IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Not reportable

Case Number: 16432/2022

In the matter between:

FREDERICK CHRISTOFFEL GREEFF Applicant

and

JAMES OPENSHAW ZERVAS Respondent

Coram: Greig AJ

Heard: 25 November 2025

Delivered: 18 May 2026

Summary: Compulsory sequestration — act of insolvency in terms of s 8(b) of Insolvency Act 24 of 1936 — nulla bona return — return referring only to movable and not to disposable property — no act of insolvency established. Factual insolvency — judgment debt unpaid — rescission proceedings dismissed — onus on debtor to rebut prima facie case not discharged — factual insolvency established. Advantage to creditors — respondent alleges he owns

no assets, earns only an income — director of eight companies and trustee of various trusts — trustee would be empowered to investigate — advantage to creditors established. Provisional sequestration order granted.

ORDER

(a) The estate of the respondent is placed under provisional sequestration, and the respondent and all interested persons are called upon to show cause on a date to be allocated by the Registrar why:

(i) The estate of the respondent should not be finally sequestrated.

(ii) Costs should not be costs in the insolvent estate of the respondent.

(b) The provisional order reflecting the date allocated by the Registrar for the return day shall be served not less than 10 days prior to the return day:

(i) On the respondent in terms of the Uniform Rules of Court;

(ii) By publication in the Cape Times newspaper and the Government Gazette;

(iii) On employees and trade unions (if any) in terms of section 9(4A)(a)(i) and (ii) of the Insolvency Act 24 of 1936,

(iv) On the South African Revenue Service in terms of section 9(4A)(a)(iii) of the Insolvency Act 24 of 1936.

JUDGEMENT

Greig AJ

Introduction

[2] This is an application for the provisional sequestration of the respondent, Mr Zervas, which was launched on 29 September 2022 and came before me for hearing on 25 November 2025. The applicant, Mr Greeff, claims locus standi based on the allegation that Mr Zervas is indebted to him in the amount of R 590,384.67 arising from a default judgement granted against Mr Zervas in the Pretoria High Court on 19 November 2021.

[3] Mr Greeff claims that Mr Zervas committed an act of insolvency in terms of section 8(b) of the Insolvency Act on the basis of a nulla bona return from the Sheriff.

[4] Mr Greeff further avers that Mr Zervas is in any event factually insolvent based primarily on the default judgement against him which still remains unpaid.

[5] Mr Zervas denies that he committed any act of insolvency, taking issue with the Sheriff's nulla bona which forms the basis of this allegation. He further denies factual insolvency.

[6] The application was initially set down on 24 April 2025 and was, on that date, postponed by agreement for hearing on 25 November 2025.

MASTER'S CERTIFICATE

[7] Mr Zervas took a point in limine at the hearing that the application should be dismissed on the basis that no certificate of the master was lodged 10 days before the petition in terms of section 9(3)(b) of the Insolvency Act.

[8] Counsel for Mr Greeff adopted the stance that the security bond sufficed, and also offered to stand the matter down for two days until 28 November to

procure the certificate and continue with the argument then. I declined to stand the matter down for this purpose and suggested that the document be procured and placed on file, and that if the parties wished to make further submissions in this regard, they could do so.

[9] The relevant Master's certificate was placed on the file under cover of an email from Mr Greeff's correspondent attorneys stating that 'both parties are in agreement that a further appearance before Judge is not necessary'.

[10] It was held in *Court v Standard Bank of SA Ltd; Court v Bester NO and Others*[1] that what is required by the subsection is that security must have been given before the matter is heard and that the security certificate shall then accompany the application. In this regard the security required by the subsection is not security for the costs of opposition incurred by the respondent, but the costs of the Master and the Sheriff.

[11] My view is firstly that the bond of security should suffice for this purpose, as submitted by counsel for Mr Greeff.

[12] Even if the above is not correct, I do not think that the provision of the Master's certificate in the circumstances described above, shortly after the hearing and before judgement, alters the position. The purpose of the section is nonetheless fulfilled.

[13] Moreover, to the extent that condonation is required, section 157(1) of the Insolvency Act provides that:

> 'nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court'.

[1] *Court v Standard Bank of SA Ltd; Court v Bester NO and Others* 1995 (3) SA 123 (A)

[14] There is no prejudice to Mr Zervas, and no basis for prejudice was advanced at the hearing; accordingly, condonation for the late filing of the Master's certificate is granted.

SEQUESTRATION: LEGAL PRINCIPLES

[15] For a sequestration order to issue in terms of the Insolvency Act[2] the applicant must satisfy the Court that prima facie the petitioner has demonstrated a liquidated claim of at least R100, that the respondent has committed an act of insolvency or is insolvent, and that there is reason to believe that it will be to the advantage of creditors if the respondent is sequestrated.[3]

Act of Insolvency

[16] In the present matter Mr Greeff relies on section 8(b) of the Insolvency Act which provides that a debtor commits an act of insolvency:

> 'if a court has given judgment against him or her and he or she 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 or she has not found sufficient disposable property to satisfy the judgment.'

[17] This subsection contemplates two separate acts of insolvency; the one with, and the other without, presentation of the writ to the debtor.[4]

[18] The creditor must set out the facts necessary for establishing either of the two acts of insolvency. Neither the words '*nulla bona*' nor the precise form of the document on which they appear are of importance, however.[5]

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[2] Insolvency Act 24 of 1936

[3] Section 9(1) and 10 of the Insolvency Act 1936.

[4] *Corner Shop* (*Pty*) *Ltd v Moodley* 1950 4 SA 55 (T) 56

[19] A return that refers only to movables or movable property is not adequate for the purposes of the section. If a return is to be relied on as proof of an act of insolvency, it must indicate that the sheriff has found no disposable property of any nature.[6] However (for example) words appearing after the preamble in a return to the effect that the debtor answered that he or she had no money, property, or assets with which to satisfy the writ or any portion of it, would be sufficient to cover all disposable property, and returns containing these or similar words have been held to be acceptable to establish an act of insolvency in terms of the section.[7]

[20] If a debtor wishes to avoid the adverse results of a *nulla bona* return, they should indicate the nature and whereabouts of any disposable assets.[8]

Factual insolvency

[21] Mr Greeff further relies on factual insolvency. Factual insolvency may be proved by setting out such facts from which the inference can be drawn that the respondent's liabilities exceed his assets. In *ABSA Bank Ltd v Rheboksklo of (Pty) Ltd* 1993 (4) SA 436 (C) the Court held at 443E as follows:

> ‘Even, however, where a debtor has not committed an act of insolvency and it is incumbent on his unpaid creditor seeking to sequestrate the former's estate to establish actual insolvency on the requisite balance of probabilities, it is not essential that in order to discharge the onus resting on the creditor if he is to achieve this purpose that he set out chapter and verse (and indeed figures) listing the assets (and their value) and the liabilities (and their value) for he may establish the debtor's insolvency inferentially. There is no exhaustive list of facts from which an inference of insolvency may be drawn,

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5 *Lotzof v Raubenheimer* 1959 1 SA 90 (O) at 92

6 *Natalse Landboukoöperasie Bpk v Moolman* 1961 3 SA 10 (N) at 11.

7 *Amalgamated Hardware & Timber* (*Pty*) *Ltd v Wimmers* 1964 2 SA 542 (T) at 543.

8 Fair*weather*, *Castignani & Holmes Motor Distributors Ltd v Grobler* 1966 2 SA 326 (O) at 328

as for example an oral admission of a debt and failure to discharge it may, in appropriate circumstances which are sufficiently set out, be enough to establish insolvency for the purpose of the prima facie case which the creditor is required to initially make out. It is then for the debtor to rebut this prima facie case and show that his assets have a value exceeding the sum total of his liabilities.'

[22] In a similar vein Binns-Ward J in this division held:

'it is not incumbent on an applicant relying on factual insolvency to adduce evidence that would enable the respondent's assets and liabilities to be finitely determined in rands and cents. It would be a rare case, other than in the context of so-called friendly sequestrations, for an applicant to be able to do that. It is well established that an applicant can discharge the onus of establishing a prima facie case on the basis of factual insolvency by adducing sufficient evidence to justify the inference as a matter of probability that the respondent is insolvent. Once the applicant does that, the respondent attracts an evidential onus to rebut the inference by showing that [they] possess sufficient assets to be able to settle his liabilities… A strong and persuasive indicator of insolvency is the failure by respondent to pay his debts…'[9]

Advantage to creditors

[23] The legal standard applicable to this enquiry is well settled. In *Stratford and Others v Investec Bank Ltd and Others*[10] the Constitutional Court held as follows:

'The meaning of the term 'advantage' is broad and should not be rigidified… To my mind, specifying the cents in the rand or 'not-negligible' benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin et al state that — 'the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a

[9] *Ullman Sails (Pty) Ltd and others v Jannie Reuvers Sails (Pty) Ltd and related matters* [2022] 3 All SA 290 (WCC).

[10] *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC)

larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order.'[11]

ACT OF INSOLVENCY AND NULLA BONA RETURN

Section 8 (b) of the Insolvency Act

[24] The parties accept the authorities in paragraph [17] above which are to the effect that in terms of section 8 (b) of the Insolvency Act two distinct acts of insolvency are established, viz.:

(a) The debtor fails, upon the demand of the Sheriff, to satisfy the judgement or indicate sufficient disposable property to satisfy the judgement; and

(b) It appears from the return made by the Sheriff that he has not found sufficient disposable property to satisfy the judgement.

The nulla bona return in this case

[25] In this case the Sheriff's return dated 20 July 2022 stated in relevant part as follows:

> 'On 20 July 2022 at 11:00 I, E Josias attempted unsuccessfully to execute the above Writ …against JAMES OPENSHAW ZERVAS, the Second Defendant, at UNIT […], K[...] W[...] B[...] ESTATE, […] K[...] CRESCENT, PLATTEKLOOF. This was due to the fact that at service address I could not find any movable property to attach to satisfy the writ amount, Mr James Openshaw Zervas could neither point out any movable assets that I could attach. This was after I demanded the payment of the writ amount and Mr Zervas was unable to pay it. Further be advised that Mr Zervas refused to sign the Nulla Bona certificate. (please see attached Nulla Bona certificate)'.

[11] At para 44.

[26] The ‘Nulla Bona certificate’ attached to the return stated:

> ‘I James Openshaw Zervas being the judgement debtor/ representative of the judgement debtor* against whom the relevant judgement has been given, acknowledge that the *sheriff / deputy sheriff served on me a copy of the warrant in the above matter after exhibiting the original and explaining the nature and the contents thereof to me. He demanded from *me / the judgement debtor payment of the amount due thereunder to satisfy the judgement I informed him that *I / the judgement debtor did not process (possess) any disposable property to satisfy die judgement
>
> The consequences of signing the certificate, inter alia that- My I the judgement debtor’s estate could be *sequestrated / liquidated…have been explained to me’.

[27] The above certificate was not signed by the respondent. The word ‘process’ is in typescript whilst the word ‘possess’ (possibly a correction, though the papers do not mention that it is contemporaneous) is written in parentheses in handwriting below.

Alleged execution of the writ at the incorrect address

[28] Mr Zervas states that the address in the writ is incorrect, as the respondent resides at […] K[...] Crescent, B[...]. In reply, however, the applicant insists that the respondent resides at […] K[...] W[...].

[29] The respondent argues that several factors militate against this version being sustained. Firstly, Mr Zervas states that in the applicant’s particulars of claim the address is listed as […] K[...] Drive. Though this is also not correct (the correct address according to the respondent is K[...] *Crescent*), Mr Zervas nonetheless submits that this shows that the applicant knew that the respondent’s address was not K[...] W[...], as was also conveyed via email on 3 November 2021.

[30] Mr Zervas further disputes the correctness of the return on the basis that he says the sheriff did not attend at this address at all, but instead met with the

respondent at an agreed location, whereupon the return was issued. Few details as to this odd interaction with the Sheriff are, however, supplied.

Failure on demand to satisfy the judgement or to indicate sufficient disposable property to satisfy the judgement

[31] Mr Zervas submits that the Sheriff's return does not state that he demanded that Mr Zervas point out sufficient disposable property, as is required by section 8 (b), but instead merely records a demand for payment and the fact that Mr Zervas could not point out movable assets for the Sheriff to attach.

[32] Mr Zervas submits that for the nulla bona return to serve as a basis for an act of insolvency it was necessary that the Sheriff demanded sufficient *disposable property* (i.e. not just movable property). Though mention of such a demand is not required where Mr Zervas replied that he had nothing to attach,[12] the respondent submits that this is not the case where the demand cannot be inferred from the return itself.

[33] I agree with this submission. I doubt that the document can be so generously interpreted as Mr Greeff contends. As the extract quoted in paragraph [26] above also makes clear, various options in the document, evidently intended to be struck out by hand if not applicable, were simply ignored. More significantly, the word 'possess' was inserted in handwritten parentheses at some unspecified time to replace the word 'process'; this addition is not countersigned by the deputy sheriff or the respondent.

[34] It is so that the certificate does refer to 'disposable property'. However, the return states that 'Mr Zervas refused to sign the nulla bona certificate'. If the certificate had been duly completed and signed, it may have supplemented the return's incorrect reference to 'movable property', bearing in mind that

[12] *Lotzof v Raubenheimer* 1959 (1) SA 90 (O) at 93C.

the precise form of the document is not decisive.[13] But I doubt that the unsigned document can serve this purpose.

[35] It is further significant that no affidavit was filed by the deputy sheriff attempting to explain these issues, and therefore the facts to exercise a discretion in favour of the applicant are simply not available. In *ABSA v Collier*[14] the sheriff filed an affidavit confirming certain details in the return of service after these were disputed by the respondent. The court, despite this, held that the sheriff's affidavit was not sufficiently clear or precise and did not address the respondent's challenge to the return. In this case, as the respondent points out, 'the applicant has not even bothered to procure an affidavit from the sheriff.'

[36] On this first ground, therefore, I am inclined to the view that an act of insolvency has not been established. The nulla bona return and the attached 'certificate' have manifold irregularities on their face. The return itself refers only to 'movable property' and not to 'disposable property'. Whilst the certificate attached to the nulla bona return does refer to 'property' and not merely 'movable property', it was unsigned and the word 'process' is used, with the word 'possess' replacing it in handwriting at some unspecified time.

[37] The value of this unsigned certificate as indicating that a demand for 'disposable property' was made is therefore negligible.

[38] Counsel for the respondent relied on *Amalgamated Hardware & Timber (Pty), Ltd v Wimmers*[15] which confirmed that it is insufficient under section 8 *(b)* of the Act to establish an act of insolvency where the return establishes

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[13] *Lotzof v Raubenheimer* 1959 1 SA 90 (O) at 92

[14] *Absa Bank Ltd v Collier* 2015 (4) SA 364 (WCC)

[15] *Amalgamated Hardware & Timber (Pty), Ltd v Wimmers* 1964 (2) SA 542 (T)

a failure to find movables only. See further *M Mendelsohn and Son (Pty) Ltd v Kohler*[16] which is to the same effect.

[39] Accordingly on the first ground in section 8(b) I hold that no act of insolvency has been established.

Whether it appears from the return that the Sheriff has not found sufficient disposable property to satisfy the judgement

[40] As to the second ground in section 8 (b), the respondent submits that the writ directed the sheriff to execute the judgement at the incorrect address, as I have stated above. The submission amounts to a contention that the execution of the warrant at an address other than that reflected in the writ, where disposable property was not 'found' to satisfy the judgement, would be insufficient to establish a ground of insolvency.

[41] Firstly, the sheriff's return must be taken to be prima facie correct. It states that the address was 'Unit […], K[...] W[...] B[...] Estate, […] K[...] Crescent, Plattekloof'. Whilst the reference to 'K[...] W[...]' may be incorrect, as Mr Zervas contends, the return still refers to […] K[...] Crescent, B[...] Estate, which the respondent says is correct. This error – the inclusion of 'K[...] W[...]' – to my mind does not deal a mortal blow to the contention that the Sheriff attended at the Mr Zervas' premises – especially as the respondent's version by no means displaces it, and raises more questions than it answers.

[42] The version presented by Mr Zervas as to his interactions with the Sheriff lacks plausible detail:

> 'the Sheriff did call me on 8 July 2022 to ascertain my whereabouts and I advised him that I would be back from Plettenberg Bay where I was on holiday at the time on 18 July

[16] *M Mendelsohn and Son (Pty) Ltd v Kohler* 1979 (4) SA 839 (O).

2020 [sic: 2022]… On 20 July 2022, two days after returning from Plettenberg Bay, I called the Sheriff and was informed that he was out serving documents, but could provide me with the writ of execution. I then met him at a mutually agreed location where he handed the writ of execution to me. The Sheriff did not attend the premises known as Unit 1, K[...] W[...], B[...] Estate on 20 July 2022 as indicated on the return of service.'

[43] If it was so that the sheriff arranged to meet Mr Zervas at 'a mutually agreed location', after which he (the Sheriff) reflected the wrong address in his return, one would expect more details to have been provided by Mr Zervas about these interactions, particularly as the version carries with it the implication that the return of service was deliberately fabricated after the fact by the Sheriff, an officer of this Court. Little of the substantiating detail which one would expect to accompany a serious accusation of this nature is provided by Mr Zervas. For instance, where was the 'mutually agreed location'? What conversation took place there? Was anyone else present? Why has this dishonest conduct not been reported to the Board of Sheriffs?

[44] These omissions are particularly stark given the fact that the respondent was legally represented and would have been advised that it was incumbent upon him to provide all the relevant detail in the answering affidavit. [17]

[45] These factual issues, however, do not require to be determined. Section 8(b) of the Insolvency Act requires personal service only and it does not state where such service has to take place.[18]

[46] In any event, the return, as I have mentioned, is at best equivocal as to whether the Sheriff sought 'disposable property' or only movable property. The applicant has not caused a clarificatory affidavit to be filed by the

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[17] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 13.

[18] See *Beira v Raphaely-Weiner and Others* 1997 (4) SA 332 (SCA) at 338.

deputy sheriff, E Josias, to address this issue, as one would expect. Accordingly, I also find that on the second ground in section 8(b), no act of insolvency is established on these papers.

FACTUAL INSOLVENCY

Is factual insolvency established?

[47] Mr Zervas admits that he does not own any immovable property in his personal capacity but claims to earn a substantial income of approximately R150,000.00 per month as a property developer.

[48] As to the debt owed to Mr Greeff, Mr Zervas at the time of deposing to the answering affidavit stated that he was in the process of finalising the application for rescission of the judgement, which rescission he suggested held 'excellent prospects of success'. On this basis, he stated that he did not owe Mr Greeff anything.

[49] In reply, Mr Greeff pointed out that, on 10 January 2022, Mr Zervas, in a letter from his attorneys, indicated that he would be launching an application for rescission of the judgement. However, despite this, the rescission had not been launched by the time of the deposition of the replying affidavit on 28 November 2022, and accordingly, the prospects of success of the rescission were negligible.

[50] However, by the time that the matter came before me many of these issues had been overtaken by events. In particular, in a judgement of the Gauteng High Court, per Mooki AJ, Mr Zervas' application for rescission was dismissed on 31 August 2023.

[51] The judgement of Mooki AJ relates how Mr Zervas sought rescission on two bases: Rule 42(1)(a) and, in the alternative, the common law. As to Rule 42(1)(a), the court held that the application failed at the first hurdle: the

default judgment had not been granted in the applicant's absence. Mooki AJ found that Mr Zervas had been informed of the application for default judgment, and served with the application on 4 October 2021 at an email address he himself had nominated. Mr Zervas was also informed that the matter would be heard on 19 November 2021, and was in fact present in court when default judgment was granted.

[52] As to the common law basis, Mooki AJ found that Mr Zervas had provided no satisfactory explanation for his default, noting in particular that his allegation of ignorance of the proceedings was contradicted by his own conduct. His prescription defence was unsound as prescription had been interrupted by the issue of summons, and the later amendment of the particulars of claim had no bearing on the issue.

[53] Mr Zervas' application for leave to appeal was likewise dismissed by Mooki AJ on 14 August 2024.

[54] Despite the above Mr Zervas' counsel submitted at the hearing that this court is in the dark about what has happened since the leave to appeal was dismissed in August 2024, and that Mr Greeff ought to have filed a supplementary affidavit to address current circumstances. Reliance was further placed on *Corner Shop (Pty) Ltd v Moodley*[19] for the proposition that the mere failure to pay a debt, in the absence of an act of insolvency, does not without more establish factual insolvency.

[55] I am not persuaded by these submissions. The passage in *Corner Shop*[20] on which the respondent relies must be understood in context: it cautions against drawing an inference of insolvency too readily where the failure to pay admits of an innocent explanation or merely some 'temporary financial

[19] *Corner Shop (Pty) Ltd v Moodley* 1950 (4) SA 55 (T)

[20] *Corner Shop (Pty) Ltd v Moodley* 1950 (4) SA 55 (T)

embarrassment'. Before 14 August 2024, when judgement was handed down in the application for leave to appeal, Mr Zervas' explanation for non-payment was that he was challenging his liability for the default judgement by way of rescission proceedings. However, after his application for leave to appeal against the unsuccessful rescission was dismissed on 14 August 2024, and no further steps were taken, that explanation fell away entirely.

[56] What the respondent's submission based on *Corner Shop*[21] overlooks is that it is not the applicant's burden to explain the respondent's continued failure to pay. The applicant has established a prima facie case of factual insolvency, grounded in the existence of an undisputed judgment debt and Mr Zervas' failure to pay it over a period that now spans several years. In the passage from *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd*[22] quoted in paragraph [21] above, the court confirmed that, once a creditor has established a prima facie case, it is then for the debtor to rebut this prima facie case and show that his assets have a value exceeding the sum total of his liabilities.

[57] The respondent has plainly not discharged that burden. His answering affidavit contains no more than a bare assertion that he earns 'a substantial income of approximately R 150,000 per month as a property developer', and that the fact that 'he does not own substantial movable and immovable property' does not render him insolvent, and that he is 'able to pay all his debts.'

[58] The above assertions are made without producing a single bank statement, financial statement, or other documentary proof. In *Wightman t/a JW Construction v Headfour (Pty) Ltd*[23] the Supreme Court of Appeal held that

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[21] *Corner Shop (Pty) Ltd v Moodley* 1950 (4) SA 55 (T)

[22] *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C)

[23] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA)

where the facts averred lie within the peculiar knowledge of the disputing party, a bare denial will not suffice. The respondent’s financial position is a matter peculiarly within his own knowledge, and his failure to place any supporting evidence before the court is fatal to his opposition on this ground.

[59] The staleness argument, moreover, is a double-edged sword. The passage of time since the founding papers were filed, in which intervening period the rescission of judgement has now been finally dealt with adversely to Mr Zervas, significantly deepens the inference of insolvency. If the respondent's circumstances had changed for the better since 2022, and if he were now in a position to pay the judgment debt or to demonstrate convincingly that his assets exceed his liabilities, one would have expected him to say so, and provide substantiation. He has not done so. It is therefore Mr Zervas whose inaction has allowed the inference of insolvency to calcify into something approaching certainty.

[60] There is thus now no dispute that the judgment debt is due and payable, and not a cent of it has been paid. The respondent has offered no credible explanation for this state of affairs now in existence for several years. On his own version he has assets in his own name. In these circumstances, the only reasonable inference is that the respondent’s liabilities exceed his assets and that he is factually insolvent. This ground for his sequestration is accordingly established.

Advantage to creditors

[61] Mr Zervas's opposition to this leg of Mr Greeff's case is, in substance, that sequestration would disqualify him from holding directorships, thereby eliminating the very income stream from which he claims to pay his debts, and that the sequestration would accordingly harm rather than benefit

creditors. He further submits that no other creditors are identified as standing to benefit from the order. Neither of these contentions survives scrutiny.

[62] As held in *Meskin & Co v Friedman*[24]

> 'The facts put before the Court must satisfy it that there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Insolvency Act some may be revealed or recovered for the benefit of creditors, that is sufficient'.[25]

[63] Applying those principles, the following matters are either common cause or effectively uncontested on the papers. Mr Zervas is an active director of at least eight private companies and is a trustee of various trusts. He accepts that he generates income from his directorships and trustee appointments.

[64] That is precisely the situation which justifies the appointment of a trustee armed with appropriate statutory powers to investigate. A trustee would be in a position to investigate what has been done with Mr Zervas' income, to examine his interests in various trusts and in the companies of which he is a director, and to lay hands on any assets properly recoverable for the benefit of creditors. For instance, Mr Zervas states that certain assets were sold to MJA Concepts (Pty) Ltd, but provides no elaboration.

[65] As Horwitz J observed in *Chenille Industries v Vorster*,[26] sequestration places in the hands of creditors 'superior legal machinery' which in my view is precisely what is required in the circumstances presented by these papers.

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[24] *Meskin & Co v Friedman* 1948 (2) SA 555 (W)

[25] At 559.

[26] *Chenille Industries v Vorster* 1953 (2) SA 691 (O) at 699F

[66] Mr Zervas's submission that his sequestration would eliminate his income and thereby harm creditors is, in the final analysis, an argument that a debtor who structures his affairs through companies and trusts can insulate himself from sequestration by pointing to an income stream from such sources. That argument cannot be correct. A debtor who says to the court, in effect, 'trust me to pay my creditors from my income', while simultaneously refusing to honour an undisputed judgment debt for several years, provides no basis for confidence. In all the circumstances, there is ample reason to believe that the sequestration of Mr Zervas's estate will be to the advantage of creditors.

Conclusion

[67] In short, the papers establish that Mr Greeff has the necessary locus standi to bring these proceedings, that Mr Zervas is factually insolvent, and there is sufficient advantage to creditors arising from his sequestration. Accordingly, a provisional sequestration order should issue.

Order

[68] I accordingly make the following order:

(a) The estate of the respondent is placed under provisional sequestration, and the respondent and all interested persons are called upon to show cause on a date to be allocated by the Registrar why:

(i) The estate of the respondent should not be finally sequestrated.

(ii) Costs should not be costs in the insolvent estate of the respondent.

(b) The provisional order reflecting the date allocated by the Registrar for the return day shall be served not less than 10 days prior to the return day:

(i) On the respondent in terms of the Uniform Rules of Court;

(ii) By publication in the Cape Times newspaper and the Government Gazette;

(iii) On employees and trade unions (if any) in terms of section 9(4A)(a) (i) and (ii) of the Insolvency Act 24 of 1936,

(iv) On the South African Revenue Service in terms of section 9(4A)(a) (iii) of the Insolvency Act 24 of 1936.

M GREIG

ACTING JUDGE OF THE HIGH COURT

WESTERN CAPE

Appearances:

For Applicant: Adv. N.G. Louw

Instructed by: Warrener De Agrela and Associates Inc.

For Respondent: Adv. P Gabriel

Instructed by: Neethling Attorneys