IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 2023 - 070163

(1) REPORTABLE: **No**

(2) OF INTEREST TO OTHER JUDGES: **No**

(3) REVISED: **Yes**

5 May 2026

SIGNATURE

In the matter between:

THE BODY CORPORATE OF CERES Applicant

and

SOLANI DOLLENCE NTUKWANA Respondent

[Identity Number: 6[...]]

[Marital Status: unmarried/married out of community of property]

The judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it to the electronic file of this matter on Caselines. The date and time of hand-down is deemed to be 16:00 on 5 May 2026.

JUDGMENT

J Vorster, AJ

[1] The applicant is a body corporate established in terms of section 36 of the Sectional Titles Act, 95 of 1986, read together with section 2 of the Sectional Title Schemes Management Act (**STSMA**).

[2] As part of its statutory obligations, the applicant must establish an administrative fund which is reasonably sufficient to cover the anticipated expenses referred to in section 3 of the STSMA and collect levies from its members.

[3] The respondent is the registered owner of unit 65 in the sectional title scheme known as Ceres. As a result, she is a member of the applicant is liable to pay contributions levied by the applicant. The respondent admits her membership and the duty to contribute to the applicant's administrative fund.

Admission of supplementary affidavits

[4] The respondent has filed an application in which she seeks leave to supplement her earlier (first) answering affidavit by way of a supplementary affidavit. Although the applicant opposes this application, it has nevertheless filed a reply to the proposed supplementary affidavit.

[5] It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed.[1]

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1 **James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO** 1963 (4) SA 656 (A) at 660D-H.

[6] In **Bangtoo Bros and Others v National Transport Commission and Others**,[2] it was held that a litigant who seeks to serve an additional affidavit is under a duty to provide an explanation that negatives *mala fides* or culpable remissness as the cause of the facts and/or information not being put before the court at an earlier stage.

[7] Although I am not persuaded that the respondent has adequately explained her failure to include, in her answering affidavit, the evidence now sought to be introduced by way of a supplementary affidavit, I am mindful that a sequestration application concerns status, and that a less rigid approach may, for that reason, be warranted. In addition, the supplementary affidavit is not unduly lengthy, and the applicant has filed a replying affidavit thereto.

[8] In the result, I intend granting an order condoning the filing of both the supplementary answering affidavit and the applicant's supplementary replying affidavit.

Requirements for a sequestration order

[9] Section 9(1) of the Insolvency Act provides that a creditor with a liquidated claim of not less than R100.00 against a debtor, who has committed an act of insolvency, or is insolvent, may apply to court for the sequestration of the estate of the debtor.

[10] For the applicant to succeed, it must establish on a *prima facie*[3] basis, that:

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[2] 1973 (4) SA 667 (N).

[3] Section 10: "*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 nine; and
(b) the debtor has committed an act of insolvency or is insolvent; and
(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
it may make an order sequestrating the estate of the debtor provisionally."

(a.) it has a claim that entitles it, in terms of section 9(1) of the Insolvency Act[4], to apply for the sequestration of the respondent's estate;

(b.) the respondent has committed an act of insolvency or is factually insolvent; and

(c.) there is reason to believe that it will be to the advantage of creditors of the respondent's estate if her estate is sequestrated.

[11] It is appropriate to consider, in turn, the three requirements for the granting of a provisional sequestration order.

Applicant's status as creditor

[12] In the founding affidavit the applicant refers to three separate judgments granted against the respondent, and further that all three judgments remain unsatisfied.[5]

[13] The respondent's evidence in this regard is as follows:

> "*While I do not dispute the existence of those judgments, I dispute the quantum reflected therein, which remains the subject of a bona fide dispute.*"

[14] In accordance with section 165(5) of the Constitution, 1996, an order or decision issued by a court binds all persons to whom it applies. In **Department of Transport and Others v Tasima (Pty) Ltd**,[6] the Constitutional Court confirmed the binding nature of all court orders as follows:

> "*This reading of s 165(5) accepts the judiciary's fallibilities. As explained in the context of administrative decisions, 'administrators may err, and even . . . err grossly'. Surely the authors of the Constitution viewed judges as equally human. The creation of a judicial hierarchy that provides for appeals attests to this understanding. Like administrators, judges are capable of serious error.*

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4 **Braithwaite v Gilbert** 1984 (4) SA 717 (W) at 718.

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6 2017 (2) SA 622 (CC) at [182].

Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences."

[15] Consequently, whatever the respondent's subjective views concerning the quantum of the three judgments may be, they exist as a matter of fact, and confirm the applicant's status as creditor.

[16] During argument, counsel for the respondent submitted that she is instructed that the respondent intends to apply for the rescission of the three judgments on the basis that they were granted for incorrect amounts. Even if I were to accept this submission, which is unsupported by any evidence on affidavit and appears to be no more than a knee-jerk response to the fact that the existence of the three judgments — of which the respondent has been aware for several years — serves to confirm the applicant's status as a creditor, it does not advance the respondent's case.

An act of insolvency or factual insolvency

[17] The applicant contends that the respondent has committed an act of insolvency in terms of section 8(b) of the Insolvency Act, and that her estate is also factually insolvent.

[18] According to a return of service issues by the sheriff on 24 January 2023, he attempted to execute a warrant of execution at the respondent's place of residence, and found the respondent personally. When he demanded payment, the respondent informed him that she has no money of negotiable property wherewith to satisfy the judgment debt, and that no disposable movable property was pointed out to him or could be found. His return was therefore one of *nulla bona*.

[19] In her answering affidavit, the respondent denies the sheriff's allegations concerning execution and personal service of the warrant. She claims that

she resides at unit 33, 973 Klippan Road, Twee Riviere Lifestyle Estate, Village 1, Montana, and that the sheriff executed the warrant at an incorrect address.

[20] The sheriff's return of service indicated that execution took place at unit 3[...], T[...] R[...] L[...] Estate, Village 1[...], B[...] Drive, Montana Tuine. In my judgment, on a *prima facie* basis, it is significant that execution took place at unit 3[...], T[...] R[...] L[...] Estate, Village 1. It matters little whether the entrance to the estate is located in Klippan Road or Bougainville Road.

[21] A further issue of significance is the fact that the sheriff's return records that:

> "*Judgement debtor was uttering some words which shows disrespect towards the deputy sheriff, the body corporate of Ceres and the attorneys in charge. She mentioned that I should drive to Limpopo to find the assets.*"

[22] It is unlikely that this recordal would have been included in the return had service not been effected on the respondent, particularly since the reference to assets in Limpopo accords with the version advanced in the supplementary answering affidavit that she owns property in that province.

[23] I am further fortified in my approach to the sheriff's return by the fact that it is well-established that a sheriff's return of service constitutes *prima facie* proof of the facts stated therein. It is not lightly to be impeached and will be accepted as correct in the absence of clear and satisfactory evidence to the contrary.[7]

[24] I am therefore satisfied that an act of insolvency as contemplated in section 8(b) has been established.

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[7] **FHP Managers (Pty) Ltd v Theron NO and Others** [2000] JOL 7308 (C) at [22]; **Deputy-Sheriff v Goldberg** 1905 TS 680 at 684 referred to in **Sussman & Co (Pty) Ltd v Schwarzer** 1960 (3) SA 94 (O) at 96D, as quoted in **Van Vuuren v Jansen** 1977 (3) SA 1062 (T) at 1062H.

[25] A factor I have to consider is the fact that the return of service is issued more than two years ago. In **Investec Bank Ltd v Le Roux**,[8] the court concluded that the practice of requiring an applicant to prove that there has been no material alteration in the respondent's financial position where the *nulla bona* relied upon is older than six months, is a rule of practice only and that the fact that a writ may be stale is only relevant in the exercise of the court's discretion not to grant a provisional sequestration order. I align myself with this approach, and therefore find that the act of insolvency remains. The date of the return is a factor that I must consider when exercising my judicial discretion to grant or refuse the provisional sequestration order.

[26] As mentioned earlier in the judgment, the applicant also alleges that the respondent is factually insolvent. In support of this contention the applicant relies on inferential reasoning and point to the continued failure to pay levies, the increasing arrears, and the information contained in the *nulla bona* return.

[27] In **Ullman Sails (Pty) Ltd and Others v Jannie Reuvers Sails (Pty) Ltd and Others and Related Matters**,[9] it was held that an applicant relying on actual insolvency is not required to adduce evidence to finitely determine the respondent's assets and liabilities in Rands and cents and he may discharge the *onus* of establishing a *prima facie* case by way of sufficient evidence to justify the inference as a matter of probability that the respondent is insolvent. If the applicant does so, the *onus* shifts to the respondent to rebut the inference by showing that he has sufficient assets to be able to settle his liabilities.

[28] The evidence adduced in the founding affidavit in support of the allegation of factual insolvency is insufficient to satisfy me that the respondent is factually insolvent. The failure to meet payment obligations is, in itself, more indicative of a cash flow difficulty and does not necessarily bear upon the respondent's balance sheet position, namely the value of her assets relative to her

8 (575/2014) [2016] ZAGPJHC 11 (11 February 2016) at para. 22.
9 [2022] 3 All SA 290 (WCC) at para. 48.

liabilities.

[29] The Supreme Court of Appeal previously confirmed that although proof of commercial insolvency will be sufficient in the case of winding-up of a company, it will not be sufficient for the purpose of obtaining a sequestration order.[10]

[30] Although the evidence tendered by the respondent to demonstrate her factual solvency falls far short of what is to be expected from a person with direct personal knowledge of the relevant facts, I find that the applicant has failed to discharge the onus of establishing factual insolvency.[11]

Advantage to creditors

[31] The concept of advantage to creditors is a broad one[12] demonstrated by, for example, a not too negligible pecuniary benefit to creditors, or that advantage is to be gained through an enquiry into the debtor's financial affairs,[13] or that it is important that trustees take control of the estate since the debtor is wasting the property of the estate or there is a real concern that the debtor is concealing assets of the estate,[14] or attempts to dissipate assets. In essence, there must be some useful purpose.[15]

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10 **Prudential Authority v Dlamini and Another** [2025] 1 All SA 76 (SCA) at [33].

11 **Wightman t/a JW Construction v Headfour (Pty) Ltd** 2008 (3) SA 371 (SCA) at 375 [13]: "*A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision.*"

12 **Body Corporate of Empire Gardens v Sithole and Another** 2017 (4) SA (SCA) at [10].

13 **Investec Bank Limited v Louw and Another** [2012] JOL 29473 (WCC) at para. [74] – [76].

14 **Fourie *NO* v Smith** [2017] JOL 38868 (GP) at [51].

15 ***Ex Parte* Shmukler-Tshiko and Thirteen other cases** [2012] ZAGPJHC 209 (26 October 2012) at para.
[34] and [59].

[32] In the founding affidavit, the applicant contends that the value of unit 65 in the Ceres sectional title scheme is sufficient to demonstrate an advantage to the respondent's general body of creditors. More specifically, the applicant estimates the value of the property to be between R340,000 and R450,000. Although the property is bonded in favour of Standard Bank, the applicant points out that the original bond amount was only R320,000.

[33] In her initial answering affidavit, the respondent stated that only an amount of R160,000 remained outstanding on the bond. As an annexure to her supplementary answering affidavit, she disclosed a copy of her Standard Bank statement reflecting that, as at August 2025, the outstanding balance had reduced to R94,000. On this basis, even if the lower valuation advanced by the applicant (namely R340,000) is accepted, the sale of the property would yield a substantial pecuniary benefit for the general body of creditors.

[34] In addition, the respondent contends that: (i.) she owns movable assets (although she does not provide details of any specific assets); (ii.) she receives monthly rental income from unit 6[...]; and (iii.) she owns an unencumbered immovable property known as Erf 3[...], M[...], Limpopo. These allegations confirm the likelihood of a pecuniary benefit to the respondent's body creditors.

[35] It is, in my judgment, clear that an investigation into the respondent's financial affairs may reveal further assets capable of realisation for the benefit of creditors. In **Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd and Hawker Aviation Partnership and Others**[16] the Supreme Court of Appeal confirmed that a court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit but that the court need be satisfied only that there is reason to believe - not necessarily a likelihood, but a prospect not too remote - that as a result of investigation and enquiry, assets might be unearthed that will benefit creditors. I align myself with this approach to the topic of advantage to creditor.

Discretion

16 2006 (4) SA 292 (SCA).

[36] A sequestration order is discretionary in nature.[17]

[37] The nature of the discretion was explained in **FirstRand Bank Ltd v Evans**,[18] where Wallis, J (as he was then) stated that there is little authority on how the court's discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. He went on to state:

> "*Broadly speaking it seems to me that the discretion falls within that class of cases generally described as involving a power combined with a duty. In other words where the conditions prescribed for the grant of a provisional order of sequestration are satisfied then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.*"

[38] In my judgment, the respondent has not established special or unusual circumstances warranting the exercise of my discretion in her favour. Consequently, a provisional sequestration order in respect of her estate will be granted.

[39] The following order is made:

1. Leave is granted to both the applicant and the respondent to file supplementary affidavits.
2. The costs occasioned by the applications for leave to file supplementary affidavits shall be costs in the cause.
3. The estate of the respondent, Solani Dollence Ntukwana, with identity number 6[...], is provisionally sequestrated.
4. All persons with an interest in the respondent's affairs are called to present reasons on <u>3 August 2026,</u> at 10:00 why the provisional order of sequestration should not be made final.
5. The provisional order of sequestration must be:

   5.1 Served on the respondent in the manner prescribed by

[17] Section 10: "*… may make an order sequestrating the estate of a debtor provisionally.*"

[18] 2011 (4) SA 597 (KZD).

paragraphs 2.1, 2.2 and 2.3 of the substituted service order dated 20 September 2023, and also by email service of the respondent's attorneys, Ndhlovu Nyiko Attorneys Inc.

5.2 Delivered to the Commissioner for the South African Revenue Service and the Master of the High Court, Pretoria;

5.3 Published on one occasion in the Government Gazette and the Citizen newspaper;

6. The costs incurred by the applicant shall be costs in the administration of the respondent's insolvent estate, and is to be taxed on scale B.

J VORSTER, AJ.

Acting Judge of the High Court

Date heard: 4 May 2026.

Judgment date: 5 May 2026.

<u>Appearances</u>:

<u>For the applicant:</u>

Counsel: M Bronkhorst
(Heads of Argument by D Hewitt)

Instructed by: Loock Du Pisani Inc. Attorneys

<u>For the respondent:</u>

Counsel: N Satekge

Instructed by: Ndhlovu Nyiko Attorneys Inc.