IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 5566/2021

In the matter between

THABO JUSTICE MOKOENA **APPLICANT**

and

BONGANI DUNCAN TSHABALALA **RESPONDENT**

In re:

Case no: 5566/2021

In the sequestration application between

BONGANI DUNCAN TSHABALALA **APPLICANT**

and

THABO JUSTICE MOKOENA **RESPONDENT**

Neutral citation: *Mokoena v Tshabalala* (5566/2021) [2025] ZAFSHC 273 (28 August 2025)

Coram: Mhlambi ADJP

Heard: 7 August 2025

Delivered: 28 August 2025

Summary: Application for rescission of provisional and final sequestration orders – ss 9(4A), 11(1) and 11(2A) of the Insolvency Act 24 of 1936 – failure to serve petition on debtor personally.

ORDER

The application is dismissed with costs on a party and party scale including counsel's fees on scale C.

JUDGMENT

Mhlambi ADJP

Introduction

[1] A provisional sequestration order was granted against the applicant on 28 November 2024, and the final order was issued on 9 January 2025. On 24 March 2025, the applicant filed an application for the rescission of both the provisional and final sequestration orders in the following terms:

'1. That condonation be granted to the applicant for the late filing of the application for rescission of the provisional (granted 28/11/ 2024 as well as the final sequestration (granted 9/1/2025) orders granted against the applicant;

2. That the Final Sequestration Order, granted 9 January 2025, for the final sequestration of the applicant's estate be rescinded;

3. That the Provisional Order of Sequestration, granted 28 November 2024- for the provisional sequestration of the Applicant's estate, be rescinded;

4. That leave be granted to the Applicant, to file a notice of intention to: Oppose to; the Respondent's (Applicant in Sequestration application) Application for Sequestration, within five (5) days from date of this order;

5. Respondent to pay the cost of this Application only if the Application is opposed;

6. Further and/ or alternative relief.'

[2] The application is opposed on the basis that the applicant has adopted a shotgun approach and has failed to demonstrate that he is entitled to the relief sought.

Background

[3] The respondent was awarded a costs order after winning a claim for damages against the applicant, and the costs were taxed at R120 789.43. A writ was issued, but the sheriff could not successfully execute it on the movable property because the applicant's girlfriend claimed an interest in it. The assets were released from attachment, and a *nulla bona* return of service was issued. This *nulla bona* return served as the basis for the sequestration

application.

[4] The sequestration application was served on 14 November 2024 on the Municipal Manager of the Thabo Mofutsanyana District Municipality, the applicant's place of employment, and attempted to be served by the sheriff on 6, 9,12, and 19 November 2024 at his residence in Bohlokong, Bethlehem.

The applicant's case

[5] The applicant argues that the orders were mistakenly sought and granted in his absence because neither the application nor the provisional order was personally served on him, and he did not receive notice before being ultimately sequestrated. The rescission is pursued under the Uniform Rules 42(1)(a) and 31(2)(b), the common law, and s 149(2) of the Insolvency Act 24 of 1936 (the Insolvency Act).

[6] The applicant argued that he was not informed about the service of the sequestration application at his workplace nor about the attempted service at his residence on 19 November 2024. He explains that he was neither at his residence in the Bethlehem/Bohlokong district in November or December 2024 because he attended roadshows. He took his annual leave from 20 December 2024 until 8 January 2025, when he returned to Bethlehem. His first workday was on 9 January 2025, when he received the provisional sequestration order. He consulted his attorney on 10 January 2025 and was informed by his attorney on 16 January 2025 that the final sequestration order had already been granted.

[7] He provided his attorney with the necessary funds on 30 January 2025 for the rescission application, which was filed on 14 March 2025. Had he known about the sequestration application, he would have contested it. He is employed and earns enough income to cover his monthly debts, and he is not insolvent.

The respondent's case

[8] The respondent noted that the applicant's main concern was not that the sequestration application and the provisional order were not served according to court rules, but rather that they were not personally served on him. The respondent's argument was that he complied with the provisions of s 9(4A)*(a)* and *(b)* of the Insolvency Act, and the court, after hearing the application, was satisfied that a copy of the application was provided to the

applicant in accordance with that section and Uniform Rule 4(1)(a)(iii). Neither the Act nor Uniform Rule 4 requires that a provisional order of sequestration is personally served on a debtor. The service of a provisional sequestration order is governed by s 11 of the Act.

[9] Failure to effect personal service is not a procedural error because it involves the court's discretion during the hearing. The service affidavit and the return of service submitted to the court demonstrated that the court exercised its discretion in accepting the mode of service in accordance with the rules. It was not permissible for the applicant to argue, within the limits of rule 42(1)(a), that the court should have exercised its discretion differently, and, since personal service was not completed, the order was wrongly sought or wrongly granted.

[10] The applicant failed to demonstrate that the application was made in good faith and that the defence was genuine. Therefore, he did not meet the requirement of good or sufficient cause as specified in both rule 31(2)(b) and the common law. He also did not establish exceptional circumstances that would warrant protection under s 149(2) of the Insolvency Act.

Legal position

[11] Uniform Rule 42(1)(a) states that a court can, in addition to its other powers, *mero motu* or upon the request of any affected party, rescind or change an order or judgment that was mistakenly sought or mistakenly granted without the presence of any affected party. A judgment can only be rescinded under this rule in specific, limited circumstances, such as if it was wrongly granted. Once a judgment has been properly issued, it has finality and cannot be easily overturned.

[12] Uniform Rule 31(2)(b) states that a defendant may, within 20 days of learning about a judgment, apply to the court with notice to the plaintiff to set aside that judgment. The court may, upon showing good cause, set aside the default judgment on terms it finds appropriate. In *Grant v Plumbers*,[1] an applicant must meet the following requirements:

'(a) He must provide a reasonable explanation for his default. If it appears that his default was wilful or caused by gross negligence, the Court should not assist him.

(b) His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.

(c) He must demonstrate that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if

[1] *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-477.

he presents a *prima facie* defence, meaning he states facts that, if proven at trial, would entitle him to the relief sought. He does not need to fully address the merits of the case or provide evidence showing that the probabilities favour him.'

[13] In *Chetty v Law Society, Transvaal* (*Chetty*),[2] it was stated that in terms of the common law, the Court has power to rescind a judgment obtained on default of appearance provided sufficient cause therefor has been shown. The Court continued to state that:

'The term "sufficient cause" (or "good cause") defies precise or comprehensive definition. . . [b]ut it is clear that in principle and in the long-standing practice of our Courts two essential elements [thereof] are: (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and (ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.

It is not sufficient if only one of these requirements is met; for obvious reasons, a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment granted against him, no matter how reasonable and convincing the explanation of his default.' (Footnotes omitted.)

Have the sequestration orders been erroneously granted?

[14] The applicant argued that he qualified for the rescission of the sequestration orders under rule 42(1)(a) because the legislation has standardised the procedure for serving a sequestration application in ss 9(4A)[3] and 11[4] of the Insolvency Act, with the latter requiring

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[2] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) (*Chetty*) at 764I-765C.

[3] (4A)*(a)* When a petition is presented to the court, the petitioner must furnish a copy of the petition-

(i)to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and

(ii) to the employees themselves-

(aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or

(bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;

(iii)to the South African Revenue Service; and

(iv)to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it.

(b) The petitioner must, before or during the hearing, file an affidavit by the person who furnished a copy of the petition which sets out the manner in which paragraph *(a)* was complied with.

[4](1) If the court sequestrates the estate of a debtor provisionally it must simultaneously grant a rule *nisi* calling upon the debtor upon a day mentioned in the rule to appear and to show cause why his or her estate should not be sequestrated finally.

(2) If the debtor has been absent during a period of twenty-one days from his or her usual place of residence and of his or her business (if any) within the Republic, the court may direct that it is sufficient service of that rule if a copy thereof is affixed to or near the outer door of the buildings where the court sits and published in the *Gazette*, or may direct some other mode of service.

(2A) A copy of the rule *nisi* must be served on-

(a) any trade union referred to in subsection (4);

(b) the debtor's employees by affixing a copy of the petition to any notice board to which the employees have

personal service on the debtor. Section 9(4A) (a) requires the respondent to provide a copy of the petition to the debtor. Section 11(2)(A) mandates serving the rule *nisi* on the union, the employees, and the South African Revenue Service. When the court grants a provisional order in terms of s11(2), it also calls on the debtor to show cause on a specific date why the estate should not be finally sequestrated. The sections do not require personal service to be effected on the debtor.

[15] The applicant relied on *Mackay v Cahi* (*Mackay*)[5] and *Nel N.O v Cilliers N.O* (*Nel N.O*),[6] but these two cases do not support the applicant's position. In *Mackay*, it was stated that it is a serious matter if a creditor is granted an order without giving a respondent any prior notice. Such an order should not be granted lightly unless the evidence submitted ex parte is of such a clear and convincing nature that it is reasonable to act on it. In *Nel N.O*, it was stated that where a proper case has been made out, the court's discretion is not restricted from granting a provisional sequestration order without notice to a debtor.

[16] The applicant also relied on *Chiliza v Govender and Another,*[7] and contended that s 9(4A) should be read as being peremptory. In this case, the court stated that:

'In view of the fact that the word "furnish" is expansive and encompasses several forms of notification which may not entail personal service, it seems to me that *the Act prescribed the filing of an affidavit as the most effective way to satisfy a court that the petition has been "made available in a manner reasonably likely to make it accessible" to the listed parties. It is not surprising that s 11(2A) does not contain a similar requirement because the term "serve" usually denotes personal service or "legally delivered, i.e. delivered in accordance with the law so as to notify the person on whom it is served of its contents" or "bestel; oorhanding" to the party itself or its representative, and is usually easy to prove through a return of service, a stamp or a signature of the recipient.* It is only in rare circumstances, usually when proof of service is not apparent on the face of the document, that a court would require an affidavit to prove service. The import of the requirement of an affidavit in s 9(4A) therefore is to provide conclusive proof of compliance with the provisions of the Act, and the fact that s 11(2A) does not require an affidavit to be filed, whilst s 9(4A)*(b)* does, has no bearing on the peremptory nature of the two provisions.'[8] (My emphasis.)

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access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition; and

(c) the South African Revenue Service.

[5] *Mackay v Cahi* 1962 (4) SA 193 (O) at 203.

[6] *Nel N.O and Others v Cilliers N.O* [2008] ZAFSHC 22.

[7] *Chiliza v Govender and Another* [2016] ZASCA 47; 2016 (4) SA 397 (SCA).

[8] Ibid para 11.

[17] In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*,[9] it was stated that when notice of proceedings must be given to a party, and a judgment is granted against that party in their absence without such notice being provided, the judgment is issued wrongly. This is true, not only if the record of the proceedings at the time the judgment is granted shows that proper notice was not given, but also if, despite what the record indicates, proper notice was actually not served. For example, this could happen if the Sheriff's return of service falsely states that the relevant document was served as required by the rules, when in fact it was not. In such cases, the party against whom the judgment is made is not entitled to a ruling based on an error in the proceedings. If, under these circumstances, judgment is granted in the absence of the concerned party, the judgment is incorrect. In this case, the applicant does not argue that no notice was given.

Did the applicant show good or sufficient cause?

[18] In *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 and Others,*[10] the court affirmed the common law requirements espoused in *Chetty*,[11] and stated that these were twofold. First, the applicant must furnish a reasonable and satisfactory explanation for his default. Second, he must show that on the merits he has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in the refusal of the request to rescind.

[19] It was argued, on behalf of the respondent, that the applicant admitted that, apart from denying being insolvent, he did not address his financial situation or his detailed defence against the sequestration application. It is indeed so that this concession was made in the applicant's heads of argument. It was stated that the applicant's case was that he was able to pay his debts, and the application was an abuse of process. In both the founding and replying affidavits, the applicant failed to present a *bona fide* defence to his act of insolvency that resulted in his sequestration.

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[9] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; [2007] SCA 85 (RSA); 2007 (6) SA 87 (SCA).

[10] *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 and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) para 71.

[11] Op cit fn 2.

Section 149(2) of the Insolvency Act

[20] Section 149(2) of the Insolvency Act provides that the court may rescind or vary any order it has made. *Storti v Nugent*,[12] states that this section can be invoked both when the order was not warranted and when it was correctly made, but subsequent factors make rescission or variation necessary or desirable. If it is alleged that the order should not have been granted, the facts must at least support a cause of action for a common-law rescission. Based on the above, it is clear that the applicant has not established a case for the rescission of the sequestration orders under this section.

Conclusion

[21] It is evident that the sequestration orders were not granted erroneously. The applicant failed to show good and sufficient cause for the orders to be rescinded. In the light of the above, I am not persuaded that the applicant has made out a case for the relief sought and the application stands to be dismissed.

Costs

[22] It is trite that the successful party is entitled to the costs. The respondent seeks a special costs order on the scale as between attorney and client for the unreasonableness in the applicant's conduct of the litigation. I am not persuaded that such an order is appropriate and am of the view that costs should be awarded on a party and party scale.

Order

[23] I therefore, make the following order:

The application is dismissed with costs on a party and party scale including counsel's fees on scale C.

[redacted]

MHLAMBI ADJP

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[12] *Storti v Nugent* 2001 (3) SA 783 (W) at 806.

Appearances

For the applicant:	CP Pienaar SC
Instructed by:	Blair Attorneys, Bloemfontein
For the respondent:	PJJ Zietsman SC
Instructed by:	Honey Attorneys, Bloemfontein.