

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

15/10/2025

DATE

M M ANTONIE

CASE NO: 2024-122891

In the matter between:

AFRICAN BANK LIMITED

Applicant

and

DUNSTAN MONTAGUE CULVERWELL

Respondent

JUDGMENT

ANTONIE AJ:

- [1] This is the return day of an order provisionally sequestering the estate of the respondent which order was granted by Dippenaar J on 30 July 2025 having delivered a written judgment.¹
- [2] At all material times since the inception of this application, the respondent was represented by Lazarus Johsua Attorneys. Mr Lazarus prepared the answering affidavit and argued the application for provisional sequestration before Dippenaar J. On 3 October 2025, the respondent's attorneys withdrew as attorneys of record "*due to lack of instructions*".² When it came to my attention that the respondent's attorneys had withdrawn, I directed them to advise the respondent to appear before me at 10h00 on 3 October 2025 before allocating the matter to be heard. The respondent's attorneys complied with my directive. In the interim, and on the morning of 6 October 2025, the respondent filed an answering affidavit opposing the final sequestration of his estate.
- [3] When the matter was called, the respondent appeared and advised me that he was representing himself. Ms Swandle, counsel for the applicant, advised that the applicant wished to extend the rule in order to file a replying affidavit. I declined this request because the respondent's answering affidavit was only seven pages long and directed the applicant to file its replying affidavit by no later than 17h00 on 7 October 2025 which it duly did. I also advised the respondent and counsel for the applicant that I intended to hear the matter at 10h00 on 9 October 2025. The respondent advised that he wished to obtain further legal representation and I indicated that he was free to do so.
- [4] When the matter was called at 10h00 on 9 October 2025, Adv Maake advised me that he had been instructed to represent the respondent on the instructions of J M Bauer Attorneys. Adv Maake indicated that he did not have insight into the matter because

¹ Judgment, pp 22-4 to 22-17

² 41-2 to 41-4

he had only been instructed on the evening before and had not been given access to CaseLines. He sought an extension of the rule on behalf of the respondent in order to properly acquaint himself with the matter. Ms Swandle advised me that on the previous afternoon her instructing attorneys had received an email from attorney Enzo Da Gama who stated that he represented the respondent and sought an extension of the rule. I have not seen that email but it did not appear to be in dispute. It is unclear to me how or why Mr Bauer came to substitute Mr Da Gama but little turns on this.

- [5] I then questioned the respondent. He conceded that his erstwhile attorneys had represented him since the application for the sequestration of his estate was launched; that they prepared his answering affidavit and that Mr Lazarus argued the matter before Dippenaar J on 23 and 24 July 2025. He was unable to plausibly explain why, instead of engaging attorneys who had no knowledge of this dispute, he did not re-engage his erstwhile attorneys who were fully apprised of the matter.
- [6] Mr Maake then made submissions in support of the extension of the rule relying principally on two arguments. First, if the respondent's estate was finally sequestrated the consequences for him would be dire and the prejudice irreparable. Second, there could be no prejudice to the applicant because there was already a provisional order in place. In addition, Mr Maake tendered the wasted costs occasioned by the extension of the rule. Mr Maake, in answer to a question by me, advised that he would be obliged to withdraw from the application if I refused an extension of the rule.
- [7] Ms Swandle opposed the extension of the rule on the grounds that there were no facts placed before the court regarding prejudice and that in any event, even if the rule was to be extended, the respondent's prospects of success in having the rule discharged were poor.

[8] In essence, the respondent seeks a postponement of the hearing relating to the final sequestration of his estate. The legal principles applicable to an application for the granting of a postponement were set out in *Myburgh Transport*.³ In summary, these principles are the following:

- [a] The court has a discretion whether to grant an application for a postponement and also has a discretion to refuse a postponement even when wasted costs are tendered. In the present matter, a tender of wasted costs by a person whose estate has already been provisionally sequestrated is of cold comfort to the applicant. The discretion must be exercised in a judicial manner.
- [b] An applicant for a postponement seeks an indulgence and must show good and strong reasons, furnishing a full and satisfactory explanation of the circumstances that gave rise to the application. In the present matter, there is no formal application before the court supported by an affidavit and the respondent has failed to furnish a full and satisfactory explanation motivating his application for a postponement. He has neither explained why he terminated his erstwhile attorneys' mandate and why he decided to appoint new attorneys who had no knowledge of the matter instead of re-engaging his erstwhile attorneys. To my mind, this has all the hallmarks of a delaying tactic which seeks to interfere with having the matter finalized which is in the general interests of the administration of justice and in the interests of the applicant. Put differently, I do not regard the application for the extension of the rule as being *bona fide*.
- [d] One of the oldest tricks in the book is the practice of some legal practitioners, when the shoe pinches, to withdraw from the case or of clients to terminate the

³ *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 314F 315J; These principles are also applicable to a postponement of an application – *Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459E - G

mandate in an attempt to compel the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that such potential abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.⁴

[e] Whilst considerations of prejudice always plays a significant role in the exercise of the court's discretion, a further significant factor is the respondent's prospects of success in the application for the final sequestration of his estate. Having regard to what is set out below, where I deal with the merits of the application, it is clear that the respondent's prospects of success are poor because he is hopelessly insolvent and delaying the inevitable would serve no one's interests. In the circumstances, the respondent could suffer little prejudice by the refusal of the postponement.

[9] It appears that the respondent is no stranger to abusing the court process in order to obtain a postponement. When the matter came before Dippenaar J and on the day before the hearing, the applicant launched a substantive application for leave to supplement his answering affidavit by introducing an answering affidavit deposed to by his father in separate sequestration proceedings in a different court. After assessing the merits of the argument, Dippenaar J determined that the respondent's belated application constituted an abuse of process aimed at obtaining a postponement of the application for the provisional sequestration of his estate.⁵

⁴ *Take & Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at para 3

⁵ **Judgment**, p 22-9, para 13

[10] For the reasons set out above, I refused to extend the rule and ordered that argument on the merits commence immediately. Mr Maake then withdrew from the matter with my leave.

THE MERITS OF THE APPLICATION

[11] In order for the applicant to secure a final order for the sequestration of the respondent's estate, it must satisfy me, on a balance of probabilities, that:⁶

- [a] it has established a claim against the respondent in the sum of R100.00;
- [b] the respondent 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 if the respondent's estate is sequestrated.

[12] It is common cause that on 7 August 2023 this court granted an order against the respondent and his father, jointly and severally, the one paying the other to be absolved, for:

- [a] Payment to Grindrod Bank Limited (**Grindrod**) of the sum of R56 million plus interest thereon at the rate of prime per annum, calculated daily and compounded monthly in arrears from 6 April 2022 to date of payment, plus costs on the scale as between attorney and own client.
- [b] Payment to Grindrod of the sum of R40 551 603.77, plus interest thereon at the rate of prime per annum, calculated daily and compounded monthly in arrears from 6 April 2022 to date of payment, plus costs on the scale as between attorney and own client.

(the judgment debts)

⁶ Section 12 of the Insolvency Act

- [13] There is no evidence before me that any portion of the judgment debts has been paid and, since interest has been accruing for a little over forty two months, performing even a rudimentary calculation demonstrates that the outstanding judgment debts, including compounded interest, have ballooned to more than R130 million.
- [14] It is now common cause that, subsequent to an amalgamation with Grindrod in terms of section 54 of the Banks Act, the assets and liabilities of Grindrod became vested in the applicant. In the circumstances, the applicant became the respondent's judgment creditor in respect of the judgment debts.
- [15] Actual or factual insolvency denotes that the respondent's liabilities actually exceed the value of his assets.⁷ It is sufficient to prove this element on a balance of probabilities. It has been held that an applicant relying on actual insolvency is not required to adduce evidence to finitely determine the respondent's assets and liabilities in rands and cents and it may discharge the onus of establishing a *prima facie* case by way of sufficient evidence to justify the inference as a matter of probability that the respondent is insolvent. If the applicant does so, the onus is on the respondent to rebut the inference by showing that he has sufficient assets to be able to settle his liabilities.⁸
- [16] In his answering affidavit, the respondent contends that properties owned by the principal debtors (in respect of whom he and his father bound themselves as guarantors) were recently sold for R79 million. He argued that this amount will be paid to the applicant in reduction of the judgment debts owed by him. In its replying affidavit, the applicant rightly pointed out that the proceeds from the sales of these properties have not been received by the applicant and will be dealt with in terms of the respective

⁷ *Investec Bank Limited v Lambrechts NO & Others* 2019 (5) SA 178 (WCC), para 27 and the authorities referred to therein.

⁸ *Ullman Sails (Pty) Ltd & Others v Jannie Reuvers Sails (Pty) Ltd & Others* [2022] 3 All SA 290 (WCC), para 48

liquidation and distribution accounts of each of the insolvent companies whose properties were sold. The applicant attached to its replying affidavit copies of the encumbered asset account schedules in respect of the movable properties sold reflecting the collective dividend receivable from the sales will be approximately R65 million.

[17] If the applicant receives R65 million in reduction of the judgment debts, that constitutes a shortfall of approximately R31 million of the capital of the judgment debts and approximately a 50% shortfall of the total outstanding amounts including accrued interest, meaning that the shortfall in that circumstance will be approximately R65 million.

[18] In neither his answering affidavit opposing the provisional order nor the answering affidavit opposing the final order, did the respondent adduce any relevant evidence to rebut the clear inference that he is insolvent. I am satisfied on the evidence before me that the respondent is actually insolvent.

[19] The applicant also relies on an act of insolvency in terms of section 8(b) of the Insolvency Act being a *nulla bona* return of service rendered by the Sheriff when executing on the judgment debts. The return of service of the Sheriff constitutes *prima facie* evidence of its contents.⁹ The effect of a return of service, which is on the face of it valid, is trite. The onus is on the respondent to show by the clearest and most satisfactory evidence that the return is impeachable.¹⁰ The respondent's sketchy assertions that the Sheriff did not take the requisite steps set out in the return of service does not meet the threshold.

⁹ *Van Vuuren v Jansen* 1977 (3) SA 106 2 (T)

¹⁰ *Fedco Cape (Pty) Ltd v Meyer* 1988 (4) SA 207 €

[20] In the circumstances, I find that on a balance of probabilities, the respondent committed an act of insolvency.

Advantage to creditors

[21] The Constitutional Court has determined that, in considering whether a final order of sequestration would be to the advantage of creditors, that phrase is broad and should not be rigidified.¹¹ The court there went on to state that as long as there is a reasonable prospect that some pecuniary benefit will result to creditors, that is sufficient. It endorsed the dictum in *Meskin*¹² where it was held that it is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of an enquiry under the Insolvency Act, some may be revealed or recovered for the benefit of creditors, that is sufficient.

[22] In its founding affidavit the applicant alleged that the respondent is involved in several business enterprises and adduced evidence that he is a director of at least eight companies. The applicant alleges further that these companies may be investigated by trustees to establish whether the respondent owns shares in them, whether he has credit loan accounts and whether he derives an income from his position. The applicant has also adduced evidence that two of the companies own immovable property.

[23] In his answering affidavit, the respondent baldly denies that an investigation of his affairs will not demonstrate any advantage to creditors without substantiating this conclusion. He admits that he is a director of a construction company that has recently turned a profit and that he trades through a private company. Dippenaar J found that the applicant had made out a *prima facie* case that it would be to the advantage of creditors to provisionally sequester the respondent's estate. In his latest answering

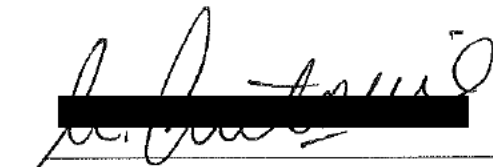
¹¹ *Stratford v Investec Bank Limited* 2015 (3) SA 1 (CC) paras 44 - 46

¹² *Meskin & Co v Friedman* 1948 (2) SA 555 (W)

affidavit, the respondent adduced no evidence to rebut this *prima facie* finding. In the circumstances, I am satisfied that the applicant has established, on a balance of probabilities, that there is a reasonable prospect that some pecuniary benefit will result to creditors.

[24] In the circumstances, the applicant has satisfied all three requirements listed in section 12 of the Insolvency Act and I make the following order:

1. The estate of the respondent is hereby placed under final sequestration.
2. The costs of this application shall be costs in the sequestration.


[Redacted signature area]

MICHAEL ANTONIE

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Date of Hearing: 9 October 2025

Date of Judgment: 15 October 2025

For the Applicant: Adv L V Swandle

Instructed by: ENS Africa

For the Respondent: In person

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the hand down is deemed to be 15 October 2025.