IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 2022-015844

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/~~NO~~	
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~	
(3) REVISED	
25/6/2025	[redacted]
DATE	SIGNATURE

In the matter between:

THE BODY CORPORATE ACUBENS **APPLICANT**

and

KENNY MATHOBELA FOFORANE **RESPONDENT**

JUDGMENT

KOOVERJIE J

FINAL SEQUESTRATION ORDER

[1] The applicant seeks the final sequestration of the respondent, Mr Foforane. A provisional sequestration order was granted previously by this court. The order reads:

"1. That the estate of the respondent is placed under provisional sequestration.

2. That the respondent is called upon to advance the reasons, if any why the court should not order final sequestration of the said estate on the 2nd of June 2025 at 10h00 or as soon thereafter as the matter may be heard.

3. That the costs of the application shall be costs in the sequestration."

[2] The Court was satisfied that the Applicant ("Acubens") had established a *prima facie* case warranting the provisional sequestration of the respondent. The matter was fully ventilated in court with both parties having filed their affidavits.

THE FACTS

[3] Prior to the sequestration application being instituted, the applicant obtained default judgment on 8 April 2022 against the respondent in the amount of R38,660.94, together with interest (at the rate of 15.5% per annum calculated from 3 November 2021) in the Magistrates Court. When execution steps were attempted, the sheriff filed a *nulla bona* return. The warrant of execution was indeed served on the respondent personally albeit at his work address. The nulla bona return recorded that the respondent was unable to pay his debts and the sheriff found no disposable assets to satisfy the claimed amount.[1]

---

1 *The Nulla Bona Return read…Kenny Foforane declared that he has no money or disposable property wherewith to satisfy the said amount. No disposable assets were pointed out to me, or could after diligent search and enquiry be found at the given address. It is further satisfied that Kenny Foforane Mathabela was requested to declare whether he owns any immovable property which is executable on which the following reply was furnished. NO"*

[4] On this premises it was argued that the respondent committed an act of insolvency as contemplated in section 8(b) of the Insolvency Act 24 of 1936 ("the Act").

[5] The applicant relied on a further act of insolvency in terms of section 8(g) of the Act, contending that the respondent was unable to settle the debt due to him being unemployed. He remains the registered owner of the immovable property in issue and continues to incur liability for the monthly levies and associated charges. Post default judgment, the arrears on the levies has escalated significantly. As at 1 February 2024, the outstanding amount was R270,417.68. The respondent raised various defences in order to avoid the final sequestration.

[6] In his answering papers (which was before the court previously), the respondent initially alleged that he was unemployed and consequently unable to meet the monthly instalments. He further alleged that since he was no longer the registered owner of the property, he could not be held liable for the incurring levies and consequent costs.

[7] In his supplementary affidavit, now before me, he alleged that the parties had entered into an agreement which set out payment terms and that he had been honouring such payments. He further alleged that the applicant has caused tenants to live on his property without his approval.

[8] In his heads of argument he advanced further defences, namely that the underlying claim is not for a liquidated amount; the applicant has failed to

demonstrate that sequestration would yield an advantage to creditors; the application amounts to an abuse of the court's process; the non-joinder of the respondent's spouse; the *nulla bona* return was tainted by material misrepresentations; the applicant failed to take reasonable steps to execute at the respondent's current residential address; and he had already made payments in the total amount of R115,900.00. He therefore could not be liable. At this juncture it is necessary to point out that of the said defences have not been substantiated with facts under oath.

[9] As a last resort, he relied on a pending rescission application which has been directed to set aside the default judgment granted in the applicant's favour. He thus sought a postponement, pending final determination of the rescission application. This rescission application was launched at the last hour, on 30 May 2025 in the Regional Court and has allegedly been enrolled for hearing on 15 September 2025.

ISSUES TO BE DETERMINED

[10] The following issues require determination:

(i) whether the defences raised have merit and should be given weight to without being pleaded in an affidavit/s

(ii) whether the pending rescission application would hinder the granting a final sequestration order. The rescission application was instituted in the Magistrate's court on 30 May 2025, after the provisional sequestration order was granted; and

(iii) whether the applicant has satisfied with the requirements of Section 12(1) of the Insolvency Act for a final sequestration order.

ANALYSIS

[11] on the first issue, it is settled law that legal argument can be advanced provided they arise from facts alleged in the papers.[2] Absent the facts alleged, the legal point cannot be entertained by the court.[3]

[12] In ***Minister of Land Affairs and Agriculture v D&F Wevell Trust***[4] the Supreme Court of Appeal further expressed:

> *"It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits*[5]*. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion*

---

2 Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 324H-I
"Heckroodt NO v Gamiet 1959 (9) SA 244 (T) at 246A-C and Van Rensburg v Van Rensburg en Andere 1963 (1) SA 505 (A) at 509E-510B, it was held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged. As was held in Cabinet for the Territory of South West Africa v Chikane and Another 1989 (1) SA 349 (A) at 360G, the principle is clear but its application is not without difficulty. In Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A) at 285J it was held that this principle:
'Word egter gekwalifiseer deur die voorbehoud dat die hof alleen sou kon optree as daar geen onbillikheid teenoor die respondent geskied nie. In die sake word hierdie element gewoonlik uit te druk deur te vereis dat alle relevante feite voor die hof moet wees. Hierdeur word die mees voor die hand liggende bron van onderhawige geval gaan dit egter om 'n leemte in die getuienis.' "

3 *Municipal Employees Pension Fund v City of Johannesburg Metropolitan Municipality and Others* (27756/2021) [2023] ZAGPJHC 177 (24 February 2023) at par 16.

4 2008 (2) SA 184 (SCA) at 200B-D.

5 My underlining

proceedings, the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted."

[13] Parties are therefore bound by the case made out in their affidavits, and new factual material may not ordinarily be introduced through heads of argument or during oral submissions. But for the supplementary affidavit the new defences raised by the respondent were not pleaded.

[14] Mindful of the fact that a final sequestration order has grave consequences for the respondent. I afforded the counsel for the respondent an opportunity to present the defendant's defences particularly those not raised before. I further afforded the applicant an opportunity to address me on such new defences. During argument it become evident that such defences were devoid of merits.

[15] On the second issue regarding the pending rescission application, it is common cause that such application was instituted at the last hour. The respondent requested that the return date should be extended pending the rescission application, which challenges the default judgment granted by the court.

[16] In response, the applicant correctly contended that the respondent lacked *locus standi* to institute the rescission application. A trustee duly appointed would have locus standi to have instituted this recission application. By virtue of Section 20(1)(a) of the Insolvency Act, the estate vests in the master and

thereafter the trustee once appointed.[6] Furthermore I have noted that the rescission application was merely uploaded without an accompanying affidavit setting out the bases for the rescission.

[17] The effect of a provisional sequestration order is that it has a disabling effect on the person against whom it is granted. It deprives such person of his/her status and right to deal with his/her property. It was therefore not competent for the respondent to have instituted the said rescission application.

[18] It is an established principle that where the underlying debt is alleged to be disputed, the onus lies squarely on the respondent to establish that the indebtedness is genuinely and *bona fide* disputed on reasonable grounds. [7] The respondent has failed to set out facts the defences raised. There is no doubt that the applicant remains the owner of the property. The deeds search annexed to the replying affidavit confirmed same. In order to succeed in obtaining a sequestration order, the applicant has to merely prove a claim over R100.00 which it was proved in this case.

[19] The respondent pleaded that he has been paying the levies off by virtue of a purported agreement entered into with the applicant. However, no explanation has been proffered as why same was not signed by the respondent and no further facts placed before this court as to when, how and to what extent the alleged payments were made. As things stand, the levies remain unpaid, and the debt continues to escalate.

---

6 *Du Plessis v Majiedt NO and Others [2025] 2 All SA SCA (28 January 2025) at para 21*

7 *Kalil v Decotex (Pty) Ltd* 1988 (1) SA (2) at 980B-D

[20] In granting the provisional order, the court noted he was unable to pay his monthly instalments by indicating to the sheriff that he had no disposable property worth to satisfy the debt. His conduct clearly demonstrates acts of insolvency.

[21] For the applicant to succeed in obtaining the final order, the prerequisites in terms of Section 12 must be met, which stipulates:

> *"12(1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that –*
>
> *(a) the petitioning creditor has established against the debtor a claim such as mentioned in subsection (1) of section 9; and*
>
> *(b) the debtor has committed an act of insolvency or is insolvent; and*
>
> *(c) there is reason to believe that it will be to the advantage of creditors if the debt of the debtor if his estate is sequestrated it may sequestrate the estate of the debtor."*

[22] The applicant is required to merely satisfy two requirements namely that the respondent had committed an act of insolvency, and the sequestration would be to the advantage of the creditors.

[23] The contention that the respondent's estate is not insolvent has not been successfully rebutted by the respondent. It was argued that if the respondent was solvent, the debt would have been settled.

[24] In ***Absa Bank v Rhebokskloof (Pty) Ltd and Others*** **1993 (4) 436 (C) 443D-F** the court expressed:

"Even, however, where a debtor has not committed an act of insolvency it is incumbent upon his unpaid creditor seeking to sequestrate the former's estate to establish actual insolvency on the requisite balance of probabilities, it is not essential that in order to discharge the onus resting on the creditor if he has achieved this purpose that he set out chapter and verse (and indeed figures) listing the assets and their value and liabilities (and the fair value) for he may establish the debtor's insolvency inferentially. There is no exhaustive list of facts from which an inference of insolvency may be drawn, as for example an oral admission of a debt and failure to discharge it may, in appropriate circumstances which one sufficiently set out, be enough to establish insolvency for the purpose of a prima facie case which the creditor is required to initially make out. It is then for the debtor to rebut the prima facie case and show that his assets have a value exceeding the sum total of his liabilities."

[25] In this matter, it is evident that, the respondent failed to provide any details of his assets and liabilities and income and expenditure, despite having the opportunity to make full disclosure thereof. [8]

[26] I reiterate that this court's discretion in granting the final sequestration order is not unfettered. In terms of Section 12(1) of the Insolvency Act, on establishing an act of insolvency and that there is reason to believe that sequestration will be to the advantage of creditors, the Court *"must sequestrate the debtor's*

---

8 In ***De Waard v Andrew and Thienhaus Ltd*** **1907 TS 727 733,** Innes CJ held that:
"Speaking for myself, always look with great suspicion upon, and examine very narrowly, the position of a debtor who says "I am sorry that I cannot pay my creditor but my assets far exceed my liabilities". To my mind the best proof of solvency is that a man should pay his debts and therefore I always examine in a critical spirit the case of a man who does not pay what he owes".

estate, it is not bound to do so". The word *"may"* allows for a discretion. The discretion of the Court is however not to be exercised lightly and where an act of insolvency has been proven the onus upon the debtor who wishes to avoid sequestration is a heavy one.[9]

Advantage to creditors

[27] The applicant motivated that the sequestration would be to the advantage to creditors. The applicant owns immovable property. The forced sale value of the property as per the valuation was R900,00.00 and the market value in excess of R1 million. The "advantage to creditors" concept entails that 'if the debtors' estate is realised, it would yield a dividend in favour of the concurrent creditors. In this instance there is no doubt that the immovable property offers a pecuniary benefit for the creditors.[10] On the facts before me I am satisfied that there is a

---

9 *Millward v Glaser* 1950 (3) SA 547 (W) at 553 (A) at 553 G

10 The Constitutional court **in Stratford and Others v Investec Bank and others 2015 (3) SA(1) (CC) at par 44-46** held that:

"[44] *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 in 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.'

[45] The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in Friedman. 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.

reasonable prospect not necessary a likelihood but a prospect which is not too remote, that some pecuniary benefit will result.[11]

[28] The jurisdictional requirements of Section 12 of the Insolvency Act have clearly been met and in exercising my limited discretion, there is no reason why a final sequestration order should not be granted.

[29] There has also been compliance in respect of effecting service on the relevant parties, as directed by the court when it granted the provisional sequestration order. A compliance affidavit setting out same was attended to. In the premises, the rule nisi is confirmed and the provisional order is made final.

[30] The following order is made:

1. A final order for the sequestration of the respondent is granted.
2. The costs shall be the costs in the sequestration.

[redacted]

KOOVERJIE, J
Judge of the High Court
Gauteng Division, Pretoria

---

[46] Given the potential impeachable transactions detailed by Investec G — totalling over R37 million — it is evident that there is reason to believe that there will be an advantage to creditors. It is apparent from the facts that the sequestration is inevitable. I will not interfere with the final sequestration order."

[11] Meskin & Co v Friedman 194 8(2) SA 555 W at 558

Appearances:

For the Applicant:	*Adv D Broodryk*
Instructed by:	*Rousseau Attorneys*
For the Respondent:	*Malale & Nthapeleng Attorneys*
HEARD ON:	*02 June 2025*
DATE OF JUDGMENT:	*25 June 2025*