REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2025/079012

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

31 JULY 2026 **F STRYDOM AJ**

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA

Reg. No. 1962/000738/06 **APPLICANT**

and

NOMVULA FLORENCE PHANGISA

Identity No. 7[…] **RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 14h00 on the 31st of JULY 2026.

F STRYDOM AJ:

Introduction

[1] This is an opposed application by Standard Bank (the applicant) for the provisional sequestration of Ms Nomvula Florence Phangisa (the respondent).

[2] In its founding papers the applicant asserts two claims against the respondent:

(1) A claim in the sum of R3 491 436,70 together with interest from 1 May 2025 in respect of a home loan granted to the respondent for the acquisition of an immovable property in M[...] E[...], Gauteng.

(2) A claim of R17 268 670,90 together with interest from 25 April 2025 in respect of a guarantee debt incurred by the respondent as guarantor for the obligations of Mvulazana Trading CC ("Mvulazana").

[3] In terms of Section 10, read with section 9(1), of the Insolvency Act, 24 of 1936 ("the Act") a Court may make an order for the provisional sequestration of the estate of a debtor if the Court is of the opinion that *prima facie* (a) the sequestrating creditor has established against the debtor a liquidated claim for not less than R100,00; (b) the debtor has committed an act of insolvency or is actually insolvent; and (c) there is reason to believe that it will be to the advantage of creditors of the debtor if her estate is sequestrated.

[4] In the present case, the applicant relies both on an act of insolvency by the respondent in terms of section 8(g) of the Act and/or that she is actually insolvent in that her liabilities exceed the value of her assets.

[5] The respondent, on the other hand, seeks to challenge the presence of each element of the jurisdictional requirements for a sequestration order by–

(1) contending that the applicant lacks the necessary *locus standi* as creditor to seek the sequestration of her estate, in particular that there is no proof of a liquidated claim that is due and payable;

(2) disputing that the respondent committed an act of insolvency in terms of section 8(g) of the Act, namely that she gave notice in writing to the applicant that she is unable to pay any of her debts;

(3) disputing that the respondent is factually insolvent and, in particular, with reference to the respondent's alleged equity interest in Mvulazana, contending that the market value of her assets exceeds the sum of her liabilities;

(4) disputing that sequestration of the respondent's estate will be to the advantage of her general body of creditors, in particular that no proof of a dividend yield to her creditors has been given; and

(5) contending that the current application constitutes an abuse of the process for sequestration as it is aimed at debt collection of a debt *bona fide* disputed.

[6] Before dealing with each of the disputed elements, I refer to a number of interlocutory rulings made *in limine* and thereafter set out, in summarised form, the relevant factual matrix against which the matter must be considered.

Interlocutory rulings

[7] The respondent sought leave in terms of Rule 6(5)(e) to file a short supplementary answering affidavit relating to Mvulazana's continued payments towards its commercial loan. There was no opposition by the applicant's counsel at the hearing and I granted the necessary leave.

[8] The applicant sought condonation for the late filing, by a few days, of its replying affidavit. In the absence of opposition by the respondent's counsel, I granted the condonation sought.

[9] The respondent sought the striking out of certain portions of the applicant's replying affidavit on the basis that it constituted impermissible new matter in reply. After considering counsel's written and oral submissions in this regard, I dismissed the striking out application.

[10] The respondent objected to the form of the confirmatory affidavit deposed to by attorney Lauren Davids on behalf of the applicant and alleged discrepancies in the attestation of the affidavit as it appeared from two versions of the same

statement. After hearing argument on behalf of both parties, I dismissed the objection.

Mvulazana

[11] In this application, Mvulazana plays a central role as the applicant's second claim against the respondent arises from guarantees given by the respondent for the payment by Mvulazana of its debt to the applicant in terms of a commercial loan. On the other side, the respondent relies on her alleged equity interest in Mvulazana not only as a valuable asset in her estate, but an asset with a value that exceeds the quantum of the applicant's claims and the respondent's other known liabilities.

[12] Mvulazana, trading as Kings Student Accommodation, operates an off-campus student residency in Gqeberha (Port Elizabeth). Mvulazana is accredited by the Nelson Mandela University to provide and operate student accommodation for National Student Financial Aid Scheme ("NSFAS") students that attend the University. NSFAS is a government-student bursary and loan scheme that receives its funding from the National Department of Higher Education and Training.

[13] Mvulazana is the owner of a number of immovable properties on which the student accommodation is built. These properties are bonded in favour of the applicant as security for a commercial loan facility of about R30 million.

[14] It seems common cause that the business of Kings Student Accommodation is or has been a joint business venture between the respondent and one Mr Michael Kyriakides ("Kyriakides"). It is alleged by Kyriakides in various affidavits forming part of the material in this matter that he and the respondent each held a 50% members' interest in Mvulazana. The respondent herself, in her answering affidavit before me, averred that if Kyriakides' declaratory application (referred to hereunder) succeeds, the effect thereof would be that the respondent's member's interest in Mvulazana would reduce from 100% to 50%, and that Kyriakides would hold the other 50% member's interest.

[15] For purposes of the valuation of her personal assets, the respondent was content in her answering affidavit to work from a basis that she holds a 50% equity interest in Mvulazana. However, as pointed out below, the applicant denies that the respondent holds any membership interests in Mvulazana at present. In the alternative, the applicant contends that the Court is not in a position to quantify the respondent's alleged membership interest in Mvulazana because she had failed to present credible and cogent evidence in this regard.

[16] Regarding Mvulazana's indebtedness to the applicant, this arose by virtue of a commercial loan, secured by the registration of covering mortgage bonds, advanced by the applicant to Mvulazana in November 2019 and February 2022 respectively. Mvulazana also enjoyed overdraft facilities from the applicant.

[17] In 2023, Mvulazana developed financial difficulties and started to default in its payments to the applicant on the commercial loan facilities. By August 2023, Mvulazana was in arrears on the loan facilities in an amount of R1,8 million. As a result, on 29 August 2023, the applicant exercised its rights to accelerate the payment date of the full outstanding indebtedness on the commercial loan and demanded payment from Mvulazana in the sum of R21 626 507,95.

[18] Mvulazana did not make immediate payment of the sum of R21 626 507,95 claimed but did make substantial payments to the applicant in the period from September 2023 to May 2025, reducing the outstanding indebtedness to R19 703 760,88 as of 31 January 2024 and R17 268 670,90 as of 25 May 2025.

[19] On 8 December 2023, Kyriakides instituted an urgent application for the business rescue of Mvulazana under case no. 2023/04253 ("the business rescue application"). However, on 13 December 2023, the business rescue application was struck from the roll due to a lack of urgency. The business rescue application remained pending at the date of the hearing of the present sequestration application.

[20] On 6 March 2024, the applicant issued an application under case no. 2024/025203 for the winding-up of Mvulazana ("the winding-up application"). The winding-up application was opposed by Mvulazana as represented by

Kyriakides. Mvulazana's answering affidavit was delivered on 3 June 2024 and at the time of the hearing of the present sequestration application, the applicant had yet to deliver its replying affidavit and/or prosecute the winding-up application to finality. In the papers before me, the applicant ascribed the delay to settlement talks which ultimately failed and confirmed its intention to proceed with the winding-up application.

[21] It appears necessary to consolidate the business rescue application and the winding-up application. As the relief sought in the two applications is mutually exclusive, they should be heard and decided together. Until that occurs, Mvulazana's future remains uncertain.

[22] At the same time, there are several pending applications between Kyriakides and the respondent in relation to a membership dispute in Mvulazana and various aspects concerning the management of Mvulazana.

[23] The first of these is an application brought by the respondent for the removal of Kyriakides as member of Mvulazana under case no. 2022/050796. This matter was struck from the roll by Justice Vally on 7 December 2022. No indication has been given by the respondent to this Court that she intends to pursue this removal application.

[24] The second is an urgent application for declaratory and interdictory relief brought by Kyriakides against, *inter alia*, First National Bank and the respondent in February 2023. Part A of the application sought an interdict against the Bank from allowing the respondent to transact freely on two accounts of Mvulazana held with that Bank without Kyriakides' permission or consent. Part B of the relief anticipated an order confirming Kyriakides' right, title and interest in Mvulazana. On 17 February 2023, Justice Dippenaar granted an order disposing of the part A relief and providing, *inter alia*, for Kyriakides and the respondent to have joint transactional authority on the relevant accounts and making provision that the parties would only be allowed to transact on the accounts in respect of necessary expenses as set out in the Court Order. The

relief sought in Part B was postponed *sine die* and, at the time of hearing of this sequestration application, was still pending.

[25] Thirdly, at the instance of Kyriakides, Justice Makume on 5 February 2024 under case no. 2024/4020 issued an interim order, *inter alia*, setting aside the purported sale or transfer of membership interest in Mvulazana by the respondent to one Nomahlubi Sivuyisiwe Mbeki ("Ms Mbeki") which allegedly occurred on 25 January 2024, ordering the respondent and Ms Mbeki to repay an amount of R2 700 000,00 to Mvulazana, interdicting the respondent and Ms Mbeki from selling, disposing of or in any way encumbering the property of Mvulazana and ordering the amendment of Mvulazana's corporate records to reflect Kyriakides as the sole member thereof. These orders would operate on an interim basis pending the return day of the application when the respondent and Ms Mbeki had to show cause why these orders must not be made final. At the time of hearing of this sequestration application, the postponed return day was still pending.

[26] According to a copy of a CIPC search report in relation to Mvulazana included in the papers before me, the respondent was removed as member of Mvulazana on 25 January 2024 and replaced by Ms Mbeki as member on the same date. Following the Order of Justice Makume, Ms Mbeki was removed as member of Mvulazana on 2 May 2024 and Kyriakides was added as member on the same date. The CIPC report obtained on 2 July 2025 reflected Kyriakides as the sole member of Mvulazana and it is presumed that this position remains unchanged.

The home loan claim

[27] On 4 October 2018, a home loan agreement was concluded between the applicant and the respondent for a principal debt of R2 906 037,50. The home loan was in respect of the purchase of Erf 4[…] M[...] E[...] ('the M[...] E[...] property"). The term of the home loan agreement would be for a period of 240 months with an initial repayment amount of R27 870,44 per month.

[28] As collateral for the home loan a guarantee in favour of the applicant would be provided by SB Guarantee Company (RF) (Pty) Limited ("SBGC"). The respondent, in turn, provided a written indemnity in terms of which she indemnified SBGC against any claim made by the applicant and further registered a first covering mortgage bond for the amount of R2,9 million in favour of SBGC over the M[...] E[...] property.

[29] Over time, the respondent fell into default with payment of her monthly instalments on the home loan agreement. By the end of January 2024, the respondent was in arrears in a total sum of R395 636,63 which represented about fourteen months' arrears in the agreed monthly instalments. According to an e-mail sent by the respondent to the applicant's attorneys on 7 May 2024 the reason for the defaults was the fact that since 2023 she was entangled in litigation (with Kyriakides) which prevented her from accessing the income of the business (Mvulazana) which was the respondent's only source of income. I return to the e-mail of 7 May 2024 hereunder.

[30] As a result of the respondent's defaults on the home loan agreement, the applicant's attorneys sent a letter of demand in terms of section 129 of the National Credit Act, 34 of 2005 ("the NCA") to the respondent. The respondent was requested to rectify her default by making payment of the arrear amount of R395 636,63 plus interest by no later than 16 February 2024. If the respondent failed to respond to the demand, the full outstanding balance in respect of the home loan agreement plus interest and costs would become immediately due and payable without further notice.

[31] The respondent failed to make payment as demanded by the deadline of 16 February 2024, or at all. Accordingly, the full outstanding balance on the home loan became due, owing and payable by the respondent to the applicant in terms of clause 20.3 of the standard terms and conditions of the home loan agreement.

[32] In terms of a certificate of balance given by the applicant's manager on 20 May 2025, the respondent was indebted in the sum of R3 491 436,70 together with

interest from 1 May 2025, which amount was due, owing and payable as at the date of the certificate.

The guarantee claim

[33] On 20 November 2019 the respondent executed a written Guarantee and Shortfall Undertaking ("the first guarantee") in terms of which the respondent guaranteed and undertook to the applicant the due and punctual payment by Mvulazana of its present and future debts which were or became owing by Mvulazana to the applicant. This guarantee was given as additional security for the commercial property finance loan advanced by the applicant to Mvulazana. The respondent's liability to the applicant under the first guarantee was limited to the sum of R11 240 000,00 plus interest and costs.

[34] On 3 February 2022 the respondent executed a further written Guarantee and Shortfall Undertaking ("the second guarantee") in favour of the applicant with a maximum liability of R30 million plus interest and costs. This was pursuant to a restatement of the loan facility agreement between the applicant and Mvulazana.

[35] In terms of the first and second guarantees, it was stipulated that each guarantee was given in addition to, and would not in any way be prejudiced by, any other guarantee or security then or subsequently held by the applicant.

[36] It was a further term of the guarantees that the obligation of the respondent under the first and second guarantees would not be affected by an act, omission, matter or thing which would otherwise reduce, release or prejudice any of the respondent's obligations under the guarantees.

[37] The respondent also renounced the benefit of the legal exception of excussion and the other legal exceptions mentioned in the agreements and further agreed that a certificate of balance signed by a director or manager of the applicant would be *prima facie* proof of, *inter alia*, the existence of and the amount of Mvulazana's or the respondent's debt to the applicant, that such amount is due and payable, and the interest accrued thereon.

[38] After the winding-up application in respect of Mvulazana was issued, and pursuant to its defaults in respect of the loan and overdraft facilities, the applicant caused a written demand dated 2 April 2024 to be sent to the respondent. The letter reminded that in terms of clause 4.1.2 of the guarantee agreement, the respondent undertook to the applicant that whenever Mvulazana failed to pay any amount or perform any obligation when due under or in connection with the guaranteed obligations, the respondent would immediately on demand pay that amount or perform that obligation, as the case may be, as if it was the borrower (regardless of whether the applicant had accelerated its rights against Mvulazana following the occurrence of a default).

[39] The letter of demand proceeded to state that Mvulazana was indebted to the applicant at that time in the sum of R19 260 763,32 together with interest from 31 January 2024 in respect of the commercial property finance loan and in the sum of R467 248,47 together with interest from 25 January 2024 in respect of an overdraft on Mvulazana's current account.

[40] The letter of demand further recorded that as Mvulazana's debt was then due, owing and payable by Mvulazana to the applicant and remains unpaid, the respondent was likewise indebted to the applicant for the debt by virtue of the guarantee agreement. In the result, demand was made for payment of the full debt by the respondent by no later than 16 April 2024.

[41] Despite service of the demand on the respondent, there was no response and the respondent did not make payment of the debts demanded therein.

[42] In terms of a certificate of balance issued by the applicant's manager, the respondent was indebted to the applicant in the sum of R17 268 670,90 together with interest from 25 April 2025, which amount was due, owing and payable by the respondent as at 20 May 2025.

Locus standi

[43] In its founding affidavit the applicant submitted that it had the necessary *locus standi* to bring the sequestration application as creditor of the respondent. It

relied on a total debt, exclusive of interest, of R20 760 107,60 comprised of the home loan debt of R3 491 436,70 and the guarantee debt of R17 268 670,90. The applicant's alleged *locus standi* was challenged by the respondent.

[44] Already prior to the issue of the sequestration application the respondent had entered into a sale agreement on 15 April 2025 in respect of her M[...] E[...] property for a purchase consideration of R5,2 million. The transaction was in the hands of conveyancing attorneys for purposes of registration of transfer to the purchaser. From the purchase consideration, provision was made for a guarantee in favour of the applicant in the sum of R3 577 942,93 for "*bond cancellation*".

[45] A legal fight developed over the net proceeds of the sale, expected to be in the region of R800 000 – R900 000, which would be due to the respondent upon transfer of the property. The applicant sought an undertaking from the respondent that the excess proceeds from the sale of the property would be paid to the applicant in reduction of the respondent's guarantee indebtedness to the applicant. The respondent refused. In response, the applicant instituted the present sequestration proceedings and also obtained on 18 June 2025 before Acting Justice Liebenberg under case no. 2025/087641 an interdictory order restraining the conveyancing attorneys from paying out or releasing the net proceeds from the transfer pending the final determination of the sequestration application.

[46] The M[...] E[...] property was transferred to the purchaser on or about 21 July 2025, shortly after the filing of the applicant's replying affidavit in this matter. The conveyancer's confirmation of the transfer, dated 24 July 2025, and its final statement of account dated 23 July 2025, were uploaded to the Court file before the present matter was argued. In terms of the statement of account the applicant was paid the sum of R3 577 942,93 in respect of the home loan and net proceeds of R989 959,82 were retained in trust pursuant to the Court interdict.

[47] In the above circumstances it is clear that the applicant enjoyed *locus standi* in the sequestration application at the outset by virtue of the unpaid home loan debt at that stage. However, as a result of the extinction of the home loan debt upon transfer of the property on 21 July 2025, the applicant lost its *locus standi* insofar as it rested upon its home loan claim.

[48] In regard to the applicant's guarantee claim of R17 268 670.90 the respondent submitted that the applicant lacked *locus standi* on the basis that the guarantee debt was not due and payable by the respondent at the time the applicant brought the sequestration application on 27 May 2025. In addition, in her answering affidavit, the respondent contended that her potential liability under the guarantee had not been triggered by any failure or default of the principal debtor and in the absence of a demand or default notice served upon the respondent. The respondent described the applicant's claim against her under the guarantee as "*contingent*".

[49] The respondent pointed out that the applicant had accepted payments of nearly R5 million made by Mvulazana towards its commercial property loan between May 2024 and May 2025 and subsequently, Mvulazana continued to service the loan. The respondent contended that the applicant's acceptance of these payments without protest constituted an affirmation of performance and should be interpreted as a waiver of the alleged default on the part of Mvulazana.

[50] The applicant, in reply, acknowledged that the mentioned payments were made by Mvulazana, however, on 20 May 2025 (after the payments by Mvulazana had been received) the loan balance owed by Mvulazana was still the amount of R17 268 670,90 as certified in the applicant's certificate of balance. The applicant had made a formal demand for payment by Mvulazana of its accelerated indebtedness, at that stage the amount of R21 626 507,95, on 29 August 2023 (see para [17] above). The applicant has also made formal demand for payment by the respondent in terms of the guarantees on 2 April 2024, at which stage the applicant's claim under the guarantee amounted to the sum or R19 260 763,32 (see para [39] above).

[51] I am accordingly satisfied that a default by Mvulazana of its obligations to the applicant had been proven, giving rise to the respondent's obligations under the guarantees, and that proper demand was made on the respondent for payment under the guarantees. The respondent's liability under the guarantees has accrued and stood irrespective of any accommodation that may have been given by the applicant to the principal debtor, Mvulazana, thereafter. The guarantee obligations were independent and primary obligations, and not accessory to the obligations of Mvulazana as principal debtor. For this reason it is incorrect for the respondent in her papers to refer to the relevant guarantees as "*suretyships*", a term that she used interchangeably with the term "*guarantees*" in her papers.

[52] The applicant in reply denied that its acceptance of further payments by Mvulazana constituted a waiver of its claim for the acceleration of Mvulazana's debt. The applicant asserts that there were attempts to settle the winding-up application brought by it against Mvulazana but, as settlement had failed, the applicant intends to proceed with the winding-up application. In any event, even if there had been a waiver of the applicant's rights to accelerate Mvulazana's debt (which has not been proved), this would not have availed the respondent. The respondent's liability under the guarantees accrued as a separate and independent obligation subject only to a release *pro tanto* any payments made by the principal debtor towards the guaranteed debt. I find accordingly that the applicant's guarantee claim of R17 268 670,90 was, and remain, due and payable by the respondent.

[53] The respondent also contends that the applicant lacks *locus standi* because the respondent disputes her alleged indebtedness to the applicant on "*bona fide and reasonable grounds*". However, the respondent has failed to show proper grounds upon which her liability under the guarantees may be assailed in the light of Mvulazana's default and the demands made by the applicant on both Mvulazana and the respondent, and as far as the quantum of the guarantee debt is concerned, the respondent is confronted with the applicant's certificate of balance which provided *prima facie* proof of the existence and amount of

indebtedness and that such amount is due and payable. The respondent has failed to rebut the probative value of the certificate.

[54] There is accordingly no *bona fide* and reasonable dispute about the respondent's indebtedness under the guarantees which affects the applicant's *locus standi* or stands in the way of the sequestration application being determined on the papers.

[55] The *locus standi* point is accordingly decided on the basis of a *prima facie* opinion as required at this stage, in favour of the applicant.

Act of insolvency

[56] The applicant claims that the respondent committed an act of insolvency in terms of section 8(g) of the Insolvency Act by addressing an e-mail on 7 May 2024 to Ms Katy Lund of the applicant's attorneys in the following terms:

> *"Kindly note that I have been in the middle of a litigation case since last year 2023 and the matter is still in court and have prevented me from accessing the income of the business that was my only source of income.*
>
> *I have realised that the matter might take forever and have decided to find other alternative remedies of generating an income outside the business and the income in question.*
>
> *I am also aware that I am behind with the bond loan repayments hence I paid 200 000 something last year and had hoped by now I would have caught up with the areas* [sic] *and be in the position to pay the current bond repayment accordingly.*
>
> *I am currently faced with two options that can assist me out of the situation and I have decided to rent the house out in the meantime, until such time I can be in a position of either selling the house or go back to how things were financially in my life on where I can once again pay my bond on time and accordingly.*
>
> *May I please conclude this e-mail by imforming* [sic] *you that the house is being currently rented out and from the end of this month, the bond will be paid accordingly as expected.*
>
> *Kindly confirm on how I can deal with the outstanding arrears in question.*
>
> *Your understanding and assistance in this matter will be highly appreciated."*

[57] In the submission of the applicant the contents of the e-mail demonstrate the respondent's inability (as opposed to merely an unwillingness) to pay her admitted indebtedness at that stage under the home loan agreement to the applicant. It is pointed out that not only is the respondent's indebtedness as well as the fact that she was in arrears admitted in the e-mail, but it is also evident from the e-mail that the respondent was unable to make the monthly

payments in terms of the home loan agreement. There were promises of possible payment in the future, but such promises only served to demonstrate the respondent's inability to pay at the time of writing the e-mail.

[58] In her answer, the respondent denies the allegations of an act of insolvency in bald terms without suggesting an alternative interpretation that may be given to the contents of the e-mail. The respondent preferred to emphasise her allegation that her estate was not insolvent. This defence seems to rest upon the *dicta* of Roper J in *Millward v Glaser* 1950 (3) SA 547 (W) at 553F-554A, to the effect that where a debtor cannot pay immediately, but is not insolvent, and if given time will be able to discharge the debt, the Court would be justified in exercising its discretion against sequestration.

[59] During oral argument, the issue was debated as to whether the respondent's relevant e-mail amounted to an indication of her "*unwillingness*" to pay the debt or did it amount to an indication of her "*inability*" to pay the debt? At the conclusion of oral argument, counsel for the parties were requested to prepare further written submissions on this topic with special reference to the commentary of Meskin in *Insolvency Law and Its Operation In Winding-Up* and the authorities referred to therein.

[60] Predictably, in the further notes submitted, the applicant submitted that the contents of the e-mail show an acknowledgment of an inability to pay the debt whereas the respondent submitted that the e-mail is merely evidence of an unwillingness on the part of the respondent to pay the arrears immediately and did not amount to an admission of actual inability.

[61] Both parties accepted that the inquiry is an objective one and that the subjective intention of the respondent in giving the written notice to the applicant is not important. Construing the written notice involves deciding how a reasonable person in the position of the creditor receiving the notice would understand it. To such a reasonable person must be attributed the creditor's knowledge at the time of the relevant circumstances. (*Court v Standard Bank of SA Ltd; Court v Bester N.O.* 1995 (3) SA 123 (A) at 134A-B).

[62] The respondent's counsel drew attention to the authority of *Strabo Investments (Pty) Ltd v Van Niekerk* [2025] ZAGPJHC 936 to the effect that a letter does not constitute an act of insolvency where the debtor merely explains circumstances, delays payment or proposes remedial steps. Where the letter conveys explanation, context and future intention, rather than an unequivocal admission of inability, section 8(g) is not triggered.

[63] Further reference was made to the decision in *Howie v Daren N.O* [2024] ZAGPPHC 352 where the Court reiterated that while a debtor who gives notice that he will only be able to pay in the future may, in certain circumstances, be taken to indicate inability, this is not so where the communication merely reflects temporary cash-flow difficulty coupled with a willingness and intention to pay once circumstances permit. The Court expressly confirmed that if the debtor could nonetheless pay if pressed, but is explaining a delay or conditional difficulty, the notice does not constitute an act of insolvency.

[64] Reliance was also placed by the respondent on the authority of *Education and Training Unit NPC v Mwanandimai* [2025] ZAGPPHC 829 where the Court recognised that a written request to pay a debt by instalments may, in the appropriate context, give rise to an inference of inability. However, the Court made it clear that such an inference depends on the nature of the undertaking and the surrounding circumstances, where a debtor merely explains a temporary situation and anticipates resuming or effecting payment in full, without an unequivocal concession that instalments are the only means of payment, the inference of inability does not arise.

[65] On the other hand, the applicant's counsel referred me to the *a quo* decision in *Court v Standard Bank of SA Ltd* (*supra*), reported at 1993 (3) SA 286 C at 293B-G. Scott J is reported to have expressed himself as follows:

"*The letter, of course, does not say, in express terms, that the respondent cannot pay. But a debtor who gives notice that he will only be able to pay his debt in the future gives notice in effect that he 'is unable' to pay. A request for time to pay a debt which is due and payable will, therefore, ordinarily give rise to an inference that the debtor is unable to pay a debt and such a request contained in writing will accordingly constitute an act of insolvency in terms of s 8(g). This is particularly so when the request is coupled with an undertaking to pay the amount due and payable by way of instalments (...). A distinction must, however, be drawn between an* *inability to pay and an unwillingness to pay. If a reasonable person in the position of the creditor to whom the notice is addressed would understand the notice to mean that while the debtor was unwilling to pay his debt forthwith he could nonetheless do so if pressed, then the notice will not constitute an act of insolvency (...). In each case, where there is a request for time, the inquiry, therefore, is whether the content of the written statement, viewed together with the circumstances to which it may be permissible to have regard, is such as to negative the inference arising from the request for time to pay and to justify the conclusion that the debtor would be able to pay at once if pressed to do so. The mere fact that the debtor's assets may exceed his liabilities would not be sufficient (...). If, on the other hand, the debtor has disposable assets which could readily be converted to cash in an amount which is sufficient to pay the debt, or the debtor is the owner of unencumbered immovable property against which funds could promptly be raised, these facts could well serve to rebut the inference that the debtor is unable to pay and indicate that he is merely unwilling to do so."*

[66] In applying the principles enunciated in the *a quo* and appeal decisions in *Court v Standard Bank of SA Ltd* (*supra*), the applicant argued that a reasonable creditor receiving the relevant e-mail would understand it to mean that the respondent cannot presently meet her payment obligations as they fall due, but payment is anticipated once rental income is received; the respondent is not offering immediate settlement, but is asking for an arrangement or indulgence while she implements measures to restore her payment ability in the future, either by generating rental income or by selling the home; and there is no indication that the respondent has disposable assets which could readily be converted to cash in an amount which is sufficient to pay the debt, or that she is the owner of unencumbered immovable property against which funds could promptly be raised. It is submitted that the contents of the e-mail, viewed objectively, show that the respondent cannot pay at once if pressed (which constitutes an inability to pay).

[67] Counsel for the respondent argued that the relevant e-mail does not provide evidence of the kind of actual inability contemplated by section 8(g). The respondent does not state that she cannot pay her debts generally, nor that she lacks realisable assets. On the contrary, her communication explains the reasons for the delay, refers to income disruption caused by ongoing disputes, and outlines steps being taken to restore cash-flow and resume payment. There is no indication that the assets are blocked, incapable of realisation, or unavailable if pressed. It is submitted that, properly construed, the notice

reflects at most a temporary cash-flow difficulty and an unwillingness to pay immediately, not an admission of actual inability.

[68] On my reading of the relevant e-mail, the respondent promised the imminent resumption of payment of the monthly instalments on the home loan agreement (from the rental to be received) but was seeking to determine the applicant's expectations regarding the matter of the outstanding arrears in excess of R400 000,00 (payment of which was demanded in the section 129 letter of 30 January 2024 – see para [30] above). The respondent did indicate a willingness to sell the M[...] E[...] property and settle the home loan debt in its entirely if it becomes necessary. However, absent the sale of the property or restoration of the income that she used to receive from Mvulazana, the respondent was unable to pay the substantial arrears on the home loan agreement at all. I assume that the monthly rental to be received would approximate the monthly instalment due on the home loan agreement and would not provide much of a surplus which could be paid towards the arrears. In other words, the respondent indicated that she was not able to pay the arrears at once but will be able to settle same in due course if pressed to do so by selling the property. There is no indication of any other assets of sufficient value which were available for immediate realisation.

[69] Must the respondent's e-mail be taken as an admission of mere temporary financial constraint and that she indeed possesses a disposable asset (the property) that can readily be realised? One knows from experience that immovable property is not readily sold overnight and particularly an expensive properly like the M[...] E[...] property with a value in the region of R5 million. One further knows that the respondent later sold the M[...] E[...] property on 15 March 2025 and transfer occurred four months later on 21 July 2025. In my view, the relevant property cannot be described as an immediate or readily realisable asset. And a creditor, like the applicant, cannot reasonably be expected to wait for payment of the arrears until the property is marketed, sold and transferred in due course.

[70] The other potential source for payment of the arrears identified in the e-mail was the restoration of the respondent's income from Mvulazana. In terms of the Order of Justice Dippenaar of 17 February 2023, Mvulazana was ordered to pay the respondent a monthly salary of R150 000,00 and an additional amount of R400 000,00 subject to her providing supporting documentation of expenses. However, Mvulazana, under the stewardship of Kyriakides failed to pay these amounts to the respondent. The respondent is also involved in various litigious matters with Kyriakides about their respective membership in Mvulazana. Furthermore, with effect from 25 January 2024, the respondent resigned her membership in Mvulazana in favour of Ms Mbeki. At the hearing of the present sequestration matter, none of these issues had been resolved and it remained uncertain when, if ever, the respondent would again receive an income from Mvulazana. The applicant must have been aware of the uncertainty of the respondent's income from Mvulazana when it received the respondent's relevant e-mail of 7 May 2024 as it had already instituted the winding-up proceedings in respect of Mvulazana at that stage. As a reasonable creditor, it could not have understood the e-mail to indicate that such income would be restored any time soon.

[71] Having given anxious consideration to the issue of whether the respondent's e-mail disclosed an inability to pay the arrears on the home loan agreement or merely an unwillingness/temporary dislocation, I am driven to the *prima facie* opinion that the respondent acknowledged that she was unable to pay either immediately or in a short period of time by the realisation of a readily disposable asset. It follows that, on my reading of the authorities, the respondent has committed an act of insolvency in terms of section 8(g) of the Act.

Factual insolvency

[72] The applicant submits that it has been established that the respondent is also factually insolvent, i.e. that her liabilities exceed the value of her assets. The respondent, on the other hand, submits that it has clearly been shown that her estate is factually and commercially solvent.

[73] In the founding papers the applicant lists known assets of the respondent with an estimated total asset value of R7,1 million. This comprised of the sale value of the M[...] E[...] property (R5,2 million) and the cash proceeds from the sale of another immovable property referred to as the Mount Croix property (R1,9 million). Against that the applicant lists known liabilities of the respondent in an estimated total amount of R21,1 million. This sum includes the respondent's home loan indebtedness at that time, the respondent's indebtedness under the guarantees and property-related debt owed to the Ekurhuleni Municipality and the M[...] E[...] Homeowners Association. No value is attributed by the applicant to the respondent's interest, if any, in Mvulazana. On the applicant's calculations the respondent's liabilities exceed the value of its assets by an amount of R14 million.

[74] In her answering affidavit, the respondent lists assets to the value of R43 928 760 and liabilities of R151 114. The assets include a 50% equity stake in Mvulazana valued at R27 528 760, a claim of R13 050 000 against Mvulazana for outstanding salaries and expenses due, a half-share in a property situated in the Chartwell Agricultural Holdings ("the Chartwell property") to a value of R1 800 000, equity due to the respondent from the sale of the M[...] E[...] property in the sum of R800 000 and three motor vehicles as well as furniture and appliances with a combined value of R750 000. According to the respondent her liabilities consist of motor vehicle debt of R130 970 and some other amounts owed to Telkom, Vodacom and in respect of utilities. The respondent did not recognise the applicant's guarantee claim of R17 268 670,90 in her calculations. The respondent submits that her asset value exceeds the amount of her liabilities by a sum of R43 777 644.

[75] The Chartwell property was bought for the sum of R3 600 000 on 15 June 2022 and transferred into the name of Mvulazana on 1 November 2022. The respondent claims the value of a half-share in the property at cost price but it is clear that the property belongs to Mvulazana and should be excluded from a calculation of the respondent's assets, save to the extent that the value of the property is reflected in the respondent's equity share in Mvulazana.

[76] For the valuation of Mvulazana, the respondent relies on a valuation report by a professional valuer in January 2022 in which the open market value of Mvulazana's land and buildings was set at R72 million and the forced sale value thereof at R50 400 000.

[77] The respondent further relies on information provided by Kyriakides in Mvulazana's answering affidavit in the winding-up application brought by the applicant. In this affidavit Kyriakides puts the value of Mvulazana's assets at R76 million (represented mainly by its Gqeberha properties and the Chartwell property) and estimated liabilities of R20 942 480. These liabilities comprise mainly of Mvulazana's indebtedness to the applicant on the commercial property loan (R19,2 million) and in respect of an overdraft (R467 000,00). The mentioned liabilities exclude Kyriakides' loan account of R3,5 million in Mvulazana which had been subordinated.

[78] The respondent argues that the value of Mvulazana's assets exceeds its liabilities by R55 057 250 and submits that the respondent's equity share of 50% in Mvulazana is accordingly worth some R27,5 million.

[79] When determining the assets and liabilities of the estate sought to be sequestrated it is of course necessary to provide satisfactory proof of the existence of the assets and liabilities as well as the value to be attributed to each asset and liability. The respondent has failed in this regard to put up cogent and reliable evidence to rebut the *prima facie* case presented by the applicant. It seems that the respondent has put her faith in her ability to show that her equity share in Mvulazana of approximately R27,5 million would trump her liability of R17 268 670 to the applicant under the guarantees.

[80] Although the respondent was one of the founders of Mvulazana's business, which according to Kyriakides in the Mvulazana business rescue application is stated to be a viable business with an annual income of at least R18 – 24 million, the status of the respondent as a member of Mvulazana is at best uncertain. Two features fly in the face of any finding that the respondent is

currently a member of Mvulazana or holds an equity share in Mvulazana despite not being registered as a member.

[81] The first feature is the fact that the respondent resigned her membership on 25 January 2024 and was replaced as a member by Ms Mbeki. No explanation is given by the respondent of the circumstances surrounding this change of membership. The papers before Justice Makume and the judgment of Justice Makume in support of his Order of 5 February 2024 were not made part of the papers in this sequestration application. I do not know whether the respondent sold or otherwise disposed beneficially of her interest to Ms Mbeki, or whether it was intended that Ms Mbeki would act as nominee of the respondent. In the latter situation, the respondent may still be the true owner of the relevant membership interest despite the name of Ms Mbeki appearing on the members' register for a period.

[82] The second feature is the consequences following upon the order of Justice Makume of 5 February 2024. In terms of that Order, the sale/transfer of membership interest to Ms Mbeki was set aside and the amendment of the records of Mvulazana was directed to reflect Kyriakides as the sole member of Mvulazana. This order operates on an interim basis pending the return day of the application on which the respondent and Ms Mbeki must show cause why the Order must not be made final. The Order was implemented in that the name of Ms Mbeki was removed as a member of Mvulazana and Kyriakides was added as the member on 2 May 2024. It follows that, as things stand at present, the respondent is not a member of Mvulazana and whether she still owns any equity share in Mvulazana is not known.

[83] In these circumstances, I do not believe it is possible to include any interest in Mvulazana in the assets of the respondent's estate. Even if it is possible to count an interest in Mvulazana as part of the respondent's assets, the present values of Mvulazana's assets and liabilities have not been satisfactorily proven. A recent valuation of Mvulazana's business as a going concern would have been helpful. After conclusion of the argument before me, the respondent's

attorneys invited me to receive a copy of Mvulazana's annual financial statements for the year ended 31 December 2021 (the relevance of which is questionable given that the statements related to a period four years ago). Nevertheless, this should have been included in the respondent's answering affidavit if she had wanted the Court to take account thereof. The applicant objected to the informal and late introduction of the financial statements whereafter I was asked by the respondent's attorneys to disregard them. Accordingly, the financial statements do not form part of the Court's record in this matter at present.

[84] Save for attaching a copy of the valuation of Mvulazana's property assets as at January 2022 to her the answering affidavit, the respondent relied exclusively on averments made by Kyriakides in the affidavit opposing the winding-up application which may be regarded as hearsay evidence. Kyriakides did not make a confirmatory affidavit in the present sequestration proceedings. Kyriakides' affidavit in the winding-up application, as well as his affidavit in the business rescue application, must be read with the understanding that he was advancing ultimately his own interest as member of Mvulazana. In the affidavits Kyriakides admits the indebtedness of Mvulazana to the applicant of about R19,2 million at that stage. Moreover, in the mentioned affidavits Kyriakides made damning allegations against the respondent, including allegations of forgery and fraud. Before me, the respondent did not seek to deny these harmful allegations but instead chose to "*cherry-pick*" portions of Kyriakides' affidavit that she believed would advance her case in the present matter.

[85] Also in regard to the proof of value of the respondent's other assets, such as the motor vehicles, furniture and appliances, the respondent failed to prove the existence and value of these assets by reliable extrinsic evidence, such as motor vehicle licence or registration papers, an inventory of the furniture and appliances and an independent third party's valuation of these assets. In sequestration matters, the Court cannot merely accept the *ipse dixit* of the respondent as to existence and value of the assets said to be falling within her estate.

[86] Be that as it may, once the alleged value of R27,5 million in respect of an equity share in Mvulazana falls to be excluded from the computation, it follows that there are not sufficient assets in the respondent's estate on any basis to off-set the respondent's guarantee liability of about R17,2 million. On a "*best case scenario*" for the respondent it has been shown that the respondent's assets comprise of the net proceeds of the sale of her M[...] E[...] property of about R1 million, a salary claim against Mvulazana in terms of the Order by Justice Dippenaar of about R2,4 million and the alleged value of her motor vehicles, furniture and appliances of about R750 000. That amounts to a total asset value of R4 150 000. It is unnecessary to consider the respondent's smaller liabilities aside from her guarantee liability of R17,2 million.

[87] On the above basis, I hold on a *prima facie* basis that the respondent's liabilities exceed the value of her assets. The respondent will have the opportunity on the return date of the Order that I intend to grant, to furnish better proof of the extent and value of her assets, in particular insofar as it concerns any interest in Mvulazana. Hopefully, the litigation between the respondent and Kyriakides would also by then have reached an outcome.

[88] During oral argument I debated with counsel the prospect, if a provisional sequestration order was to be granted, whether I should not direct the provisional trustees appointed by the Master to investigate and file a report on the asset and liability position of the respondent's estate for the benefit of the Court on the return date. On reflection, I have decided against such a course of action. The respondent has the opportunity to save herself from a final sequestration order by assuming personal responsibility to put the necessary material before the Court. No doubt she and her lawyers would take guidance from this judgment as to what type of evidence is required.

Advantage to creditors

[89] It is trite that the applicant bears the onus of showing that there is at least a reasonable prospect that some benefit will accrue to the creditors as a result of sequestration as contemplated by section 10(c) of the Act.

[90] The respondent submits that the applicant has failed to demonstrate that sequestration of her estate would yield such advantage. It submits that there is no verified schedule of other creditors who stand to benefit from the sequestration and that the applicant is effectively the only creditor. The respondent submits that the Act does not permit sequestration for the sole benefit of a single creditor under the guise of insolvency proceedings. It is submitted that the applicant has failed to show that a sequestration order would benefit itself more than the benefit to be gained from obtaining a judgment and obtaining execution.

[91] The applicant, on the other hand, submits that the concept of an "*advantage*" to creditors is relative and depends on whether there is a reasonable prospect that some pecuniary benefit will result to creditors. This does not require proof of a dividend in a fixed amount. Even if it has not been shown that the respondent has any assets, but there are reasons for thinking that as a result of inquiry under the Act some assets may be revealed or recovered for the benefit of creditors, that is sufficient (*Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559; *Stratford v Investec Bank Ltd* 2015 (3) SA 1 (CC) at pars [44] and [45]).

[92] In the present case, on the respondent's own version, there are liabilities owed to Telkom, Vodacom, the financial institution which provided motor vehicle finance in respect of the Renault Clio motor vehicle and in respect of utilities. The applicant is not the sole creditor, albeit that it is certainly the major creditor.

[93] From the above analysis it appears that the respondent has at least assets to the value of R4 150 000 which would be available for realisation and distribution amongst proven creditors. That represents a dividend yield in excess of 20%.

[94] There is also the prospect once the litigation between Kyriakides and the respondent regarding their interests in Mvulazana has been finalised, that some value in respect of an interest in or claim against Mvulazana would fall within the respondent's estate, including a claim against Mvulazana for any monies actually paid to the applicant for Mvulazana's debts if she had secured

contractually a right of indemnity by Mvulazana, or perhaps on the basis of unjustified enrichment.

[95] I am accordingly satisfied, on a *prima facie* basis, that it has been shown that a sequestration of the respondent's estate would be to the advantage of the general body of creditors.

Abuse of process

[96] It is well recognised that the Court has an inherent jurisdiction to prevent abuse of its process and will not grant a sequestration order even if a proper case has otherwise been established, in circumstances where the sole or predominant motive or purpose of the applicant is something other than the *bona fide* achievement of the sequestration of the estate for its own sake, i.e. if the sequestration order is sought for an ulterior purpose.

[97] Although it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of its debt, it should not be used where an ordinary debt recovery procedure would be more appropriate (*Gardee v Dhanmanta Holdings* 1978 (1) SA1066 (N) 1069 – 1070) or where an alternative, less drastic, remedy is available.

[98] In the present case, the respondent submits that the sequestration proceedings amount to an improper debt collection disguised as a sequestration. It is alleged that the proceedings seek the recovery of a disputed debt and is used as a weapon of debt enforcement by a single creditor instead of seeking to advance the interests of a body of creditors.

[99] The applicant denies that the sequestration application has been issued to coerce payment of a "*disputed*" debt as the guarantee debt of the respondent is clearly not disputed *bona fide* and on reasonable grounds. The applicant points out further that it has various legal remedies at its disposal when dealing with a non-paying debtor and it is at liberty to elect which legal course of action to

pursue. It is well-established that it is not improper for a creditor to sequestrate a debtor's estate with the object of payment of a debt. The applicant is also not required to obtain a judgment against the respondent first. This is particularly so when the respondent owns no valuable or realisable assets against which the applicant could successfully execute.

[100] The last point referred to above carries particular weight with this Court. Although the applicant holds security in the form of mortgage bonds over the immovable property of Mvulazana for its indebtedness under the commercial property loan agreements, the applicant holds no security for the respondent's separate indebtedness under the guarantees. If the applicant had proceeded by way of action against the respondent for enforcement of its guarantee debt of about R17,2 million, and obtained judgment, it is clear that at best for the respondent she has executable assets of about R4 150 000 (see para [86] above) which, apart from the property proceeds of about R1 million in cash, would render a far lesser amount on a forced judicial sale. In these circumstances, I do not think that the applicant could have been expected to first seek a civil judgment against the respondent. By initiating sequestration proceedings, the applicant was clearly seeking the *bona fide* achievement of the sequestration of the estate for its own sake and for the benefit of the body of creditors. I do not believe there is merit in the respondent's point of a misuse of process.

The Court's discretion

[101] The Court has a statutory discretion to withhold a sequestration order in circumstances where all the jurisdictional elements have been satisfied. This flows from the wording of section 10 of the Act.

[102] It is trite that only in special circumstances should the Court's discretion be exercised against an applicant who otherwise has established a case for the grant of a provisional order. In the present case, I find no such special circumstances.

Conclusion

[103] In the premises I hold that the applicant has satisfied all the requirements for a provisional sequestration order and has also complied with the statutory formalities, including the provision of the Master's certificate of the necessary tendered security for costs. A provisional sequestration order should follow. A *rule nisi* is to be issued calling upon the respondent and any other interested party to show cause on the return date as to why the provisional order should not be made final.

[104] I thus make the following order:

1. The respondent's estate is placed under provisional sequestration.
2. A *rule nisi* is issued calling upon the respondent and any other interested party to show cause, if any, to this Honourable Court on **19 October 2026** at **10:00**, or as soon thereafter as the matter may be heard, as to why:
   2.1 the respondent's estate should not be placed under final sequestration, and
   2.2 the costs of this application should not be costs in the sequestration of the respondent's estate.
3. This order must be served on:
   3.1 the respondent at 4[…] F[…] Road, P[…] Hill, G[…] <u>and</u> at the address of her attorneys, Sitsula Attorneys, Elephant House, Suite 1[…], 1[…] A[…] S[…] Drive, Johannesburg (Ref: Mr Muvhumbi Sitsula);
   3.2 the employees of the respondent, if any;
   3.3 registered trade unions representing the respondent's employees, if any;
   3.4. the South African Revenue Service; and
   3.5 the Master of the High Court.
4. The respondent is directed to provide an affidavit to the applicant and the court within 5 (five) days of date of this order stating whether she has any employees,

and if so, providing the names and contact details of such employees and whether any such employees are represented by a registered trade union in which case the names and contact details of such trade unions must be provided.

F. STRYDOM AJ

ACTING JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

HEARING

DATE OF HEARING:	21 and 22 January 2026
DATE OF JUDGMENT:	31 July 2026

APPEARANCES

APPLICANT'S COUNSEL:	Adv. P G Louw
APPLICANT'S ATTORNEYS:	Edward Nathan Sonnenberg Inc (Ref: Ms L Davids/ Ms K Lund)
RESPONDENT'S COUNSEL:	Adv. K Maponya
RESPONDENT'S ATTORNEYS:	Sitsula Attorneys (Ref: Mr M Sitsula)