

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2023-033713

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
12 August 2025	
DATE	SIGNATURE

In the matter between:

TEMPLAR CAPITAL LTD

Applicant

and

PHILLIPPUS JACOBUS VAN DER WESTHUIZEN

Respondent

JUDGMENT

CRUTCHFIELD J

- [1] The applicant, Templar Capital Ltd, seeks the sequestration of the estate of the respondent, one Phillippus Jacobus van der Westhuizen, a major unmarried male. The applicant is private company incorporated under the company laws of Bermuda.
- [2] The applicant brings this application in terms of section 9(1) together with s10 of the Insolvency Act, 1936 ("the Act"). The applicant alleges that it has met the

requirements of s10(a) to (c) of the Act in that; the applicant has a liquidated claim of not less than R100.00 against the respondent, the latter has committed an act of insolvency in terms of s8(b) of the Act, the respondent is factually insolvent, and there is reason to believe that it will be to the advantage of creditors if the respondent's estate is sequestrated, provisionally at this stage.

- [3] The applicant relies upon an *allocatur* issued by the Taxing Master pursuant to a costs order made in terms of a judgment delivered by Keightly J, as the learned judge then was, on 10 December 2020. The Taxing Master issued the *allocatur* in the sum of R991 981.60.
- [4] The applicant's two demands for payment of the amount of the *allocatur* were not met by the respondent. Thereafter, the applicant attempted to execute through the Sheriff against the respondent's property. The Sheriff returned a *nulla bona* return, the respondent having informed the Sheriff that he "*has no money or disposable property wherewith to satisfy the said warrant*".
- [5] Subsequent to the hearing before me, the applicant delivered an application to file a supplementary affidavit. The respondent opposed the application to deliver the further affidavit. I deal with this issue later in the judgment.
- [6] The respondent declined to deliver an answering affidavit in the sequestration proceedings electing instead to deliver a notice in terms of Rule 6(5)(d)(iii) ("the notice"), articulating various alleged points of law that he intended to raise at the hearing. The respondent delivered the notice outside of the 15-day time period permitted by the Rules and absent an application for condonation in respect of the lateness. The applicant submitted that it was appropriate to disallow the notice for those reasons. Notwithstanding, I am minded to permit the notice and to deal with it on the merits of the issues raised in the notice.
- [7] This being the provisional stage of sequestration proceedings, the applicant must demonstrate that it meets the requirements of s9 and s10 of the Act, on a *prima facie* basis.

- [8] It is apposite for me to deal briefly with the effect upon these proceedings of the respondent's failure to deliver an answering affidavit and his reliance upon the notice alone.
- [9] This court in *Ngomane v Ngomane & Others*¹, in circumstances where the respondent delivered a notice in terms of Rule 6(5)(d)(iii) only, Gilbert AJ reiterated that the election to deliver a notice in terms of Rule 6(5)(d)(iii) had important consequences, including that the averments in the founding affidavit are taken as established facts as there is no competing factual version.
- [10] The same applies in this matter before me. There is no competing factual version and I must accept the applicant's averments in the founding papers, as established facts.
- [11] So too, in *Minister of Finance v Public Protector & Others*² where the court also dealt with a notice in terms of Rule 6(5)(d)(iii) and declared that such a notice is not a pleading but merely a notice declaring the respondent's intention to rely on certain specified points of law, allegedly dispositive of the disputes between the parties. The notice being neither a pleading nor an affidavit, a respondent relying on such a notice may not plead facts or produce evidence in support of the points of law raised in the notice, and which ought to have been placed before the court by way of an affidavit.
- [12] In the absence of an answering affidavit, a court is at liberty to deal with the matter on the points of law raised and the evidence alleged in the founding affidavit. In circumstances where the respondent relies solely on the notice, the averments in the founding affidavit "*must be taken as established facts by the court*".³
- [13] Accordingly, in the light of the respondent's failure to deliver an answering affidavit in this matter, the applicant's allegations are to be accepted by me as established facts for the purposes of this application.

¹ *Ngomane v Ngomane & Others* 2021 JDR 2491 (GJ) at [4] and [5].

² *Minister of Finance v Public Protector & Others* 2022 (1) SA 244 (GP) at [15]

³ *Minister of Finance id*; *Boxer Superstores Mthatha & Another v Mbenya* 2007 (5) SA 450 (SCA) at 452F-G; *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) at 514I-G.

- [14] Turning to the statutory requirements under the Act, the applicant established an indebtedness by the respondent in favour of the applicant in the amount of the *allocatur*, being R991 981.60 ("the debt"). The debt is undisputed and thus the applicant established the respondent's indebtedness sufficiently for the purposes of s10(a) of the Act read together with s9(1). Furthermore, the applicant holds no security for the respondent's indebtedness to the applicant.
- [15] Section 10(b) of the Act provides that the applicant must demonstrate *prima facie* that the respondent committed an act of insolvency or is insolvent. The requirement is disjunctive, meaning that proof on a *prima facie* basis of either the respondent being factually insolvent or having committed an act of insolvency, is sufficient for the purposes of granting a provisional sequestration order. The applicant relies on both the respondent's factual insolvency and an act of insolvency committed by the respondent. The respondent alleges in the notice that the applicant does not meet either requirement of s10(b).
- [16] In respect of the alleged act of insolvency by the respondent, the applicant relies on the *nulla bona* return delivered by the Sheriff upon attempting to execute the *allocatur*. The applicant contends in respect of the respondent's alleged insolvency, that on the respondent's own version there is an undisputed debt of R991 981.60 and that the respondent has no money or disposable property to satisfy the warrant.
- [17] Pursuant to two demands for payment that were not met by the respondent, the Sheriff, on the instructions of the applicant, attempted to execute against the writ of execution on two occasions. The first attempt was unsuccessful as the Sheriff could not locate the respondent at the given address. The Sheriff, on the second occasion, served the writ on the respondent personally.
- [18] The respondent, notwithstanding demand by the Sheriff, failed to satisfy the debt or indicate disposable property sufficient for the purposes of satisfying the debt, to the Sheriff.
- [19] The Sheriff recorded that the respondent informed the Sheriff that "*he has no money or disposable property wherewith to satisfy the said warrant.*" The

Sheriff's return of service, in terms of s43(2) of the Superior Courts Act, 10 of 2013, is *prima facie* proof of its content.

- [20] There is nothing from the respondent in terms of an answering affidavit, to dispute or deny the contents of the return of service. The Sheriff noted on the return⁴ that no disposable assets were pointed out to him and nor could sufficient disposable assets be found despite a diligent search and enquiry being conducted by the Sheriff. Furthermore, the Sheriff recorded that the respondent was requested to declare whether he owned any immovable property that was executable. At the end of the return, the Sheriff noted that the defendant does not have assets.
- [21] Accordingly, the Sheriff was unable to find sufficient disposable property to satisfy the debt and the Sheriff stated that his return was one of *nulla bona*.
- [22] Subsequently, the respondent deposed to an affidavit that was remitted to the applicant's attorneys of record in which the respondent contended that he was a businessman and a director of a company by the name of Ingwesol, that the latter company leased the immovable property where the Sheriff located the respondent, that the lessors of the property owned various of the immovable property located on the premises, which movables were included in the lease agreement. Furthermore, the respondent's partner at the time, also deposed to an affidavit in which she alleged that she owned certain movables in the premises.
- [23] The applicant placed reliance on the content of the *nulla bona* return in terms of the founding papers. As already stated, the content of the founding affidavit must be accepted by me as established fact.
- [24] Insofar as the respondent argued that the *nulla bona* return did not show that he did not have any immovable property and that the *nulla bona* return referred to the respondent not having movable assets only, the Sheriff recorded in the return that the respondent was specifically asked to declare if he owned any immovable property that was executable. Thereunder, towards the bottom of

⁴ CaseLines 01-81.

the return, the Sheriff stated that the respondent did not have assets, this being an allegation that the applicant repeats in the founding affidavit. Accordingly, the Sheriff asked the respondent specifically in respect of his ownership of immovable property and the Sheriff recorded that there was not sufficient disposable property, that being movable and immovable property, to meet the debt.

- [25] Whatever complaints the respondent may have in respect of the *nulla bona* return, the applicant alleges in the founding papers, these being self-standing averments in the founding affidavit, that the respondent does not have assets sufficient to meet his indebtedness to the applicant. Furthermore, as already stated, in terms of s43(2) of the Superior Courts Act, the *nulla bona* return is *prima facie* proof of its content.
- [26] Furthermore, the respondent did not put up security for the indebtedness, the applicant says that it does not hold any security and that the respondent's indebtedness remains unpaid. The applicant says so in the founding affidavit and there is no contrary version from the respondent.
- [27] In respect of the respondent's argument that the *nulla bona* return does not show that he has insufficient immovable property to satisfy the judgment, the Sheriff specifically enquired in terms of the respondent's ownership of immovable property. Additionally, insofar as the Sheriff refers to there being insufficient disposable property available to meet the demand, "disposable property" in terms of s2 of the Act is defined as including both movable and immovable property.
- [28] Accordingly, the respondent's argument that the applicant did not show that the respondent holds immovable property sufficient to satisfy the debt, must fail.
- [29] In the circumstances, given that the requirement at this stage of the proceedings is a *prima facie* case, the applicant has met the requirement to show that the respondent *prima facie* is insolvent.

- [30] As regards the act of insolvency relied upon by the applicant, whilst it is sufficient for purposes of a provisional sequestration order that I have found that the respondent *prima facie* is insolvent, I intend to deal, in addition, with the act of insolvency upon which the applicant places reliance.
- [31] The applicant alleges that the respondent's failure to satisfy the judgment upon the demand of the Sheriff, or to indicate disposable property sufficient to satisfy the judgment, or that the Sheriff did not find sufficient disposable property to satisfy the judgment, meets the requirements of s8(b) of the Act for purposes of the respondent committing an act of insolvency.
- [32] The respondent contends that the *nulla bona* return is stale, given that it is dated more than six months ago, on 1 February 2023. The respondent contends further that the applicant did not depose to an affidavit to the effect that the respondent's circumstances remained unchanged from the position reflected in the Sheriff's *nulla bona* return dated 1 February 2023. Nor did the applicant bring any evidence to show that the respondent's financial position remained unchanged.
- [33] The applicant issued the application on 17 April 2023 and a date on the opposed motion roll was obtained initially for 19 July 2024.
- [34] The provisions of the Act do not require that the *nulla bona* return be dated within six months and if not so dated, that the applicant must demonstrate that the respondent's circumstances remain unchanged. This is, however, a practice that has arisen in the Gauteng Division but it is not a statutory requirement for the purposes of granting a provisional sequestration order.
- [35] The respondent argued that it is not for the respondent to inform this Court that there has or has not been a change or an improvement in his financial circumstances. Such information must be placed before the Court by the applicant.
- [36] The respondent did not raise this issue in the notice but the respondent's counsel, in the best traditions of the Bar, informed the applicant's counsel that he would raise the point, on the afternoon prior to the hearing. As a result, the

applicant, subsequent to the hearing and during April 2025, launched the interlocutory application referred to earlier for leave to deliver the supplementary affidavit dealing with the issue.

- [37] The respondent did not file an answering affidavit but objected to the supplementary affidavit being admitted for purposes of this application. I considered the application for leave to deliver the supplementary affidavit although I did not hear argument in that regard.
- [38] It is important to view the respondent's argument in respect of the *nulla bona* return being stale and the applicant's failure to bring any information demonstrating that there was no change in the respondent's financial circumstances, in the context of these proceedings. This application is a hostile sequestration application. The applicant, in its founding affidavit, says that the debt is unpaid and that the applicant holds no security for the debt. The applicant, given the nature of this hostile application, does not have access to the respondent's financial position or details thereof and is confined to what is available on public platforms in respect of the respondent's circumstances.
- [39] I accept that if the respondent in the interim, since the issue of the application, had made payment towards the debt, the applicant would have deposed to a supplementary affidavit informing the Court thereof that payments towards liquidating the debt had been made. This has not transpired. Furthermore, the respondent as already noted, has not deposed to any affidavit in the proceedings and there is nothing before me from the respondent to the effect that he has made payment.
- [40] Accordingly, on the papers as they stand before me, there is nothing to indicate an improvement or a change in the respondent's financial position, different to that reflected in the *nulla bona* return of the Sheriff.
- [41] The Act does not require confirmation of the respondent's financial position as reflected in the *nulla bona* return in circumstances where the return is older than six months. Notwithstanding, I accept that this is a salutary practice. However, there is nothing in the Act that says that in the absence of an applicant placing information before a court showing that there is no change in

the respondent's circumstances, notwithstanding that the return is stale, that the applicant should be disqualified on that point alone, from being found to have met the requirements of a provisional sequestration order.

- [42] Practice, and this is a rule of practice only, does not bind judicial discretion, and certainly cannot serve to amend or vary the statutory requirements set out in the Act. The fact that practice does not bind judicial discretion applies particularly in a matter such as this where not only have there been multiple delays as a result of the respondent failing to act timeously within the context of contentious litigation but there are substantial delays inherent in the system operating in this court, pursuant to the workload and the very high number of matters being processed through the system. This fact alone, the system that operates within our courts in respect of opposed motion proceedings, makes it unlikely if not impossible for a *nulla bona* return in opposed proceedings to be less than six months old.
- [43] In addition, the applicant is an arm's length creditor. The applicant has no knowledge of the respondent's financial circumstances other than what appears on public platforms and on the papers before me.
- [44] The respondent, furthermore, declined to furnish any information in respect of his financial circumstances and did not demonstrate assets to satisfy the judgment.
- [45] Accordingly, on the facts before me, the respondent *prima facie* does not have assets sufficient to satisfy the debt. In those circumstances and in the context of this matter overall, the applicant has discharged the burden of demonstrating *prima facie* that the respondent's financial position has not improved since the Sheriff provided the *nulla bona* return. Accordingly, I reject the respondent's reliance on the *nulla bona* return being stale.
- [46] In the circumstances of this matter, the interests of justice are served by my condoning the absence insofar as it is necessary to do so, of an affidavit or any further information from the applicant to the effect that the respondent's circumstances are unchanged.

- [47] The consequence thereof is that the applicant is entitled to rely on the *nulla bona* return for the purposes of s8(b) of the Act and the applicant *prima facie* has met the requirements of an act of insolvency committed by the respondent.
- [48] Accordingly, I decline to allow the applicant to deliver the supplementary affidavit aforementioned. In my view, on the papers before me, the supplementary affidavit is unnecessary for purposes of determining this application.
- [49] In respect of s10(1) of the Act, an advantage to creditors, the applicant does not have access to the respondent's financial circumstances save as set out on publicly available platforms. As far as the applicant knows, it is the sole creditor to the respondent's estate. The applicant is not obliged to set out a rands and cents calculation of the benefit to creditors that will follow in the event of a provisional sequestration order.
- [50] The applicant states that the respondent is a director of 17 companies from which, in the ordinary course, the respondent stands to receive a salary. The applicant attaches a copy of the CIPC search reflecting that the respondent is a director of 17 companies and a resigned director of five companies. Those are undisputed facts before me. I can rely on those facts for the purposes of determining whether or not there is *prima facie* a benefit to creditors.
- [51] The applicant alleges in addition to the salary that the respondent likely receives pursuant to his directorship of the 17 companies, that there is a possibility of the respondent holding shares and receiving dividends as a result of the shareholdings. In my view, it is not necessary for the purposes of demonstrating a benefit to creditors to consider whether or not the respondent may or may not hold shares in the 17 companies of which he is a director.
- [52] The allegations in respect of the respondent being a shareholder in those various companies amount in my view to speculation. There are insufficient facts before me to find that the respondent is a shareholder in any of those companies. I do however have before me the statement from the CIPC search that the respondent is a director of those 17 companies and that is sufficient for a finding in that regard.

- [53] Any salary that may be received by the respondent from the companies of which he is a director can be attached to satisfy the respondent's debt to the applicant once the *concuris* has been established. The applicant knows that the respondent resides in a house leased by Ingwesol, of which the respondent is a director. The respondent says as much. The question that arises is what consideration does the respondent pay to Ingwesol for his occupation of the premises leased by Ingwesol.
- [54] I need only find for the purposes of granting a provisional sequestration order that there is a reasonable prospect that is not too remote, that some pecuniary benefit will result to creditors from the *concuris*. The applicant does not need to prove that the respondent has assets, only that there is a reasonable prospect that is not too remote, of there being a benefit to the creditors.⁵
- [55] Accordingly, the applicant placed sufficient before me to demonstrate that there is a prospect that is not too remote, that a pecuniary benefit will follow and result in favour of the creditors, from an enquiry being held into the respondent's affairs.
- [56] The respondent raised the point that the applicant did not include as an annexure to the founding affidavit, a certified copy of the Sheriff's return of service. The applicant, accordingly, engaged with the Sheriff only to ascertain that the original return had been mislaid. The Sheriff provided a duplicate original, duly certified, and placed before the Court. The respondent argued that it was not good enough for the applicant to produce the duplicate original after the delivery of the founding affidavit and that the duplicate original ought to have been included in the founding affidavit.
- [57] The respondent's stance cannot be countenanced. The respondent had sight of the duplicate original well in advance of the hearing before me and the respondent did not deliver an answering affidavit to the founding papers. The respondent cannot and does not dispute the content of the return of service because it did not file an answering affidavit. In the circumstances, I accept the

⁵ *Stratford & Others v Investec Bank Ltd & Others* 2015 (3) SA 1 (CC).

duplicate original. There is no prejudice to the respondent as a result and nor is there prejudice to the Court as a result thereof.

[58] The last issue that I must address is the delay in the delivery of this judgment. I regret the delay and I apologise to the litigants for the delay. The volume of work that I was expected to deal with during the week of 17 February 2025 was such that it was simply not possible for me to deliver all of the judgments timeously within the 3-month period, that is considered appropriate. Regrettably, this is one of the three judgments that remained outstanding after the expiry of the 3-month period.

[59] In conclusion, having regard to the facts and circumstances set out before me, the applicant has discharged the onus *prima facie* in respect of the requirements of s9 and s10 of the Act and I intend to grant an order in terms of the applicant's notice of motion.

[60] In the circumstances, the following order issues:

1. The estate of the respondent, Phillippus Jacobus van der Westhuizen, is placed under provisional sequestration.
2. The respondent and any other party who wishes to avoid such an order being made final, are called upon to advance reasons, if any, why the Court should not grant a final order of sequestration of the respondent's estate on the 17th day of November 2025 at 10h00 or as soon thereafter as the matter may be heard.
3. A copy of this order must forthwith be served on :
 - 3.1. The respondent personally;
 - 3.2. All employees of the respondent, if any;
 - 3.3. All trade unions of which the employees of the respondent are members, if any;
 - 3.4. The Master; and

3.5. The South African Revenue Service.

4. The costs of the application are costs in the sequestration of the respondent's estate.

I hand down the judgment.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT
PRETORIA

For the Applicant:

Adv J Brewer instructed by Tabacks
Attorneys.

For the Respondent:

Adv Maritz instructed by Attorneys JW
Botes Incorporated.

Date of the hearing:

19 February 2025.

Date of the judgment:

12 August 2025.