IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION: GQEBERHA

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES
DATE: 24 MARCH 2026__________
SIGNATURE: __________________

CASE NUMBER: 3903/2024

In the matter between

SHACKLETON CREDIT MANAGEMENT (PTY) LIMITED	Applicant
And	
NNDANDULENI BERNIS KHAVHADI	First Respondent
LUTENDO KHAVHADI	Second Respondent

Summary: Application – provisional sequestration - - Insolvency Act 24 of 1953- (section 8(b), inability to pay debt, not indirect enforcement. Two stage process–rule nisi and final order. Application – refused with costs.

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] This is an application for provisional sequestration of the first and second respondents' joint estate who are married to each other in community of property.

[2] The applicant sought a provisional order of sequestration in terms of the Notice of Motion:

> *(i)* *that the joint estate of the respondents is placed under provisional sequestration.*
>
> *(ii)* *The respondents and any other party who wishes to avoid such an order being made final, are called upon to advance reasons, if any, why the Court should not grant the final sequestration of the respondent's estate on a date to be determined by the Court.*
>
> *(iii)* *ordering that the costs of this application be costs in the sequestration of the respondents*
>
> *(iv)* *that the applicant be and is hereby granted and /or further alternative relief.*

[3] On the other hand, the first and second respondents who will be jointly referred to in this judgement as 'respondents' opposed this application. Broadly, they argued that these proceedings were an indirect way of collecting the debt they owed the applicant. In addition, it was not necessarily for the benefit of other creditors. The reasons will be articulated during the course of this judgment.

[4] In essence, the relief sought and issues to be determined require this Court to establish the circumstances that resulted in this impasse between the parties.

BACKGROUND

[5] This matter arose out of an instalment of sale agreement between the first respondent and Standard Bank of South Africa Ltd (Standard Bank). The respondent defaulted on this agreement and an application for a default judgment was instituted and granted against him. This order, with Case Number: 4283/14 dated 13 March 2015 was for the payment of R369.466.61 including interest and costs on an attorney and client scale. This amount doubled to R738 933.33. Further, the applicant concluded a deed of cession with Standard Bank. The deed was ceded unconditionally to the applicant on the 01st of August 2017 and with all the rights, title and interest in and to the book debts listed in the schedule to the cession.

[6] The respondents, having failed to satisfy the debt, several attempts were made for the resolution of this issue in an amicably way without any results. The applicant approached his attorneys, Claudia De Combos of Lyn & Main Attorneys (De Combos) to take steps on his behalf. The attorneys issued a writ of execution in respect of movable property against the respondents. The services of the Sheriff were instituted to serve warrants of executing the debt in question, which also failed. In this instance, the Sheriff initiated this process on 18 April 2024; 03 May 2024 and 04 May 2024 without any success in locating the respondents. On the 18th of May 2024, after another failed attempt to serve the writ of execution in terms of Rule 46 at […] Street, […], Port Elizabeth for the satisfaction of the debt due, the Sheriff made a *Nulla Bona* Return. The Return indicated that 'after a diligent search, there was no sufficient and disposable property that could be found to satisfy the writ'.

[7] The respondents raised arguments against this background and will be contextualized in the analysis of the submissions made. This then brings me to the issues in dispute.

ISSUES

[8] The centrality of the issues in this application is to determine whether:

(i) the respondents committed an act of insolvency.

(a) the non-payment of a debt amount to an act of insolvency?

(b) the failure to point out executable assets constitute an act of insolvency?

(c) the "delay" in satisfying a debt constitute an act of insolvency? and

(ii) there will be a benefit to creditors if the respondent's joint estate is sequestrated.

[9] These issues serve as the lens through which the legal framework may set the pathway in addressing the dispute in this matter.

THE LEGAL FRAMEWORK

[10] The Insolvency Act 24 of 1936 lays down the framework to determine whether a person has committed an act of insolvency in terms of section 8(b) which reads as follows:

(a) […] …

(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.

[11] The purpose of this section encapsulates a two-stage process which sets the tone for the sequestration of the estate. First stage, the Court may grant a provisional order together with a *rule nisi* which calls on the party to show cause and reasons for any factor that may bar the issuing of the final order. This stage seeks to ensure that respondents are aware of the proceedings against them and are given an opportunity to counter the action, failing which a *rule nisi* will be granted against them. The second stage, on failure to satisfy the first requirement, would be the legal basis for granting the final order due to non-fulfilment of justifying the case against the final order.

[12] Furthermore, I am of the view that section 8(b) should not be read in isolation of section 10 of the Insolvency Act. The latter section seeks to ensure that there is a genuine and *bona fide* application that will not be prejudicial to either party and provides as follows:

> "*If the Court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie:*
>
> *(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 make an order sequestrating the estate of the debtor provisionally."

[13] The courts are therefore required to ensure strict adherence to these requirements because of the impact of the final order not only on the debtor but for all the affected parties. Such adherence is borne by the fact that the process of execution will have to be halted until the appointment of the Trustee by the Master of the High Court. Even after appointment, the Trustee will not exercise an overnight process because a proper investigation of the debtor's affairs will have to be conducted before a distribution to various creditors can be made.

[14] The language of section 8(b) requires the applicant to enforce the judgment debt after complying with enforcement proceedings before lodging an application for provisional sequestration. The overall purpose of section 8(b) is to ensure a fair and justifiable process in the distribution of the debtor's property. It turn to equally serve as an advantage to all the affected parties. It is not an indirect enforcement of the existing debt without having established that the debtor has committed an act of insolvency. Therefore, the consequent results of provisional sequestration may unearth other assets that may be available for distribution to creditors. In essence, it also helps to identify creditors that may not have been known or knew about the 'solvency' status of the debtor.

[15] Thus, in the context of this case, could it be conclusively reached, considering this legal framework that provisional sequestration will be justifiable and advantageous to creditors? In answering this question, I must first deal with the submissions made by the parties.

PARTIES SUBMISSIONS

Applicant

[16] In this case, the applicant submitted that the respondents committed an act of insolvency in terms of sections 8(b) and 8(c) of the Insolvency Act in that:

(i) *the Sheriff rendered a Nulla Bona Return when he attended to execute the writ in respect of movable property,*

(ii) by benefiting certain creditors above others as evidenced by the TransUnion Report that shows that the respondent is paying other creditors and

(iii) particularly servicing:

(a) the bond with SA Home Loans.

(b) the FNB loans whilst not servicing the applicant; and

(c) Vodacom account.

[17] This is the crux of applicants' case for the respondent's provisional sequestration of their joint estate. This is reinforced by the respondent's marriage in community of property which widens the pool of assets for the relief sought.

Respondents

[18] The respondents opposed the application and submitted that the applicant failed to prove the *nulla bona*, acts of insolvency and the fact that the application would be of benefit to the creditors. They disputed the facts relating to effecting of service and argued against the proper execution of service of the warrant as recorded in the *Nulla Bona* Return. They submitted that the serving of the warrant was fatal in that the Sheriff did not satisfy himself with the search for movable and or in the alternative, immovable property as he did not get into the property. They contended that the service was never executed in accordance with Rule 45 of the Uniform Rules of Court. They also submitted that reliance on the TransUnion Report was nothing more than hearsay evidence to prove the truth of underlying information reported by a third party. Besides, Ms Bisset, who

filed a founding affidavit, did not have authority to execute these proceedings against them.

[19] These submissions, as is the case with the background above, do not provide any significant difference to the material issues to be determined by this Court. In these circumstances, the submissions will not be exhausted and will be expanded in this judgment.

[20] Therefore, considering the legal framework above and its link to the parties' submissions, what constitutes a justifiable and legitimate reason that will be beneficial to the applicant should an order of provisional sequestration be granted? Secondly, what impact would it have on the respondents? Lastly, how does it become of benefit to creditors which are not limited to the applicant?

DISCUSSION

[21] The main issue in this application was to establish whether the respondents committed an act of insolvency. Secondly, whether such an act was prejudicial to other creditors. Lastly, whether the applicant provided sufficient reasons to justify the order for provisional sequestration of the respondent's estate.

[22] Let me reiterate, a provisional sequestration is a step that requires a party or anyone to show cause on the return date as to the reasons why it should not be made final. It serves as a bridge towards the order of final sequestration. This is of significance in that it sets the bar high to minimize any possibility of litigious behavior that may not only undermine the foundations that regulate the principles of a provisional order but the final order itself. The view was similarly endorsed by Windell J in *Body Corporate of Charlemagne v Drysdale*[1] who held:

[1]Body Corporate of Charlemagne v Drysdale [2026] ZAGPHC 68.

"[The relief sought in sequestration proceedings] is not merely a matter of form. It reflects a failure to appreciate the statutory scheme and the safeguards built into the Act for debtors, creditors, employees and other affected parties. Sequestration orders have far-reaching consequences: upon the grant of such an order, a debtor is divested of his or her estate, which vests in the Master until a trustee is appointed and thereafter in the trustee. The application must therefore be assessed strictly against the requirements for a provisional sequestration order, failing which it cannot succeed,"[2] *(*emphasis mine*).*

[23] I turn now to the subject of contention in this matter. I must state that an act of insolvency is the creation of a statute in terms of section 8(b) of the Insolvency Act. It is also qualified by meeting the requirements that are provided in terms of section 9 which include amongst others, (i) the disclosure of the respondent's marital status and full particulars of the spouse, (ii) service of the application on the Master, (iii) South African Revenue Services (SARS); (iv) debtor's employees; (v) registered trade unions and (vi) valid and timeous certificate by the Master that an adequate security has been lodged and (vii) filing of an affidavit setting out how the service was effected by the person who effected it. In this case, the applicant demonstrated compliance with these requirements. The satisfaction of this obligation is not in dispute. However, his confirmation that he was not aware of any employees employed by the respondent is not viewed by this Court as *mala fide*. Taking all the relevant factors cumulatively, the dismissal of the case based on a technicality will limit the evolution of the principles relating to the overall scheme of the Insolvency Act.

[24] The applicant argued that the respondents' inability to service their principal debt was indicative of factual and *prima facie* evidence of the act of insolvency. According to him, it justified the order of obtaining the provisional sequestration. In rebuttal, the respondents submitted that the value of their property exceeded the amount owed to the applicant. I am inclined to accept this submission. This

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[2] *Ibid* para 3.

was not disputed by the applicant as he equally submitted an audit of the respondent's financial standing.

[25] It is also of significance that I deal with the question of the *Nulla Bona* Return after the Sheriff made several attempts to effect service to no avail. This is prompted by the respondent's argument about its effective service. As noted above, on the 18th of May 2024, the second respondent was at their place of residence when the Sheriff arrived to execute the warrant. Thus, the Sheriff demanded the amount due and for the respondent to sign the writ. There was an exchange between them and the respondents said that it was 'impossible to pay the amount claimed or any amount' brings to the question raised above whether it constituted an act of insolvency? How does the mere response of not having money to satisfy the debt amount to an act of insolvency? In essence, does the Sheriff able to determine whether the respondents were "factually" insolvent? These questions might be raised, they are of significance in that Rule 4(1)(a)(iv) of the Uniform Rules of Court empowers the Sheriff to first, 'serve a notice or process of court at a *domicilium citandi* by delivering or leaving the notice or process in a manner by which in the ordinary course the notice or process would come to the attention and be received by the intended recipient. Secondly, report to the court how the process was served and why it was served in that manner.' In this case, the respondent was at her place of residence and was shown the writ of execution, thus, she refused to sign it. Let me repeat, does the refusal to sign a writ constitute an act of insolvency? It also trite mentioning that there was a *Nulla Bona* Return which was made on the 12th of June 2020 at the height of COVID-19 pandemic.

[26] This Court is inclined not to pronounce on this Return except for raising its "eyebrows" about the period between that return and the 2024 return. This Court was of the view that the 2020 return could not have been used as the legal basis in this application. This raised the question of the benefit that returns could have in these proceedings. The initiation of this process in the year 2020 and only to

be re-started in the year 2024 leaves this Court finding itself with the difficulty of establishing what could have been the cause of delaying the execution of the 2020 order at that time when it was granted. I am persuaded by the respondents who argued that the period between 2020 and 2024 rendered that return as stale with no force and effect. The applicant might have indicated and is evident from the papers and oral argument that various attempts were pursued to resolve the impasse between them with the possibility of settling the debt to no avail. Thus, the crux of the issue was the existence of a court order that was supposed to have been executed at the time when it was issued. After the passage of time, what effect does the 2020 order had in showing the respondent's indebtedness which in turn should prove an act of insolvency when it was not executed?

[27] Let me revert, the respondents in their answering affidavit averred that their estate was not insolvent. They referred to and argued that the amount owed to the applicant is far less than the value of their estate as to be indicated below. Cumulatively, the respondents argued that the total assets were beyond the amount they owe to the applicant. However, if the respondents have more assets to satisfy the debt raised a question about what could have been the reason for not paying the debt? To what extent should creditors go in ensuring the enforcement of the debt owed? It is incomprehensible that the respondents will not pay the debt even after a default judgment was granted against them. This Court was unable to find a justifiable reason if they have more assets and could not satisfy the debt?

[28] Another issue raised by the respondents which this Court viewed as not having legal basis was the argument against the authority of Ms Bisset who was granted authority to act on behalf of the applicant, Ms Bisset was vested with all the authority to undertake any function or role that is directly linked to the company. This appointment was properly captured in a meeting of Directors that was held on the 19th of May 2022. In this regard, the respondents clutched legal straws which this Court dismisses and could not go beyond the dismissal itself as it saw

no need for further consideration by this Court. This Court frowned upon the basis relied on when the established facts were placed before it relating to the authority that was vested on Ms Bisset.

[29] The overall relief and arguments against it, as gleaned from both parties' affidavits, raised another contentious issue relating to the commission of an act of insolvency and inability to pay the debt owed. Let me assume, I am correct, to what extent an order of provisional sequestration will be of benefit to creditors?

ADVANTAGES TO CREDITORS?

[30] The Insolvency Act seeks to ensure that there are fair processes and equitable distribution of the debtor's assets to the benefit and an advantage to all creditors. The main legal issue in both papers and oral arguments was related to the extent to which the provisional sequestration may be of equal benefit to other creditors. Kooverjie J in *Body Corporate Acubens v Foforane*[3] simply stated that the 'applicant is required to satisfy two requirements [whether] the respondent had committed an act of insolvency and the sequestration will be of benefit to the creditors.'[4] This means that the provisional sequestration is not individualistic in approach. It seeks to ensure that creditors that might be owed by the debtor are afforded an opportunity to have their claims satisfied when the final order is made. Reddy J in *Prevance Bonds (PTY) Ltd v XYD Property Group (PTY) Ltd*[5] had put a legal perspective on the benefit that is linked to creditors and held:

> *"… the hand of law is laid upon the estate of the general body of creditors that must be considered. No transaction can thereafter be entered into regarding estate matters by a single creditor to the prejudice of the*

[3] Body Corporate Acubens v Foforane [2025] ZAGPPHC 649.
[4] *Ibid* para 22.
[5] Prevance Bonds (PTY) Ltd v XYD Property Group (PTY) Ltd (3506/24) [2026] ZANWC 32.

general body. The claim of each creditor must be dealt with as it existed at the issue of the order."[6]

[31] Ponnan ADP in *Liberty Group Limited v Moosa*[7] provided further guidance on the purpose of provisional sequestration and the benefit it would have in the creditors. He held:

"*Advantage to creditors may lie in the prospect of finding assets falling into the insolvent estate, which may have been concealed or improperly disposed of. It will be sufficient if the creditor, on an overall view on the papers, can show, for example, that there are reasonable grounds for coming to the conclusion that upon investigation and inquiry a trustee may be able to unearth assets that might then be attached, sold and the proceeds disposed of for distribution amongst creditors."*[8]

[32] It is deduced from above that the applicant must prove the inability of the respondents to pay the debt. On the other hand, this Court is required to be careful in assessing whether a legitimate case of provisional sequestration has been made and it will also be of benefit to other creditors. Provisional sequestration is not made for an aggrieved party to indirectly use the law under the name of the interests of a benefit to other creditors. Fourie J in *OBC Distribution Centre (Pty) Ltd t/a OBC Cold Storage v Correia*[9] had put this Court at ease as he held:

"A court must be cautious to infer insolvency from circumstances. … the inability to pay a debt should not be taken out of its context, for it may be "consistent with a state merely of temporary financial embarrassment" or

[6] *Ibid* para 12.
[7] Liberty Group Limited v Moosa [2023] ZASCA 52.
[8] *Ibid* para 27.
[9] OBC Distribution Centre (Pty) Ltd t/a OBC Cold Storage v Correia [2014] ZAGPPHC 743.

due to "commercial insolvency" in circumstances where a debtor's liabilities do not exceed the value of his assets."[10]

[33] It is drawn from above that an application for a provisional sequestration must be considered holistically and not to be based on silky grounds that will not stand legal scrutiny. Similarly, the applicants are placed on an equal footing to ensure that they will not scratch around and engage in a nationwide chase of who might be creditors that will also benefit from the sequestration. The consequent result of provisional sequestration must be its outcome and not the first step itself. Cachalia JA in *Naidoo v Absa Bank Ltd*[11] in concurrence Windell J, held:

> *"Sequestration proceedings are not in and of themselves 'legal proceedings to enforce the agreement' ...... [They] are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent'– they are not proceedings 'for the recovery of a debt'.... [And] rights of the two litigants but also of third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent – it is not an ordinary judgment entitling a creditor to execute against a debtor*."[12]

[34] The applicant, in his founding affidavit which was corroborated by the respondents in their answering affidavit affirmatively put this Court into confidence that the respondent's debt exceeded the amount owed to the Applicant. The applicant was privy to the respondent's status *quo* as he recorded that the respondents purchased the property on 13 November 2009 and was registered at the King William's Town Deeds Office on 10 March 2010. The said property was described as:

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[10] *Ibid* para 4.
[11]Naidoo v Absa Bank Ltd [2010] 4 All SA 496.
[12] *Ibid* para 4 (footnotes omitted).

> "ERF [… … ….] Township, [… Measuring 917 (Nine Hundred and Seventeen) Square Metres Held by a Deed of Transfer […] Situated at […] […], Port Elizabeth."

[35] As adduced by the applicant before this Court, at the time of registering the property, the respondents passed a bond in favour of SA Home Loans for R740 000.00. The value of the property had since increased to R1 140 000.00 and R2 300 000.00 with a municipal value of R1 500 000.00. The applicant went on to submit that the SA Home Loans bond was at R287 216. 00 and the sale price of the property should be in the region of R1 140 000.00 and R2 3000 000.00. The applicant further brought to the attention of this Court the judgement by Cameron J in *Commissioner for South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation services Partnership*[13] who held that *'the prospect of a benefit should not be remote and reasonable belief should exist that an investigation might be unearthed for the benefit of creditors.*'[14] In this case, the benefit does not fall within the classification of a reasonable belief because, first, the identified creditors were owed far less than the amount that could have contributed to the determination of the act of insolvency. Secondly, given that the debts owed by the respondents to SA Home Loans: R287 216; FNB; R1519 and Vodacom R204 and the applicant R622 021.81 in total amount R910 960.81. This Court considered the amount owed by the applicant to the respondents of R116 911.41 which reduces the total amount owed by the respondents to R794 048.59. The applicant's calculations of the value of the respondents exceeds the amount they owed to creditors. What value does this application bring to the creditors? What reasonable belief will be held to exist when a pecuniary loss to the creditors does not constitute any act of insolvency? In these circumstances, it is linked to the Sheriff's return of not finding any executable assets at the respondent's place of

[13] Commissioner for South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation services Partnership 2006 (4) SA 292 (SCA).
[14] *Ibid* para 29.

residence. It is my view that the Sheriff has limited authority in terms of proving the 'factual' status relating to the act of insolvency.

[36] The Applicant further identified that the respondents are directors / members of three entities:

(i) The Big Tree Holiday Lodge CC, […].

(ii) Expansum Capital (Pty) Ltd, […] and the newly registered entity in 2023:

(iii) Mirero Studio (Pty) Ltd, […]

[37] I am not going to reproduce this information because it is also in the respondent's answering affidavits. In the circumstances of the established facts, what constitutes an act of insolvency as measured against the R622 021.81 debt that is owed by the respondents to the applicant? Is this not the abuse of the court processes and the applicant used an indirect attempt to enforce the default judgment against the respondents? In concurrence with Windell J and Cachalia above, I reiterate that "the declaration of insolvency in the interest of creditors does serve as an alternative to debt-collection mechanism where execution remains available."[15]

[38] It is, therefore, my respectful view that this application was not about the benefit of creditors but 'self-serving approach' which is an indirect mechanism to enforce the applicant's own default judgment against the respondents. The use of provisional sequestration is an abuse of the processes of this Court. It was also a misapplication of the content of section 8(b) of the Insolvency Act. In this regard, the applicant had placed a limited number of audited potential creditors (SA Home Loans, Loans and Vodacom) that do not indicate an excess of the respondent's financial liability that could have enabled the determination of the act of insolvency. The applicant was also not better placed to claim the amount

[15] See note 1 above and note 11.

due because it was also below the amount that is owed by the respondents. In essence, the applicant, including the three creditors, outweighs any argument that may counter the respondent's financial liabilities. The respondent's financial capacity was laid bare and could not have gone beyond an enquiry in establishing whether there were assets that could have been hidden. This was important for this case because as Twala J stated in *Mercantile Bank Limited A Division of Capitec Bank Limited v Ross*[16] '*securing the pecuniary benefit to the creditors … to protect the general body of the public [was beyond was the scope of the applicant's investigation into the assets that could have been hidden by the respondents].*'[17] Therefore, the servicing of debts held by the respondents with the existing creditors was immaterial because they did not constitute a prejudice against them, including the applicant. The value of the respondents' assets had been factually established that they do not fall within the category of section 8(b) of the Insolvency Act.

[39] A proper conspicuous of evidence did not lead to the conclusion that provisional sequestration was necessary. Provisional sequestration procedures should not be used as a form of punishment and a pretext of benefit to other creditors. It is my view that there were no justifiable reasons that could have resulted in the provisional sequestration of the respondents' assets to ensure the subsequent benefit to the applicant and other creditors. Therefore, I do not see any reason that justified the success of this application.

[40] It is also a standing principle that costs should follow the results. The costs are meant to justify the merits of each case. They are not as a measure to punish the loosing litigant. In the circumstances, the costs will be ordered as they appear below.

[41] In the result, the following order is made:

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[16] Mercantile Bank Limited A Division of Capitec Bank Limited v Ross [2023] ZAGPJHC 435.
[17] *Ibid* para 25.

[41.1] The application for a provisional sequestration of the First and Second Respondent’s joint estate is refused.

[41.2] The applicant is ordered to pay the costs of this application on Scale B including the cost of one Counsel where so employed.

N NTLAMA-MAKHANYA
ACTING JUDGE OF THE HIGH COURT
GQEBERHA

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Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. Its date of delivery is deemed 24 March 2026*.

Date Heard: 12 February 2026

Date Delivered: 24 March 2026

Appearances:

Applicant:	Advocate KD Williams Gqeberha
Instructing Attorneys:	Lynn & Main Strahavon
Respondent:	Advocate D Madokwe

Gqeberha

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