REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2023-067739

(1)	REPORTABLE: ~~No~~
(2)	OF INTEREST TO OTHER JUDGES: Yes
(3)	REVISED: Yes
20/03/26	[redacted]
DATE	SIGNATURE

In the matter between:

BODY CORPORATE OSHIVELO	Applicant
and	
NOMAHLUBI CHRISTINE NOMALIZO MTIMKULU	Respondent

Heard: 17 March 2026

Delivered: 20 March 2026

JUDGEMENT

NOTSHE A.J.

[1] This is an application for the provisional liquidation of the respondent.

[2] It is now trite law that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds. This is part of the broader principle that the court's processes should not be abused. The decisions are legion.

[3] An applicant for winding up has to satisfy the following requirements:

3.1 that it is a creditor of the respondent and therefore has *locus standi* to institute the proceedings;

3.2 that the respondent is the debtor because it owes the amount claimed;

3.3 that the respondent falls within one or more of the grounds laid down in section of the Insolvency Act, 1936 (Act No. 24 of 1936). ("*the Act*")[1]

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[1] Section 8 provides that:
"A debtor commits an act of insolvency-
(a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;
(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

[4] In terms of section 10 of the Act the Court will grant a provisional sequestration order if it 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 nine; 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.

[5] In this case the applicant alleges that the respondent has committed an act of insolvency as set out in section 8(a) of the Act.

[6] Section 8(a) of the Act provides that a debtor commits an act of insolvency *if "... [she] departs from [her] dwelling or otherwise absents [herself], with intent by so doing to evade or delay the payment of [her] debts."*

[7] In this case, the applicant alleges that the respondent absented herself from her dwelling with the intention to evade or delay the payments of her debts.

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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;

(c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;

(d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;

(e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;

(f) if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section six or seven, he fails to comply with the requirements of subsection (3) of section four or lodges, in terms of that subsection, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on which such application is to be made;

(g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts;

(h) if, being a trader, he gives notice in the Gazette in terms of subsection (1) of section thirty-four, and is thereafter unable to pay all his debts."

[8] The onus of proving an act of insolvency rests on the applicant. At this stage, the applicant is required to lead merely *prima facie* evidence. It is, however, not sufficient for the applicant merely to adopt the words of the relevant sections of the Act. The applicant must state the facts which constitute the alleged act of insolvency. It must always be remembered that the founding affidavit in the insolvency application, like any other application, should contain both the pleadings and the evidence. Rule 6(1) of the Uniform Rules provides that every application shall be brought on notice of motion supported by an affidavit as to facts upon which the applicant relies for the relief.

[9] In this case, the applicant merely avers that *"The Respondent has committed the following act of insolvency as envisaged by Section 8 of the Insolvency Act 24 of 1936. In terms of Section 8(a) of the Act as the Respondent has departed herself from the property with the intention to avoid or delay paying her debt."*

[10] This is a mere conclusion, but there are no facts that support this conclusion.

[11] An allegation to the effect that the respondent has departed from the property with the intention to avoid or delay paying the debt has two components that must be proved. They are the objective fact of departing and the subjective element; the departure is intended to evade or delay the payment of debts. These must not only be alleged but must also be proved.

[12] The first element is easy to prove: that the respondent departed from the premises. The second element is proved by the express words of the respondent or the facts from which the intention of the respondent can be inferred.

[13] In *Hassan v Berrange*[2] the Court said the following:

"Both ss 8(a) and 8(d), in setting out acts of insolvency, refer to an intent on the part of the debtor. In the case of s 8(a) the intent is one to evade or delay the payment of debts, while in s 8(d) the intent on the part of the debtor is to prejudice his creditors or to prefer one creditor above another. The test of intention on the part of the debtor is a subjective one (cf De Villiers NO v Maursen Properties (Pty) Ltd). Intention is established by a process of inferential reasoning and is not dependent upon the mere ipse dixit of the debtor who may well deny that he has any such intention. A court, in considering whether there was such an intention, is required to weigh up all the relevant facts and circumstances in order to determine what, on the probabilities, was the 'dominant, operative or effectual intention in substance and in truth' of the debtor."

[14] In this case, the applicant failed in both regards. There is no proof that the respondent departed from the premises. In the first place, on 04 August 2022, the respondent sent an email to the applicant giving her residential address. Thereafter, the applicant received a return of service of the sheriff dated 12 October 2022. The return of service merely reads that *"... the warrant of execution against the property could not be executed as the execution Debtor is unknown at the given address as informed by Mr Jimmy Sepondo Head of security of Vukani consisting of 119 units."*

[15] There is no follow-up by the applicant informing the respondent that she could not be found at the address she had given.

[2] 2012 (6) SA 329 (SCA).

[16] The next attempt to serve the writ of execution is at a different address. Not surprisingly, the return of service reads that the whereabouts of the debtor were unknown.

[17] It is clear from the foregoing that this cannot be proof that the respondent departed from the premises, let alone with the intention to delay or evade paying her debts.

[18] The applicant has failed dismally to prove that the respondent committed an act of insolvency that is alleged.

[19] I therefore make the following order:

(a) The application for a provisional sequestration of the respondent is dismissed.

(b) The applicant is to pay the costs of the application.

[redacted]

V. S NOTSHE

Acting Judge of the High Court

APPEARANCES:

For the Applicant: Messrs Alan Levy Attorneys Inc

For the Respondent: In Person