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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number:030979/2024

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

SIGNATURE

30 April 2026
DATE

The application between

BODY CORPORATE OF MOUNT BEVERLY

Applicant

And

NANDIPHA D'OLIVEIRA SALGADO MENDES DA SILVA
(ID NO: 8[...])

1st Respondent

VASCI D'OLIVEIRA SALGARO MENDES DA SILVA
(ID NO: 7[...])

2nd Respondent

FIRSTRAND BANK LIMITED

3rd Respondent

JUDGMENT

BARNARDT AJ

Introduction

- 1] This is an application for the provisional sequestration of the first respondent's estate. The application against the second respondent was withdrawn.
- 2] The matter became opposed by the intervening creditor who was granted leave to intervene and oppose the sequestration application on 3 June 2025 by Mooki J.
- 3] The intervening creditor opposed the application mainly on the grounds that the applicant failed to comply with the provisions of section 9(1) and 9(3)(a)(ii) and section 10 of the Insolvency Act, 24 of 1936 (hereinafter referred to as "the Act"). According to the intervening creditor, the applicant failed to prove a liquidated claim of at least R100 or more and failed to show an advantage to the creditors.

Background

- 4] The first respondent (hereinafter referred to as the respondent) is the owner of Unit [...], M[...] B[...], 4[...] C[...] Street, Cyrildene, JOHANNESBURG. (hereinafter referred to as the property) Due to her failure to pay the levies

and other contributions in respect of the property to the applicant, the applicant obtained judgment against her and Christelle Janse Rensberg in the Johannesburg Magistrate Court on 13 June 2022 in the sum of R19 018.34.

- 5] It was eventually established that Christelle Janse Rensberg was a previous owner of the property and the judgment against her was erroneously sought and granted and no further steps were taken against her.
- 6] A warrant of execution was issued, and on 13 December 2022 the Sheriff attempted to serve/execute the writ at Unit [...], 4[...] C[...] Street, Cyrildene Johannesburg. According to the Sheriff, the respondent, being the first execution debtor, was staying in the flat with no furniture and she refused to sign the *nulla bona* return.
- 7] The applicant, due to the mistaken belief that the respondents were married in community of property, brought the sequestration application against both respondents in June 2024, but it has since been established that the respondents were married out of community of property, and the application was withdrawn against the second respondent.
- 8] The intervening creditor has a first ranking covering mortgage bond over the property because of a home loan agreement entered into between the intervening creditor and the respondent.

- 9] On consideration of all evidence, it must be accepted that currently, the Municipal valuation of the property is approximately R550 000.00, whilst the bond indebtedness to the intervening creditor is at least R800 718.64, the outstanding arrear to the applicant is R156 088.75 and the municipal arrears R21 000.00.

Statutory requirements

- 10] To be successful with a provisional sequestration application, the creditor needs to prove compliance with the provisions of the Act.
- 11] Section 10 of the Act provides as follows:

“10. Provisional sequestration

If the Court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie*—

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section 9; 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 make an order sequestrating the estate of the debtor provisionally.”

Liquidated claim for more than R100

- 12] The applicant obtained judgment against the respondent in the amount of R19 018.34 in June 2022, and this amount is not only still unpaid, but it has also increased to R156 088.75 at the time when this application was brought.
- 13] I therefore find that the applicant has a liquidated claim for more than R100.

***Nulla bona* certificate**

- 14] The applicant relies on the *nulla bona* return dated 13 December 2022 as the respondent's act of insolvency and alternatively claims that the first respondent is factual insolvent. It must be accepted that the Sheriff communicated with the respondent, since it is recorded that the "defendant is staying in the flat no furniture. Doesn't want to sign *nulla bona*."
- 15] The intervening creditor disputes that the Sheriff's return of service constitutes a *nulla bona* return and takes issue with inter alia the lapse of time between the date of the return and the date of the launching of the sequestration application.
- 16] It is practice, although not a statutory requirement, in the Gauteng Division that an applicant must demonstrate that a respondent's circumstances remained unchanged if a *nulla bona* return is older than six months.

- 17] This issue has been dealt with in **Seaways (Pty) Ltd t/a South African Express Line v Rubin**¹ where Boruchowitz J held as follows:

[7] It is common cause that there was a substantial lapse of time of approximately a year between its issue and the launch of the application for sequestration. It is a long-standing practice in this Division that an applicant who is armed with a recent nulla bona return is entitled to approach the Court without notice to the respondent In cases where a nulla bona return is not a recent one there must be allegations supported by facts that the debtor's position is unchanged (see Abell v Strauss 1973 (2) SA 611 (W) at 613B-C; Wilken & Others NNO v Reichenberg 1999 (1) SA 852 (W) at 860A-C).

[8] A nulla bona return, whether recent or not, is sufficient to establish an act of insolvency in terms of s 8(b) of the Act. But where the nulla bona relied on is not a recent one, the failure to indicate that the debtor's circumstances have not improved in the interim may be a significant factor in the exercise of the Court's discretion to grant a sequestration order (see First Rand Bank Ltd v Evans 2011 (4) SA 597 (KZD) paras 28-30). Rubin has not opposed the sequestration application and there is no reason to suppose that his financial position has improved since the issue of the nulla bona return. Accordingly, the lapse of time between the issue of the return and the launch of the application for sequestration is not a factor that would affect the exercise of the Court's discretion.'

- 18] In **Investec Bank Limited v Le Roux**² the following was said, in relation to a nulla bona return in a sequestration application:

¹ (31419/2019[2013] ZAGPJHC 118 (2013)

² (575/2014) [2016] ZAGPJHC 11 (11 February 2016) paras 22-32.

[22]The next point is whether the return of service is stale. The facts are that the writ was served on 25 July 2013, and the application for sequestration was issued on 14 January 2014, nearly but not yet six months later. In their loose-leave publication Joffe at al, High Court Motion Procedure: A Practical Guide, LexisNexis, the authors say that where the nulla bona relied upon is older than six months, the applicant must provide proof that there has been no material alteration in the respondent's financial position in the interim.

[23]The rationale for such a rule is not clear. The arms-length creditor/applicant will have little access to or knowledge of the debtor's affairs. And when the matter comes before the court the debtor will have had an opportunity to resist the application by, if it applies, showing that she or he has assets to satisfy the judgment. And if she or he does not have assets to satisfy the judgement, then the applicant's difficult burden of showing no improved financial position would in any event have been discharged.

[24]Certainly the legislature in s.8(b) of the Insolvency Act did not require the nulla bona return to be younger than seven months; how then could the courts legitimately impose the limitation? The only explanation for the rule could be that it is simply a rule of practice, and adjunctive to another rule of practice, and not adjunctive to a statute, which in view of the constitutional separation of powers it could never be"

- 19] It is undisputed that the although the *nulla bona* was older than six months, the arrear amount is still outstanding, and the respondent opted not to oppose the sequestration application.
- 20] It is furthermore evident from the founding affidavit as well as the affidavit filed on behalf of the intervening creditor, that the respondent's financial position is in fact worse.
- 21] In the result, nothing turns on the period since the *nulla bona* return was issued and I therefore find that the applicant can rely on the *nulla bona* return of 13 December 2022.

Factual insolvency

- 22] On consideration of the founding affidavit as well as the intervening creditor's affidavit and figures as set out in the intervening creditor's calculations, I cannot but find that the respondent is factually insolvent.
- 23] In this regard it is specifically noted that the respondent is also in arrears with her payments toward the intervening creditor and the balance owing was R900 123.07 on 2 December 2024.

An advantage to creditors

23] Before a court can grant a sequestration order, the applicant is, inter alia, required to prove that: “there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated”. Although the phrase ‘advantage to creditors’ is not defined in the Act, it entails a ‘reasonable prospect of some pecuniary benefit to the general body of creditors.’

24] In **Meskin & Co v Friedman**³ Roper J stated:

“Sections 10 and 12 of the Insolvency Act 24 of 1936, cast upon a petitioning creditor the onus of showing, not merely that the debtor has committed an act of insolvency or is insolvent, but also that there is ‘reason to believe’ that sequestration will be to the advantage of creditors. Under s 10, which sets out the powers of the Court to which the petition for sequestration is first presented, it is only necessary that the Court shall be of the opinion that prima facie there is such ‘reason to believe’. Under s 12, which deals with the position when the rule nisi comes up for confirmation, the Court may make a final order of sequestration if it ‘is satisfied’ that there is such reason to believe. The phrase ‘reason to believe’, used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the Court must be ‘satisfied’, it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so.”

Further Roper J stated:

³ 1948 (2) SA 555 (W) at 558 – 559

“... 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 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 Act some may be revealed or recovered for the benefit of creditors, that is sufficient.”

25] The Constitutional Court in ***Stratford and Others v Investec Bank Ltd and Others***⁴ warned that the term “advantage” should not be rigidified as it is broad. Stratford referred with approval to the dicta of Friedman, where it was held: “In my opinion, 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 Act some may be revealed or recovered for the benefits of creditors, that is sufficient.”

26] The respondent did not oppose the application and did not disclose to this court whether she has other assets. It is also unknown whether she has other creditors apart from the applicant, intervening party and the local municipality.

⁴ 2015(3) SA 1 (CC)

27] The respondent's unit is subject to statutory monthly obligations in terms of the Sectional Title Schemes Act⁵ which she fails to pay. There is no indication that she intends to pay or settle the outstanding amount which continues to increase every month, with detrimental consequences for her creditors.

28] In **Dunlop Tyres (Pty) Ltd v Brewitt**⁶ the following was stated in respect of an advantage to creditors:

“it will be sufficient that a creditor in an overall view on the papers can show for example that there is a reasonable ground for coming to the conclusion that on a proper investigation by way of an inquiry and section 65 a trustee may be able to unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors.”

29] In **Chenille Industries v Vorster**⁷ the following was stated:

“[There are]... the superior legal machinery which creditors acquire by sequestration, the right to control the collection, custody and disposal of all the assets through their nominee, the trustee, the right to control similarly the sale of the assets, the certainty that the insolvent cannot contract further debts and diminish the estate, and the assurance that

⁵ Act 8 of 2011

⁶ 1999 (2) SA 580 (W) at 583

⁷ 1953 (2) SA 691 (O),

all creditors will be accorded the treatment prescribed by law in the division of the proceeds.”

30] The intervening creditor argued that the applicant failed to prove an advantage to creditors and relied on the Supreme Court of Appeal judgment in ***Body Corporate of Empire Gardens v Sithole and Another***⁸, where the body corporate argued that they were not only acting to protect their own financial interests but that they had a statutory obligation to protect the interests of all the members who were prejudiced when a single member failed to pay their arrear levies. The court held that there was no basis for making a distinction between bodies corporate and other creditors and concluded that a body corporate was also required to prove that a sequestration order would be to the advantage of the general body of creditors.

31] It should be noted that in the Sithole-matter, contrary to this matter, the creditor was still paying her monthly instalment to Nedbank and the court found that a sequestration order would therefore not be to the advantage of Nedbank, the intervening creditor.

32] In ***Mercantile Bank Limited, A Division of Capitec Bank Limited v Ross and Another***⁹ Twala J held as follows in the purposive interpretation of the Act:

⁸ Case 240/2016 [2-17] ZASCA 28 (6 March 2017)

⁹ [2023] ZAGPJHC 435 para 25.

“[25] Even if I am wrong in finding that the respondent’s estate should be sequestrated on the basis of the reasons stated above, it should also be borne in mind that the purpose of the Insolvency Act is not only for securing the pecuniary benefit to the creditors, but to protect the general body of the public from people who behave in this manner. It would be an absurdity to interpret s 12(2) of the act in a way that, even if the creditor has established and met the requirements of s 12 (a) and (b), but the debtor does not have any assets which when realised may yield a dividend to the benefit of the body of creditors, an order sequestrating the estate of the debtor should not be granted because the sequestration of the estate will not be to the advantage of the creditors. I say so because that would be a narrow and rigid interpretation of s 12(2) of the Act.

[26] It is now settled that, in the interpretation of a statute, Courts must consider the words used in the statute, the context and the purpose for which the legislation was promulgated and other related legislation. Section 39 (2) of the Constitution of the Republic of South Africa provides that, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

[27] In **Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd** [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10 BCLR 1027 (CC); (6 June 2007) the Constitutional Court dealt with the interpretation of the provisions of a statute and stated the following:

“Paragraph 53: It is by now trite that not only the empowering provisions of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing ‘as a result of past racially discriminatory laws or practices’ in its setting of section 2 (1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due

regard to context. This so even when the ordinary meaning of the provision to be construed is clear and unambiguous.”

[28] More recently, in ***Independent Institution of Education (Pty) Limited v KwaZulu Natal Law Society and Others*** [2019] ZACC 47 the Constitutional Court again had an opportunity of addressing the issue of interpretation of a statute and stated the following:

“Paragraph 1: It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution.

Paragraph 2: The interpretive exercise is no exception. For, section 39(2) of the Constitution dictates that ‘when interpreting any legislation ... every court, tribunal, or forum must promote the spirit, purpose and objects of the Bill of Rights’. Meaning, every opportunity courts have to interpret legislation, must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself.”

[29] The Court continued and stated the following:

“Paragraph 18: To concretise this approach, the following must never be lost sight of. First, a special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a word or expression in a statute, without straining the language, ‘promotes the spirit, purport and objects of the Bill of Rights’, then that is the meaning to be adopted even if it is at odds with any other meaning in other statutes.”

“Paragraph 38: It is a well-established canon of statutory construction that ‘every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature’. Statutes dealing with the same subject matter, or which are in pari material, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.

Paragraph 41: The canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to the words used therein. While maintaining that word should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive must be applied

to statutory interpretation. Courts must have due regard to the context in which the words appear, even where the words to be construed are clear and unambiguous.

Paragraph 42: This Court has taken a broad approach to contextualising legislative provisions having regard to both the internal and external context in statutory interpretation. A contextual approach requires that legislative provisions are interpreted in of the text of the legislation as a whole (internal context). This Court has also recognised that context included, amongst others, the mischief which the legislation aims to address, the social and historical background of the legislation, and, most pertinently for the purposes of this, other legislation (external context). That a contextual approach mandates consideration of other legislation is clearly demonstrated in Shaik. In Shaik, this Court considered context to be ‘all-important’ in the interpretative exercise. The context to which the Court had regard included the ‘well-established’ rules of criminal procedure and evidence’ and, in particular, the provisions of the Criminal Procedure Act.”

[30] The purposive interpretation of the act is that the intention of the legislature is to protect the unsuspecting and innocent public from dealing with persons who are unable to pay their debts and whose liabilities exceed their assets and are actually insolvent. It is my considered view therefore that where a creditor has demonstrated and proved compliance with the s 12 (1) (a) and (b) but failed to satisfy the Court that sequestration of the estate of a debtor will bring some pecuniary benefit to the creditors in terms of s 12 (1) (c), in that the debtor does not have any realisable assets capable of affording a pecuniary benefit to his or her creditors, his or her estate should nonetheless be sequestered. It would be an absurdity not to sequester an estate of a person who is unable to pay his debts because that would be allowing him or her to continue to enter into contracts with unsuspecting and innocent members of the public who will have no recourse against him since he or she does not have assets which when realised would not be to the benefit of the creditors.

[31] It should be recalled that, once an insolvent has been so declared and his estate sequestered, his rights are to a certain extent curtailed and therefore will be unable to contract without the consent of his or her trustee. That is the protection being afforded the innocent public against mischievous conduct of insolvent persons. It therefore does not lie in the mouth of the respondent that he does not have any

assets to his name that may yield a pecuniary benefit to his creditors when are sold and therefore his estate should not be sequestrated. The unavoidable conclusion is therefore that the applicant has made out a case which is unassailable by the respondent and is therefore entitled to the relief that it seeks in terms of the notice of motion.”

- 33] Considering all the above, I am satisfied that applicant has demonstrated reasonable grounds for concluding that a provisional sequestration order may be granted.

Alternative remedies

- 34] On behalf of the intervening creditor it was argued that the applicant could have sold the property at a sale in execution following either Section 66/Rule 43A procedures in the Magistrate’s Court alternatively Rule 46A steps in the High Court.
- 35] It was also suggested that the applicant could have established the employment details of the respondent and then proceeded with a garnishee and/or emolument attachment order.

36] With due regard to the respondent's financial position and the fact that her financial position is deteriorating every month, I am of the view neither of the suggested alternative remedies would be a feasible solution in the circumstances of the respondent.

Discretion

37] Section 10 of the Act provides that if the court is of the opinion that prima facie, the applicant has established against the debtor a claim mentioned under subsection 9(1), the debtor has committed an act of insolvency or is insolvent and there is reason to believe that it will be to the advantage of creditors of the debtor's estate that the estate be sequestrated, and the court may make an order sequestrating the estate of the debtor provisionally.

38] I align myself with the remarks of Twala J in Ross *supra*. Even if my findings on sequestration are incorrect, it remains significant that the purpose of the Insolvency Act extends beyond securing a financial benefit for creditors; it also serves to protect the broader public from conduct of this nature. I am therefore satisfied that a provisional sequestration order is warranted.

39] I therefore grant a provisional sequestration under the terms as set out in the Order, attached hereto.

**ACTING JUDGE JF BARNARDT
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected 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 CaseLines. The date for hand-down is deemed to be 30 April 2026.

APPEARANCES

For the applicant: Jukes & Associates

For the intervening creditor: RWL Inc.

Date of hearing: 9 March 2026

Date of Judgement: 30 April 2026