REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 049884/2023

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

____________________ ____________________
DATE SIGNATURE

Summary

Insolvency Act 24 of 1936—section 9(1) read with section 9(2)—contingency basis of payment of counsel's fees does not on its own defeat liquidity where the claim has accrued but is not yet due.

Sequestration application—applicant must make out his case in the founding papers—pre-sequestration discovery against a third party, in motion proceedings, impermissible—Uniform Rule 35(13) of the Uniform Rules of Court—discovery in motion proceedings available only in exceptional circumstances.

Sequestration application—alternative relief sought against non-debtor third party in motion proceedings for disclosure of records—incompetent—pre-sequestration access by a private litigant to records of a public body is regulated, where applicable, by the Promotion of Access to Information Act 2 of 2000, and post-sequestration interrogation by sections 64 to 66 of the Insolvency Act.

In the matter between:

CLINT CHRISTIAN ASCAR	Applicant

and

MAKJAMASHARE EMMANUEL MALEPE	First Respondent
MALEPE ATTORNEYS	Second Respondent
THE LEGAL PRACTICE COUNCIL OF SOUTH AFRICA	Third Respondent
THE ROAD ACCIDENT FUND	Fourth Respondent

JUDGMENT

CILLIERS AJ

ORDER

The following order is made:

1. The application for the provisional sequestration of the estate of the first respondent, alternatively the estate of the second respondent, is dismissed.

2. The alternative relief sought against the fourth respondent is dismissed.

3. The applicant is directed to pay the costs of the first respondent, such costs to include the costs of counsel on Scale B, where employed.

4. The applicant is directed to pay the fourth respondent's costs of opposition to the alternative relief, such costs to include the costs of counsel on Scale B where employed.

Introduction

[1] This is an opposed application for the provisional sequestration of the estate of the first respondent and, in the alternative, that of the second respondent, brought in terms of the Insolvency Act 24 of 1936.[1] Alternative relief is sought against the fourth respondent for the disclosure of certain financial records relating to thirteen Road Accident Fund matters in which the second respondent acted for the plaintiffs. The applicant invokes section 10 of the Insolvency Act, relying primarily on section 8(c) (and, less prominently, on section 8(g)), and in the alternative on factual or commercial insolvency.

[2] The applicant is an advocate of the Johannesburg Bar. He alleges that, from in or about May 2019, he was briefed on numerous occasions by the first respondent, who conducts a litigation practice as a sole proprietor under the name and style of "Malepe Attorneys". The bulk of the briefs were claims against the Road Accident Fund. The applicant claims an aggregate balance of R606 813.00 in respect of fees rendered and not paid, with interest *a tempore morae* at 10 per cent per annum from 31 May 2019. The first and second respondents oppose the application. Their answering affidavit was deposed to, not by the first respondent, but by Mr Selaelo Malatji, an external attorney. The fourth respondent's opposition is confined to the alternative relief sought against it. The third respondent has played no active part in the proceedings. The applicant has filed a replying affidavit.

The legal framework

[3] Sections 8, 9, 10 and 12 of the Insolvency Act govern compulsory sequestration. Section 9(1) confers locus standi upon a creditor with a liquidated claim of not less than the prescribed minimum[2] against a debtor who has committed an act of insolvency or is insolvent. Section 9(3) requires that the petition set forth the amount, cause and nature

[1] Section 9(1) of the Insolvency Act 24 of 1936 (the Insolvency Act).
[2] R100, alternatively R200 in the aggregate where two or more creditors petition jointly: section 9(1) of the Insolvency Act, read with the Decimal Coinage Act 61 of 1959.

of the claim, and the act of insolvency relied upon "or otherwise allege that the debtor is in fact insolvent". These averments must appear *ex facie* the founding papers.[3]

[4] Section 10 governs the provisional order. At that stage, the court must be satisfied that the petitioning creditor has established a *prima facie* case that the applicant has a claim of the kind contemplated in section 9, the commission of an act of insolvency as defined in section 8 or the existence of actual insolvency, and reason to believe that sequestration will be to the advantage of creditors. Section 12 governs the final order, where the corresponding test is whether the court *is satisfied* of the same three requirements on a balance of probabilities. The substantive content of the three requirements is the same at both stages, and only the standard of proof differs.[4] The applicant must establish either an act of insolvency or factual insolvency. Proof of an act of insolvency is sufficient on its own, and where the applicant succeeds on that ground it is unnecessary to consider factual insolvency. Where, however, no act of insolvency is established, the applicant must prove factual insolvency. At the provisional stage that proof need only be *prima facie*, but it remains necessary to establish, even *prima facie*, that liabilities exceed assets, and that is not established by suspicion or by the mere fact of non-payment of a particular creditor.

[5] Even where the requirements of section 10 are met, the court retains a discretion whether to grant a provisional order, informed in particular by the requirement of advantage to creditors as articulated in *Meskin & Co v Friedman* and approved in *Stratford*.[5]

The citation of the second respondent

[6] The second respondent is cited as "Malepe Attorneys". The applicant himself avers, in the founding affidavit, that the first and second respondents are "for all practical intents and purposes, one and the same individual person", with the first respondent being "the sole proprietor of a law practice styled as Malepe Attorneys". Nothing in the

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[3] *Bishop v Baker* 1962 (2) SA 679 (N) at 682H to 683A.

[4] *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) at [5] and [6]. For the *prima facie* standard at the provisional stage, see *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 976F to G.

[5] *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559; *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC) at [43] to [45].

founding papers suggests that the second respondent is incorporated or that it has any other form of separate legal personality. On the applicant's own pleaded case, “Malepe Attorneys” is the trading name of the sole proprietorship through which the first respondent conducts his legal practice.

[7] It is trite that a sole proprietorship is not a legal persona. As Goldstein J held in *Simpson's Motors v Flamingo Motors*, “a firm is not a legal persona and … a firm name is really the alias of its sole proprietor”.[6] A trading name does not denote a separate estate capable of sequestration. Rights and obligations arising from the conduct of the business are those of the natural person who conducts it. The applicant's own reliance on section 34(7)(c)(i) of the Legal Practice Act 28 of 2014, on the footing that the first respondent is jointly and severally liable for the contractual debts of the second respondent, fortifies rather than displaces that conclusion.[7] On the applicant's own case there is one debtor and one estate.

[8] It follows that the only estate susceptible to sequestration is the estate of the first respondent. To the extent that the relief is sought against the “estate” of the second respondent, that relief is incompetent.

The evidential status of the answering affidavit

[9] The answering affidavit of the first and second respondents was not deposed to by the first respondent. It was deposed to by Mr Selaelo Malatji, an adult male legal practitioner who practises under his own name and style at Sandton. Mr Malatji claims to be the first and second respondents' “legal representative of record”, authorised to oppose and to depose by virtue of a power of attorney and mandate documents. Neither of those documents has been attached. No confirmatory affidavit has been filed by the first respondent, nor by anyone within the practice of Malepe Attorneys.

[6] *Simpson's Motors v Flamingo Motors* 1989 (4) SA 797 (W) at 798F.
[7] Section 34(7)(c)(i) of the Legal Practice Act 28 of 2014.

[10] In the replying affidavit the applicant takes objection to Mr Malatji's authority and, more importantly, to his lack of personal knowledge of the substantive matters in dispute. In my view, the objection is well taken.

[11] Hearsay evidence is inadmissible in civil proceedings save where it is admitted by agreement, where the person upon whose credibility its probative value depends testifies, or where the court admits it in the interests of justice.[8] The probative value of the substantive factual averments in the answering affidavit, which concern the terms upon which the applicant was briefed in particular matters, the alleged contingency-fee arrangements, the receipt of payments, the alleged overpayment in one of the matters, and the alleged failure by the applicant to render the services in two of the matters in a professional manner, does not depend on the personal knowledge of Mr Malatji. It depends on the evidence of the first respondent and on the books and records of the first respondent's practice, neither of which Mr Malatji can speak to from his own knowledge.

[12] This is not to say that every averment in the answering affidavit is inadmissible. The deponent may competently depose to matters within his own professional role, such as authority to act, procedural steps taken in the litigation, the exchange of correspondence in which he participated, and the fact that identified annexures are what they purport to be. But those matters do not carry the substantive defence on indebtedness. No application has been brought under section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 for the admission of hearsay in the interests of justice. No satisfactory explanation is given for the absence of an affidavit by the first respondent, who is the central witness on every contested factual issue. No confirmatory affidavits from any bookkeeper, practice manager or member of staff have been filed. No comprehensive counter-reconciliation has been produced. No bank or trust-account records have been adduced as evidence to substantiate the payments alleged.

[13] Once the inadmissible material is excluded, what remains in the answering affidavit are formal admissions, limited procedural averments within the deponent's

[8] Section 3(1) of the Law of Evidence Amendment Act 45 of 1988.

personal knowledge, bare denials, and legal contentions. The affidavit is not a nullity, but it does not place before this Court admissible factual material capable of sustaining the respondents' substantive version on indebtedness. The general rule restated by Corbett JA in *Plascon-Evans* presupposes admissible evidence.[9] A court does not manufacture a genuine dispute of fact by treating hearsay as though it were competent proof.

[14] The consequence is twofold. First, the respondents have not raised any admissible *bona fide* dispute as to the applicant's claim. Second, the applicant must still prove the requirements for sequestration on the admissible evidence adduced in the founding affidavit. He cannot obtain a sequestration order merely because the respondents have failed to put up admissible evidence. That second proposition is the more important. Even where a creditor's claim is established, insolvency proceedings are not designed to operate as machinery for the mere collection of a debt where the rest of the statutory machinery is not engaged.[10] It is to the requirements to obtain a provisional order for sequestration that I now turn.

The liquidated claim

[15] The applicant's case on indebtedness is supported by a running reconciliation of accounts annexed to the founding affidavit, in which invoices, payments and shortfalls are reflected on a matter-by-matter basis from May 2019 to April 2023, aggregating to R606 813.00. The composition of that aggregate, and the basis upon which the applicant says it is owing, are not entirely uniform across the matters reflected in the reconciliation.

[16] In the Road Accident Fund matters, the applicant's own pleaded case is that his fees would only be paid by the second respondent at a time when the second respondent had received payment from the Road Accident Fund, and that the underlying briefs proceeded on a contingency basis. The first respondent relies on those very arrangements pleaded by the applicant. The first respondent contends in this regard that the fees are not yet due. and are subject to taxation. That contention

[9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H to I.
[10] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H to 348C.

misapprehends the test for liquidity. Section 9(2) of the Insolvency Act provides in terms that a liquidated claim which has accrued, but is not yet due on the date of the hearing of the petition, shall be reckoned as a liquidated claim for the purposes of section 9(1).[11] The fact that payment of fees in a particular matter is contingent upon receipt of capital by the attorney from the Road Accident Fund therefore does not, on its own, defeat the applicant's locus standi. The issue is whether the claim has accrued and whether the amount is sufficiently certain to be considered a liquid debt. The respondents place reliance on Uniform Rule 69 and on *Blakes Maphanga* and *Rabani & Schoeman* in support of the contention that an untaxed bill cannot found a liquidated claim.[12] Whether those authorities can avail an attorney resisting a claim by an advocate for fees, as opposed to an attorney–own client dispute, is a question I need not decide. Section 9(2), and the conclusions reached below, render the issue academic.

[17] In *Kleynhans*, Wessels AJA held that a liquidated claim is one of which the amount is fixed either by agreement, by an order of court, or otherwise. What matters is certainty as to the amount, and not the legal basis of the claim, and the mere fact that a claim is disputed does not in itself destroy liquidity.[13]

[18] Considered as such, the applicant has in my view established a liquidated claim of an amount substantially in excess of the statutory minimum. In one of the matters, the *Botha* matter, the indebtedness in the amount of R217 241.00 was reduced to a written instalment plan in October 2022, of which no payment was made. That amount is fixed by agreement and is liquidated. Another matter, the *Collins* matter, is a non-contingency claim in the amount of R20 020.00 which has been only partially paid; that amount too is fixed and liquidated. In addition, the founding papers identify a number of Road Accident Fund matters in which the contingency precondition has been triggered by capital payments from the Road Accident Fund to the second respondent, and the corresponding fee components are sufficiently certain to qualify as liquidated for purposes of section 9(1). Even on the most cautious view, the cumulative amount

[11] Sections 9(1) and 9(2) of the Insolvency Act.
[12] *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 (SCA); *Rabani & Schoeman Inc v Engela* (1022/2018) [2020] ZAGPPHC (20 April 2020); Uniform Rule 69 of the Uniform Rules of Court.
[13] *Kleynhans v Van der Westhuizen NO* 1970 (2) SA 742 (A) at 749F to G.

of liquidated indebtedness comfortably exceeds the statutory minimum. I consider that the applicant has accordingly established locus standi as a sequestrating creditor.

Acts of insolvency

[19] The next issue to be considered is whether an act of insolvency or factual insolvency has been proved. If either section 8(c) or section 8(g), on which the applicant relies, were established *prima facie*, it would not be necessary to consider factual insolvency. If neither is established, the applicant must establish factual insolvency on a *prima facie* basis. I take the alleged acts of insolvency first.

[20] Section 8(c) of the Insolvency Act requires proof that the debtor has made or attempted to make a disposition of property which has had, or would have had, the effect of prejudicing creditors or preferring one creditor above another.[14] A “disposition” is defined in section 2 of the Insolvency Act as a transfer or abandonment of rights to property, and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor. Absent such a disposition, the section is not engaged. A failure to pay a creditor, even a persistent failure, does not in itself constitute a disposition.[15]

[21] On the founding papers, no primary facts are pleaded which establish a disposition, as defined. The averments are that the second respondent received, or was entitled to receive, payments from the Road Accident Fund on behalf of clients, that those funds were paid into the second respondent's trust account, and that the applicant's invoices were not paid. Payment of trust monies, in accordance with the client's mandate, to that client in whose name the trust account is held, is not a disposition of the attorney's own property within the meaning of section 8(c). Where, by contrast, an attorney draws on a trust account to discharge his own personal liabilities or to benefit his own estate, that may constitute a disposition for purposes of the impeachment provisions in the Insolvency Act.[16] No such transaction has, however,

[14] Section 8(c) of the Insolvency Act, read with the definition of “disposition” in section 2.
[15] *De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T) at 676A to E; Mars *The Law of Insolvency in South Africa* 10 ed (2019) at para 4.4. See also *Stratford* above n 5 at para 11.
[16] *De Villiers NO v Kaplan* 1960 (4) SA 476 (C); *Wypkema v Lubbe* 2007 (5) SA 138 (SCA); *Van Wyk Van Heerden Attorneys v Gore* NO [2022] ZASCA 128.

been pleaded on the founding papers. The averments are confined to the receipt of moneys from the Road Accident Fund into the second respondent's trust account and the non-payment of the applicant's invoices The applicant's complaints about an asserted lavish lifestyle, an expensive lunch at a well-known hotel, and a luxury motor vehicle are not pleaded as identifiable dispositions of the first respondent's property in favour of any creditor. No specific transaction is identified that has the effect of preferring one creditor above another. The evidential material to support a conclusion of an act of insolvency founded on section 8(c) is absent. To reach a conclusion of disposition on the present pleadings would require speculation. Section 8(c) has therefore not been engaged.

[22] Section 8(g) of the Insolvency Act requires that the debtor "gives notice in writing to any one of his creditors that he is unable to pay any of his debts".[17] The applicant invokes the provision in respect of a written communication received from the first respondent in mid-December 2022, in which the first respondent is said to have responded to a payment enquiry by suggesting that the festive period not be "spoiled", and that the matter could be resolved in January 2023. An invitation, however informal, to defer a payment discussion past the festive period is not a notice of inability to pay. It is a request for forbearance. Section 8(g) is concerned with an unequivocal admission of inability to pay any debts. The communication relied upon is neither unequivocal nor an admission of inability to pay any debts. Section 8(g) has therefore not been engaged either.

[23] In my view it follows that neither of the pleaded acts of insolvency under section 8 has been established. Because no act of insolvency has been proved, the applicant must show factual insolvency, even if only on a *prima facie* basis at this provisional stage.

[17] Section 8(g) of the Insolvency Act.

Factual insolvency

[24] The applicant pleads, in the alternative, that the first respondent is factually or commercially insolvent. At the provisional stage the applicant need only establish such insolvency on a *prima facie* basis, but "factual insolvency" continues to mean that the first respondent's liabilities exceed his assets. This is not a matter of inference lightly drawn. As Caney J observed in *Bishop v Baker*, quoting Wessels J in *Ohlsson's Cape Breweries Ltd v Totten*, "The Court must not be left to conjecture" and "the applicant must show clearly that the [debtor's] liabilities exceed his assets".[18] The point was put in similar terms by Feetham J in *Bhyat v Khurishi*, as endorsed in *Bishop v Baker*: "There may be grounds for suspicion, even strong suspicion that the respondent is insolvent, but … before an order can be made against a respondent the facts must be clearly proved."[19]

[25] The applicant has not proved factual insolvency, even *prima facie*. The applicant frankly concedes that he is not privy to the books, records or documents of the first or the second respondent, and is left to speculate on the state in which they are. He concedes also that he is unaware of the numeric value of the first and second respondents' assets. There is no disclosure of the first respondent's assets, no quantification of his liabilities, and no evidential material from which the Court can assess his financial position. What is advanced is a pattern of non-payment, a perceived pattern of evasive conduct, and inferences from a perceived affluent lifestyle. These facts, taken at their highest, may give rise to suspicion, but they do not establish that the first respondent's liabilities exceed his assets.

Advantage to creditors

[26] For completeness, however, I deal briefly with the requirement of advantage to creditors. Even if the applicant had established the commission of an act of insolvency, or factual insolvency, the application would in any event have failed because the applicant has not proved an advantage to creditors, even *prima facie*.

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[18] *Bishop v Baker* at 683G to 684A, applying *Ohlsson's Cape Breweries Ltd v Totten* 1911 TPD 48 at 50.
[19] *Bishop v Baker* at 684A to B, applying *Bhyat v Khurishi* 1929 TPD 896 at 901.

[27] This requirement has been considered in *Friedman*, and approved in *Stratford*. The applicant must show, on a *prima facie* basis, that there is a reasonable prospect, not necessarily a likelihood but a prospect not too remote, that some pecuniary benefit will result to creditors.[20] As *Stratford* makes plain, the meaning of "advantage" is broad and is not to be rigidified, but the test still requires a rational evidential foundation, and is not satisfied by speculation.[21] It is not necessary for the applicant to establish the existence of presently identifiable assets. It may be enough that there are facts which give rise to a rational inference that assets may be discovered, recovered or realised through the processes of sequestration. But the prospect of an advantage must be grounded in objective primary facts.[22]The applicant pleads several grounds for inferring advantage to creditors. They are that a trustee could enquire into the first respondent's affairs, deal with pending litigation more effectively, invoke section 23(5) of the Insolvency Act, realise the practice as a going concern, and impeach past dispositions. These submissions are not anchored in primary facts on the present record. The most concrete material is the assertion that payments of approximately R19.3 million in four matters have been received into the trust account of the practice on behalf of clients. Trust receipts of clients' damages are, however, not assets of the first respondent's personal estate. They belong to the trust beneficiaries, namely the clients, save for any contingency-fee component earned by the practice, which would constitute fee income of the first respondent qua sole proprietor. The applicant has pleaded neither what has become of that fee component, nor what the first respondent's personal estate consists of, nor any primary facts pointing to impeachable transactions or to a realistic prospect of recovery for the general body of creditors. What is advanced is, at best, a possibility that further enquiry might reveal something of value. That is the very speculation against which the *Friedman* standard guards. Advantage to creditors has accordingly not been proved, even *prima facie*.

The relief against the fourth respondent

[28] The notice of motion seeks, in the alternative to relief against the first and second respondents, an order directing the fourth respondent to disclose its financial records reflecting all payments made in favour of, or received from, the Road Accident

[20] *Friedman* at 559; *Stratford* at [43].
[21] *Stratford* at [44] to [45].
[22] *Stratford* at [44] to [45]; *Friedman* at 559.

Fund in thirteen identified matters. The pleaded basis for that relief is, in substance, that the applicant has had no contact with the first respondent for some months, that he is unable to verify whether the second respondent has in fact received funds from the Road Accident Fund, and that the fourth respondent could "assist this Honourable Court" by producing the relevant records. No statutory right to disclosure is invoked, and no contractual or fiduciary nexus between the applicant and the fourth respondent is pleaded.

[29] I have come to the conclusion that the pleaded basis does not establish a legal entitlement to the relief sought.

[30] First, discovery is generally not available in motion proceedings. Rule 35(13) of the Uniform Rules of Court provides that the rules relating to discovery apply to motion proceedings only insofar as the court may direct, and such a direction will be made only in exceptional circumstances.[23] An applicant who selects motion proceedings to vindicate his rights bears the consequences of that election, including the principle that the applicant must make out his case in the founding papers and not by a fishing expedition through documents in the possession of others. The principle applies *a fortiori* where, as here, the disclosure is sought from a third party that is not a debtor and against which no substantive relief is competent.

[31] Secondly, the access of a private litigant to information held by a public body is regulated by the Promotion of Access to Information Act 2 of 2000. Section 11 of that Act creates a right of access to records of a public body, subject to procedural requirements set out in sections 18 to 22, and subject to the grounds for refusal set out in Chapter 4.[24] The fourth respondent is a public body, and the records sought are records of the fourth respondent. The Promotion of Access to Information Act provides the statutory framework for access to such records, including the safeguards built in for the protection of the personal information of third parties (the underlying claimants in those matters). The applicant has not invoked that framework. He has elected, instead,

[23] Rule 35(13) of the Uniform Rules of Court; *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T) at 148I to 149H; *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 470A to D.

[24] Promotion of Access to Information Act 2 of 2000, section 11 (records of public bodies) read with sections 18 to 22 (procedural requirements).

to seek an order from this Court that the records be disclosed in motion proceedings, in circumstances where neither he nor the underlying claimants have followed the procedure that the Legislature has specifically provided. I do not think that a court would lightly bypass the considered statutory regime by granting *ad hoc* disclosure in motion proceedings, particularly where, as here, the rights and interests of third parties (the underlying claimants) are at stake.[25]

[32] Thirdly, even within the four corners of the Insolvency Act, the applicant's complaint is misconceived. Sections 64 to 66 of the Act provide for the interrogation of the insolvent and others, and for the production of documents, *after* sequestration, before the Master and the trustee.[26] Those provisions exist precisely because pre-sequestration discovery is not the way to interrogate an alleged debtor's affairs. The applicant has, in effect, sought to deploy the sequestration procedure as a vehicle for pre-sequestration discovery. To conflate the requirements for sequestration, which the applicant must meet on the founding papers, with the post-sequestration enquiry, which becomes available only once the requirements have been met and an order for sequestration has been made, is impermissible.

[33] For these reasons, the alternative relief against the fourth respondent must be dismissed. In view of that conclusion, it is unnecessary to deal further with the additional defences raised by the fourth respondent, including non-joinder of the affected plaintiffs and the privacy and personal-information considerations advanced.

[34] The fourth respondent made certain observations adverse to the first and second respondents, including the absence of proper accounting on their part. Those observations do not alter the outcome. The fact that the first – and second respondents may have explained themselves poorly, or may owe duties of accounting to the applicant, does not create a right to sequestration where the statutory requirements are not met.

[25] Section 34 of the Promotion of Access to Information Act, read with the Protection of Personal Information Act 4 of 2013.
[26] Sections 64 to 66 of the Insolvency Act.

Costs

[35] The ordinary rule is that costs follow the result.[27] The first and second respondents, although their answering affidavit was materially defective in form, have successfully resisted the sequestration application on the merits. There is no reason to depart from the ordinary rule in their favour. The fourth respondent, although not represented at the hearing, was put to the cost of opposing the alternative relief, which the applicant did not unequivocally abandon, and which therefore remained live on the papers. It is entitled to its costs of opposition.

Conclusion

[36] The applicant has established locus standi as a creditor with a liquidated claim against the first respondent for an amount well in excess of the statutory minimum. But the citation of "Malepe Attorneys" as a separate juristic person was incompetent, as the second respondent has no estate distinct from that of the first respondent. As against the first respondent, the applicant has not established a disposition contemplated by section 8(c), nor a notice of inability to pay any debts contemplated by section 8(g). Because no act of insolvency has been established *prima facie*, the applicant was required to establish factual insolvency on a *prima facie* basis, and he has not done so. Each of these failures, on its own, is fatal to the application for provisional sequestration. Advantage to creditors has not been established either. The alternative relief against the fourth respondent is also unsustainable.

[37] The application accordingly falls to be dismissed.

ORDER

The following order is made:

[27] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) at [3].

1. The application for the provisional sequestration of the estate of the first respondent, alternatively the estate of the second respondent, is dismissed.

2. The alternative relief sought against the fourth respondent is dismissed.

3. The applicant is directed to pay the costs of the first respondent, such costs to include the costs of counsel on Scale B, where employed.

4. The applicant is directed to pay the fourth respondent's costs of opposition to the alternative relief, such costs to include the costs of counsel on Scale B where employed.

[redacted]

CILLIERS AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	20 January 2026
Date of judgment:	28 April 2026

APPEARANCES

For the Applicant:	The applicant appeared in person
Attorneys for the Applicant:	Kruger Engelbrecht Attorneys
For the First and Second Respondents:	S Malatji instructed by Malatji's Legal Practitioners
For the Fourth Respondent:	No appearance