

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2023-132709**

- | | |
|-----|---|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED: YES/ NO |

23 October 2025

DATE

SIGNATURE

JRG

In the matter between:

INVESTEC BANK LTD

APPLICANT

and

NAMBITA LOYISO MNQANDI

RESPONDENT

JUDGMENT

JOHANN GAUTSCHI, AJ

- [1] This is an opposed application for the provisional sequestration of the Respondent in which the Applicant relies on factual insolvency of the Respondent, alternatively the commission of an act of insolvency in terms of section 8 (g) of the Insolvency Act 24 of 1936 (as amended) (the Act).
- [2] The *locus standi* of the Applicant is not in dispute. Its claim against the Respondent arises from a Home Loan Agreement in respect of which the

Respondent holds a first covering mortgage bond over the immovable property of the Respondent (the Property) in the capital amount of R4.4 million plus an additional amount for costs and interest of R880,000. The Respondent defaulted on her home loan agreement in June 2022. After numerous unsuccessful attempts to contact her, when she remained in default despite some payments, the Applicant terminated the home loan by reason of the Respondent's breach. In her answering affidavit the Respondent admitted the May 2021 valuation of her Property and her indebtedness as reflected in paragraph number 42 of the founding affidavit. In that paragraph the amount of the indebtedness on her home loan was alleged to be R4,473,986.33, although the liability reflected on the certificate of indebtedness, annexure **FA 28** to the founding affidavit, reflected a liability of R4,451,476.62 owing as at 8 December 2023.

- [3] The main issues on the merits are dealt with below in the following sequence. First of all, whether the Respondent committed an act of insolvency, which ground of sequestration was relied upon for by the Applicant for the first time in its heads of argument. Secondly, whether the Respondent was factually insolvent as at the date of hearing on 13 June 2025 bearing in mind, inter alia, that on the Applicant's case the Property is the only property that the Respondent owns and that it was last valued at R4.4 million in May 2021, i.e. some four years prior to the date of the hearing. Thirdly, whether the Applicant discharged the onus of proving that sequestration of the Respondent would be to the advantage of creditors.
- [4] The Respondent raised an *in limine* point in her 28 May 2025 Uniform Rule 30A notice that the application proceedings are null and void by reason of the failure to comply with the service requirements of Uniform Rule 4. This was dealt with at the commencement of argument. It is without substance for reasons which I set out below.
- [5] The Respondent's submissions in her answering affidavit and in heads of argument about non-compliance with the National Credit Act were also without substance as a sequestration application does not constitute the enforcement of a debt. Consequently, I did not require counsel for the Applicant to deal with it.

- [6] The chronology of events leading up to the hearing of this opposed application is relevant, not only to explain why the Respondent's Uniform Rule 30A objection is without substance, but also for a proper understanding of submissions relating to the existence and quantum of the Respondent's liabilities at the time of filing of the answering and replying affidavits in February 2024, as compared to their existence and quantum when this opposed application was heard on 13 June 2025.
- [7] The application was issued on 13 December 2023. Initially there was service at the last known residential address of the Respondent was effected on 14 December 2023 by affixing a copy of the application documents to the principal entrance of the service address. Service was subsequently affected personally on the Respondent at the same address and on her only employee, a gardener, on 21 May 2025.
- [8] The Respondent's notice of intention to oppose was filed on 4 January 2024. She filed her answering affidavit on 6 February 2024. The Applicant's replying affidavit was filed on 19 February 2024. The Respondent also filed a supplementary answering affidavit on 26 February 2025, but it dealt only with the issue of service.
- [9] On 31 July 2024 the Applicant filed its heads of argument. That was when the Applicant for the first time relied upon an act of insolvency as a ground for sequestration. The Respondent's heads of argument were filed on 15 April 2025.
- [10] Notice of set down for the hearing on 9 June 2025 was served personally on the Respondent and her sole employee, her gardener, on 22 May 2025. Thereafter the notice of set down was also served by email on 23 May 2025 addressed to the Respondent and her attorney of record.

Uniform Rule 30A objection *in limine*

- [11] On 28 May 2025 the Respondent filed a notice in terms of Uniform Rule 30A contending that the application proceedings are null and void by reason of the Applicant having failed to comply with the service requirements of Uniform Rule 4.

[12] The Rule 30 A objection *in limine* was plainly without substance given that the Respondent had filed an answering affidavit and heads of argument and was duly represented by counsel at the hearing of this opposed application. I did not require argument thereon from Applicant's counsel and proceeded to hear argument on the merits. Respondent's counsel could not provide any valid reasoning in support thereof and similarly proceeded to address argument on the merits. Consequently, no significant time was spent on dealing with this objection which falls to be rejected.

Act of insolvency in terms of section 10 (b) read with 8 (g) of the Act

[13] The Applicant's heads of argument seek to make out a case in the alternative that a payment arrangement concluded between the Respondent and the City of Johannesburg constituted an act of insolvency as contemplated by section 8(g) of the Act.

[14] There is no substance in this submission. Section 8 (g) of the Act provides that "*a debtor commits an act of insolvency – (g) if he gives notice in writing to any one of these creditors that he is unable to pay any of his debts.*".

[15] The alternative reliance on an act of insolvency was first raised in the Applicant's heads of argument. No act of insolvency was alleged in the Applicant's founding affidavit which only relied on proof of insolvency based, *inter alia*, on the Respondent's indebtedness of R92,943.09 to the City of Johannesburg (COJ) as evidenced by the COJ account dated 2 November 2023. The Respondent's answering affidavit referred to subsequent reductions in the amount owed to COJ. In support of a payment arrangement with the COJ she annexed an acknowledgement of debt (an NLM 04). It showed that as at 2 February 2024 the amount owed to COJ was R44,395.11. She also attached a COJ account dated 2 February 2024 reflecting payments of R22,000 and R1,238.61 which had been made by her as at that date in terms of the instalment arrangement. She concluded by stating that following further payments as at the date of the answering affidavit the outstanding balance was less than R22,000. Consequently, the replying affidavit canvassed the amount of the Respondent's

indebtedness to COJ, but did not contend that the acknowledgement of debt amounted to an act of insolvency.

- [16] The Applicant's reliance on an act of insolvency is in any event without merit. It is clear from the wording of the acknowledgement of debt that it is merely an arrangement to pay in instalments in future without any acknowledgement that the Respondent is unable to pay her debts. The Respondent explained in her answering affidavit (not contradicted in the Applicant's replying affidavit) that the acknowledgement of debt was "*an arrangement with the City of Johannesburg in terms of which the City of Johannesburg is investigating instances of overcharging and upon conclusion of such investigation, the City of Johannesburg has undertaken to make some adjustments to the account if it is found that there were instances where I was overcharged*".

Proof of insolvency in terms of section 10 (b) of the Act

- [17] In its founding affidavit the Applicant initially relied on the liabilities of the Respondent to four creditors. R4,473,986.33 was alleged to be owing on the Respondent's home loan as at 28 November 2023 plus interest thereon from 28 November 2023 to date of payment.¹ R92,943.09 owing to the City of Johannesburg for rates and taxes, water and sewerage charges according to an invoice dated 2 November 2022. R22,979 owing on the Respondent's ABSA Bank credit card as reflected on a TransUnion tracing report dated 10 March 2023. Lastly, reference was made to the debt owed to Discovery, but as that was not persisted, there is no need for me to deal any further with that alleged creditor.
- [18] The Respondent's answering affidavit disputed the Applicant's allegation that she had not made any further payments on her home loan since 7 June 2022. She attached proof of payment of R33,000 on 18 April 2023, R43,000 on 25 May 2023, R90,000 on 25 August 2023 and R150,000 on 14 January 2024.
- [19] With regard to the City of Johannesburg (COJ), as already stated above, the Respondent attached a COJ account dated 2 February 2024 reflecting payments

¹ However, the certificate of indebtedness referred to in support thereof reflects a different amount of R4,451,476.62 owing as at 8 December 2023

of R22,000 and R1,238.61 which had been made by her as at that date in terms of the instalment arrangement. She concluded by stating that following further payments as at the date of the answering affidavit the outstanding balance was less than R22,000.

[20] The Respondent further denied that she was indebted to ABSA. She alleged that she had discharged her indebtedness to ABSA by making payment and alleged that proof of payment was attached as annexure **NLM06**. However, that annexure is a list of her outstanding invoices for work done as an advocate and is not proof of payment as she alleged.

[21] The Applicant's heads of argument submitted that the Respondent's book debts as reflected in annexure **NLM06** should not be taken into account as assets of the Respondent, essentially reiterating the submissions contained in the Applicant's replying affidavit that "*most of her debtors are overdue by more than three months (after taking into account the 97 day payment cycle of advocates)*" and that "*It would appear that these debts are unlikely to be recovered and cannot be considered as assets.*".

[22] By thus excluding the Respondent's book debts, the Applicant's heads of argument submitted that having regard to the R4,451,476.62 liability on the home loan as at 15 February 2024 and the approximately R22,000 owing to COJ, "*The liabilities of the Respondent's estate exceeds (sic) the assets, fairly valued by at least an amount of approximately R73,478.62*".

[23] However, the Respondent's book debts reflected in annexure **NLM06** which are overdue by no more than 33 days beyond 97 day limit, total R238,496, i.e. considerably more than the assets shortfall of "*approximately R73,478.62*" contended for by the Applicant.

[24] Added to that it concerns me that "*approximately R73,478.62*" excess of liabilities over assets contended for by the Applicant is based on a valuation of the Respondent's Property done some four years earlier in May 2021, at a time when it was common knowledge that South Africa was still grappling with the economic devastation of the Covid epidemic. Bearing in mind that the Applicant for sequestration has the onus of proving that the Respondent is insolvent at the

date of the hearing, it is in my view insufficient for the Applicant to rely on such an old valuation. Whatever difficulties the Applicant experienced in obtaining access to the Property in earlier years to do an updated valuation (presumably realising that an updated valuation should be obtained), once the Respondent had filed her 4 January 2024 notice to oppose, the Applicant's attorney could have requested access to the Property to conduct an updated valuation. Access to inspect for an updated valuation could also have been obtained in terms of rule 36 (6) of the Uniform Rules of Court. In such circumstances I do not agree with the submissions of Applicant's counsel in argument, that it was for the Respondent to produce such an updated valuation. The Applicant had the onus of proof and the duty to adduce such evidence. It failed to do so and consequently in my view the Applicant has not discharged the onus of proving that as at the date of the hearing the Respondent's liabilities exceeded her assets.

[25] In the premises the application for provisional sequestration must fail and it is unnecessary for me to deal with the arguments addressed on advantage to creditors.

ORDER:

- [1] The application for provisional sequestration is dismissed.
- [2] The Applicant is ordered to pay the Respondent's costs, including the costs of counsel, on scale C.

Johann Gautschi
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Adv PG Louw
Instructed by: Werksmans ATTORNEYS (Ref Ms Z Oosthuizen)

For the Respondent: Adv G Zonke
Instructed by: Macoba ATTORNEYS

Date of hearing: 13 June 2025

Date of Judgment: 23 October 2025