The respondent's point seems to be rather an obstacle put up as an afterthought, than a real issue.
- [45] It is also remarkable that the default judgment was granted on 20 June 2019. When the respondent was served with the summons, she was afforded an opportunity to present her defence. When the default judgment was considered, that was not a dress rehearsal. Moreover, it is a point worth considering that when the respondent signed the AOG, she was legally represented. Though it is not clear from the respondent's papers as to when her first rescission application was delivered, according to her she was advised to bring an application for rescission around April 2023.

- [46] The application for the first rescission was removed from the court's roll on 20 February 2024, which means when [on 31 January 2024] the respondent agreed upon the extension of rule *nisi* order until [20 May 2024] this hearing date, she was aware that she had an impending rescission application.
- [47] Despite the fact that the first rescission was pending before the Wynberg magistrate court, the respondent consented on the hearing date and timeline for filing pleadings.
- [48] In *Tshwane City v Afriforum* 2016 (6) SA 279, Mogoeng CJ, stated as follows on page 305 paragraph 74:
- "It needs to be stated categorically, that no aspect of our law requires of any entity to desist from implementing any apparent lawful decision simply because an application, that might even be dismissed, has been launched to hopefully stall that implementation. Any decision to that effect lacks a sound jurisprudential basis and is not part of our law. It is a restraining order itself, as opposed to the sheer hope or fear of one being granted, that can in law restrain. To suggest otherwise reduces the actual grant of an interdict to a superfluity."
- [49] The principle to be deduced from what is stated by Chief Justice Mogoeng in the case of *Tshwane City*, is that ongoing litigation is not a reason to grant postponement. Surely, the fact that the respondent filed an application for postponement does not necessarily mean that she is going to get the postponement. Our courts have repeatedly stated that postponements are not there merely for the asking.

Conclusion

- [50] Obviously, when this court is considering an application for postponement, it has to consider the purpose of the postponement, whether it would cause unreasonable delay, both the impact of refusing and granting the postponement and any other factor that would tip the scale in favour or against granting the postponement.
- [51] Almost four months have passed since this matter was enrolled for 20 May 2024. It is settled that when a party seeks an indulgence of the court, he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interests of justice in having the matter finalised. Clearly, a postponement is not something that is desirable in sequestration proceedings, which are in their very nature urgent. Given the nature of the relief sought and the history of the matter, the applicant has a right to have the matter finalised.
- [52] Can it really be said in the circumstances of this case that the claim of the applicant is in dispute. Particularly, if offers were previously made by the respondent to the applicant to settle the claim. It can also not be said that the applicant is abusing the process with the sequestration application, as it had in the past lodged an application to declare the property of the respondent executable.
- [53] Each time the applicant is trying to vindicate its claim something happens on the side of the respondent. One cannot be faulted for thinking that the

respondent is using court processes to frustrate the actions of the applicant and keeps on shifting the goal post.

[54] In light of the history of this matter I am not convinced that the respondent is bona fide in seeking the indulgence. I am of the strong view that the history of the parties, as far as the litigation between them attests to the fact that the respondent is trying to obtain an advantage to which she is not entitled.

[55] For that matter, there is no certainty in the proposition postulated by the respondent, instead there is potential outcome. It is not even certain that she is going to get the rescission she intends to bring. The outcome of the rescission application is entirely speculative to say the least. For that matter, before the respondent gets to the rescission application, she has to overcome the hurdle of condonation. Therefore, any benefit from the postponement is speculative.

[56] In my mind, it is evident in this matter that court processes are being used to accomplish certain ends. In view of these factors, I get the distinct impression that the new defence is a tactical decision.

[57] In the circumstances, with no opposition as far as the main application for the final order is concerned, I confirmed the rule *nisi* and made the provisional order final.


CN NZIWENI
JUDGE OF THE HIGH COURT

Appearances**Counsel for the Applicant****Adv L Van Zyl****Instructed by****Pepler O' Kennedy****Mr A Pepler****Counsel for Respondent****:****Adv. A Walters****Instructed by****M.Z Solomon Attorneys****Per****Mr A Omar**