IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 37086/2022
Reportable: NO
Of interest to other Judges: NO
Revised: YES
Signature:
Date: 17.3.25

In the matter between:

SOLID LIVING HOMES (PTY) LTD **Applicant**
(Registration No: 2015/66165/07)

and

SIPHIWE SIDWELL DHLOMO **Respondent**
(Identity Number 7[…]; unmarried)

This judgment is issued by the Judge whose name is reflected hereon. This judgment is handed down electronically by circulation to the parties by email and by uploading it to the electronic file of this matter on Case Lines. The date of judgment is deemed to be the date upon which it is uploaded onto Case Lines.

JUDGMENT

GEACH, AJ

[1] Applicant seeks a provisional order of sequestration against the respondent, a major unmarried male with the Identity Number 7[…]. On 19 March 2024 the matter stood down until 20 March 2024 for settlement negotiations at the request of the Respondent, but no settlement was reached. Respondent was ordered to pay the wasted costs of 19 March 2024 on the scale as between attorney and client

[2] The jurisdiction of this court is admitted.

[3] Due to the intervening passage of time and certain subsequent events since the launching of this application for sequestration, the Applicant sought leave to file a supplementary affidavit. There being no question of resultant prejudice to the Respondent (*Garnnett-Adams Properties (Pty) Ltd v Thomas Fanahan Kenny (02998312023) Gauteng Division, Johannesburg (4 June 2024) par [14]- [17]*), such leave was granted in terms of Rule 6(5)(e). Sometime later during the hearing, Applicant sought to hand up a further affidavit to which Respondent strenuously objected. Absent exceptional circumstances (*Joseph and Jeans v Spitz 1931 WLD 48; Kasiyamhuru v Minister of Home Affairs and others 1999 (1) SA 643 (W) at 649*), this further affidavit was refused.

[4] The Applicant also sought an order dispensing with personal service of the sequestration application on the Respondent (section 9 of the Insolvency Act), but inasmuch as there was service by the sheriff on Respondent's wife; and service of the notice of set down by e-mail (*Chiliza v Govender 2016 (4) SA 397 (SCA); EB Stream Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA)); and the Respondent duly filed papers opposing this application in the form of both a notice of intention to defend and an answering affidavit; and the Respondent was indeed represented at the hearing of this application; such relief has really become moot, because the whole purpose of service has been achieved, namely that the Respondent has been made aware of these legal proceedings instituted against him

and is before the court (*Craig Alexander Hilton Howie v Eileen Roxanne Daren, N.O. (A185/2023) Gauteng Division, Pretoria (8 April 2024) Full Court par [10]*). Under the circumstances such condonation is granted (*Portion Tudor Rose Lodge (Pty) Ltd v Wessels 2012 JDR 1279 GNP; Brian Kahn Inc v Nyezi, Brian Thabo and another (28019/2020) Gauteng Local Division, Johannesburg (4 August 2023) par [49]-[53]*).

[5] As far as the formal requirements are concerned, bearing in mind the above, the Applicant has complied with all of them. The date of birth of the Respondent (section 9(3)(a)(i) of the Act) is embodied in the initial six digits of his identity number *viz* 1970-05-02 (section 7(2)(a) of Act 68 of 1997). Copies of the notice of motion and founding affidavit, were duly lodged with the Master (section 9(4) of the Act) and also furnished to the South African Revenue Service (section 4A(a)(iii) of the Act). There is a certificate of the Master, given not more than ten days before the date of such application, i.e. the certificate must have been issued not more than ten days before the date of the notice of motion (*Anthony Black Films v Beyl 1982 (2) SA 478 (W); Court v Standard Bank of SA Ltd; Court v Bester NO and others 1995 (3) SA 123 (A) at 128*). In this case it was given after the date of the notice of motion, which satisfies this requirement (*de Wet NO v Mandelie (Edms) Bpk 1983 (1) SA 544 (T) at 546; Donovan Theodore Majiedt and another NNO v Daniel Olivier Dippenaar and others NNO (3815/ 2022) Eastern Cape Division - Makhanda (24 October 2024) par [32]; Nedbank Limited v Nzeba Tshibumbu Katompa and another (29675/20) Gauteng Division Pretoria (12 May 2021) par [11]*). This certificate shows that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and all costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration (section 9(3)(b) of the Insolvency Act). There is presently no report to hand from the Master, but in terms of section 9(4) this is not obligatory (*Meskin, Insolvency Law par 2.1.6 p2-30 [Issue 16]*). With regard to section 4A of the Act, Applicant was unable reasonably to ascertain whether Respondent has any employees and *a fortiori* the existence of any registered trade union that might represent any such employees. The Respondent himself has not been forthcoming with any disclosure in this respect. The manner in which section 4A(a) was complied with is set out in the requisite service affidavit handed up at the hearing.

[6] As encapsulated in *Poole v Saffy N.O (2566/2021) [2024] ZAGPPHC 94 (5 February 2024) par [15]*: "Section 10 of the Insolvency Act provides that if the court is of the opinion that *prima facie* the applicant has established against the debtor a claim which is of the kind mentioned under section 9(1) and the debtor has committed an act of insolvency or is insolvent and there is reason to believe that it will be to the advantage of creditors of the debtor of the estate that the estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally." By virtue of section 9(5) of the Act, the court may make such other order in the matter as in the circumstances appears to be just, but not (as was held in *Courtney v Boshoff NO and others {2023] 2 All SA 100 (GJ) par [49]-[66]*), a final order of sequestration. Should the court make an order provisionally sequestrating a debtor's estate it must, in terms of section 11(1) of the Act, simultaneously grant a *rule nisi* calling upon the debtor on a day mentioned in the rule to appear and to show cause why his or her estate should not be sequestrated finally.

[7] The Applicant founds its *locus standi* (section 9(1) of the Insolvency Act) upon an alleged a liquidated claim of R 337 250.59 that is due owing and payable (at least initially secured by a landlord's hypothec), against Respondent, whom it is alleged has committed acts of insolvency. This is disputed by Respondent.

[8] "For provisional sequestration to be granted, three questions must be answered in the affirmative: [1] Does the applicant have a liquidated claim? [2] Has the ... respondent committed an act of insolvency or is the respondent insolvent? [3] Is there reason to believe that sequestration of the ... respondent's estate will be to the advantage of creditors?" (*Courier-It SA (Pty) Ltd v Trevor van Staden and another (21/6064) Gauteng Division, Johannesburg (14 February 2022) par 46*).

[9] The applicable standard of proof in this matter is contrary to the general rule in motion proceedings *viz* that any *bona fide* dispute of fact arising on affidavit evidence can only be resolved by referring the dispute to oral evidence or to trial, because in proceedings for a provisional sequestration order "the Court is required to take the unusual step of considering whether, so far as can be determined from the affidavits, there is a balance of probabilities which favours the conclusion that the

requirements of [section] 1O of [the] Act have been satisfied. If so, the requirements of [section] 10 will have been satisfied 'prima facie', and a provisional sequestration order may be issued" (*Renyolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 80-1*).

Does the Applicant have a liquidated claim?

[10] The Applicant alleges an oral lease agreement in respect of the immovable property known as Stand 1[…] (lngwe Street), Eye of Africa Estate, Eikenhof, of which the Respondent admittedly took occupation during December 2018, alleging that the Respondent failed to pay the agreed monthly rental and municipal charges and is presently in arrears to the tune of R 337 250.59. This is disputed by the Respondent.

[11] The Applicant instituted eviction proceedings against Respondent under Case No 2022/22073 in terms of Act 19 of 1998 ("the PIE Application" as it is termed by Respondent), which at the institution of this application were still pending. At the outset Respondent raised *lis pendens* on the basis of this pending duplicate dispute. However, it appears from the supplementary affidavit that was allowed, that the Applicant was successful in such eviction application and pursuant thereto that Respondent has vacated the aforesaid premises. That puts paid to *lis pendens*.

[12] The debt is disputed by the Respondent who emphatically denies being indebted to the Applicant in the said amount, arguing that the Applicant has failed to prove a liquidated claim that is due to it and alleging that the rental amounts claimed do not "corroborate (*sic*)" the terms of the alleged agreement; and that in any event the Applicant failed to adhere to the breach clause in the agreement upon which it relies.

[13] Further, according to Respondent, the original agreement was "replaced and/or amended" during or about April 2019 when Respondent proposed purchasing the property, initiating a new agreement which, however, he concedes was never finalized. Nonetheless, Applicant on 24 April 2019 confirmed that instead of monthly payments, rent could be paid by way of lump-sum payments for multiple months at a

time. This constituted a variation of the manner in which the rental amount was payable. The Respondent contends in the light thereof, the payment terms applicable to his rental of the property were for the payment via a lump sum for approximately six months at a time and not month-to-month, resulting in those "sporadic payments" now referred to by the Applicant. The Respondent claims to have continued making payments in terms of the lump-sum arrangement for his occupancy of the premises and asserts he is not default and that the Applicant has not shown that he is properly indebted.

[14] Respondent admits having signed a so-called "acknowledgement of debt" on 21 March 2020 ostensibly confirming an outstanding sum as at 21 August 2020 of R 576 806-99, but as the Respondent points out, this document embodies no terms of payment and embraces future charges due until February 2021.

[15] Despite his insistence that he paid considerable amounts since 2 June 2020, the Respondent nevertheless admits that the last payment he did make was the sum of R 300 000-00 on 3 December 2021. He justifies his cessation of payments on that date on the basis that since then the Applicant has failed to address his concerns which remain unresolved. These concerns are:

> [15.1] Since November 2021 he has been informed that the property had been sold to a third party and as such he queried the grounds upon which he was still required to make payment of the rental to the Applicant; and
>
> [15.2] The amounts payable which he has queried because he has received conflicting statements of account.

[16] "It is trite that sequestration proceedings ought not to be resorted to in order to enforce the payment of debt, the existence of which is disputed on reasonable grounds (See Badenhorst v Northern Construction 1956 (2) SA364 (T) at 347- 8 and Kalil v Decotex 1988 (1) SA 943 (A) at 980)" (*Lynn & Main Inc v Poobalan Naidoo and another (10259/04) Natal Provincial Division (12 August 2005) par (20); Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd 2018 (1) SA 94 (CC) majority par [86] at 119, concurring judgment par [141] at 133 and par [145] at*

134), "as disguised debt collection" (*Willow Acres Estate Home Owners Association v Plaatjie Mahloboagane and another (11789/20191) Gauteng Division, Pretoria (17 October 2023) par [21]*). Insofar as: "sequestration proceedings are designed to bring about a *concursus creditorem* to ensure an equal distribution between creditors, [they] are inappropriate to resolve a dispute as to the existence or otherwise of a debt. Consequently, where there is a genuine and *bona fide* dispute as to whether a respondent in sequestration proceedings is indebted to the applicant, the Court should, as a general rule, dismiss the application" (*Exploitatie- en Beleggingsmaatschappij Argonauten 11 BVand another v Honig 2012 (1) SA 247 (SCA) par [11) at 251- 2; Willemhendriksvlei (Pty) Ltd and another v Jacobus Hendrik Pieters (1563/2022) Mpumalanga Division - Middelburg Local Seat (19 January 2023) par [11]*), because: "if liability is disputed on *bona fide* and reasonable grounds, this Court is precluded from granting a sequestration order" (*Lynn & Main Inc v Poobalan Naidoo and another (10259/04) Natal Provincial Division (12 August 2005) par (25)*). However: "It is not sufficient for a respondent in a sequestration application merely to dispute the claim of an applicant creditor. A claim must be disputed on *bona fide* grounds" (*SJC v TRC (10837/2016; 19689/2016; 17728/2021) [2022] ZAWCHC 256 (11 May 2022) par 39*).

[17] In the present sequestration proceedings, there is no genuine and bona fide dispute such as to derail the Applicant. At best for the Respondent, the exact amount of the debt upon which the Applicant bases this application is disputed but not on reasonable grounds. "In other words, the applicant has prima facie discharged the onus of showing that it has an enforceable claim upon which to base its application. The fact that the exact amount of that claim is disputed, does not affect the position (cf. Re Tweeds Garages Ltd [1962] 1 All ER 121)" (*Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd 1976 (2) SA 856 (W) at 867*). Save to dispute the amount of his indebtedness, the Respondent raises no substantive defence to the claim by the Applicant. Indubitably, the Respondent is indebted to the Applicant. In the result, the Applicant has succeeded in making out a *prima facie* case that Respondent is indebted to it in the liquid sum of R 337 250.59, which debt is due, owing and payable. The Applicant's claim is certainly not disputed in such a manner nor to such an extent that the grant of a provisional order of sequestration is excluded.

Has the Respondent committed an act of insolvency?

[18] This is not a case in which the insolvency of the Respondent is an issue. On the contrary, in seeking to establish advantage to creditors, the Applicant alleges that the Respondent is possessed of numerous assets; and Respondent himself confirms that he has an amount of R 337 250-59 available to act as security for the alleged debt, offering to put such funds on trust with his attorney or to pay same into court at Applicant's election.

[19] The Applicant relies upon two separate acts of insolvency on the part of Respondent which the Respondent denies having committed, namely under:

> [19.1] section 8(e) of the Act (Respondent making or offering to make any arrangement with any of his creditors for releasing him wholly or partially from his debts); and
>
> [19.2] section 8(g) of the Act (giving notice in writing to any one of his creditors that he is unable to pay any of his debts).

[20] The Applicant relies for the accusation that Respondent made or offered to make an arrangement with the Applicant as his creditor to release him wholly or partially from his debts, upon the Respondent:

> [20.1] requesting in the course of discussions in April 2019 concerning the proposed purchase of the property, that the rent be reduced with a further reduction in rent subject to instalments being paid; and
>
> [20.2] sending a WhatsApp message dated 5 August 2020 which reads: "But I'll understand and respect any decision you might make. I really love the house, and would definitely buy it when this is done, but if it's not meant to be I'll move to another house, but I'm still fully committed to pay off the debt and future stay until the deal is done"; and

> [20.3] making an offer to pay subject to a new lease being concluded in the letter dated 11 February 2022 in which N J Makatu Attorneys Inc on his behalf indicated that Respondent would settle his indebtedness on condition he is granted a lease for a one-year period with rental payable for three months in advance; which can have a further condition of three month rental payable on or before the 31st of May 2022.

[21] The accusation that the Respondent gave the Applicant as his creditor notice in writing that he is unable to pay any of his debts rests upon entirely upon a multitude of WhatsApp message exchanged between the parties.

[22] A perusal of the documents upon which the Applicant relies and the context of the oral request to reduce rental, lends credence to the retort by Respondent that these relate merely on the one hand to his attempts at purchasing the premises and on the other hand reflect his attempts to keep the Applicant abreast of developments in respect of the lump-sum payment arrangement. At best for the Applicant there is notice of an unwillingness to pay rather than an inability to pay (*Barlows (EP) v Bouwer 1950 (4) SA 385 (E) at 390-2; Craig Alexander Hilton Howie v Eileen Roxanne Daren, N.O. (A185/2023) Gauteng Division, Pretoria (8 April 2024) Full Court par [32]-[35]; Court v Standard Bank of SA Ltd; Court v Bester NO and others 1995 (3) SA 123 (A) at 133-4*) as is the case envisaged by section 8(g). Moreover, there is in his abovementioned conduct, no express or implied acknowledgment by the Respondent that he is unable to pay the debt in full (*Laeveldse Kooperasie Bpk v Joubert 1980 (3) SA 1117 (T) at 1125-6; Mackay v Cahi 1962 (4) SA 193 (O) at 202*), sufficient for purposes of section 8(e). These accusations by the Applicant are by themselves somewhat less than persuasive.

[23] However, on the resumption of the hearing, the Applicant in amplification of the above, handed up correspondence exchanged "without prejudice" on 19 and 20 March 2024, allegedly demonstrating further acts of insolvency. Such correspondence is admissible as an exception to the rule against privileged documents (*Absa Bank Ltd v Hammerle Group 2015 (5) SA 215 (SCA) par [13] at 219*). There was no objection from Respondent to the handing up of this correspondence. In contradiction of his earlier stance that the whole amount of R

337 250-59 was readily available, Respondent in a letter written on his behalf by Rhulani Baloyi Inc Attorneys on 19 March 2024, proposed settling same in three monthly instalments commencing on 1 April 2024. That settlement offer impliedly involves an acknowledgment by the debtor that he is unable to pay such debt in full forthwith. Moreover, interest on the debt is ignored. Taken together with the conduct of the Respondent relied upon by the Applicant above, this *prima facie* constitutes an act of insolvency. The Applicant may rely upon this act of insolvency even though it came to the Applicant's knowledge after commencement of the sequestration proceedings (*Samsudin v de Villiers Berrange NO [2006] ZASCA 79 (31 May 2006) par [41]*).

[24] As matters stand: "The respondent's indebtedness in the present matter is not in dispute. It is also not materially in dispute that the respondent has been unable to pay his debts as they fall due" (*First Rand Bank Ltd v Eric M Mafuna (42356/2020) Gauteng Local Division, Johannesburg (25 July 2023) par [57]*). It was stated in argument on behalf of the Respondent, that he is in the process of paying and will make arrangements; but he cannot pay at this particular time. In *Standard Bank of SA Ltd v Court 1993 (3) SA 286 (C) at 132* the Court said: "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 where the request is coupled with an undertaking to pay the amount due and payable by way of instalments". A letter requesting instalments to pay his debts in full, is an intimation that he cannot pay his debts in the ordinary course and amounts to a notice in writing that he is unable to pay any of his debts, in terms of section 8(g) of the Insolvency Act: "If regard is had to such cases as Chenille Industries v Johannes Hendrik Vorster 1953 (2) SA 691 (O); Union Bank of SA Ltd v Fainman 1939 WLD 303; Joosub v Soomar 1930 TPD 773; Lipworth v Alexander & Barkhan 1927 TPD 785, then a letter stating that a creditor is unable to pay his debts in full unless his creditors are prepared to give him time and to accept payment in instalments, is an intimation that he cannot pay his debts in the ordinary course and amounts to a notice in writing that he is unable to

pay any of his debts, in terms of sec. 8 (g) of the Insolvency Act" *(Goldblatt's Wholesale (Pty) Ltd v Damalis 1953 (3) SA 730 (O) at 732).*

Is there reason to believe that sequestration of the Respondent's estate will be to the advantage of creditors?

[25] "In regard to the requirement of advantage to creditors, the test at the provisional stage is whether the court is 'of the opinion that prima facie' there is 'reason to believe' that it will be to the advantage of creditors if the estate is sequestrated" (*IDC of SA Ltd v Burger and another; in re; IDC of SA Ltd v Burger and another (10679/13 & 10680/13) [2014] ZAWCHC 23 (4 March 2014) par [19]*).

[26] "All that is required is that it is established that there is reason to believe that there will be an advantage to creditors" (*Courier-It SA (Pty) Ltd v Trevor van Staden and another (21/6064) Gauteng Division, Johannes-burg (14 February 2022) par 67*) but a bald allegation that sequestration will be to the benefit of creditors is not sufficient (*Meikles (Gwelo) (Pty.) Ltd v Potgieter 1957 (2) SA 20 (SR)*). The standard of proof differs in respect of a provisional and final order (*London Estates (Pty) Ltd v Nair 1957 (3) SA 591 (D) at 593; Adriaan Willem van Rooyen and another NNO v Pitso George Nkwinika and another (18665/2021) Gauteng Division, Pretoria (20 March 2023) par 3)*).

[27] 'The meaning of the term 'advantage' is broad and should not be rigidified" (*Stratford and others v Investec Bank Ltd and others 2015 (3) SA 1 (CC) par [44] at 19*). "It will be sufficient that a creditor in an overall view on the papers can show, for example, that there is reasonable ground for coming to the conclusion that on a proper investigation by way of an enquiry and section 65 a trustee may be able to unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors" (*Dunlop Tyres (Pty) Ltd v Brewitt 1999 (2) SA 580) (W) at 583*). "For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment, except through sequestration; or that some pecuniary benefit will redound to the creditors" (*Stratford and others v Investec Bank Ltd and others 2015 (3) SA 1 (CC) par [45] at 19*); "Sequestration confers upon

creditors of the insolvent certain advantages (described by de Villiers, JP, in *Stainer v Estate Bukes (1933 OPD 86 at p90*) as the 'indirect' advantages) which, though they tend towards the ultimate pecuniary benefit of the creditors, are not in themselves of a pecuniary character. Among these is the advantage of full investigation of the insolvent's affairs under the very extensive powers of enquiry given by the Act" (*Meskin & Co v Friedman 1948 (2) SA 555 (W) at 559*).

[28] The Applicant enumerates at some length and in exhaustive detail the Respondents' expensive lifestyle and his myriad business activities. *Prima facie* there is clearly 'reason to believe' that it will be to the advantage of creditors if his estate is sequestrated.

Discretion

[29] "Once the applicant for a provisional order of sequestration has established on a *prima facie* basis the requisites for such an order the court has a discretion whether to grant the order. There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking it seems to me that the discretion falls within that class of cases generally described as involving a power combined with a duty. In other words where the conditions prescribed for the grant of a provisional order of sequestration are satisfied then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour" (*First Rand Bank v Evans 2011 (4) SA 597 (KZD) par [28] at 607; Eagles Landing Home- owners Association v Ahuja Properties CC (29808/2017) Gauteng Local Division, Johannesburg (31 May 2021) par 14*).

[30] In a moving plea *ad misericordiam*, Respondent's counsel addressed the dire consequences for the Respondent as a businessman which will affect his entire livelihood. It was said that even the Applicant says he is an astute businessman. Provisional sequestration will have a negative impact on his reputation; once his sequestration becomes public knowledge, Respondent will not be trusted, he will be put into poverty and will not be in a position to make a living. The request was that

the court should have leniency upon the Respondent, his dependents as well as his other family members and let him pay off his debt. The court was urged to let these payments go through, presumably a reference to the three instalments offered in the aforesaid letter of 19 March 2024 (see par [23] above). Of course, the Respondent has had plenty of time in the interim to do this. The court was exhorted to look at the broader society.

[31] The broader society includes the Applicant. In *Estate Logie v Priest 1926 AD 312 at 319* the Appellate Division endorsed the principle that there is nothing wrong for an applicant to employ sequestration proceedings in order to procure payment of a debt (*Willemhendriksvlei (Pty) Ltd and another v Jacobus Hendrik Pieters (1563/2022) Mpumalanga Division - Middelburg Local Seat (19 January 2023) par [11]*). Indeed, the primary object of the Insolvency Act is not to grant debt relief to harassed debtors - that result may ensue - but it is important to appreciate that the Act was passed for the benefit of creditors (*R v Meer 1957 (3) SA 641 (N) 619; Justice V Ponnan (Supreme Court of Appeal) SAJEI - Thursday, 4 July 2024, p2*).

[32] The discretion vested in the court by section 1O of the Insolvency Act not to make a provisional sequestration order, notwithstanding the Applicant having prima facie established all the requirements of section 10, is not unlimited and must be exercised judicially (*Julie Whyte Dresses (Pty) Ltd v Whitehead 1970 (3) SA 218 (D) at 219*) and judiciously (*Nedbank v Potgieter (2012/5210) {2013] ZAGPJHC 242 (3 October 2013) par [15]*), having regard to all the facts and circumstances of the case. The court cannot on a whim decline to grant the order (*Orestisolve (Pty) Ltd t/a Essa Investments v Ndft Investment Holdings (Pty) Ltd and another 2015 (4) SA 449 (WCC) par [18] at 457-8*). In substance the Respondent says to the Applicant as his creditor: 'I cannot pay you, but give me time, let me carry on doing business and I will be able to pay you in future'; simultaneously begging the court to 'absolve me in the meantime from the consequences of my failure to satisfy the Applicant's debt". Indubitably, these are not circumstances in which a court ought to exercise the discretion against making a provisional order of sequestration (compare: *Trust Wholesalers and Woollens (Pty) Ltd v MacKan 1954 (2) SA 109 (N) at 115; Realizations Ltd v Ager 1961 (4) SA 10 (D) at 15*). There exists no solid ground (see

Imobrite (Pty) Ltd v DTL Boerdery CC (1007/20) [2022} ZASCA 67 (May 2022) par (21)) for exercising a discretion *ex misericordia* in favour of the Respondent herein.

Conclusion

[33] "Sec 10 of the Act, as its title suggests (*Provisional sequestration*), empowers a court, if satisfied on a *prima facie* level, that the requirements as set out in sections (a); (b) and (c) have been met, to provisionally sequestrate the debtor's estate. If a court makes an order provisionally sequestrating a debtor's estate it must, in terms of section 11(1) of the Act, simultaneously grant a rule nisi calling upon the debtor upon a day mentioned in the rule to appear and to show cause why his or her estate should not be sequestrated finally. The remaining provisions of this section deal with the requirements pertaining to the service of the *rule nisi*' (*Courtney v Boshoff NO and others {2023] 2 All SA 100 (GJ) par [52]*). That is the position in this application.

Costs

[34] The costs on a party and party High Court scale of this application as well as the applications in terms of section 9(4A)(a)(iv) of the Insolvency Act 24 of 1936 and Rule 6(5)(e) shall be costs in the sequestration of Respondent's insolvent estate. Rules 67A(3) and 69(7) evidently do not apply with retrospective effect (*Mashavha v Enaex Africa (Pty) Ltd (2022118404) [2024] ZAGPJHC 387; 2025 (1) SA 466 (GJ) (22 April 2024) par 12-3; Felicity Mary Grogan v Changing Tides (Pty) Ltd (1970/2023) Eastern Cape Division, Makhanda (25 September 2024) par [15]).* In the event that this might prove not to be the case, on which matter no opinion is expressed, the costs of Applicant's counsel should be on scale B, which is justified considering: (i) the relative complexity of the matter, given the nature of Respondent's opposition; and (ii) the importance of the relief sought (compare: *TUHF Limited v Farber (2024/066493) {2025] ZAGPJHC 8 (14 January 2025) par 24*).

Order

[35] The following order is accordingly made:

[35.1] The estate of the Respondent is hereby provisionally sequestrated and placed in the hands of the Master of the High Court Pretoria.

[35.2] A rule nisi be and is hereby issued calling upon the Respondent and any other interested party to appear and show cause, if any, before this court on 28 May 2025 at 10h00 or so soon thereafter as the matter may be heard as to why the Respondent's estate should not be finally sequestrated.

[35.3] Personal service upon the Respondent of the sequestration application as well as this rule nisi is dispensed with in terms of section 9(4A)(a)(iv) of the Insolvency Act 24 of 1936.

[35.4] A copy of this rule nisi must be served on:

[35.4.1] The Respondent:

[35.4.1.1] by hand on Rhulani Baloyi Inc Attorneys at care of the offices of Bonoko & Maphokgo Attorneys, Ground Floor, Metropolitan Building, BMMS Chambers, 1064 Arcadia Street, Hatfield, Pretoria (Reference: CIV329/RB/24); and
[35.4.1.2] by e-mail under the reference CIV329/RB/24 to each of the following e-mail addresses:
[35.4.1.2.1] admin@bonokomaphokga.co.za
[35.4.1.2.2] info@rbaloyiattorneys.co.za
[35.4.1.2.3] tebogo@rbaloyiattorneys.co.za

[35.4.1.3] by e-mail to the Respondent's last known e-mail address: s[…].

[35.4.2] Employees of the Respondent, if any, in terms of section 11(2A) of the Insolvency Act 24 of 1936.

[35.4.3] Trade Unions of the employees of the Respondent, if any, in terms of section 11(2A) of the Insolvency Act 24 of 1936.

[35.4.4] The Master of the High Court, Pretoria.

[35.4.5] The South African Revenue Service.

[35.5] The Respondent is ordered within five days after service upon him of this rule nisi, as aforesaid, to inform the Applicant directly or the Applicant's attorneys in writing whether he personally has any employees, including domestic employees; and if so, (a) at exactly what premises they are so employed; and (b) whether they are represented by any trade union; and if so, the name and address of such trade union.

[35.6] This order is to be published once in the Government Gazette and The Citizen newspaper;

[35.7] The costs on a party and party High Court scale of this application as well as the applications in terms of section 9(4A)(a)(iv) of the Insolvency Act 24 of 1936 and Rule 6(5)(e) shall be costs in the sequestration of the Respondent's insolvent estate.

BP GEACH
ACTING JUDGE OF THE HIGH COURT
PRETORIA