



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPETOWN**

CASE NO: 2025 - 222638

In the matter between

AAA CONSORTIUM PTY LTD

Applicant

And

A M KLAASEN + 3 OTHERS

Respondents

Coram: PETERS, AJ

Heard: 27 May 2026

Delivered electronically: 20 August 2026

ORDER

1. The Applicant has failed to satisfy the requirements for sequestration of the estate of the First Respondent.
2. The application is therefore dismissed.
3. The applicant is to pay the costs of the application, including the point in limine.

JUDGMENT

INTRODUCTION

[1] The Applicant seeks the sequestration of the joint estate of the First and Second Respondents, in the alternative, the individual estate of the First Respondent.

[2] The Applicant is a venture capital entity. The First and Second Respondents are married to each other. The Fourth Respondent is a duly registered and incorporated private company. It has the First Respondent as the only director and shareholder.

[3] On or about 20 November 2023, the Applicant and the Fourth Respondent, (represented by the First Respondent) entered into a Joint Venture Agreement. In terms thereof, the Fourth Respondent undertook to apply for and acquire tenders and projects advertised by various government institutions while the Applicant undertook to provide the necessary finances to deliver on said tenders and projects. The Applicant held 35% interest and Fourth Respondent 65% interest, in the Joint Venture. Monies were indeed provided to the Fourth Respondent by the Applicant in terms of the Joint Venture Agreement. On 11 April 2024, the First Respondent, subsidiary to the Joint Venture Agreement, entered into a suretyship agreement with the Applicant as surety and co-principal debtor for all the debts incurred by the Fourth Respondent and owed to the Applicant.

[4] Further to this, on 4 June 2025, the Applicant and Fourth Respondent entered into an acknowledgement of debt and payment of debt agreement in which the Fourth Respondent undertook to repay a total capital amount of R68 570 357, 73 in monthly installments of R2, 500 000, 00. It is common cause between the parties that payments, in terms of the acknowledgment of debt and payment of debt agreement, were not honoured by the Fourth Respondent. This led to a slew of email communications between the Applicant and the Fourth Respondent, as represented

by the First Respondent, which included unsuccessful attempts to agree on a revised acknowledgment of debt and undertaking to pay agreement.

[5] On 9 September 2025, the Applicant served a letter of demand on the Fourth Respondent, which also addressed the First Respondent, in his personal capacity as surety. In the founding affidavit of Ruan Fourie, which the Applicant uses in support of its application, it is stated in paragraph 9 thereof that the First and Fourth Respondents are insolvent due to their inability and failure to pay their debts. Based on this, the Applicant in said founding affidavit (para 11) avers that, on the premise that they are married in community of property, it is just and equitable to sequestrate the joint estate of the First and Second Respondents.

POINT IN LIMINE

[6] The Second Respondent was made part of these proceedings solely based on the averment by the Applicant that she is married in community of property to the First Respondent. She raised a point in limine seeking the removal of her name as a party to the proceedings, due to misjoinder. She alleged and proved (through the filing of the antenuptial contract between herself and the First Respondent) that she and the First Respondent are married out of community of property. The Applicant objected to the point in limine taken by the Second Respondent by, firstly, stating that the parties are wrongly cited. It is contended by the Applicant that the Second Respondent, in her misjoinder application, should have referred to herself as the "applicant in reconvention" and the Applicant as the "respondent in reconvention". The Applicant is clearly confusing points in limine and counter-applications (as referred to in rule 6(7) of the Uniform Rules of Court) with each other. A point in limine is purely procedural in nature, which is used here by the Second Respondent to have her name removed from the proceedings because her estate is separate from that of the First Respondent, they being married out of community of property. It is not a claim that counters the application.

[7] The second point of objection against the point in limine is a reference to sections 16 and 21 of the Insolvency Act, 24 of 1936. Section 16 (which places a duty on the insolvent and the spouse whose separate estate has not been sequestered, to deliver business records and lodge statements of affairs with the

Master) and section 21 (dealing with the effects of sequestration on the property of the spouse of the insolvent) of the Insolvency Act, provide the mechanisms governing the treatment of the solvent spouse's estate following the sequestration of the insolvent spouse's estate.

[8] It is trite law that spouses married out of community of property, do not have a joint estate, but separate estates, and hence their separate estates cannot jointly be sequestrated. The assertion by the Applicant in the answering affidavit by Ruan Fourie (paragraph 5.7 thereof), to the Second Respondent's founding affidavit in the misjoinder/ sequestration application, that it is for the protection of the interests of the Second Respondent that she is cited in these proceedings, does not make sense. It should be borne in mind that the Second Respondent was not joined to protect her interests. She was joined as a party which the Applicant contended was married in community of property to the First Respondent and whose joint estate, with the First Respondent, is to be sequestrated. It follows that both points of objection raised by the Applicant should be rejected and the point in limine upheld.

SEQUESTRATION OF FIRST RESPONDENT'S ESTATE

[9] Section 10 of the Insolvency Act, 24 of 1936, sets out the requirements that an applicant must meet in order to succeed in an application for the provisional sequestration of a respondent's estate. Those being:

- (a) a liquidated claim against the respondent of not less than R100.00,
- (b) an act of insolvency or factual insolvency; and
- (c) reason to believe that sequestration will be to the advantage of creditors. A liquidated claim against the respondent of not less than R100.

[10] The Applicant makes reference to the suretyship agreement signed by the First Respondent on 11 April 2024, in terms of which he bound himself as surety and co-principal debtor for all the debts incurred by the Fourth Respondent with the Applicant. It then makes further reference to the acknowledgment of debt and payment of debt agreement which the Fourth Respondent entered into with the Applicant on 4 June 2025. Further, the fact that it notified the First Respondent on 1 September 2025 that the Fourth Respondent was in material breach of the acknowledgment of debt and repayment of debt agreement. Also, the fact that on 9

September 2025 it drew the First Respondent's attention to the surety agreement and demanded that First Respondent pay the outstanding debt of the Fourth Respondent, which the First Respondent failed to do.

[11] It is however clear from e-mail communications between the First Respondent (on behalf of the Fourth Respondent) and the Applicant (which the Applicant himself, through annexures attached to the founding affidavit by Ruan Fourie, placed before the court) that there are disputes between the parties concerning the underlying indebtedness of the Fourth Respondent to the Applicant. It specifically refers to accounting reconciliations, the allocation of payments and the extent of any actual indebtedness, amongst others. The Applicant stated that it intends the dispute to be determined by arbitration.

[12] The basis for the Applicant alleging that it has a liquidated claim against the First Respondent, is the suretyship agreement dated 11 April 2024. The First Respondent bound himself as surety and co-principal debtor, jointly and severally for the debt of the Fourth Respondent. As indicated above, there are disputes between the Applicant and the Fourth Respondent about the indebtedness of the Fourth Respondent to the Applicant. In *Kilroe-Daley v Barclays National Bank Ltd*¹ it was found that a surety's liability is accessory to that of the principal debtor, despite it being based on a different contract. In *Liberty Group Ltd v Ilman*² it was further found that the addition of the words "co-principal debtor" in a suretyship, does not transform the contract into any contract other than that of a suretyship. If the principal debt therefore becomes prescribed the surety debt also ceases to exist.

[13] By the same token then, where the principal debt is disputed by the Fourth Respondent, the liability of the surety (First Respondent) similarly becomes disputed. The court finds that the Applicant does not have a liquidated claim against the First Respondent. Factual insolvency or an act of insolvency. Simply stating that the First Respondent is factually insolvent, is not enough. The Applicant itself in paragraph 12.1 of the founding affidavit states that it has no insights as to the further assets and liabilities of the First Respondent. This, after stating in paragraph 9.2 and 9.3, in

¹ 1984 (4) SA 609 (A)

² 2020 (5) SA 397 (SCA)

contradiction thereto, that the First Respondent is unable to pay his debts, due to the fact that he has failed to cure the Fourth Respondent's indebtedness as surety and co-principal debtor, after being called on to do so. Clearly, factual insolvency has not been established.

[14] The Applicant, however, does contend further that the First Respondent committed one and/or two acts of insolvency, being:

(a) In terms of section 8(e) of the Insolvency Act, 24 of 1936 having made or offered to make arrangements with the applicant for releasing him wholly or in part from his debts, and/or

(b) In terms of section 8(g) of the Insolvency Act, 24 of 1936 having given notice in writing to the Applicant that he is unable to pay his debts.

[15] This is simply factually incorrect. The First Respondent did not make or offer to make arrangements with the Applicant for releasing him wholly or partly from his debts. What he effectively did was to enter into a suretyship agreement with the Applicant to proverbially "stand in" for the debts of the Fourth Respondent owed to the Applicant. The First Respondent furthermore never gave notice in writing to the applicant that he is unable to pay his debts. It is the Fourth Respondent that, on 4 June 2025, signed an acknowledgment of debt and payment of debt agreement with the Applicant.

[16] The Applicant is clearly confusing the First Respondent, being a natural person, and the Fourth Respondent, being a juristic person, with each other. The two remain separate entities, notwithstanding the fact that the First Respondent is the only director and shareholder of the Fourth Respondent.

[17] Reason to believe that sequestration will be to the advantage of creditors: The court cannot find that the First Respondent committed an act of insolvency. Furthermore, the court has already found that the Applicant does not have a liquidated claim against the First Respondent. It was also found that the First Respondent is neither factually insolvent nor has he committed an act of insolvency. It logically follows then that no advantage to creditors, through the sequestration of the First Respondent's estate, has been established.

ORDER

1. The Applicant has failed to satisfy the requirements for sequestration of the estate of the First Respondent.
2. The application is therefore dismissed.
3. The applicant is to pay the costs of the application, including the point in limine.

K PETERS AJ
WESTERN CAPE HIGH COURT

1 Kilroe-Daley v Barclays National Bank Ltd 1984 (4) SA 609 (A)
2 Liberty Group Ltd v Ilman 2020 (5) SA 397 (SCA)

APPEARANCES:

For the Applicant: Adv D Petersen

For First Respondent: Mr Mbokazi