

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2019-28191**

(1)	REPORTABLE: YES / ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ ☒ NO
(3)	REVISED: YES/NO
<u>31 July 2025</u>	<u>[Signature]</u>
DATE	SIGNATURE

In the matter between:

MAREE, PATRICK NO

First applicant

KHAN, ISMAIL JAFFER NO

Second applicant

and

KAYIWA, KAYANJA NAKIRENZI

Respondent

And in the matter between:

KAYIWA, KAYANJA NAKIRENZI

Applicant

and

MAREE, PATRICK NO

First respondent

KHAN, ISMAIL JAFFER NO

Second respondent

And in the matter between:

NEDBANK LTD

Applicant

and

KAYIWA, KAYANJA NAKIRENZI

First respondent

MAREE, PATRICK NO

Second respondent

KHAN, ISMAIL JAFFER NO

Third respondent

JUDGMENT

HA VAN DER MERWE, AJ:

- [1] On 25 November 2019 Van der Walt AJ granted an order in an application brought by Ms Kayiwa for the voluntary surrender of “her” estate (the reason for the inverted commas should be apparent from what follows below).
- [2] What was not mentioned in her founding affidavit in the voluntary surrender application is that she was married at the time (and still is) to Mr Kayiwa, in community of property. As the marriage is in community of property, there is only one joint estate. In order to address this, the trustees appointed by the Master following Van der Walt AJ’s order (Messrs Maree and Khan NNO) (“the trustees”) brought an application for an order declaring that the result of that order is that the joint estate of Mr and Ms Kayiwa was, as a matter of law, sequestrated and not only Ms Kayiwa’s estate as the order would suggest.
- [3] The application by the trustees prompted Mr Kayiwa to bring an application for the rescission of Van der Walt AJ’s order.
- [4] In the midst’s of the trustees’ application for a declaratory order and Mr Kayiwa’s rescission application, Nedbank Ltd (“Nedbank”) brought an application for the sequestration of Mr Kayiwa’s estate. On 4 October 2023 a provisional sequestration order was granted, that was made returnable on 5 February 2024. The return date was extended to 27 May 2024, but that order lapsed for non-

appearance on the extended return date, as Mr Matsiela who appeared for Nedbank conceded. Nedbank's application is therefore not before me.

- [5] What I have before me is Mr Kayiwa's rescission application and the trustees' application for a declaratory order. As it is common cause that Mr and Ms Kayiwa's marriage is one in community of property, if the rescission application fails, it follows that the declaratory order should be granted, otherwise the entire matter would be left in an untenable state of uncertainty. I return to this topic below.
- [6] Mr Kayiwa's case in the rescission application is framed as one in terms of rule 42. I do not perceive rule 42 to be his appropriate remedy. Sequestration orders, unlike other orders, do not affect merely the immediate parties to such orders. It also affects, for instance, the rights of the trustees appointed by the Master and the creditors of a debtor's estate. As such, Mr Kayiwa ought to have located his case in section 149(2) of the Insolvency Act 24 of 1936. The discretion of a court to set aside an order for the voluntary surrender of an individual's estate in terms of section 149(2) is wide enough to also include the grounds on which a rescission may be obtained in terms of rule 42 and at common law, so to that extent the identification of the proper remedy is somewhat academic. What is however important, is to pay attention to manner which our courts considered the interests of parties other than the immediate parties to an order. For that one must look to the cases decided under section 149(2).
- [7] Mr Mahlanga is undoubtedly correct that Van der Walt's AJ's order should not have been granted. In terms of section 17(4) of the Matrimonial Property Act 88 of 1984, an application for the voluntary surrender of a joint estate must be brought by both spouses. That is however not the end of the matter.
- [8] Section 149(2) of the Insolvency Act is a matter of this Court's discretion (*Storti v Nugent* 2001 (3) SA 783 (W); *Herbst v Hessels NO* 1978 (2) SA 105 (T); *Asmal Wholesalers (Pty) Ltd v Dawood*; *Marshall Industrials Ltd* 1963 (1) SA 250 (N)). As pointed out above, it requires a consideration of the interests of not only the debtor, but also of the various other parties that may be affected by the setting aside of a sequestration order. As such, it seems to me that is not as simple as

Mr Mhlanga argued that if I am satisfied that that requirements of rule 42 are met, then it follows that that I should grant the rescission application.

[9] It seems to me as if I ought to exercise my discretion against granting the rescission application. For one, there is nothing in Mr Kayiwa's affidavits to suggest that the joint estate is not insolvent. In her founding affidavit in the voluntary surrender application, Ms Kayiwa sets out "her" (a misnomer of course since it is now clear that there is only one joint estate) liabilities to come to R1 130 000, comprising of an immovable property over which a bond is registered in favour of Nedbank. It is improbable that the joint estate is without other assets; however, I am bound to decide the application on the facts presented by Mr Kayiwa. The liabilities mentioned in her founding affidavit are a debt owed to Nedbank in the amount of R930 000 and what is referred to as "convenient creditors", which in context can only mean concurrent creditors, in the amount of R283 000. On her affidavit therefore, "her" estate is insolvent to the extent of R83 000. In his affidavit in the rescission application, Mr Kayiwa does not take issue with these figures. He does not reveal any additional assets of the joint estate, nor does he have anything to say about the liabilities referred to in Ms Kayiwa's affidavit. That being so, on the facts before me, the joint estate is as insolvent as was presented in Ms Kayiwa's affidavit.

[10] There are other factors that to my mind militate against granting the rescission application. Mr Kayiwa's version is that he learned of Van der Walt AJ's order only when the trustees' application came to his knowledge, during June 2022, more than two and a half years later. That seems unlikely, but while that is not impossible, what is more significant is that nowhere does Mr Kayiwa explain what passed between him and his wife when he did discover that, in his words, she obtained Van der Walt AJ's order by fraudulent means. I cannot imagine that there would not have been at least a discussion between Mr and Mr Kayiwa once he came to know of her fraud, yet he makes no mention of such a discussion. This lacuna in his version is particularly pertinent in that, as Mr Groenewald (who appeared for the trustees) argued, in order for Mr Kayiwa to state that his wife's application was fraudulent, requires of her to have had the intention to mislead. Mr Kayiwa states in the affidavit, for instance that the voluntary surrender

application was “deliberately hidden” from him, apart from his calling that application fraudulent. For him to be believed therefore, requires of him to have formed an insight into her intentions, which he could not come to without at least discussing the matter with her. If not, then Mr Kayiwa’s allegations of fraud are made without foundation.

[11] Even if the application were to be decided solely on rule 42, it would remain a matter of a discretion, as Mr Matsiela correctly pointed out.¹ Under rule 42 I would have exercised my discretion in the same way.

[12] As the rescission application is to be dismissed, the declaratory order sought by the trustees should be granted. Here it is important to keep in mind that it is, strictly speaking, a misnomer to speak of a person as having been sequestrated. People are not sequestrated, only ever the estate of a person.² It is therefore wrong to approach the matter as if only Ms Kayiwa was sequestrated or that an order is required for Mr Kayiwa to be sequestrated. The joint estate, being the only estate in issue, was sequestrated. Thus all the declaratory order sought by the trustees will do, is to make the sequestration of the joint estate clear.

[13] It is discomfoting to allow an order to stand that should not have been granted. However, discomfort must yield to principle. As there is only one joint estate, in law, Van der Walt AJ’s order placed the joint estate in sequestration. There is no question that Van der Walt AJ had the substantive jurisdiction to grant the order. In the result that order stands until set aside.³ For the order to be set aside, a proper case must be made out, which Mr Kayiwa has failed to do.

[14] As for costs, Mr Groenewald did not seek an order as to costs against Mr Kayiwa if I am with him, because in the circumstances of this matter, such an order would be pointless.

[15] I make the following order:

¹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) para [53]

² *Acar v Pierce & Other Like Applications* 1986 (2) SA 827 (W) at 829I

³ *Department of Transport and others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); *Municipal Manager, OR Tambo Muni v Ndabeni* 2023 (4) SA 421 (CC) at para [23] – [27]

- (a) The rescission application brought by Kayanja Nakireng Mark Kayiwa is dismissed;
- (b) It is declared that the joint estate of Maureen Dimakatso Kayiwa and Kayanja Nakireng Mark Kayiwa was sequestrated by the order of Van der Walt AJ dated 25 November 2019, of which estate Patrick Maree and Ismail Jaffer Khan NNO are the trustees;
- (c) The costs shall be costs in the sequestration of the joint estate of Maureen Dimakatso Kayiwa and Kayanja Nakireng Mark Kayiwa.



H A VAN DER MERWE
ACTING JUDGE OF THE HIGH COURT

Heard on: 29 July 2025

Delivered on: 31 July 2025

For the applicant in the rescission application, the respondent in application for a declaratory order and the application brought by Nedbank Ltd: Adv Mhlanga instructed by Precious Muleya Attorneys.

For the applicants in the application for a declaratory order and the second and third respondents in the rescission application: Adv J H Groenwald instructed by Haasbroek & Boezaart Inc.

For Nedbank Ltd: Adv L Matsiela instructed by Van Deventer Dlamini Inc

