

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

CASE Number: 015844/2022

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

In the matters between: -

THE BODY CORPORATE OF ACUBENS

APPLICANT

And

K FOFORANE

RESPONDENT

JUDGMENT

KEKANA, AJ

INTRODUCTION

[1] This is an opposed application for the provisional sequestration of the respondent based on the respondent's alleged inability to satisfy a judgment obtained by the applicant against the respondent in the Magistrates Court District of Tshwane Central held at Pretoria under case number 39001/2021.

BACKGROUND

[2] On 20th April 2022, the applicant, a body corporate, obtained a default judgment against the respondent in the sum of R38 660.93 for arrear levies on the

respondent's property, Unit 1[...] A[...], cnr Reitspruit and Honey Buzzard Street, Kosmosdal, Centurion. A warrant of execution was issued and was served on the respondent personally on the 21st June 2022. The sheriff delivered a *nulla bona* return to the applicant.

[3] The applicant's basis for this application is that the respondent has committed an act of insolvency. The respondent opposes the sequestration application arguing that he is not insolvent since the value of his assets exceeds his liabilities.

ISSUE FOR DETERMINATION

[4] The issue for determination is whether the respondent is insolvent within the meaning of the Insolvency Act 24 of 1936 (the Insolvency Act).

THE LAW

[5] It is trite that the applicant for the sequestration of the debtor's estate must meet the prescribed requirements set out in section 10 of the Insolvency Act which provides as follows:

"If the Court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie*—

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section 9; and
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may make an order sequestrating the estate of the debtor provisionally."

[6] Section 9(1) of the Insolvency Act provides that a creditor who has a claim of not less than R100.00 against a debtor who has committed an act of insolvency or is insolvent may petition the court for the sequestration of the estate of the debtor.

SUBMISSIONS

[7] The judgment obtained by the applicant against the respondent is not in dispute.

[8] The applicant relies on two acts of insolvency, one being that the respondent failed to satisfy the judgment or to indicate to the sheriff disposable property sufficient to satisfy the judgment, prompting the sheriff to issue a *nulla bona* return; and secondly that the respondent attempted to dispose of the immovable property which would prejudice his creditors or have the effect of preferring one creditor, in this case the mortgagor, above other creditors.

[9] The respondent contended that the applicant must show that the respondent is insolvent for the court to consider this application. In this regard, the respondent submitted that his assets exceed his liabilities and therefore he is not insolvent.

[10] Regarding the third requirement, the applicant submitted that although the applicant is not aware of the respondent's other creditors, they were aware that the immovable property owned by the respondent is mortgaged. The applicant contended that there is reason to believe that if the respondent's estate is sequestrated it will be to the advantage of his creditors. The applicant obtained a valuation of the respondent's property and the forced sale value was determined to be R900 000. It is on this basis that the applicant submits that if the immovable property is sold, it will result in

ANALYSIS

[11] It is not in dispute that the respondent is indebted to the applicant in the sum of R38 660.98 which satisfies the requirement in terms of section 10(a) of the Insolvency Act.

[12] Regarding the second requirement, the sheriff recorded that the respondent "*declared that he has no money or disposable property wherewith to satisfy the said warrant...*". He further recorded that the respondent declared that he does not own any immovable property which is executable. The sheriff delivered a *nulla bona* return as a result.

[13] The respondent's conduct in this regard constitutes an act of insolvency as contemplated by section 8(b) of the Insolvency Act which provides as follows: "A debtor commits an act of insolvency if a Court has given judgment against him and

he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment". The respondent's contention that the applicant can only succeed if it can prove that the respondent is insolvent, can therefore not be sustained. In my view, absent any evidence to impeach the sheriff's return, the applicant established that the respondent committed an act of insolvency contemplated in section 8(b).

[14] The final requirement is that the applicant must convince the court that sequestration of the respondent's estate will benefit the creditors.

The applicant argues that selling the immovable property is likely to yield a substantial dividend based on its valuation. Although the respondent initially denied ownership of the immovable property in his affidavit, he subsequently acknowledged that he was indeed the owner. To support his claim of having sold the property, he included a notice of sale in execution favouring Nedbank Limited with his affidavit. Aside from denying ownership, the respondent did not provide the court with information regarding his creditors, debts, or assets. This omission prevents the court from concluding that the applicant's assertions are inaccurate. Therefore, there is no evidence to contradict the applicant's claim that realizing the value of the immovable property would produce a significant dividend for the creditors.

[15] As Innes CJ stated in *De Waard v Andrew & Thienhaus Limited* 1907 TS 727 at 733, when a person commits an act of insolvency, he must expect his estate to be sequestrated. He further noted that the court has a discretion whether to grant the order or not. In exercising this discretion, the condition of a man's assets and his overall financial situation are significant factors to consider

[16] I am satisfied that the applicant established a claim as referred to in section 9(1) of the Insolvency Act; secondly that the respondent committed an act of insolvency as contemplated in section 8(b) of the Insolvency Act and thirdly that there is reason to believe that the sequestration of the respondent's estate will be to the advantage of the creditors. However, this does not conclude the matter. A further requirement is

that even if the court is satisfied, it still must exercise its discretion whether to grant or deny the order, taking in to account all the relevant facts.

[17] At the hearing of this matter, the respondent presented several defences that were not included in the answering affidavit. He did not address the applicant's claim regarding the escalating debt, the judgment that had been granted against him, or the *nulla bona* return. Furthermore, he failed to disclose his financial situation. It was not part of his case before this court that he had settled the overdue levies.

[18] Counsel for the respondent requested the court to afford the respondent additional time to pay the debt, stating that the respondent was in the process of negotiating a salary with a prospective employer. This statement was made from the bar, and no admissible evidence was submitted to support it. Without relevant information that would allow the court to determine whether to exercise its discretion in his favour, the court finds that the applicant is entitled to the order it seeks.

The following order is made:

1. That the estate of the respondent is placed under provisional sequestration.
2. That the respondent is called upon to advance the reasons, if any, why the Court should not order final sequestration of the said estate on 17 February 2025 at 10h00 or soon thereafter as the matter may be heard.
3. The costs of this application shall be costs in the sequestration.

P D KEKANA
ACTING JUDGE OF THE HIGH COURT

Date of hearing : 17 February 2025

Date of Judgment: 28 February 2025

Appearances

For the Applicant:

Adv D Brookdryk

071 296 9791

duan@clubadvocates.co.za

Instructed by Attorneys:

Rousseau and Rousseau Attorneys
012 998 7316

For the Respondent:

Unknown

Instructed by Attorneys:

Botha Massyn and Thobejane Associated
c/o Malebye Motaung Mtembu inc
011 970 3600

