

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 125130/2023

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

In the matter between:

MONAGHAN FARM HOMEOWNERS ASSOCIATION NPC

Applicant

and

ANDILE THWALA

Respondent

Delivered: *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 email and by uploading it to the electronic file of this matter on CaseLines. The date and time for hand-down is deemed to be 10:00 on 19 September 2025.*

JUDGMENT

VAN EEDEN AJ

- [1] More than a century ago, Innes CJ stated the following in *De Waard v Andrew Thienhaus Ltd*:¹

“Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, ‘I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities’. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.”

- [2] Innes CJ might as well have written about the respondent in this matter. The respondent is a member of the applicant homeowners’ association and receives monthly invoices in respect of levies and similar charges for which homeowners are responsible. The respondent has been a member of the applicant since transfer of the relevant immovable property to him during May 2016.
- [3] It appears to be common cause that the immovable property is unencumbered and that it has a value of approximately R4,5 million. But the respondent does not make payment of the monthly invoices that he receives from the applicant. Instead, he makes *ad hoc* payments from time to time when pressured by the applicant to do so.
- [4] And so in 2019 action was instituted against the respondent for payment of the arrears. The litigation ended in a written settlement agreement concluded between the parties and signed on 12 April 2023. It reflects that the respondent was indebted to the applicant in respect of outstanding levies, building levies, CSOS levies, administration fees, reminder fees, water consumption and interest due up to and inclusive of January 2023 in an amount of R676 511.88. It also reflects that the respondent was unable to pay the admitted amount and the parties agreed that he would immediately pay an amount of R150 000.00. The balance would be paid in monthly instalments in the amount of R50 000.00. Interest would be charged on the outstanding balance at 10% per annum from

¹ 1907 TS 727 at 733.

date of signature of the settlement agreement until date of payment of the final instalment, both dates inclusive. If the respondent defaulted on any monthly instalment, the remaining balance would immediately become due and payable and the respondent agreed that the applicant could then proceed with a warrant of execution. Furthermore, the respondent undertook to pay the plaintiff's wasted costs on an attorney and client scale as the agreement between the applicant and its members stipulates.

- [5] The respondent, however, failed to adhere to the terms of the settlement agreement, in consequence of which the applicant returned to court. On 19 September 2023, the settlement agreement was made an order of court.
- [6] Once again, the respondent failed to settle the debt contained in the court order. In the execution process that followed, the sheriff provided personal service of the warrant of execution on 23 October 2023. Still, the respondent did not pay. The sheriff rendered a *nulla bona* return.
- [7] On 27 November 2023, this application was issued. The applicant seeks the sequestration of the respondent, relying on the sheriff's return and actual insolvency. The respondent still did not pay the amount due in terms of the court order.
- [8] The opposed sequestration application came before Fisher J on 26 May 2025, and she granted a provisional order of sequestration. On the return day of 24 July 2025, the matter came before Kairinos AJ, who extended the rule *nisi* and granted leave to the parties to file supplementary affidavits in support of the allegations contained in the sheriff's *nulla bona* return. This appears to have been in consequence of the respondent's contention that he did not fail to point out sufficient disposable property to the sheriff, but that he pointed to the unencumbered immovable property. Supplementary affidavits were duly filed and the sheriff conceded that the return was incorrect for the above-stated reason. The respondent, however, still did not make payment of the full outstanding amount of the court order and continued to oppose his sequestration, contending that there is an abuse of process and that normal

execution proceedings should rather be instituted against him. This is what brings the words of Innes CJ to mind.

[9] Advocate Mushet and Advocate A Huhlwane appeared for the applicant. At the commencement of the hearing on 16 September 2025, Mr Mushet informed me from the Bar that earlier that morning the capital outstanding amount of R28 511.88 had been paid by the respondent. The interest on the judgment debt in the amount of R53 118.45 remained unpaid. Mr T Mahapa appeared on behalf of the respondent and confirmed that the payment as explained by Mr Mushet had been made earlier that morning. The interest remains outstanding, as do the monthly instalments payable which according to the applicant now amounts to R465 480.50. The respondent's response to this outstanding amount is that the amount is not liquidated.

[10] It appears to me that the amount owing is indeed liquidated, certainly at least the interest portion thereof given that the agreement of settlement was made an order of court. The monthly levies are capable of easy ascertainment and if the respondent disputed any of the entries on his account with the applicant, he provided no details thereof in his opposing papers. In fact, it is altogether not clear why the respondent fails to make the necessary monthly payments, other than financial inability. Although he alludes to a dispute between him and the applicant, he failed to provide any details of the alleged dispute. There is, for example, no correspondence evidencing attempts to resolve a dispute. The respondent did not provide any financial information that one would have expected him to reveal. For instance, he did not state where he is employed, what he earns, what assets he has; he has not provided a balance sheet of assets and liabilities and no details of expenditure that one would expect, such as in respect of vehicles, credit cards and telephones. At the end of the day, it is unclear why payment of the court order and monthly invoices were not forthcoming, and he has made no effort to explain his failure to make monthly payments.

[11] The aforesaid facts demonstrate actual insolvency. It appears to me that he also committed an act of insolvency in terms of section 8(g) of the Insolvency Act, 24 of 1936, when he gave notice in the agreement of settlement that he is unable to

pay the admitted debt which underpinned the 2019 litigation, and asked for time to pay same.

[12] The applicant's papers make out a case that there would be a benefit to creditors if the monthly increase in the outstanding amount can be arrested by a trustee. In addition, in my view the investigative powers of a trustee will render benefit to creditors, given the absence of factual information provided in the court papers. Moreover, the immovable property in issue is unencumbered. I am accordingly satisfied that the applicant is a creditor, that the respondent is insolvent and that there is advantage to creditors.

[13] In the premises, I make the following orders:

1. The estate of the respondent is placed under final sequestration.
2. The costs of the application are costs in the sequestration of the respondent, on an attorney and client scale.



H VAN EEDEN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances:

For the Applicant: Adv S Mushet and Adv A Huhlwane instructed by
AJ van Rensburg Inc

For the Respondent: Adv T Mahapa instructed by Crafford Attorneys

Date heard: 16 September 2025

Date delivered: 19 September 2025