

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 045914/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

6 August 2024

In the matter between:

THE BODY CORPORATE OF DSL

SCHEME NO: SS31/1981

Applicant

and

SIPHUMELELE LUNIKA

First Respondent

IDENTITY NUMBER: 6[...]

KHAYAKAZI LUNIKA

Second Respondent

IDENTITY NUMBER: 7[...]

JUDGMENT

SK HASSIM J

[1] The applicant is a sectional title scheme located at 3[...] DSL Building 1[...] R[...] S[...] Street, Trevenna, Pretoria. The respondents own Unit 2[...] (“the Unit”). On 25 August 2022, the applicant obtained an order provisionally sequestrating the respondents’ joint estate with the return date 15 November 2023. The respondents

delivered an opposing affidavit on 14 November 2023. The application came before me in the opposed motion court on the extended return date.

[2] The respondents seek condonation for the late delivery of their opposing affidavit and the applicant seeks condonation for the late delivery of the replying affidavit. Neither party opposes the other's application. I am satisfied with the explanation given by the parties for their respective failures. The late delivery of the respective affidavits is therefore condoned.

Grounds for opposition

[3] The applicant seeks the confirmation of the rule *nisi* and a final sequestration order. The respondents oppose this on several grounds. In view of my finding on the application it is not necessary to discuss all the issues raised by the respondents. I discuss the principal ones briefly. In summary, the respondents oppose the application on the basis that:

- (a) The application is without merit and/or a cause of action for the sequestration of the respondents' estate has not been made out. In this regard they contend firstly, that the *nulla bona* return is invalid because rule 45(3) requires the warrant of execution to be served on a judgement debtor personally and in the absence of this the sheriff cannot demand that movable or disposable property is pointed out to satisfy the warrant of execution. Secondly, they contend that the sheriff did not carry out a diligent search as required and had he done so he would have established that the respondents owned household furniture and appliances, motor vehicles and various investments, as well as cash in two bank accounts.
- (b) The provisional order was fraudulently sought and obtained because the application had been transmitted to the incorrect email address and therefore the application had not been served prior to the provisional order being obtained.
- (c) Sequestration proceedings are unlawfully being used as a means of collecting a debt and not in the interests of creditors.

The debt and attempted execution

[4] On 25 May 2022, the applicant obtained a default judgment against the respondents in an amount of R11 652.95 (“the judgment debt”). The *causa* was unpaid levies.

[5] The Sheriff unsuccessfully attempted to serve a warrant of execution on the respondents personally at Unit 2[...] on 11 August 2022 at 18h01 and 18 August 2022 at 9h34 to execute against the respondents’ movable assets. The respondents were not on the premises. On 23 August 2022 at 13h57, the Sheriff again attempted to serve the warrant of execution on the respondents. The respondents were again not on the premises. The Sheriff established that the Unit was occupied by a tenant. The Sheriff served the warrant of execution on the respondents by affixing it to the principal door at 3[...] DSL Building (Unit 2[...]) 1[...] R[...] S[...] Street, Trevenna, Pretoria. The Sheriff recorded the following in the return of service:

“...On the 23 August 2022 at 13h57 at 3[...] DSL Building (Unit 2[...]),1[...] R[...] S[...] Street. Trevenna, Pretoria being the judgment debtors [*sic*] *domicilium citandi et executandi* a copy of the warrant of execution was served by affixing it to the principle [*sic*] door. I was not able to contact the execution debtor personally to demand payment of the judgment debt and costs... from him, or to demand that movable and disposable property be pointed out to me wherewith to satisfy the warrant of execution. It is certified that after a diligent search and enquiry no movable or disposable property wherewith to satisfy the warrant or any part thereof could be found. It could also not be ascertained whether the defendant owns immovable property. My return is therefore one of *nulla bona*.

NB: Mr Lukhayoo Oliphant is the tenant at the given address.

ATTEMPT(S):

11 August 2022 at 18h01 – attempted personal execution.

18 August 2022 at 9h34 attempted personal execution.

The institution of the sequestration application

[6] The statement of account ¹ attached to the founding affidavit in the sequestration application reflects that by 1 September 2022 the amount owed to the Body Corporate had increased to R29 657.83. On 11 November 2022 the applicant issued an application for the sequestration of the respondents' estate on the basis that by virtue of section 8 (b) of the Insolvency Act, Act No 24 of 1936 ("the Insolvency Act") the *nulla bona* return constituted an act of insolvency; and (ii) that the respondents' failure to pay the monthly levies to the body corporate gives rise to the inference that the respondents are insolvent.

Service of the sequestration application

[7] The sequestration application was not served on the respondents personally. On 25 April 2023, the applicant applied for an order for substituted service at amongst others by e-mail to the respondents' last known e-mail address ² which it averred was "lu*****@gmail.com". An order for substituted service was granted and the applicant was directed to serve the application for sequestration (i) by the Sheriff affixing it at the Unit alternatively by the Sheriff serving it on the tenant residing at the unit; (ii) transmitting the application to the email address "li*****@gmail.com"; and (iii) transmitting a text message to mobile numbers *** **3449 and *** ** 2819. The court order contained an error in paragraph 2.2. The applicant was directed to serve the application by transmission to the e-mail address "li*****@gmail.com" and not "lu*****@gmail.com" which was the respondents' last known e-mail address. (The letter "u" in the e-mail address had been replaced with the letter "i"). Accordingly, service was authorised at an address which was unrelated to the respondents.

[8] On 21 August 2023, the applicant's attorney deposed to an affidavit to confirm that the application had been served as directed by the court on 25 April 2023. The Sheriff's returns of service were attached to the affidavit. The deponent averred that the application as well as the notice of set down were transmitted by

¹ Dated 13 September 2022.

² In order to ensure that personal particulars are not divulged the letters in e-mail addresses, and numerals in bank account numbers and telephone numbers have in this judgment been replaced with an asterisk (*).

email to the respondents' last known email address, li*****@gmail.com. In support of the latter an email transmitted to li*****@gmail.com was attached to the affidavit marked "SS4". However, that was not the respondents' e-mail address. And no proof of delivery of the e-mail was provided.

The applicant's case for a final order of sequestration

[9] The applicant contends that it has satisfied the requirements in section 12 of the Insolvency Act for a final sequestration order.

The respondents' case

[10] The respondents admit that levies are due to the applicant. They however deny that they have committed an act of insolvency or are insolvent. Insofar as the former defence is concerned, their case is that although the applicant was aware of the respondents' place of residence through a search of the registry of deeds, the warrant of execution was not served on them personally. They contend that the warrant of execution was null and *void ab initio*. I disagree.

[11] Firstly, on the papers the deeds registry search was done on 10 April 2023 which is after the warrant of execution had been served. Secondly, the failure to serve a warrant of execution on a debtor at his residence does not affect the validity of the execution of a warrant.³ Nor does the failure to serve a warrant of execution on a judgement debtor personally. In fact, it is permissible to serve a warrant of execution at a location other than that contemplated in the rules of court if assets to be attached are there, even if the debtor is not.⁴ More importantly for purposes of this case, a chosen *domicilium citandi et executandi* is taken to be the place of the debtor's residence as contemplated in the rules of court which deal with the service of a summons.⁵ In my view, a warrant of execution served at a debtor's chosen *domicilium citandi et executandi* is valid whether it comes to the debtor's attention or not. And where a debtor chooses a *domicilium citandi et executandi*, the address holds good until execution.⁶

³ *De Beer v Isaacson* 1929 AD 345 at 347.

⁴ *Wilken and Others NNO v Reichenberg* 1991 (1) SA 852(W) at 858I-J.

⁵ *Muller v Mulbarton Gardens (Pty) Ltd* at 332G.

⁶ *Muller v Mulbarton Gardens (Pty) Ltd* 1972 (1) S A 328 (W) at 332D.

[12] In terms of paragraph 4(5) of the Management Rules in annexure 1 to the Sectional Titles Schemes Management Regulations, 2016, the address for any legal process or the delivery of any other document to a member of a body corporate is the address of the primary section registered in that member's name. There is accordingly no merit in the respondents' complaint that the execution of the warrant was invalid. The applicant was entitled in law to have served the warrant of execution at the Unit. Having said this, in my view, a judgment creditor is not precluded from serving the warrant of execution at a location where the debtor's assets are to be found.⁷ This is a case where the applicant should have served the warrant at the address or addresses in Mthata. More on this later.

[13] Regarding solvency, the respondents do not dispute that a bond is registered over the Unit in favour of Nedbank. They aver that they have been paying the monthly instalment on the bond. An extract from the records of the deeds registry is attached to the papers. On the face of it there is no equity in the property. However, a deeds search is not reliable. It reflects the purchase price of the property and the value of the bond but not the value of the property nor the amount due on the bond.

[14] As far as assets are concerned, the respondents aver that they own household furniture and appliances to the value of R300 000.00, two vehicles, an investment policy with a surrender value of R20 000.00 which at maturity will be valued at R150 000.00. But they have not disclosed the value of the motor vehicles, nor whether they are subject to a credit agreement. They have also not produced a valuation of the household furniture and appliances. They refer to retirement annuities and their pension interest in the Government Employees' Pension Fund. What ultimately weighs in favour of the respondents is that cash totalling R276 134.94 stands to the credit of the respondents in two bank accounts held at Standard Bank. The bank account numbers are disclosed. Furthermore, a screenshot of a text message from Standard Bank on 11 October 2023 notifying the first respondent of a payment of R164,044.07 into the Standard Bank account resulting in a credit balance of R193 384.77 is attached to the opposing affidavit.

Has the applicant made out a case for a final sequestration order?

[15] I am satisfied that the applicant has demonstrated that the respondents have committed an act of insolvency. I am also satisfied that the provisions of section 12(1)(c) of the Insolvency Act have been met.

[16] I am though not satisfied that the applicant has succeeded in establishing that the respondents are insolvent. The applicant's case is that it can be inferred from the respondents' failure to satisfy the judgment debt and pay levies to the body corporate that they are insolvent. However, the respondents have been paying creditors, albeit that they were not paying the levies as they fell due. They did though pay R40 000.00 to the applicant's attorney on 26 September 2023. While the single largest asset is an immovable property over which a bond is registered, the respondents have movable assets in the form of motor vehicles, furniture and appliances and between them R276,134.94 in their Standard Bank accounts.

[17] The fact that a debtor's assets exceed his liabilities does not however non-suit a creditor who applies for his sequestration. A debtor who has committed an act of insolvency may be sequestrated even though he is solvent. As was pointed out by Innes CJ in De Waard v Andrew & Thienhaus, Ltd.⁸ a respondent who has committed an act of insolvency cannot escape sequestration merely by showing that his assets exceed his liabilities and that "the best proof of solvency is that a man should pay his debts".

[18] The respondents have been paying other creditors, including the bondholder, Nedbank. They have authorised stop orders and debit orders in favour of their creditors. In the circumstances, I am not persuaded that it can be inferred from the respondents' failure to pay levies that they are insolvent.

The court's discretion

[19] Notwithstanding the finding that the respondents committed an act of insolvency, I am not enjoined to grant a final sequestration order. This even, if it was established that the respondents are insolvent. Section 12(1) of the Insolvency Act

⁸ 1907 TS 727 at 733

empowers a court to grant an order sequestrating a debtor's estate, provisionally or finally but does not oblige it to do so. The court has an overriding discretion whether to grant a sequestration order or not. The discretion must however be exercised judicially upon the consideration of all the facts and circumstances of a particular case.⁹ Then too, the discretion must be exercised sparingly, and only if special circumstances exist.¹⁰ I am satisfied that special circumstances exist in this case for the refusal of a final order of sequestration.

Special circumstances which favour the respondents

[20] The respondents are not impecunious. The salary advice of both for November 2023 is attached to the answering affidavit. They are both employed by the Eastern Cape Department of Education. The first respondent's job title is described as "Education Specialist Deputy Chief (Office Based)" and he has been employed since 16 July 1991 and the second respondent since 17 October 2005 as a teacher. The respondents' salary advice reflects monthly payments amongst others to Sanlam, Old Mutual, Assupol Life, and Metropolitan Life. Some of these are monthly contributions to at least one investment policy. The second respondent's salary advice furthermore reflects a monthly payment to Liberty. Cumulatively the respondents' net monthly income exceeds R50 000.00. The respondents have been gainfully employed in steady employment with the same employer for an extended period.

[21] This is not a case of a debtor who is unable to pay his debts. Just over two weeks after the respondents discovered¹¹ that their estate had been provisionally sequestrated, namely on 26 September 2023, they paid R40,000.00 to the applicant's attorneys after the attorneys had provided it to them upon request. The proof of payment is attached marked annexure "A" to the letter sent by the respondents' attorneys to the applicant's attorneys on 24 October 2023 (annexure SL4 to the opposing affidavit). Furthermore, the letter conveys the respondents' desire to pay whatever debt remained outstanding. Two paragraphs in the letter deserve mention. They read as follows:

⁹ *Julie Whyte Dresses (Pty) Ltd. v Whitehead* 1970 (3) (D) at 219 A – B.

¹⁰ *Firststrand Bank v Evans* 2011 (4) SA 597 (KZN) at 607E-F

¹¹ On 9 September 2023.

- “13. We further advise that our clients acknowledges [sic] being indebted to the applicant and are requesting to be allowed to pay the outstanding monthly levies as well as cost of the application for a default judgement up to a stage of the warrant of execution as they have already paid R 40,000.00 towards the debt. A copy of the proof of payment is attached hereto and for ease of reference marked as annexure ‘A’.
14. We also request that the bank accounts be unfreeze [sic] as [sic] they may gain access to the account and be able to make payment as in the bank account there is a balance of R 193 384.00 [of] which R164 044.07 was deposited into the account by SANLUM [sic]. A copy of the proof of bank balance is attached hereto and marked as annexure ‘B’.”

[22] In their letter under reply dated 25 October 2023, the applicant’s attorneys admitted the payment of R40 000.00 however the deponent to the replying affidavit continued to maintain in the replying affidavit that the respondents owed to the applicant R63,279.57.

[23] The consequence of the admitted payment is that the respondents did not owe outstanding levies in an amount of R 63,279.57 as claimed in the replying affidavit but R 40,000.00 less. A statement of account ¹² dated 9 February 2024 which is attached to the replying affidavit marked “RA1” does not record the respondents’ debt correctly. The first line item on the statement is a balance of R39 626.58 brought forward on 1 August 2023. The amount outstanding on 21 September 2023 was R 39,371.51. This explains why the respondents paid R40 000.00 on 26 September 2023; that is what they owed to the applicant on that day. The next line item is dated 1 October 2023 and under it are a number of debits.

¹² CL 22-36 and 22-37. Though on the face of it the statement of account consisted of three pages, only two pages are attached to the replying affidavit. Hence the description of the amounts reflected on the statement of account.

[24] The 26 September 2023 payment of R40 000.00 does not appear on the statement of account. Had it been reflected thereon the account would have been in credit.

[25] The total amount due is reflected at the foot of page 1 as R63 279.57. The same amount is reflected at the foot of page 3 which is the last page of the statement of account. After taking the payment of R 40,000.00 into account, the respondents' indebtedness to the applicant on 9 February 2024 was R23 279.57, and not R63 279.57. After the payment on 26 September 2023, the judgment debt was settled. It appears from the letter of 24 October 2023 that the reason that the respondents have since the payment of the R40 000.00 not paid levies is because their bank accounts are frozen.

[26] In my view the payment of R40 000.00 is in itself an indication that the respondents can pay their debts. Moreover, they are servicing the bond to Nedbank monthly.

[27] A significant amount of cash is held in the respondents' bank accounts. The respondents have disclosed the credit balance and provided proof thereof. In addition, they have disclosed the bank at which the accounts are held. They have also disclosed the bank account numbers. I am satisfied that the respondents have proven that on 11 October 2023 an amount of R164 044.07 was paid into the first respondent's bank account resulting in a credit balance of R193 384.00 on that day. In the answering affidavit which was deposed to on 13 November 2023 the respondents averred that the balance in the first respondents account was R234,120.64 and the balance in the second respondent's account was R42 016.30. Considering that the respondents' bank accounts are frozen, it is highly unlikely that the funds have been depleted.

[28] The respondents estimate the value of their household contents to be R300,000. I am mindful that the respondent has failed to attach a valuation in support of this. Considering that the respondents have been gainfully employed by a single employer, in the case of the first respondent for 33 years and the second

respondent 18 years, it is not implausible that the value of household effects accumulated by the respondents is not insignificant.

[29] The respondents' combined net monthly income exceeds R50 000.00. All things being equal, being employed as educators in the public service, the respondents enjoy job security.

[30] The applicant has regrettably failed to exercise caution in seeking payment of the judgment debt. Had the applicant done so, and applied its mind studiously, the likelihood is that the warrant of execution would have been satisfied in the one case and in the other a provisional sequestration may have been averted and the debt owed paid.

[31] The applicant sent statements of account to an address in Umtata (namely, 1[...] *****la Street Umtata).¹³ It can be inferred from this that they expected the statements to come to the respondents' knowledge at that address. Notwithstanding this the Sheriff was not instructed to execute the warrant of execution at that address especially when the Sheriff's return indicated that Unit 2[...] was occupied by a tenant.

[32] The applicant was unable to serve the sequestration application personally on the respondents. Consequently, it applied for directions as to service. A tracing report electronically generated from the "LexisNexis Windeed XDS Trace" platform on was attached to the application for substituted service. It reflected the respondents' residential address on 15 February 2023 to have been 1[...] *****la Street, North Crest Township, Mthata. This address, and erf 2****, C***** 5100 are reflected as the respondents' residential address and postal address at different times since 2007. No. [...] R***** Street, North R Mthatha is reflected as the respondents' residential and postal address on 19 January 2022 and the address C*r* Location L*****, 5[...] as the residential address on 19 May 2011, 5 December 2011, 12 December 2011 and 3 January 2012. The respondents' employer is also reflected on the document, namely the Eastern Cape Department of Education. The

¹³ CL 02-13, Annexure "E" to the founding affidavit. CL 22-36, Annexure "RA1" to the replying affidavit.

tracing report also identifies the second respondent's mobile number as well as what appeared to be fixed line home and work telephone numbers. A similar document is attached in respect of the first respondent.

[33] There is no explanation why the applicant made no efforts to trace the respondents earlier than 10 April 2023.

[34] Armed with the "LexisNexis Windeed XDS Trace" the applicant knew that the respondents resided at either 1[...] *****la Street, Mthata, erf 2****, C***** P*** or No. [...] R***** Street, North R Mthatha. Despite this, the applicant applied for an order that the application for the sequestration of the respondents' estate may be served at Unit 2[...] when the Sheriff in his return of service of 23 August 2022 had indicated that the Unit is occupied by a tenant. Furthermore, the applicant sought an order that the notice of the sequestration application may be given to the first respondent through a text message transmitted to a mobile number which was not the most recent mobile number on the "LexisNexis Windeed XDS Trace" but one which was in use on 4 September 2011.

[35] The applicant also sought and obtained an order authorising the service of the application amongst others by transmitting it to an e-mail address ¹⁴ on the basis that the parties used the e-mail address to communicate, and it was therefore "likely that the application will come to the [their] attention..." However, the application was not transmitted to that e-mail address. Instead of transmitting the application to the email address lu*****@gmail.com it was transmitted to lj*****@gmail.com. Needless to say, the respondents did not receive the application transmitted to the latter e-mail address. If the applicant had exercised care from the outset the respondents may have paid the judgment debt earlier.

[36] In my view, there are special circumstances in this case for me to exercise my discretion in the respondents' favour.

Section 9(5) of the Insolvency Act

¹⁴

Lu*****@gmail.com.

[37] Section 9(5) of the Insolvency Act permits a court hearing a sequestration application to make any order in the matter as in the circumstances appears to be just. It provides as follows:

“The court, on consideration of the petition, ...may make such other order in the matter as in the circumstances appears to be just.”

[38] The substantial credit balance in the first respondent's Standard Bank account is one factor that has played a greater role than any other in arriving at the decision not to finally sequester the respondents. This being so, the funds in the account should be preserved for the applicant's benefit.¹⁵ This will not happen if the rule *nisi* is discharged without the funds in the respondents' bank accounts being protected. However, I have not heard submissions on whether this is permissible, and can be achieved under section 9(5) and how, and more importantly what the scope of a court's powers under section 9(5) are.

[39] In order to protect the applicant's interests, I intend extending the rule *nisi* until I have heard the parties on a just order to accompany an order discharging the rule *nisi*, or until the parties have agreed to an order preserving the applicant's rights, and I have made such order. Insofar as the costs of the application are concerned, the parties are afforded an opportunity to make further submissions before I decide who should bear the costs of the application.

[40] Accordingly, I make the following order:

The rule *nisi* is extended to Thursday, 15 August 2024 at 10h00 before me. The applicant and respondents must deliver heads of argument by 16h00 on 12 August 2024 on (i) whether it is permissible to protect the funds in the Standard Bank accounts to pay the debt owed to the applicant, and if so what a suitable order to accompany an order discharging the rule *nisi* would be; and (ii) who should bear the costs of the application.

¹⁵ Cf. *Walsh v Kruger* 1965 (2) SA 756 (E).

S K HASSIM

Judge: Gauteng Division, Pretoria
(electronic signature appended)

Applicant's Counsel: Adv Z Schoeman

Respondent's Counsel Adv A Nase

Date of hearing: 22 July 2024

Date of Judgment: 6 August 2024

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 August 2024.