

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

Case No: 17498/2024

- 1. REPORTABLE: NO
- 2. OF INTEREST TO OTHER JUDGES: NO
- 3. REVISED: NO

In the matter between:

ABSA BANK LIMITED

Applicant

and

**DAVID EDWARD RHODES SARGENT N.O.
RYAN WINSTON READ N.O.**

First Respondent
Second Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time of hand-down is deemed to be 10h00 on Tuesday 28 April 2026.

COOKE AJ:

1. On 10 February 2025, Dlamini J granted an order provisionally sequestrating the Feltre Trust (IT: 11689/2000) ("**the Trust**"). The Trust is represented in these proceedings by the respondents – its appointed trustees. There are no

reasons furnished for the grant of the provisional order, but it appears to have been given on the strength of a judgment of this Court handed down on 8 June 2022, and *nulla bona* return issued by the Sheriff on 26 October 2022.

2. This is the return day of the *rule nisi*. The applicant (“**Absa**”) seeks that the rule be confirmed. The respondents, as trustees of the Trust, oppose the grant of a final order and, pursuant to the order of Dlamini J, filed an affidavit purporting to show cause why the provisional order should not be made final. At the hearing the Trust’s counsel informed me:

- 2.1. that the Trust abandoned reliance on the answering affidavit in its entirety. Accordingly, I need not consider the issues raised in it; and

- 2.2. of a development that had arisen shortly before the hearing and after the answering affidavit had been filed. I shall return to this aspect in due course.

3. Section 12(1) of the Insolvency Act 24 of 1936 (“**the Insolvency Act**”) mandates that:

If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that-

- (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,*
it may sequester the estate of the debtor.

4. The heightened threshold required to be met on a return day was explained by Zulman AJ (as he then was) in *Braithwaite v Gilbert*:¹

¹ 1984 (4) SA 717 (W) at 718B-D

The onus of satisfying the Court on these three points is on the creditor and there is no onus on the debtor to disprove any of them. Furthermore, the degree of proof required when application is made for a final order of sequestration is higher than that for the grant of a provisional sequestration order. In the latter case a mere prima facie case need be established whereas the Court, before it will grant a final order, must be satisfied on a balance of probabilities as to the three matters aforementioned. Even then the Court still has a discretion in terms of s 12 (1) of the Act whether or not to grant a final order.

5. It is apparent that I am bound not merely to rubber stamp the provisional order – even in circumstances such as these where any opposition has effectively been withdrawn – but to interrogate the application to ensure that the requirements for the grant of a final order have been met. I intend to do so.
6. The judgment debt held by Absa is in the amount of approximately R 1,8 million. Absa asserts that together with interest and costs, the Trust's liability to it is now approximately R 2,5 million. Evidently then the first of the requirements of section 12(1) is satisfied.
7. On the question of the Trusts insolvency, or an act of insolvency committed by it, Absa relies on a return *nulla bona* issued by the Sheriff. Importantly, in respect of the requirement under section 12(1)(b) of the Insolvency Act, Absa's reliance is on section 8(b) alone, and no other ground is raised by it.
8. The first set of returns were issued against the Trust and both of the respondent trustees separately. In relevant part they are identical in that they each state:

On this 26th day of October 2022 at 13:37 I served this WRIT OF ATTACHMENT : MOVABLE PROPERTY upon MR JETHO (MEMBER), ostensibly a responsible employee and not less than 16 years of age, of and in control of and at the principal place of business within the court's jurisdiction of FELTRE TRUST at 7 MAPLEDURHAM AVENUE, HENLEY ON KLIP by handing to the firstmentioned a

copy thereof after exhibiting the original and explaining the nature and exigency of the said process. RULE 4 (1) (a) (v)

Subsequently, after I demanded payment of the amount due, I was informed by the abovementioned that it was impossible to pay the amount claimed or any sum. Except property exempted by law in terms of Section 39 of Act 59 of 1959, as amended no property or assets could, after enquiry, be pointed out to satisfy this writ. Despite diligent search and enquiry I could not find sufficient disposable property to satisfy this writ. As the judgment debtor does not have sufficient movable property to satisfy the Warrant, I therefore make a return of NULLA BONA.

("the First Return")

9. While the First Return was primarily relied on to evidence an act of insolvency under section 8(b), a second return was also relied on too. That return is in respect of the second respondent only. It states:

That on Saturday 02 December 2023 at 09h20 at 1[...] J[...] AVENUE, R[...] RIDGE, RANDBURG being the defendant's residential address, payment of the judgement debt in the amount of R1 769 127.57, interest, my costs plus VAT was demanded from READ: RYAN WINSTON N.O. wherewith to satisfy this warrant. READ: RYAN WINSTON N.O. declared that he has no money, moveable or disposable property wherewith to satisfy the said warrant. No moveable or disposable property was pointed out to me or could after a diligent search and enquiry be found at the given address. It is further certified that READ: RYAN WINSTON N.O. was requested to declare whether he owns any immovable property which is executable, which the following reply was furnished. 'NO'

That simultaneously with the execution, a copy of the warrant of execution was served by handing 110 READ: RYAN WINSTON N.O. personally after the original document was displayed and the nature and contents thereof explained to him. Rule 4[1](a)(1).

("the Second Return")

10. Section 8(b) of the Insolvency Act states:

A debtor commits an act of insolvency... 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. Evidently what is envisaged are two discrete acts of insolvency:

11.1. the first, where a Sheriff attends in execution of a judgment and demands from the judgment debtor (or an appropriately authorised person where the judgment debtor is a juristic entity) that the judgment debt either:

11.1.1. be satisfied; or

11.1.2. sufficient disposable property to satisfy it be indicated;

11.2. the second, where a Sheriff attends in execution of a judgment and conducts a diligent search for disposable property that is sufficient to satisfy the judgment debt, but does not find it.

12. I now consider whether any of the returns meet either of these requirements.

The First Return

13. It was accepted that the papers do not disclose who “Mr Jetho” is, what relationship he has with the Trust, whether he is *au fait* with the Trust’s affairs or whether he has any authority in respect of the Trust at all. Likely because he has no authority or appropriate knowledge of the Trust’s affairs, when the Sheriff made demand Mr Jetho was unable to indicate sufficient property belonging to the Trust to satisfy the judgment debt.

14. In those circumstances, and regardless of what Mr Jetho said, is reported to have said or his failure's in either satisfying the judgment debt or pointing out sufficient property that would do so, a return served on him certainly does not meet the requirements for an act of insolvency under the first leg of section 8(b).

15. That is not the end of the enquiry in respect of the First Return as the second leg of the section 8(b) threshold requires consideration, that is: whether after diligent search, the Sheriff was able to find sufficient disposable property to satisfy the judgment. I repeat the relevant portion of the return:

Despite diligent search and enquiry I could not find sufficient disposable property to satisfy this writ. As the judgment debtor does not have sufficient movable property to satisfy the Warrant, I therefore make a return of NULLA BONA.

16. In a number of places in the First Return, the Sheriff makes reference to "*movable property*" as opposed to "*disposable property*", and in the portion immediately quoted above, appears to make a return *nulla bona* on the basis of there being insufficient "*movable property*" to meet the amount of the judgment. *Ex facie* the return, there is at least some confusion apparent in the mind of the Sheriff, and certainly in what he has reported.

17. An exposition of the facts, as they appear in the founding affidavit, is necessary.

18. Absa states that the Trust owns two immovable properties. A valuation is attached to the founding affidavit which reflects:

18.1. a property in Henly on Klip which is valued at R 7 500 000.00; and

18.2. a property in Auckland Park which is valued at R 1 850 000.00

19. Absa holds:

19.1. over the Henly on Klip property, a continuing covering mortgage bond:

19.1.1. as first mortgagor in the total sum of R 2 280 000.00;

19.1.2. as second mortgagor in the total sum of R 6 720 000.00; and

19.2. over the Auckland Park property, a continuing covering mortgage bond,
as first mortgagor, in the total sum of R 900 000.00.

20. On the papers before me, there appear to be no further encumbrances over either property.

21. It is evident then that the Sheriff, who reported that he searched the Henley-on-Klip property, did not give any consideration to the very property in which he was standing.

22. In *Collier*² a full bench of the Western Cape Division detailed the historical authorities that considered whether or not mortgaged immovable property constitutes disposable property for purposes of section 8(b) of the Insolvency Act. The Court found, particularly at the instance of the first mortgagor, that it did.

23. In the light of that decision, and the facts outlined above, the Trust certainly has sufficient *disposable property* to satisfy the judgment debt. That being the case, the Sheriff's return does not meet the threshold required under the second leg

² Absa Bank Ltd v Collier 2015 (4) SA 364 (WCC)

of section 8(b) and, because of the conclusion that I reached in paragraphs 13 and 14 above, the First Return does not constitute an act of insolvency under section 8(b) of the Insolvency Act.

24. I put my concern to Mr Alli, who appeared for Absa. I am grateful to him for the helpful submissions he made and for referring me to an unreported judgment of Maier-Frawley J in this Court in the matter of *Appelcryn*.³ There the provisional sequestration of Mr Appelcryn was sought on the basis of an act of insolvency committed under section 8(b) of the Insolvency Act. The court held:⁴

On the unrefuted evidence in casu, the respondent was handed a power of attorney by the applicant's attorneys to permit the marketing and sale of his properties by way of private treaty or by holding special controlled private auctions in order to obtain the highest possible prices possible for the properties, which he refused to sign. The respondent also indicated that he has no intention of selling his properties and refused to permit the applicant access to the properties when valuations were required. He baldly denies that he has refused to sell his properties, yet he offers no explanation as to why he has made no attempt whatsoever to market and sell these assets in order to obtain the best possible price for purposes of discharging his liabilities.

The applicant submits that Collier is distinguishable on its facts. I agree. In Collier, the debtor had informed the Sherriff of his immovable property and that its value would extinguish the indebtedness owed to the creditor. There was no suggestion in that case that the property, if sold, would not extinguish the indebtedness owed. In the present case, the respondent failed to inform the Sherriff of the existence and value of his immovable properties or to point out disposable property of sufficient value that could be used to expunge the debt owed by him. Furthermore, the applicant states that the properties in question, which comprise agricultural commercial farms, are not easily realised on the open market. The reason is self-evident. The niche area within which one markets such commercial agricultural property substantially limits the buying power or ability to achieve market value for the properties as compared to ordinary easily marketable residential property, as was considered in Collier.

³ Absa Bank Ltd v Appelcryn, Case No.: 38365/2019

⁴ Ibid paras 31 and 32

25. The facts of this case are quite different:

25.1. far from a stated refusal to sell the properties, Absa has bonds over both properties;

25.2. Absa itself has given a valuation of the properties;

25.3. the value of the properties far exceeds the judgment debt

25.4. the Sheriff's engagement was with Mr Jetho and not with a person who had the requisite knowledge and/or authority to give an informed response to the demand, or any authority to bind the Trust in response;

25.5. there is no evidence that the properties cannot be easily marketed or sold and, from what appears below, the opposite is true; and

25.6. a final order is sought rather than a provisional one as in *Appelcryn*.

26. Accordingly, there is no reason on the facts of this case to depart from the established position in *Collier*. I therefore find that the First Return does not give rise to an act of insolvency for the purposes of section 8(b) of the Insolvency Act.

The Second Return

27. The wording of the Second Return indicates that the Sheriff made demand from the second respondent personally, instead of in his capacity as a trustee of the Trust, and attempted the execution at an address not related to the Trust (which the Sheriff indicates was "the defendant's residential address"). Why the

Sheriff searched the second respondent's personal property, in execution of a debt owed by the Trust, is an anomaly.

28. Because there is nothing from the Second Return that indicates the Sheriff having made the demand in respect of the debt owed by the Trust, I find that the Second Return also does not give rise to an act of insolvency for the purposes of section 8(b) of the Insolvency Act.

The offer for the Henly on Klip Property

29. On the morning of the hearing, the respondents' counsel informed me of an offer that had been recently made for the Henley on Klip property by an entity called Koloni Trading and Investments (Pty) Ltd. The offer to purchase is dated 24 February 2026 and is in the amount of R 7 500 000.00. There is a photograph which seems to show bond approval in favour of the offeror and an email dated 20 April 2026 from MacGillvray Pool Inc attorneys which confirms it. The offer was accepted and is signed.
30. The offer evidences: the salability of the Henly on Klip Property, the disposable property available to the Trust to satisfy the judgment debt and indeed, the Trust's solvency. In any event, if this sale does not eventuate for any reason, Absa was authorized by the judgment it obtained to sell both the Henley on Klip and Auckland Park properties in execution.
31. As there was no judgment or reasons given for the grant of the provisional order, I do not know why Dlamini J saw fit to give it. Whatever they may be, I respectfully differ from them.

32. As the Trust has not committed an act of insolvency under section 8(b) of the Insolvency Act (either prima facie or on a balance of probabilities), and Absa does not rely on any other basis, I am not satisfied that the requirements of section 12(1) of the Insolvency Act have been met.

Costs

33. The Trust contended that costs should follow the result. I disagree. The allegations made in the answering affidavit did not contain a single reason why the provisional order should not be made final. Indeed, the affidavit did little other than waste the Court's time in having to read it. The Trust's abandonment of the affidavit in its entirety at the hearing, likely on the sage advice of the counsel who appeared before me, confirms its irrelevance.
34. There is no reason why Absa should pay the costs of an opposition that had no bearing on the matter or its outcome.

I make the following order:

1. *The application is dismissed.*
2. *There is no order as to costs.*

M J COOKE
ACTING JUDGE OF THE HIGH COURT
GAUTENG, JOHANNESBURG

DATE OF HEARING	21 April 2026
DATE OF JUDGMENT	28 April 2026
APPLICANT'S COUNSEL	N Alli
APPLICANT'S ATTORNEYS	Jay Mothobi Inc
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