



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: 2024-109617

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO [REDACTED]
19 September 2025 DATE SIGNATURE	

In the matter between:

STARBO INVESTMENTS (PTY) LTD

Applicant

and

QUINTEN VAN NIEKERK

Respondent

JUDGMENT

WINDELL J:

Introduction

[1] This is the return date of a rule nisi of a provisional sequestration order granted over the respondent's estate on 26 February 2025. The applicant seeks a final sequestration order. The respondent opposes the application and denies that the statutory requirements have been satisfied.

[2] Section 12(1) of the Insolvency Act 24 of 1936 (the Act) provides that a court may confirm a provisional sequestration order if it is satisfied that:

'(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 sequester the estate of the debtor.'

[3] Once these three elements are shown, the court retains a discretion, but it is a discretion coupled with a duty: in the absence of special circumstances the order ordinarily follows. In *FirstRand Bank Ltd v Evans*,¹ Wallis J explained as follows:

'Once the applicant for provisional sequestration has established on a prima facie basis the requisites for such an order, the court has a discretion whether to grant the order. There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within a class of cases generally described as involving a power combined with a duty. In other words, where the conditions prescribed for the grant of a provisional order of sequestration

¹ 2011 (4) SA 597 para 28.

are satisfied, then in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.'

[4] Against this statutory framework the task of the court is a narrow but important one. It is not to decide the merits of the underlying contractual dispute in all its detail, nor to determine the respondent's ultimate solvency beyond doubt, but to assess whether the applicant has established the three jurisdictional facts—existence of a liquidated claim, an act of insolvency or actual insolvency, and a reasonable prospect of advantage to creditors—and whether any special circumstances justify withholding a final order. It is to these requirements that I now turn.

Debt Owed

[5] The applicant's claim arises from a written agreement of sale concluded on 4 March 2024 for three properties at a purchase price of R4.5 million. In terms of the agreement, the respondent undertook to pay a R400 000 deposit by 30 April 2024 and monthly instalments of R200 000 until the full price was paid by August 2025. He also agreed to pay occupational rental of R30 000 per month, pro rata in advance, and to bear water and electricity charges.

[6] The respondent paid only R260 000 in total and failed to pay the deposit, instalments, occupational rent and municipal accounts (which by June 2024 already totalled R49 455.80). The applicant calculates the amount outstanding at R1 599 456.80 as at September 2024. Although the respondent disputes the quantum and claims that certain charges were inflated or not agreed, he concedes that the R400 000 deposit

remains unpaid. This constitutes a liquidated claim well above the statutory minimum of R100 required by section 9(1) of the Insolvency Act. The respondent, however, contends that the applicant waived its right to demand payment of the R400 000 deposit because the formal demand was issued after the contractual due date.

[7] Waiver is never presumed and requires clear proof that the creditor, with full knowledge of the right, unequivocally intended to abandon it. In *McGenis v RAF*² the court held that waiver must be clearly proved and that the conduct relied upon must be irreconcilable with the continued existence of the right. The Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*³ confirmed that waiver is a matter of intention judged objectively and that persons do not lightly abandon their rights. The onus rests on the party asserting waiver to show that the other party, with full knowledge of the right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.

[8] Measured against these principles, the respondent's allegation falls far short. The mere fact that the applicant issued its demand after the payment period had expired does not establish an intention to abandon the right to the deposit. The defence is therefore rejected out of hand.

² *McGenis v Road Accident Fund* (4486/2005) [2009] ZAKZDHC 34 (14 September 2009) para [12] and [13].

³ 2009 (4) SA 529 (CC) para [80].

Act of Insolvency – Section 8(g)

[9] Section 8(g) of the Insolvency Act provides that a debtor commits an act of insolvency if he gives notice in writing to any creditor that he is unable to pay his debts. The applicant relies on a series of WhatsApp messages sent by the respondent on 12 August 2024—after repeated demands for payment and once the debt had fallen due—in which he stated that he was “busy with a bond” and awaiting the bank’s decision.

[10] The respondent admits that payments were delayed but maintains that he made intermittent payments and was negotiating further arrangements in good faith. He disputes the applicant’s calculation of occupational rent as excessive and contends that the municipal charges are overstated and partly attributable to the applicant or its subsidiaries. He also asserts that the WhatsApp messages merely reflected ongoing financing efforts and not an inability to pay.

[11] These protestations do not alter the objective meaning of the communications. Applying the test in *Court v Standard Bank of SA Ltd*,⁴ the question is not whether the debtor is in fact insolvent, but how a reasonable creditor would understand the message. As the court explained:

‘Whether a particular notice is such as to constitute an act of insolvency within the meaning of s 8(g) depends on the construction of its contents, read as a whole. The question ... is not whether the debtor is in fact unable to pay or whether he is solvent or insolvent. Inability to pay must be

⁴ *Court v Standard Bank of South Africa Ltd.*, *Court v Bester NO* (133/93, 638/93) [1995] ZASCA 39; 1995 (3) SA 123 (AD); [1995] 2 All SA 440 (A) (30 March 1995) at 134A-C.

distinguished from unwillingness to pay. If the debtor is merely saying that he is unwilling to pay, the letter does not constitute an act of insolvency. Construing the written notice involves deciding how the reasonable person in the position of the creditor receiving the notice would understand it.’

[12] Viewed objectively, these communications indicate that the respondent lacked the funds to meet his obligations and was dependent on securing external finance before payment could be made.

[13] The respondent also attempted to register a mortgage bond over properties already subject to the sale agreement. Such conduct, if successful, would have the effect of preferring one creditor over others and reinforces the inference of financial distress.

[14] Taken together, the WhatsApp messages and the attempt to encumber the properties reveal more than a mere unwillingness to pay. They depict a debtor who acknowledges that he does not have the funds to discharge his obligations and who seeks a period of grace to secure alternative financing. A reasonable creditor would understand these statements as notice of inability to pay within the meaning of section 8(g).

[15] Although the respondent denies committing any act of insolvency and argues that he remains asset-rich and in the process of obtaining finance, the objective facts satisfy the statutory requirement. The communications amount to notice of an inability to pay and therefore constitute an act of insolvency as contemplated in the Act.

Advantage to Creditors

[16] The applicant need not prove that a substantial dividend will result. The test is whether there is a reasonable prospect—not too remote—of some pecuniary benefit to

creditors. In *Stratford and Others v Investec Bank Ltd and Another*,⁵ the Constitutional Court explained that a sequestration order may be granted if “there is reason to believe that it will be to the advantage of creditors,” and emphasised that it is enough to show a reasonable prospect of benefit, even if the debtor appears to have no realisable assets. In *Meskin & Co v Friedman*,⁶ the court likewise held that a reasonable prospect of discovering assets or recoverable transactions through the enquiry procedures of the Act is sufficient. The concept of “advantage” is deliberately broad and not limited to a calculable dividend. As *Meskin* observes, the relevant reason to believe exists where, after allowing for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment—however small—to each creditor, unless some alternative process would yield a larger return.

[17] The respondent has admitted owning several immovable properties which he claims are unencumbered. Even if their precise nature or value is uncertain, these properties, together with any movable assets on them, can be investigated, inventoried and realised by a trustee. An enquiry into his financial affairs may also reveal further assets or voidable dispositions for the benefit of creditors. In *Lynn & Main Inc v Naidoo and Another*⁷ it was held that even if no assets are presently known, the prospect that an investigation may uncover recoverable property is sufficient to satisfy the requirement.

⁵ (CCT 62/14) [2014] ZACC 38; 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC) (19 December 2014).

⁶ *Meskin & Co v Friedman* 1948 (2) SA 555 (W).

⁷ 2006 (1) SA 59 (N) para [40].

[18] Despite these admitted holdings, the respondent has placed no facts before the Court to show that sequestration would not advantage creditors. As Hathorn JP observed in *Amod v Khan*,⁸ a debtor is uniquely positioned to provide information about his own financial affairs, while a creditor will usually have little knowledge of the debtor's assets or liabilities. Recognising this imbalance, the Legislature in 1936 made it easier for a creditor to establish advantage to creditors, requiring only a modest evidentiary showing. The respondent, who alone knows the full extent of his estate, has failed to discharge this evidential burden.

[19] The uncontested facts support the applicant's case. The respondent's indebtedness arises from a written sale agreement, the material terms of which are common cause. He has defaulted on his obligations, admitted ownership of unencumbered immovable property adjacent to the applicant's properties, and offered no credible explanation why sequestration would not benefit creditors. These circumstances provide "good reason to believe" that sequestration will yield at least a not-negligible benefit.

[20] The respondent argues that sequestration would prejudice him by frustrating his ability to complete the purchase and by complicating his financing arrangements, but these considerations do not displace the statutory test. They merely underscore that he does not have the liquid funds to meet his obligations and that only the machinery of sequestration will ensure an orderly investigation and distribution of any assets for the benefit of the *concursum creditorum*.

⁸ *Amod v Khan* 1947 (2) SA 432 (N) at 438.

[21] On the facts, there is a reasonable prospect that creditors will derive a pecuniary advantage from the respondent's sequestration. His unsubstantiated claims of personal wealth and pending financing, offered without concrete proof, cannot overcome the applicant's clear prima facie case. The requirement of advantage to creditors has therefore been met.

Conclusion

[22] The applicant has established all the statutory requirements for a final sequestration order and the respondent has failed to place any credible facts before the Court to show why the order should not follow. His admissions regarding ownership of unencumbered property and inability to pay, coupled with the absence of any special circumstances, leave the Court with no basis to exercise its discretion in his favour. A final order of sequestration is therefore warranted.

[23] In the result the following order is made:

1. The estate of the Respondent is placed under final sequestration.
2. The costs of the application are costs in the sequestration.



L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 September 2025.

APPEARANCES

For the Applicant:	R Pottas
Instructed by:	Jurgens Bekker Attorneys Inc,
For the Respondent:	S Swiegers
Instructed by:	Paul T. Leisher & Associates
Date of hearing:	1 September 2025
Date of judgment:	19 September 2025