

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Case Number: 2024-053797

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 25 November 2025

SIGNATURE OF JUDGE:

In the matter between:

THE BODY CORPORATE OF SAN LOREN

Applicant

and

ALTON CHIPAGA

Respondent

(Identity Number: 7[...])

JUDGMENT

D van den Bogert AJ

[1] The remaining issue in this case is the question of costs. This court on 18 August 2025 issued a provisional sequestration order against the respondent. The return day was 24 November 2025, and as such on the return day the case came before me in the opposed motion court.

- [2] The applicant is a body corporate, namely the body corporate of San Loren, and the respondent, Mr. Chipaga, the owner of units within the residential scheme of the body corporate. At the time that the sequestration application was launched the respondent was in arrears with levy payment and owed the applicant a substantive amount of money.
- [3] I was informed by counsel for the applicant, Mr H Marais, that the respondent had, prior to the return day, discharged its full indebtedness due to the applicant. As such, I was requested to discharge the provisional sequestration order and grant costs against the respondent on an attorney and client scale.
- [4] The respondent appeared in person. He naturally acceded to the discharge of the provisional sequestration order but opposed the granting of a costs order and specifically one on an attorney and client scale. The respondent sought to avoid a costs order on the basis that he had made all sorts of settlement proposals, but the applicant refused to accept those. None of this was contained in affidavits before court, and in the circumstances of this case, in any event, does not assist the respondent.
- [5] This judgment therefore turns on the question whether the applicant has made out a case for costs (i.e., whether a case for a sequestration order ever existed).
- [6] To motivate a costs order on the scale as between attorney and client, the applicant had on 20 November 2025, shortly before the hearing, uploaded a trustee resolution, which prima facie seems to have been taken by the trustees of the applicant. The resolution purports to propose that on 23 October 2023 a resolution was adopted by the trustees, which reads inter alia as follows:

“The fee payable by the owner of the unit will be based on the fees as applicable for an ATTORNEY CLIENT scale.

...

A member is liable for and must pay to the body corporate all reasonable legal costs and disbursements, as taxed or agreed by the member, incurred by the body corporate in the collection of arrear contributions or any other arrear amounts due and owing by such member of the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.”

- [7] The said resolution was uploaded onto CaseLines without an affidavit. The respondent was not given any opportunity to deal with the resolution in answering papers. There exists no evidence that the resolution indeed constitutes a decision taken by the trustees. It has no evidentiary value and absent the respondent being allowed to deal with this resolution, it would simply be unfair to take recognition of it. It is further not proper to simply file such a document on the electronic court file shortly before a hearing, and hope that the court will take it into consideration. That is not how evidence is placed before a court.
- [8] In any event, on its proper wording the so-called resolution does not say that where sequestration proceedings are instituted against a member, such member must pay cost on an attorney and client scale. It simply refers to the collection of arrear contributions or arrear amounts due. A sequestration application is not a process whereby outstanding levies are collected. This is trite.
- [9] As such, I indicated in court already that I will refuse to grant an attorney and client costs order, should I grant costs at all.
- [10] This brings me to the second aspect. In my view, the applicant is not entitled to a costs order as against the respondent. This is so, because the applicant did not make out a case for sequestration in the first instance. In terms of section 12(1)(b) of the Insolvency Act 24 of 1936 (herein “the Act”), a court may grant a final sequestration order if it is established that the debtor has committed an act of insolvency or is insolvent.

[11] For purposes of an act of insolvency, the applicant relies on section 8(b) of the Act. This section holds that a debtor commits an act of insolvency if judgment is given against him or her and the debtor fails, upon demand of the sheriff to satisfy it or to indicate to the sheriff disposable properties sufficient to satisfy the judgment, or if it appears from the return made by the sheriff that he/she has not found sufficient disposable property to satisfy the judgment.

[12] The return relied upon for the so-called act of insolvency, annexure "SL6" to the founding papers, stipulates that on 9 April 2024 the warrant of execution was affixed to the principal door. The sheriff says that he could not contact the execution debtor personally to demand payment of the judgment debt and costs, plus VAT from him or to demand that movable and disposable property be pointed out to the sheriff to satisfy the warrant of execution.

[13] The sheriff then records:

"It is certified that after a diligent search and enquiry no movable or disposable property wherewith to satisfy the warrant or any part thereof could be found. It could also not be ascertained whether the defendant owns immovable property. My return is therefore one of nulla bona".

[14] There is a serious problem with the fact that the applicant relies on that *nulla bona* return, because according to the applicant's own evidence the respondent owns four units within the San Loren Sectional Scheme being units 59, 13, 15 and 27.

[15] The further averment by the applicant, made in paragraph 17 of the founding affidavit, is that the respondent is also the owner of various other sectional title units in other complexes, *inter alia* unit 111 in the Woodpecker sectional scheme. The applicant's own evidence therefore does not support the version contained in the sheriff's *nulla bona* return. Instead, it rather supports the notion that the applicant is factually solvent and has sufficient immovable properties to satisfy the debt. If that is to be accepted, the sequestration application constitutes and abuses of the insolvency machinery.

[16] The legal position in respect of section 8(b) of the Act is set out in the case of **Nedbank Ltd v Norton** 1987 (3) SA 619 (N). The court from page 621 onwards says:

“Although the subsection creates two acts of insolvency, they are not all together 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 disposal 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 fact that he has not found sufficient disposable property to satisfy the judgment debt. The debtor is the person best situated to know what property he has and the whereabouts thereof and if the execution officer were to fail to enquire from the debtor when it is possible to make such enquiry, what property he has and where it can be found, then he could hardly be said to have taken all the appropriate steps to ascertain what property the debtor has.

The nulla bona return in the present application does not reflect that the deputy sheriff made the demand which he was required to make in terms of s8(b).”

[17] In this case also, the applicant did not establish an act of insolvency in terms of section 8(b). Instead, the applicant itself confirms that many properties are available for execution.

[18] The applicant also relied on section 8(c) of the Act, but there is not one single factual averment in the founding affidavit that would substantiate that the respondent attempts to make dispositions of property which would have the effect of prejudicing his creditors or preferring one creditor above the other. On this basis there is therefore also no case made out for reliance on that subsection.

[19] Counsel for the applicant urged me to consider the question insolvency with reference to all the papers exchanged and not only the case in the founding papers. Firstly, the respondent appeared for himself and is a lay person. He did not engage with the legal intricacies in his answering papers. Whatever he said, cannot be used to provide the foundation for a sequestration order. Such

reasoning would allow parties to bring about defective sequestration applications in the hope that a respondent will say something that supports a sequestration order.

[20] An applicant must make out its case in the founding papers. On the established principles in our law, a full case must be made out in the founding papers. One stands or falls by the notice of motion and the averments set out in one's founding affidavit. This much is trite. A case can, for example, not be made out in the replying affidavit. This proposition is confirmed in *Betlane v Shelly Court* CC 2011 (1) SA 388 (CC) at paragraph 29. I am therefore bound by the case made out in the founding papers.

[21] The applicant argued in court that the second basis for the sequestration order was the factual insolvency of the respondent. The claim that the respondent is factually insolvent, is premised on the following averment in the founding affidavit:

"In addition to the fact that the respondent has committed acts of insolvency, it appears from the information known to the applicant that he is factually insolvent and he is clearly unable to pay any monthly levies."

[22] This has absolutely nothing to do with factual insolvency. The applicant itself claims that the respondent has numerous immovable properties. There is no indication whether these properties have been mortgaged and if so, what the outstanding amounts due to financial institutions would be. There is nothing provided about the value of these properties. The simple question, when a claim is made that a debtor is factually insolvent, is whether his debts exceed his assets. There is not one iota of evidence in this respect.

[23] As such, the sequestration application is stillborn. Whether the parties had agreed to a discharge the sequestration, does not really matter, because at law it ought to have been discharged.

[24] The respondent appeared in person and was unrepresented and therefore did not incur any legal costs.

[25] As such, I intend to discharge the provisional sequestration, with all its consequences, with no order as to costs.

[26] I accordingly make the following order:

- (1) The provisional sequestration order, with all its consequences, is discharged.
- (2) The application for a final sequestration order is dismissed.
- (3) No order as to costs.

D VAN DEN BOGERT
ACTING JUDGE
HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 25 November 2025.

Appearances:

Counsel for the Applicants: Adv H Marais

Instructed by: Fouche Attorneys
Ref.: Mr Fouche/JF/CLE002

Appearance for respondent: In person

Date of Hearing: 24 November 2025

Date of Judgment: 25 November 2025

