

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: 59410/2022

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

9 April 2026

DATE

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SIGNATURE

NAVELA DINA NDHLOVU

Applicant

And

SHACKELTON CREDIT MANAGEMENT (PTY) LTD

First Respondent

EUGENE NEL N.O.

Second Respondent

ZIYAD SONPRA N.O.

Third Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Fourth Respondent

JUDGMENT

Introduction

[1] The applicant instituted an application to rescind the sequestration order issued against her on April 15, 2024. The application is based on section 149(2) of the Insolvency Act,¹ alternatively Rule 42(1)(a) of the Uniform Rules of Court, or common law. The applicant seeks condonation for the late filing of the rescission application.

[2] Shackleton Credit Management (Pty) Ltd (“Shackleton”), the first respondent, is opposing the application, and both the second and third respondents, who are trustees appointed by the fourth respondent, are not participating in this *lis* (including the fourth respondent). The reference to the respondent pertains to Shackleton.

Background

[3] BMW Financial Services (“BMW”) entered into an asset-based finance agreement (“agreement”) with Zigna CC Trading (“Zigna”). The applicant signed an unlimited suretyship as a co-principal debtor in favour of the respondent for the fulfillment of Zigna's obligations under the agreement.

[4] Zigna defaulted, and BMW filed a civil lawsuit against Zigna and the applicant in the Gauteng Division, Pretoria, under case number 7000/2013. A judgment was granted on 19 November 2015 in the amount of R 358 429.04. The respondent substituted BMW as the plaintiff in the lawsuit against Zigna and the applicant. Zigna was deregistered on 28 February 2015, and the respondent pursued the applicant for the judgment.

[5] The respondent attempted to attach the applicant’s movable assets, but the sheriff returned *nulla bona* after the applicant informed the sheriff that she had no money or disposable movable property to satisfy the judgment. Therefore, the respondent argued that the applicant committed an act of insolvency as described in section 8(1) of the Insolvency Act. Based on this, the respondent filed a sequestration application against the applicant. At the time of the application, the outstanding balance was R 451 665.73.

¹ 24 of 1936.

[6] The respondent conducted a search with the Companies and Intellectual Property Commission (“CIPC”) and established that the applicant is a director of six active companies. Although she informed the sheriff that she did not own any immovable property, a search at the Deeds Registry revealed that the applicant owns the immovable property, namely Erf 4, Portion 38, Riverglen. This property was purchased for R 17 500 000.00 and is mortgaged for R 13 500 000.00. The respondent commissioned a valuation which estimated the property's worth at approximately R 19 000 000.00. At the time the sequestration application was filed, the balance on the loan account was R 12 774 897.00. The respondent argued that there was significant equity in the property, amounting to several million rands. Therefore, the respondent contended that sequestration would benefit the creditors. Additionally, the respondent stated that the applicant was insolvent in accordance with section 10(b) of the Insolvency Act.

[7] In return, the applicant filed papers opposing the application for sequestration and raised three points *in limine*: first, that the amount claimed is disputed because the computation violates the National Credit Act,² which requires the credit provider to first attempt settlement with the debtor; second, that the computation breaches the common law *duplum* rule; third, that the amount claimed has prescribed before judgment was obtained.

[8] The respondent argued that the point *in limine* disputing the claimed amount was based on the alleged transaction's violation of the National Credit Act, specifically the notice requirement under section 129(1). This argument is untenable because judgment has already been obtained; the defence could have been raised before judgment was granted and is therefore irrelevant to the sequestration proceedings. Additionally, the amount should have been challenged prior to judgment. In any case, the respondent must prove that a debt of R 100 is owed. Furthermore, the defence of the *in duplum* rule is inapplicable, as the judgment amount was R 314 724.22, and with interest, the total was R 358 429.24.

[9] The third point *in limine* of prescription was equally unsustainable because the prescription period would start only after the vehicle was sold, and the claimable shortfall

² 34 of 2005.

would be subject to a three-year prescription period from the date of sale. Notably, the judgment was obtained on 19 November 2015.

[10] Louw AJ adjudicated the application for sequestration, which the applicant opposed. The opposition was unsustainable, and Louw AJ granted a provisional sequestration order on 24 February 2024, with a return date of 15 April 2024. The applicant failed to file an affidavit to show cause why the provisional order should not be confirmed, and the order was confirmed on the return date, 15 April 2024, in the applicant's absence.

[11] The applicant is aggrieved with the confirmation of the provisional order and has filed these proceedings to seek rescission of the sequestration order issued against her. The reason she provided for not submitting the answering affidavit before the provisional order was confirmed was that she was emotionally strained.

Application for condonation

[12] The applicant argued that the application was filed late and requested condonation for the delay. She admits that the delay was excessive but explains that she was hindered by the order issued against her, which caused her emotional and psychological trauma, rendering her economically inactive and unable to raise funds for legal costs. She emphasises that the matter is significant because it impacts her constitutional rights to participate in the economy and to dignity, both of which are compromised by being placed under sequestration on questionable grounds. She also states that there is no prejudice to the respondent.

[13] The respondent argues that the applicant has failed to explain the one-year hiatus since the order was granted against her. Additionally, the trustees who have since been appointed have carried out their duties, and the claim that no one would be prejudiced is ergo untenable. The argument that she lacked funds to hire an attorney conflicts with the claim that she is both factually and commercially solvent.

[14] It follows that the applicant's argument lacks merit and should be dismissed outright. However, I have exercised my discretion to grant condonation in the interest of justice and to ensure that the issues raised are finally settled.

Contentions and submissions by the parties.

[15] The applicant disputes the amount claimed by the respondent because she has continuously serviced the judgment debt, and therefore, the amount owed should have decreased. Additionally, she argued that she is factually solvent since her assets exceed her liabilities. Furthermore, she is also commercially solvent and possesses enough liquid assets to settle the debt. Considering these facts, resorting to the sequestration process was an abuse and is not in the creditors' best interest.

[16] She argues that, because she was provisionally sequestered, she was prevented from filing the papers to show cause why the final order should not be confirmed.

[17] The grounds for rescission are as follows: First, she argues that she was not in wilful default because being placed under provisional sequestration incapacitated her emotionally and financially. She was also emotionally distressed due to the provisional order. Therefore, her conduct should not be considered wilful default on her part, she argued. She also avers that she has a *bona fide* defence because she was factually solvent, and additionally, the order for sequestration was not for the benefit of the creditors. Given that she was making payments, she disputes owing the respondent R 451 665.73 as claimed. To this end, she added that the launch of sequestration proceedings was premature and baseless.

[18] There is no evidence presented to suggest that the sequestration was for the benefit of the creditors, she contended. In any case, she added, execution against the assets would have been the first step and not sequestration, which should have been a last resort.

[19] She argued further that the burden of proof on the return date is heightened for the application to demonstrate that the applicant owed the respondent at least the amount of R 100.00, that the applicant had committed an act of insolvency, and further that placing the applicant under sequestration would be to the benefit of the creditors.

[20] The applicant further argued that the respondent's immediate move to sequestration was an abuse of process, and the respondent should have first initiated execution

proceedings before pursuing sequestration. The applicant cited *Zadi*,³ where the court held that, without clearly explaining why sequestration was sought when there was immovable property that could have been attached and sold in execution, it constitutes an abuse of the sequestration proceedings.

[21] The respondent, however, argues that the applicant chose not to appear to oppose the confirmation of the provisional order and that the default was unjustifiable. She, on the return day, thus failed to surmount the initial hurdle of the common law requirement for rescission.

[22] The claim that the respondent's counsel argued further—that the issue of indebtedness was disputed—is of no importance if the judgment obtained is not being challenged. Even worse, the applicant admitted that she has been making payments to settle the judgment debt. The said judgment was granted over 10 years ago and remains in effect. She cannot challenge the judgment while simultaneously making payments.

[23] There is no evidence to show that the applicant is factually or commercially solvent, and this can also be inferred from her failure to pay what she owes to the respondent or other creditors, respondent's counsel argued. Additionally, she provides no evidence to support the claim that sequestration would not benefit the creditors.

[24] There is also no basis to argue that the court issued an order for sequestration, which was wrongly requested and granted under the provisions of Rule 42(1)(a) by the applicant; therefore, such cause of action is ill-advised and cannot be justified.

[25] The counsel for the respondent further argued that there is also no merit to the applicant's claim that the respondent acted abusively, especially since the respondent's judgment is over 10 years old and the respondent has been taking steps to collect the payments. It is also incorrect for the applicant to claim that she made the payments voluntarily; in fact, they were made as a result of the execution against her bank account.

³ *Zadi and Another v Body Corporate of Outeniqua and Others* (55727/2010) [2011] ZAGPPHC 163 at paras 10 and 12.

[26] The respondent argued that the applicant's claim of being solvent is unsustainable because she has been unable to pay the amount owed to the respondent. Her situation poses a risk to the companies she is involved with and to their employees, as she cannot settle her debts. Appointing a trustee to take over these companies and their employees would help prevent potential losses, respondent argues. Conversely, she has not provided any evidence to prove she is solvent. On one hand, she lacks funds to pay for legal representation, while on the other hand, she claims she is solvent. She is therefore contradicting herself, the respondent's counsel submitted.

[27] The counsel further argued that the judgment in *Zadi*⁴ referred to by the applicant is distinguishable from the present case, as the debt here is more than 10 years old and has not been challenged. The claim that the execution process would be suitable fails to recognise that, although the property's value may be R 17 million, execution is unlikely to realise such an amount, since the sheriff can enforce the warrant only by auction. Her attitude should be seen as lacking, as she chose to purchase a property in 2021 while she had an outstanding debt with the respondent that she could have settled.

[28] The applicant's contentions were argued before the court, which granted a provisional order did not find them sustainable. This Court should likewise reject these contentions and order the applicant to pay costs on an attorney-client scale, to be borne by the estate.

Legal principles and discussion

[29] The requirements for the rescission of judgment, as outlined in rule 42(1)(a) of the Uniform Rules of Court, require a party to clearly specify the error made by the court in granting the order. If an applicant cannot convincingly argue that an error occurred at the court's hands, then *cadit quaestio*. In this case, the applicant failed to present evidence or make an argument to support such a cause of action.

[30] The second basis raised by the applicant is common law, which requires her to persuade the court that she was not in wilful default and that she has a bona fide defence.

⁴ Id.

The applicant argues that she was not in wilful default because the order for the provisional sequestration “decapitated” her to the point that she could not gather all her resources to file documents and persuade the court on the return date that the provisional order should not be confirmed. The SCA in *Eamon Courtney*,⁵ considered the judgment in *Zuma*,⁶ which held that rescission was not available to a litigant who elected not to participate in the proceedings when the order was granted. The court, additionally referred to *Lodhi*,⁷ where it was held that even if a party had a defence which was never placed before the court, such a party cannot invoke the provisions of Rule 42(1)(a) to contend that the court erroneously granted judgment based on the defence which was never raised.

[31] The next question is whether the applicant has a bona fide defence under section 149(2) of the Insolvency Act. The court has interpreted this provision as having a broader scope than the common-law grounds of rescission. The respondent's identified defence is that there is a genuine dispute. However, this defence cannot be supported by the applicant's allegations. The applicant argued that since the order was issued, she had made several payments that should have reduced the balance. Aside from the amount paid after the bank account was frozen, she made no other payments. She also failed to demonstrate what the balance should be reduced according to her calculations. She further sought to argue that the legal costs were added, even though they were not determined by a taxing master. She also contended that the calculation of the total amount violated the *in duplum* rule against double charging of interest, charging interest on interest, or capping interest payments. The full amount due was calculated and attached to the respondent's papers. The applicant failed to challenge those calculations.

[32] The applicant's claim that she is both factually and financially solvent is not supported by any evidence and is therefore unsustainable. This also applies to the argument that sequestration would not benefit the creditors. The SCA in *Hawker Air Services*⁸ held

⁵ *Eamon Courtney v Izak Johannes Boshoff NO and Others* (483/2023) [2024] ZASCA 104 (12 June 2024).

⁶ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021).

⁷ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* (128/06) [2007] ZASCA 85; [2007] SCA 85 (RSA); 2007 (6) SA 87 (SCA) (1 June 2007).

⁸ *Commissioner for South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* (379/05) [2006]

that one should be persuaded that there is a reason to believe – not necessarily likelihood, but a prospect not too remote – that, as a result of investigation and inquiry, assets might be unearthed that will benefit creditors. In this instance, the respondent has demonstrated that sufficient equity is available to the creditors.

[33] Regarding the defence of abuse, the applicant referred to *Zadi*⁹ where the court emphasised that where there is sufficient equity in the immovable property, sequestration may be considered an abuse, particularly where the amount claimed is insignificant. It follows that where execution remains an effective option to exploit, opting for sequestration may be construed as an abuse of the court process. It was stated in *Gardee*¹⁰ that:

‘Sequestration, it is true, has been described on occasions as a legitimate form of execution. (See *Wilkins v Pieterse*, 1937 CPD 165 at p.170; *Moldenhauer v De Beer*, 1959 (1) SA 890 (O) at p.892F.) That does not however mean that the judgment creditor has the same automatic right to it which ordinarily governs execution of the routine kind. Like everyone else seeking sequestration, he must first show the Court reason to believe in its advantages to creditors and then, having done so, await the Court’s exercise of its discretion in his favour...’¹¹

[34] It is noted that the court is bestowed with discretion, which must be exercised judiciously, not to grant a sequestration order where it appears that the proceedings were launched with an ulterior or improper motive. It also applies where there are special considerations, for example, in *Millward*,¹² it was stated that a special factor exists where there is no suggestion that other creditors are pressing the respondent for payment.

Conclusion

[35] The applicant has failed to prove that she was not in wilful default. The fact that she was provisionally sequestrated did not prevent her from filing papers or attending court on the return day, and her failure to do so constitutes wilful default. She has also failed to

ZASCA 51; 2006 (4) SA 292 (SCA); [2006] 2 All SA 565 (SCA); 68 SATC 141 (31 March 2006) para at 29.

⁹ *Zadi* above n 3 at paras 10 and 12.

¹⁰ *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (N).

¹¹ *Id* at 1069B-D.

¹² *Millward v Glaser* 1950 (3) SA 547 (W).

meet the requirement of a bona fide defense under common law and section 149(2) of the Insolvency Act. The claim that she is solvent without providing any evidence or attempting to settle the debt underscores the assumption that she is determined to frustrate the respondent. Finally, there is no evidence to support the claim that the court that granted an order erred as contemplated in Rule 42(1)(a) of the Uniform Rules of Court. In the premises the application is bound to fail.

Costs

[36] The costs will follow the results.

Order

[37] As a result, I make the following order:

The application for Rescission is dismissed with costs, including counsel costs on Scale B.



M V Noko
Judge of the High Court

DISCLAIMER: This judgment was prepared and authored by Judge Noko and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The hand-down date is 9 April 2026.

Date of hearing: 17 February 2026

Date of judgment: 9 April 2026.

Appearances:

For the Applicant:

J Krause, instructed by CMS Attorneys.

For Respondent:

R J Stevenson, instructed by Lynn & Malan Inc.