

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2023-035979

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 11 September 2025

SIGNATURE OF JUDGE:

In the matter between:

PLATINUM PARK II HOME OWNERS ASSOCIATION NPC
(REGISTRATION NUMBER: 2006/000576/08)

Applicant

and

SANDRA SHABA

First Respondent

JOHANNES SHABA

Second Respondent

JUDGMENT

Woodrow, AJ:

- [1] The applicant¹ seeks a final order for the sequestration of the estate of the respondents.
- [2] A provisional order placing the estate of the respondents under provisional sequestration was granted by Nyathi J on 15 October 2024. Thereafter the rule was extended, and the matter was argued in respect of final relief before me.
- [3] The case of the Platinum Park HOA in its founding papers is briefly as follows:
- a. The application is founded upon the insolvency Act, Act 24 of 1936 (the “**Insolvency Act**”).
 - b. The respondents are the owners of an immovable property, namely “*ERF 5[...], PLATINUM PARK II, HOME OWNERS ASSOCIATION NPC, 6[...] I[...] CRESCENT, 4[...] T[...] STREET, CLARINA, EXT 27, PRETORIA NORTH, 0182*” (“**Erf 5[...]**”).
 - c. In terms of the company documents² of the Platinum Park HOA, the respondents, as owners of Erf 5[...], are members of the HOA, and

¹ I shall refer to the applicant as either the “**Platinum Park HOA**” or the “**applicant**”.

² The applicant’s deponent refers to the document as the “*articles of association*” of the Platinum Park HOA. The document attached by the applicant, annexure “**A**” (titled “akte van

jointly and severally liable for any liability to the HOA, including the payment of levies as contemplated in terms of clause 8.

- d. The respondents failed to pay their monthly levies. On 6 February 2020, the Platinum Park HOA took default judgment in the Magistrates Court, Pretoria North, (under case number 2093/2019), against the respondents in the sum of R83,672.71, plus interest at 10% *per annum* from 16 September 2019. A copy of the default judgment order is attached to the founding affidavit as annexure “E2” (the “**default judgment order**”).
- e. The Platinum Park HOA caused a warrant of execution to be issued which was served by sheriff on 12 January 2023 and a return of service in this regard was furnished. A copy of the return of service is attached to the founding affidavit marked “F” (the “**return of service**”).
- f. The applicant attaches a statement to the founding affidavit marked “G” (which purports to be addressed to the second respondent and reflects an amount due of R166,357.55), and the applicant’s deponent alleges that “... *the Respondent is in arrears with his monthly levies. ... the outstanding amount increases monthly.*”
- g. Under the heading “*REQUIREMENTS FOR SEQUESTRATION APPLICATION*”:
 - i. The applicant relies squarely upon the default judgment order in support of an allegation that the Platinum Park HOA “... *has indeed a liquidated claim against the Respondent.*”

oprigting”), is in fact the memorandum of incorporation under the previous, 1973 Companies Act.

- ii. The applicant relies on an act of insolvency, specifically in terms of section 8(b) of the Insolvency Act. The applicant states that “... *this application is based upon the commission of an act of insolvency and more particular Section 8(b) of the Insolvency Act, being a Sheriff is unable to find sufficient disposable property to satisfy the judgement.*”. The deponent goes on to allege that “... *the Sheriff have first of all endeavour to serve upon the unit, where the personal service was not effected and the sheriff could not demanded payment from the Respondent...*” and that “*I therefore respectfully submit that the Respondent have committed a deed of insolvency in accordance with Section 8 (b).*”

[4] An applicant must make out its case in its founding affidavit. Affidavits in motion proceedings fulfil the dual purpose of (a) placing before the court the essential evidence relevant to the granting (or not) of the relief claimed and (b) defining the issues between the parties. An applicant is not permitted to make out a new case in a replying affidavit or to supplement averments that should have been included in the founding affidavit.

[5] A perusal of the founding affidavit makes clear that the case brought by the applicant is founded squarely upon an act of insolvency, in particular section 8(b) of the Insolvency Act, based on the default judgment order obtained by the applicant against the respondents on 6 February 2020, and the return of service of the warrant of execution served by sheriff on 12 January 2023. The applicant says so explicitly in the founding affidavit.

[6] The applicant does not bring the application based on factual insolvency. In this regard, the applicant's deponent states as follows in the founding affidavit:

“9.6. With regards to the second ground of insolvency, being factual insolvency, the Applicant is not aware of any personal knowledge of the Respondent and therefore the Applicant is not in a position to make

submission in this regard, save for the inference that the Respondent's failure to maintain its monthly levies, can be regarded that the Respondent is factual insolvent, that its liabilities exceeds its assets."

[7] Section 8(b) of the Insolvency Act provides as follows:

8. Acts of insolvency

A debtor commits an act of insolvency—

...

(b) if a Court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;

...

[8] Section 8(b) creates two separate acts of insolvency. As held in **Nedbank v Norton** 1987 (3) SA 619 (N) at 621G-I:

The subsection creates two acts of insolvency, the first of which is committed by the debtor, if upon the demand of the officer whose duty it is to execute the judgment the debtor fails to satisfy the judgment or to indicate to the officer disposable property sufficient to satisfy the judgment, while the second is committed by the debtor if the execution officer fails to find sufficient disposable property to satisfy the judgment and if he has certified that fact in his return.

Although the subsection creates two acts of insolvency they are not altogether independent of each other in the sense that the execution officer has a choice whether to make the demand or to conduct an

enquiry into whether sufficient disposable property to satisfy the judgment is to be found.

If it is possible for the execution officer to make the demand he should do so and he is not entitled to omit to do so and simply to make a return to the effect that he has not found sufficient disposable property to satisfy the judgment. ...

- [9] The provision “... *refers to two acts of insolvency. The first is committed when the debtor fails to satisfy the judgment or to indicate sufficient disposable property to satisfy it; and the second when the sheriff fails to find sufficient property to satisfy the judgment.*” (**Absa Bank Ltd v Collier** 2015 (4) SA 364 (WCC) par [9])
- [10] “*Disposable property*” for the purposes of s 8(b), includes immovable property. (**Nedbank v Norton** 1987 (3) SA 619 (N) at 622; **Absa Bank Ltd v Collier** 2015 (4) SA 364 (WCC) par [12])
- [11] The return that is relied upon must satisfy the requirements of section 8(b) of the Insolvency Act. (**Saber Motors (Pty) Ltd v Morophane** 1961 (1) SA 759 (W) at 762H)
- [12] The applicant fails to make out a case in terms of section 8(b) of the Insolvency Act for at least the reasons set out below.
- [13] The default judgment order upon which the applicant relies was rescinded and set aside on 10 October 2023 already. (**CaseLines 28-11**) There is no warrant of execution that can be relied upon and no deed of insolvency. A valid judgment is essential to section 8(b) of the Insolvency Act. Absent such judgment, the applicant makes out no case at all. This, in my view, ought to be the end of the matter with reference to the act of insolvency relied upon by the applicant. There are, however, further reasons why the application cannot succeed.

- [14] Execution was levied at the wrong address and on the wrong assets. Execution was levied at Erf 5[...] and not Erf 5[...]. The return of service reads as follows: (my emphasis)

On this 12th day of JANUARY 2023 at 09:36 I served the WARRANT OF EXECUTION AGAINST PROPERTY in this matter upon JOHANNES SHABA at the chosen domicilium citandi et executandi at **ERF 5[...]** PLATINUM PARK II HOME OWNERS ASSOCIATION, 6[...] I[...] CRESCENT, 4[...] T[...] STREET, CLARINA, EXT 27, PRETORIA NORTH by affixing a copy of the WARRANT OF EXECUTION AGAINST PROPERTY to the principal door. (Rule 9 (3) (d)) .

AFTER DILIGENT SEARCH AND ENQUIRY NO OTHER MANNER OF SERVICE WAS POSSIBLE AT GIVEN ADDRESS AS THE PREMISES IS KEPT LOCKED.

It is hereby certified that as no person could be found at the above address after a diligent search, the goods found at the abovementioned address as described in the inventory contained in the enclosed Notice of Attachment, were judicially attached.

IMPORTANT NOTICE : Kindly furnish me with further instructions as to whether the goods under attachment must be removed to a place of safety. A sale date and sale requirements will only be supplied after removal.

Note: The original return together with the original abovementioned process is despatched to the mandator.

- [15] The return does not satisfy the requirements of section 8(b) of the Insolvency Act. It is patently insufficient. As held in **Kader v Halisman** 1958 (4) SA 31 (N) p32:

In my view generally speaking a messenger's return to a warrant which is unsatisfied and in respect of which no attachment has been possible (commonly called a *nulla bona* return) should state, *inter alia*,

- (a) that he explained the nature and exigency of the warrant, and the person to whom he explained it;
- (b) that he demanded payment;
- (c) that the defendant failed to satisfy the judgment;
- (d) that the defendant failed, upon being asked to do so, to indicate disposable property sufficient to satisfy it. (The expression 'disposable property' is preferable to the word 'goods', for the former include immovable property. Per BROOME, J. (as he then was), in *Horace Sudar & Co. (Pty.) Ltd v Cassja & Co. and Others*, 1950 (1) SA 203 (N) at p. 206);
- (e) that the messenger has not found sufficient disposable property to satisfy the judgment, despite diligent search and enquiry.

[16] The return relied upon *in casu* is patently insufficient. Further, it is common cause that the respondents do in fact own immovable property, and the return does not refer to this at all. A return executed at an unknown address (which is not the address of the respondents) does not serve to support the applicant's case. No case is made out at all.

[17] In my view, the applicant did not bring the application based on 'factual insolvency'. No proper case for relief based on such cause is made out in the founding papers. (*cf. Corner Shop (Pty) Ltd v Moodley* 1950 (4) SA 55 (T) p 59-60) However, in any event, the applicant has not shown that the respondents are factually insolvent. The applicant has not shown that the respondents' liabilities exceed their assets. The facts on record in fact demonstrate factual solvency and no case is made out for the relief sought. The application therefore fails on this ground as well.

[18] In addition to the aforesaid, the rule stands to be discharged as the applicant has failed to show that there is reason to believe that it would be to the advantage of creditors of the respondents if the estate of the respondents is

sequestered. (**Waterkloof Boulevard Homeowners Association (Association Incorporated under Section 21) v Yusuf and Another** (028945/2022) [2023] ZAGPPHC 737 (28 August 2023) Furthermore, the applicant has failed to show compliance with section 9(3)(b) of the Insolvency Act in respect of the certificate of the Master. (**Intercontinental Exports (Pty) Ltd v Fowles** 2000 (4) SA 833 (W)) The document upon which the applicant relies is unsigned, undated, and does not carry the stamp of the office of the Master. In addition, the claim of the applicant is disputed by the respondents on various grounds – indeed, and further, there is a pending action in this regard.

[19] The provisional sequestration order ought to be discharged.

[20] Counsel for the respondents submitted that the applicant ought to pay costs on an attorney and client scale, alternatively on scale C. Whilst in my view it could be argued that persisting with the sequestration application after the rescission of the default order was granted may constitute vexatious conduct (as contemplated in **In re: Alluvial Creek Ltd** 1929 CPD 532 at 535), I am not satisfied that on a totality of the facts a punitive cost order ought to be granted against the applicant. Considering the complexity of a matter, the value of the claim and the importance of the relief sought, my view is that counsel's fees ought to be taxed on Scale B.

ORDER

[21] Accordingly, I make the following order:

1. The provisional sequestration order is discharged.
2. The applicant is ordered to pay the respondents' costs, with counsel's fees to be taxed on Scale B.

WOODROW AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on the 12TH of September 2025.

Appearances

Counsel for the Applicant: Z Schoeman

Attorney for the Applicant: Kleynhans & Swanepoel Inc

Counsel for the Respondents: M Snyman SC

Attorney for the Respondents: Nkosi SP Inc

Date of Hearing: 12 June 2025

Date of Judgment: 11 September 2025