REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023/114416

(1)	REPORTABLE: ~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED: NO

22 April 2025

DATE SIGNATURE

In the matter between:

GENFIN (PTY) LTD Applicant

and

JUDY ANNE MILNE First Respondent

ROBERT MILNE Second Respondent

JUDGMENT

Noko, J

Introduction

[1] The applicant, Genfin (Pty) Ltd instituted sequestration proceedings against both respondents, who are married to each other in community of property. The application is predicated on the averments that the respondents have committed an act of insolvency in terms of sections 8(b)[1] and 8(g)[2] of the Insolvency Act[3]. The respondents oppose the application and contend that the order, upon which the alleged act of insolvency is predicated, was erroneously sought and granted, and is susceptible to rescission.

The parties

[2] The applicant is Genfin (Pty) Ltd (Reg No.: 2016/212828/07) a private company duly incorporated in terms of the laws of the Republic of South Africa, with its registered address at 9[…] J[…] D[…] J[…] Drive, […] F[…], Building […], F[…] […], V[…] O[…] E[…], D[…] B[…], Cape Town.

[3] The first respondent is Judy-Ann Milne, an adult female business person residing at 3[…] A[…] D[…], F[…], S[…], Johannesburg.

---

[1] "[I]f a court has given judgement against him and he fails, upon the demand of the officer whose duty it is to execute that judgement, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;".

[2] "[I]f he gives notice in writing to any one of his creditors that he is unable to pay any of his debts;".

[3] Insolvency Act 24 of 1936

[4] The second respondent is Robert Milne, an adult male business person residing at 3[…] A[…] D[…], F[…], S[…], Johannesburg.

Background

[5] The applicant entered into a written loan agreement ("agreement") with Abundant Media (Pty) Ltd ("Abundant Media") on 7 November 2021 in terms of which the applicant advanced the amount of R2 982 625.18 to Abundant Media. The first respondent signed and bound herself as both guarantor and surety in favour of the applicant for the obligations of Abundant Media set out in the agreement.

[6] During March 2023, the applicant issued a letter of demand for payment as Abundant Media defaulted on its repayments. Legal proceedings were instituted against Abundant Media and the first respondent in the Western Cape High Court under case number 6742/2023, and an order was granted by agreement between the parties on 5 June 2023. The settlement agreement provides that the respondents were jointly and severally liable for the debt incurred by Abudanti Media and that payment of the judgment debt will be made in instalments over a period of time.

[7] Both Abundant Media and the first respondent defaulted again on payments. The sheriff was furnished with a writ of execution and instructed to attach the assets of the first respondent. The sheriff subsequently delivered a *nulla bona* return to the applicant's Attorneys . The first respondent's attorney thereafter penned a letter to the applicant, stating that the first respondent "has no income and there is nothing she can do about it right at this moment".[4] The applicant then instituted these sequestration proceedings.

[4] See para 23 of the Applicant's Founding Affidavit at CL 01-13.

[8] The respondents referred to the background of the business activities of Abundant Media which was established in 1999 to provide marketing, branding and promotional services. Abundant Media grew exponentially and was able to generate an annual income of R90 million. During 2022, Abundant Media entered into an empowerment agreement with its employees' company, Motherland Media (Pty) Ltd ("Motherland"), in terms of which the latter would purchase its advertising-brokering core business for a consideration of R6 358 485.00 payable over a period of time. The founders of Motherland subsequently established a parallel company and stripped Motherland of its clients and thereafter raised a dispute regarding the indebtedness to Abundant Media. This dispute and refusal to pay led to Abundant Media's financial woes.

Application in terms of Rule 6(5)(e) of the Uniform Rules of Court

[9] The respondents uploaded an application for leave to admit a fourth set of affidavit a day before the hearing which was supported by a supplementary affidavit. The applicant did not object to the request to admit the supplementary affidavit, as it presented developments that occurred after the parties had exchanged initial affidavits.

[10] In view of the absence of opposition and the submission that the contents of the affidavit will aid in the adjudication of the matter, this Court granted the application seeking its admission.

Submissions by the parties

[11] Counsel for the applicant began his submissions by stating that although the Notice of Motion sought relief for provisional sequestration, the heads of argument referred to final sequestration. He clarified that the intention now is not to persist with the final order but to keep the prayer for an order of provisional sequestration. Additionally, he observed that although the respondents have

raised issues identified as points *in limine*, a closer scrutiny revealed that those issues implicate the merits of the application; accordingly, they will not be dealt with separately.

Acts of Insolvency

[12] The applicant contended that the respondent failed to satisfy the court order issued in the Western Cape High Court which, despite the first respondent's threat to challenge it, remained extant.[5] The sheriff attended the first respondent's residence for attachment, and the return of service indicates that the first respondent has no assets sufficient to satisfy the judgment. In view of this, the first respondent committed an act of insolvency, which warrants, at a minimum, an order for provisional sequestration.

[13] The first respondent seeks to impugn the loan agreement, in particular that the said agreement contains suretyship and guarantor clauses, which she contends, do not comply with the law. She argues that suretyship agreements are required to be in writing and signed by the surety. Furthermore, section 13 of the Electronic Communications and Transactions Act 25 of 2002 prescribes formalities for electronic signatures which, according to her, were not complied with. To the extent that the suretyship agreement's signature was not in compliance with the provisions of the ECT Act, she contends that it is invalid. It follows, she argues, that the order granted pursuant to that invalid agreement was sought and granted erroneously.

[5] The applicant referred to *Municipal Manager, OR Tambo Municipality and Another v Ndabeni* [2022] ZACC 3; 2023 (4) SA 421 (CC); 2022 (10) BCLR 1254 (CC) where the Constitutional Court quoted the *State Capture* case where it was stated that orders are binding until set aside.

[14] The respondent further contends, albeit not in clear terms, that the foregoing argument also applies to the portion of the agreement which provides that she was signing in her capacity as guarantor.

[15] She further contends that the sheriff's statement that there are no sufficient assets is incorrect, as she invited him into the house to effect attachment—an invitation which the sheriff declined.

[16] Although she was informed that the agreement contains both suretyship and guarantor clauses, and that she had signed it, the first respondent contends that she was not made aware that it is crafted in such a way that the applicant would be entitled to pursue her personally without first having recourse to Abudanti Media. Had she been so advised, she argues, she would not have agreed to that arrangement.

[17] The applicant concedes that the requirements for an electronic signature were not complied with and acknowledges that there is merit in the first respondent's argument but only in relation to the suretyship agreement, which is required to be in writing. However, the applicant disputes that the same applies to the guarantee clause, as a guarantee is not required to be in writing. Counsel submitted that a reading of the agreement makes it clear that the parties intended the first respondent to bind herself as guarantor for the payment of the monies due. In this regard, reference was made to clause 3.1.1. in which the first respondent agreed that she:

> "[I]rrevocably and unconditionally, guarantees and undertakes, as a principal an independent obligation in favour of the Applicant to punctually pay any and all amounts which may be payable to the Applicant from time

to time by Abundant Media and to punctually perform any and all obligations which me be owing from time to time by Abundant Media."[6]

[18] The second act of insolvency relates to the letter penned by the first respondent's attorneys, in which it was stated that the first respondent has no funds to settle the judgment debt. This constitutes an act of insolvency as contemplated in section 8(g) of the Insolvency Act, and, the applicant argues, warrants the granting of a sequestration order against the respondents.

[19] The first respondent contends that the contents of the letter upon which the averments of insolvency is premised was intended to refer to Abundant Media, and not to herself personally. While she concedes that Abundant Media could be insolvent, she argues that this does not automatically render her insolvent.

[20] The applicant contends that the argument raised by the first respondent is opportunistic, as at the time when the letter was sent, there was already an order against both Abundant Media and the first respondent. They had been held jointly and severally liable. The applicant further points out that Abundant Media was, by then, already in the process of applying for liquidation.

[21] The argument advanced by the applicant regarding the legal requirements and distinction between suretyship and guarantee has merit and aligns with the decision in *Zurich Risk Financing SA (Pty) Ltd*.[7] I have considered the disputes

[6] See para 13 of the Applicant's Replying Affidavit at CL01-215.

[7] *Absa Bank Ltd v Zurich Risk Financing SA (Pty) Ltd* [2009] ZAGPJHC 85. See also *Standard Bank of South Africa Ltd v Essa and Others* [2012] ZAWCHC 265 where it was stated in para 10 that "[i]t is well established, however, that the assumption by a surety of an obligation as 'surety and co-principal debtor' in no way derogates from the character of the contract entered into as one of suretyship. In the context the term 'co-principal debtor' denotes nothing more than a waiver of the ordinarily implied right of a surety to the excussion of the principal debtor before

raised by the first respondent and find her version to be implausible, far-fetched and untenable, and it must be rejected—save for the dispute regarding the electronic signature and the non-compliance with the requirements set out in ECT Act when the agreement was signed. I have also considered the applicant's contention that the first respondent's affidavit clearly indicates that her liabilities exceed her assets and that, as such, the respondents are factually insolvent. In the circumstances, I find that the respondents are insolvent.

[22] Having found that the respondents are indeed insolvent, I need to consider whether their sequestration would be in the interests of the creditors, and whether, in the exercise of my discretion, I ought nevertheless to refuse a sequestration order.

[23] The applicant submitted that a search was conducted and it was established that the respondents own immovable property valued at over R4 million, against which several bonds are registered, totalling approximately R1 million. No further information regarding the respondents' assets or income is known to the applicant. However, it is submitted that the sequestration would be to the advantage of the creditors. In addition, the applicant submitted that an amount of R2,4 million in cash is already available for distribution between the two creditors, being the applicant and FirstRand Bank.

[24] The respondent contended that, based on the financial information relating to her assets, sequestration would certainly not be in the interests of the creditors. The record of the Abundant Media's Liquidation process indicates that, if all assets are realised, there would be a surplus in excess of R7 million rand, which would be sufficient to satisfy the applicant's claim.

---

recourse may be had by the creditor against the surety. It also constitutes a renunciation of the benefit of division."

[25] The respondent referred to *Lambrechts*,[8] where the court stated that "[s]equestration would seem in the circumstances not to hold any material advantage over ordinary execution following upon judgment". It was further contended that, ordinarily the "… creditor would need to demonstrate some reasonable expectation that sequestration would yield more than the likely proceeds of ordinary execution: 'Unless he does that, the laborious and substantially more expensive remedy of sequestration can hardly be thought advantageous'.[9] The respondent submitted that, to the extent that dividends from the liquidation of Abundant Media may cover the judgment debt, the sequestration of the respondents may not be to the advantage of the creditors.

[26] In response, the applicant contended that it was entitled to proceed against the first respondent in her capacity as guarantor. In any event, the appointed liquidator of Abundant Media has already invited contributions towards legal costs for the litigation process. Moreover, the applicant submitted that the immovable property has since been sold, and any attempt at execution would therefore not be successful.

[27] It was stated by the Constitutional Court in *Stratford*[10] that:

> "In terms of the Insolvency Act, a court may grant a sequestration order, either provisionally or finally, if 'there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated'. It is the petitioner who bears the onus of demonstrating that there is reason to believe that this is so. In *Friedman* the Court held: "[T]he facts put before

[8] *Investec Bank Ltd v Lambrechts N.O and Others* 2019 (5) SA 179 (WCC).

[9] *Id* at para 55 as contrasted with the decision in *Gardee v Dhanmanta Holdings & Others* 1978 (1) SA 1066 (N).

[10] *Stratford and Others v Investec Bank Limited and Others* [2014] ZACC 38; 2015 (3) SA 1 (CC) 2015 (3) BCLR 358 (CC) at paras 43-44.

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

The meaning of the term 'advantage' is broad and should not be rigidified. This includes the nebulous 'not-negligible' pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or 'not-negligible' benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin et al state that— "the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order."

[28] As stated in the first respondent's supplementary papers, the immovable property has already been sold, and the creditors would certainly benefit from the funds held by the attorneys who transferred the property.

[29] With regard to the question of discretion, the applicant referred to *Malesela Taihan Electric Cable (Pty) Ltd v Fidelity Security Services (Pty) Ltd*[11]

[11] [2017] ZAGPJHC 341.

where the court held that the respondent should put forward some special or unusual circumstances for the court to exercise its discretion against the granting of a sequestration order. The respondent, in turn, referred to sections 10 and 12 of the Insolvency Act in relation to the court's discretion when determining whether to grant or refuse sequestration orders.

[30] The respondent contended that the immovable property targeted by the applicant is her residential property and that the applicant, having been aware of alternative means to recover the debt, has adopted a harsh process that will leave her homeless. The respondent further denied that the immovable property is encumbered and, accordingly, prayed that the application be dismissed with costs.

[31] The counsel for the first respondent submitted that, in exercising discretion regarding the grant of an order, the court should consider several mitigating factors. First, the respondent is 66 years of age and is responsible for the care of a daughter with a medical condition, as well as an adopted 5-year-old child. Second, the second respondent is employed as a security manager, and if declared insolvent, he would lose his employment —with adverse repercussions for the entire family.

[32] The applicant contended that the court is enjoined to exercise its discretion in favour of granting a sequestration order unless the respondents demonstrate exceptional circumstances. Authorities cited indicate that, ordinarily, the court is obliged to grant the order. The court should not give any credence to the first respondent's assertion that she stands to benefit from the liquidation of Abundant Media, particularly where the liquidator is set to litigate against Motherland, which owes the company R34 million. The suggestion that the applicant should participate in the liquidation was rejected on the basis that the liquidator has requested the creditors to contribute to launching legal proceedings

against Motherland, and the applicant is not inclined to participate in such litigation.

[33] The applicant's counsel argued that the first respondent's earlier submission—that the only property to be disposed of upon sequestration would be the residential property and that the court should therefore be hesitant to order sequestration—has been overtaken by subsequent developments, as the said property has now been sold.

Conclusion

[34] It is axiomatic that the case for the sequestration of the respondents has been established, and the respondents' attempts to frustrate the application are based purely on implausible grounds and are therefore unsustainable. Accordingly, I am persuaded that an order for provisional sequestration is warranted.

Costs

[35] The applicant has asked that the costs be costs in the sequestration and I have no qualms therewith.

Order

[36] In the premises, I make the following order:

1. The Respondents' joint estate is hereby placed under provisional sequestration and assets thereof are placed in the hands of the Master of the High Court.
2. A *rule nisi* is hereby issued calling upon the respondents and all interested parties to show cause on **25 October 2025** why, if any, the following order should not be made:

2.1. A final sequestration order be granted;

2.2. The cost of this application be caused in the sequestration.

3. A copy of the provisional order be served in the following manners:

3.1. By the Sheriff on the respondent at 39 Albatross Drive, Fourways, Sandton, Johannesburg.

3.2. By the Sheriff on the employees of the respondents, if any, at 39 Albatross Drive Fourways, Sandton, Johannesburg.

3.3. On the South African Revenue Services.

3.4. On the Master of the High Court situated in Johannesburg; and

3.5. by publication in both the Government Gazette and The Star newspaper.

M V NOKO

Judge of the High Court,

Gauteng Division, Johannesburg.

This judgement was prepared and authored by Noko J 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 of the judgment is deemed to be 22 April 2025**.**

Dates:

Hearing:	19 November 2024
Judgment:	22 April 2025.

Appearances

For the Applicant:	S van der Meer
Instructed by:	Van Dere Meer and Partners
For the Respondents:	L Acker
Instructed by:	Keyes Attorneys