

SOUTH AFRICA / JUDGMENT

Body Corporate of Old Trafford v Muronzi (016676/2023) [2024] ZAGPPHC 623 (21 June 2024)

[2024] ZAGPPHC 623

COURT

North Gauteng High Court, Pretoria

BEFORE

K Strydom

CASE / FILE NUMBER

016676/2023

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FLYNOTES:

INSOLVENCY

– Discretion of court – Right
to housing –
Application
for final sequestration based on nulla bona return on judgment
debt for unpaid levies – Sole creditors must
demonstrate
advantage of sequestration above execution proceedings –
Court's discretion – Primary residence
–
Respondent would be left homeless – Possible infringement on
respondent's rights in absence of judicial
oversight found
to constitute special circumstances – Rule nisi discharged –
Insolvency Act 24 of 1936, s 12(1).

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE NO: 016676/2023

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: NO

28

June 2024

In

the matter between:

THE
BODY CORPORATE OF OLD TRAFFORD
Applicant
and
ALFRED
MURONZI
Respondent

Delivered:

This judgment was prepared and authored by the
Judge whose name is reflected and is handed down electronically by
circulation to
the parties/their legal representatives by e-mail and
by uploading it to the electronic file of this matter on Caselines.
The date
and for hand-down is deemed to be 21 June 2024.

Summary:

Application for final
sequestration based on nulla bona return on judgment debt of
R49 104-11
for unpaid levies due to body corporate. Ito
S12(1) of Insolvency Act, 1936, Court has discretion in deciding
advantage to creditors. Sole creditors must demonstrate advantage of
sequestration above execution
proceedings. Court has further
discretion to refuse application, even if all requirements met, if
special circumstances proven.
The possible infringement on
Respondent's rights in terms of S26 of the Constitution, in
absence of judicial oversight, found
to constitute special
circumstances.

JUDGMENT

K STRYDOM, AJ

At the heart of a transformative Constitution is a commitment to substantive reasoning, to examining the underlying principles that

inform laws themselves and judicial reaction to those laws.

- Justice Pius Langa[1]

Introduction

- 1) In 2002, the Respondent bought a home within the sectional title scheme development, administered by the Applicant.
- 2) The Respondent fell behind on his levy payments and, on the 27th of August 2020, the Applicant obtained judgment in the Magistrate's Court, against the Respondent in the amount of R14 272-00. The subsequent sale in execution of his movables yielded only R3910-00. In March 2022 a further judgment in the amount of R49 104-11 was obtained against him. The Sherriff, on the 9th of May 2022, issued a nulla bona return.
- 3) The Applicant applied for the Respondent's provisional sequestration in February 2023. In March 2023, the Respondent, appearing in person, filed his opposition to the application. His "answering affidavit" was filed in May 2023. On the 9th of October 2023, the Respondent's estate was placed into provisional sequestration.
- 4) Save for service of the provisional order on the Master, SARS and attempts at service on trade unions (non-existent) and employees (non-existent), the facts before this Court remain unchanged from those before the court granting the provisional order.
- 5) On the day of hearing, I was informed that the Respondent, who would have appeared in person, would not be appearing as he was ill. No correspondence was received from the Respondent himself, nor did he request a postponement. Being in possession of both his "answering affidavit" and "heads of argument", [2] I proceeded to hear submissions by counsel for the Applicant, in the absence of the Respondent.
- 6) However, from the papers, I have noted the Respondent's submissions to be the following: He fell behind on his levy payments as a result of the loss of his employment during the Covid 19 pandemic in 2020. Since then, he has attempted to make payment when due and, as he has recently obtained work as a e-hailing service driver, he anticipates that he would be able to expeditiously bring his debt up to date. He states that he has kept the Applicant up to date regarding these developments and has attempted to make payment arrangements with it.

- 7) Whilst he has also raised non-compliance with the National Credit Act and has disputed the legal costs contained in the judgment, neither of these issues have any merit. For the most part his only relevant “defence” is predicated on Section 26 of the Constitution.

The issues: A tale of two discretions

- 8) At the hearing, I voiced my concern that, by electing to launch sequestration proceedings, the Applicant, a sole creditor, effectively circumvented the constitutional safeguards built into the R46A procedure. Counsel for the Applicant, correctly submitted that the Applicant was entitled to make such an election and, as such R46A has no bearing on the proceedings before this Court. However, does the fact that sequestration has been recognised “...as a legitimate form of execution” and the fact that a creditor therefore has an election in terms of procedure (execution vs sequestration), imply that a Court should

take a mechanical approach in deciding these types of applications?

- 9) Decidedly not. Despite having been “..passed for the benefit of creditors and not for the relief of harassed debtors...”[3], the Insolvency Act, within its aging folds, still bestows a Court with that great equaliser of justice: the discretion.
- 10) For present purposes, S12(1) of the Insolvency Act provides for two instances where the Court is be called upon to exercise its discretion:
- a) Having factually proven that the requirements of S12(1)(a) and (b) have been met, the Applicant has to satisfy the Court that, per S12(1)(c) there is reason to believe that the sequestration of the Respondent’s estate would be to the advantage of creditors. “Advantage” being a relative concept, the Court is vested with a discretion to decide whether same had been proven.
- b) The second instance arises if the Applicant has successfully proven that the requirements per S12(1)(a) have been met. Here the Court still retains an overall discretion to refuse the application if the Respondent proves that there are special or unusual circumstances justifying such a refusal.
- 11) With regards to the first instance, advantage to creditors, esteemed colleagues, such as the honourable Judges Didcott and Van der Schyff have, on similar facts, provided definitive guidance as to how the discretion should be exercised.
- 12) With regards to the second instance, the overall discretion, the crisp issue for determination, is whether the possible infringement on the Respondent’s constitutional right to adequate housing constitutes special or unusual circumstances warranting the refusal of the application, in spite of the fact that all the requirements for such an order have been met.

Advantage to creditors

- 13) The Applicant submits that there is reason to believe the sequestration would be to the advantage of the Respondent's

creditors. (In this regard, it should be noted that the only creditor noted in the papers is the Applicant itself.) According to valuations done, the Respondent's property, originally purchased for R252 500-00, would probably, be sold for R820 000-00.

- 14) As Van der Schyff J had recently, on facts similar to those in *casu*, dismissed an application for sequestration on the basis that the applicant had failed to make out a case that sequestration proceedings would benefit itself more than a sale in execution, I afforded counsel for the Applicant an opportunity to consider the

judgment

and reasoning in *Waterkloof Boulevard Homeowners Association v Yusuf*[4].

- 15) Having done so, counsel sought to differentiate the facts in this matter from those in *Waterkloof* on the basis that, in *Waterkloof*, the applicant had, after obtaining summary judgment for the levies due, brought the application for sequestration, whilst in *casu*, the applicant had attempted to obtain satisfaction of the orders obtained twice through execution and sale of the Respondent's movable assets, before launching the application for sequestration. A further argument was made on the basis that in *Waterkloof* the application before Van der Schyff J was for provisional sequestration, whereas in *casu* an order for provisional sequestration had already been.
- 16) Considering that Van der Schyff J decided *Waterkloof* as a final application and given that the stage of the application does not affect the Court's discretion in any event, the latter differentiation is irrelevant.
- 17) With regards to the contention that the applicant had attempted to obtain satisfaction in the normal course (by way of execution and sale) but failed, it is apposite to note in the matter of *Gardee v Dhanmanta Holdings and Others*[5], after having heard argument regarding advantage and the fact that the applicant and sole creditor had attempted to obtain satisfaction in the normal course, Didcott J held that:

'Sequestration, it is true, has been described on occasions as a legitimate form of execution. (See *Wilkins v. Pieterse*, 1937 CPD 165 at p. 170; *Moldenhauer v. De Beer*, 1959

- (1) SA 890 (O) at

p. 892F.) That does not however mean that the judgment creditor has the same automatic right to it which ordinarily governs execution of the routine kind. Like everyone else seeking sequestration, he must first show the Court reason to believe in its advantages to creditors and then, having done so, await the Court's exercise of its discretion in his favour..'

And further that:

“The notion of advantage to creditors is a relative and not an absolute one. Sequestration cannot be said to be to the creditor’s

advantage unless it suits them better than any feasibly and reasonable available alternative course. It follows that the enquiry

necessarily postulates a comparison.’

- 18) By way of comparison to execution proceedings, in the founding affidavit, the Applicant submits that, because the mechanisms of insolvency are used, there is also the advantage that the trustees could sell the property privately and obtain a higher price for the property, “..(w)herefore the distinct possibility exists that the property will be sold at a price that will result in the respondent's creditors obtaining a monetary advantage.” It further submitted that if the property is auctioned by the trustees, the bond holders could also not accept or reject (as they would have, had the property been declared executable by Court) the final bid. According to the Applicant this “...means that the interest of the entire concursus creditorum is served and not just that of the bondholder.”
- 19) Within the context of the only known creditor being the applicant itself, it would seem these submissions are made in the abstract and do not provide a comparison specific to the specific facts in casu. During argument, upon questioning from this Court, counsel submitted that a Windeed search indicated that bonds in favour of Standard bank had been registered in 2002, 2004 and 2006. No information regarding the status of these bonds, nor the awareness of Standard Bank vis a vis the present application was disclosed.
- 20) Even accepting that there is a bond holder who could object or influence the price obtained, it does not affect the Applicant’s

claim. To the contrary, in sequestration proceedings the Applicant would be favoured above the other creditors, by virtue of the

statutory embargo provided by s 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986, in terms of which registration of transfer of immovable property will not be permitted unless “...that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been

paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof..”

- 21) The security held thus by a body corporate, was recently confirmed by the Supreme Court of Appeal in *Body Corporate of Marsh Rose v Steinmuller and Others*:^[6]

“The operation of the embargo is not altered because the sale occurs by way of execution or as part of the liquidation of an insolvent

estate. As was observed by this Court in *Geovy Villa* in the context of insolvency:

‘The practical effect of the statute is that, assuming the availability of funds, a body corporate will be paid before transfer of immovable property is affected. A reasonable mortgagee and body corporate might arrive at an accommodation where there are insufficient funds available to cover the total of the debts owing to both parties – but neither is obliged in law to do so.’

22) The Applicant further alleged that advantage to creditors exists by virtue of the following:

“There is no effort by the respondent to pay the outstanding amounts. On the contrary, this amount accrues interest monthly, resulting in an ever- increasing financial burden. Because of this, the other owners in the development are adversely affected.”

And that

“By putting a stop to the current state of affairs of the respondent it will be to the advantage of the creditors as a group since there will be no further loss for them.”

23) It is factually incorrect to state that the Respondent has made no attempts to pay the outstanding amounts. As can be gleaned from the Applicant’s replying affidavit, the Respondent has in fact made regular, albeit partial, payments in the period since the two judgments were obtained.

24) With regards to “adversely affected” other owners, sequestration holds no distinct advantage above execution. Amounts

levied by a Body Corporate are utilised for administration, operational expenses, maintenance etc of the sectional title scheme.

As such, the pro rata portion to be contributed by the owner of a unit within the scheme, does not ‘disappear’ if such an owner’s estate is sequestrated. Those costs will have to be borne by the other owners regardless of the procedure followed by the body corporate for collection of levies due. As such, the sequestration of the Respondent’s estate will not put an end to the losses suffered by the Applicant.

25) In *Rodel Financial Services Proprietary Limited v O’Callaghan*,^[7] Windell J held that:

“[34]... Where execution is cheaper and more expeditious than sequestration and the sole creditor already has a judgment, generally there is no reason to believe that the sequestration will be of advantage to creditors.”

26) The Applicant presented no evidence as to the relative expense of their chosen procedure. Nor did (or could) it argue that the

sequestration route was more expeditious: In casu, the Applicant waited 10 months after the nulla bona return was issued, to bring the application for sequestration. In total, a period of 2 years had lapsed between the receipt of the nulla bona return and the hearing of this application.

27) Vis a vis the sole creditor in casu therefore, the sequestration proceedings provided no benefit over following execution proceedings.

- 28) With regards to the potential losses suffered by the hypothetical other creditors, it is noted that, despite the provisional order having been granted in October 2023, no such creditors have come to the fore. Similarly, since the order was granted, no evidence of voidable dispositions has emerged (nor have any been alleged by the Applicant). This “advantage” seems to be more illusionary than based in fact.
- 29) Given the importance of the issues raised by the Respondent, it is appropriate to examine what the finding would be in the event that I have erred in concluding that the Applicant failed to demonstrate advantage to creditors.

Overall discretion in the event that all requirements are met

- 30) Section 12(1) provides that “(i)f at the hearing pursuant to the aforesaid rule nisi the court is satisfied that...” the requirements are met “...it may sequester the estate of the debtor.”
- 31) In terms of section 12(1) it would appear from the use of the words “may sequester” that the court is not bound to grant a sequestration order, even where the requirements are satisfied as the Court is once again afforded a discretion.[8]
- 32) It has been held that this overall discretion must be exercised judicially and upon consideration of all the facts and circumstances.[9] It is not to be exercised capriciously, but in accordance with the correct principles. In *Orestisolve*, [10] the manner in which such a discretion ought to be exercised was discussed. Having noted that a creditor whose claim has not been

settled is entitled to demand the liquidation of the debtor *ex debito justitiae*, Rogers J remarked that although the maxim did not imply an inflexible limitation on a court’s discretion, he considered that it -

“conveys no more than that, once a creditor has satisfied the requirements for a liquidation order, the court may not on a whim decline to grant the order...To borrow another judge’s memorable phrase, the court ‘does not sit under a palm tree’...There must be some particular reason why, despite the making out of the requirements for liquidation, an order is withheld.”

- 33) The onus to prove special circumstances that would negate against an order for sequestration of his estate falls to the Respondent.[11]
- 34) In *casu*, it is common cause that the very asset to be sold, on which the Applicant has based the reasonable possibility of advantage to

creditors, is also the Respondent’s primary residence. Whilst the Applicant has disputed the assertion that he is married in terms of customary law, his version that he resides there with four school going children, save for a blanket denial, remains uncontested.

- 35) I pause to add that, in motivating the application for the provisional order, the applicant, in its heads of argument made the

following submissions in relation to this defence:

“However, it is submitted that although the property may constitute the primary residence of the Respondent and his family, it must be repeated that the Applicant is seeking the provisional sequestration of the Respondent, not an order declaring the property specially executable.

As mentioned above, the trustee appointed, should this Honourable Court grant the provisional sequestration of the Respondent, investigate

any and all claims against the Respondent's estate. Accordingly, the trustee will be in a position to determine whether the property will be sold in order to settle any and all amounts owing by the Respondent to any creditor/s, such as the Applicant.

Furthermore, from a consideration of Annexure "FA2" to the Applicant's Founding affidavit, the Respondent is the owner of TWO immovable properties.

Therefore, even if the trustee appointed, should this Honourable Court grant the provisional sequestration of the Respondent, decide to sell unit 1[...] O[...] T[...], the Respondent and his family would not be left homeless.

36) For purposes of the present application for final sequestration, reliance was placed on the same heads of argument and the same

arguments in terms thereof were advanced. It is therefore necessary to make the following comments:

- a) It is now known that since the provisional order was granted, there have been no investigations done into the need to sell the property.
 - b) The submission that, as he owns a second home, the Respondent would not be homeless if sequestrated is legally unsound. In fact it exemplifies the drastic nature of using sequestration proceedings as a debt collection mechanism: Whereas the R46 execution procedure could result in the loss of one property, once sequestrated, the Respondent would be divested of all assets.
- 37) The main argument advanced, however, is that the Applicant in casu was entitled to choose the sequestration route in terms of the Insolvency Act. As it is therefore not executing against the property, the provisions of R46 and/or R46A do not come into play.
- 38) This argument has found favour in some cases. In *Shackleton Credit Management (Pty) Ltd v Ngakatau*,^[12] for instance, in dismissing a point in limine based on non-compliance with R46A, the Court remarked that:

“[16] Rule 46A is applicable to the execution upon a judgment debt. Sequestration proceedings are not akin to execution or the recovery of debt but to bring about the concursus creditorum for the benefit of all creditors and not just one.

- [18] I agree with counsel for the Applicant that the procedures and mechanism are prescribed by the Insolvency Act and absent a challenge to the constitutional invalidity of section 20(1) of the Act, the vesting of an insolvent's estate in the Master, and then in the trustee, is statutorily permitted."
- 39) It is indeed correct that R46A does not apply in insolvency proceedings. In Shackleton, the Respondent had, seemingly, relied on Rule 46A as if it was the embodiment of the totality of the protection afforded in terms of S26 of the Constitution. This elevation of what is essentially a procedural tool to substantive law, is naturally misguided. Rule 46A merely gives practical effect to need for judicial oversight identified by the Courts in cases where potential infringement of the constitutional rights entrenched in S26 are foreseen. The fact that, in insolvency proceedings, there is no concomitant obligation to procedurally comply with the provisions of a Rule of Court, has no bearing on the duty of Court to give effect to the provisions of the Constitution. Well before the legislature even drafted Rule 46A, the need for judicial oversight in cases affecting S26 rights was recognised and enforced.
- 40) Whether or not S20(1) is constitutionally valid, is beyond the scope of this judgment. In any event, the fact that after a final order for sequestration is granted, the Respondent would be divested of his assets, has no bearing on whether a Court should, before making such an order, have regard to the effect it would have on the Respondent's rights in terms of S26 of the Constitution.
- 41) The author Borraine has explained the issue this Court is confronted with succinctly as follows:
- "Where these requirements have been met nevertheless there may be special circumstances such as abuse of process which convince the court not to grant the order. Currently, there is no direct and clear authority that a court should consider the fact that sequestration following a compulsory sequestration application renders the insolvent homeless,*
- and such a plea by the respondent-debtor will be weighed against the entrenched advantage for creditors-principle that is a hallmark of our rather pro-creditor insolvency system. Yet, as a matter of principle, the question may be posed if the same kind of principles provided in the rules of the court following the judgments in Jaftha and subsequent cases should not be considered in case of especially compulsory sequestration applications as well." [13]
- 42) Our Courts have not shied away from considering public policy in the exercise of the discretion afforded by the Insolvency Act.
- [1] Prestige lecture delivered at Stellenbosch University on 9 October 2006 "TRANSFORMATIVE CONSTITUTIONALISM" STELL LR 2006 3
- [2] Insofar as these documents are irregular, by virtue of the fact that the Respondent is a lay person, such irregularities are condoned.

- [3] R v Meer 1957 3 SA 641 (N) 619A
- [4] Waterkloof Boulevard Homeowners Association (Association Incorporated under Section 21) v Yusuf and Another (028945/2022)
- [2023] ZAGPPHC 737 (28 August 2023) (“Waterkloof”)
- [5] Gardee v Dhanmanta Holdings and Others 1978
- (1) SA 1066 (N) 1067-8)
- [6] Body Corporate of Marsh Rose v Steinmuller and Others (149/2022) [2023] ZASCA 143; 2024 (2) SA 270 (SCA) (2 November 2023) para 36
- [7] Rodel Financial Services Proprietary Limited v O’Callaghan (2016/23121) [2017] ZAGPJHC 467 (31 March 2017)
- [8] See eg Amod v Khan 1947 2 SA (N) 435, Firststrand Bank Ltd v Evans 2011 4 SA 597 (KZD) par 27; 5
- [9] Julie Whyte Dresses (Pty) Limited v Whitehead 1970
- (3) SA 218 (D) at 219A-D; Nedbank v Potgieter (2012/5210)
- [2013] ZAGPJHC 242 (3 October 2013) para 15
- [10] Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and another 2015
- (4) SA 449 (WCC)
- [11] Firststrand Bank Ltd v Evans 2011 4 SA 597 (KZD) par 27;
- [12] Shackleton Credit Management (Pty) Ltd v Ngakatau and Another (2020/38729) [2022] ZAGPJHC 58 (11 February 2022)
- [13] Boraine, A. (2020).” Does the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act of 1998 Provide Adequate Family Home Protection to Insolvent Debtors or Is It Still Pie in the Sky? (Part 1)” *Obiter*, 41(2), 199–225. <https://doi.org/10.17159/obiter.v41i2.9146> page 217
- [14] Ex parte Ford and two similar cases 2009 3 SA 376 (WCC) 384 parr 19-22
- [15] Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004)
- [16] Nedbank Limited v Fraser and Another, Nedbank Limited v Chabalala and Another, Nedbank Limited v Machitele and Another, Nedbank Limited v Moccasin Investments (Pty) Limited, Absa Bank Limited v Young Star Traders CC and Another (2011/00418, 2011/9315, 2010/28374, 2010/31703) [2011] ZAGPJHC 35; 2011 (4) SA 363 (GSJ) (4 May 2011)

[17] J.J v A.J (4041/2019)

[2020] ZAFSHC 4 (9 January 2020)

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