

SOUTH AFRICA / JUDGMENT

Tower Property Fund Limited v Burgczak (5663/24P) [2025] ZAKZPHC 61 (3 April 2025) [2025] ZAKZPHC 61

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Ncube

CASE / FILE NUMBER

5663/24P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU

NATAL DIVISION PIETERMARITZBURG

CASE

NO: 5663/24P

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED:

YES/NO

DATE:

SIGNATURE

Before:

Honourable Ncube J

In

the matter between:

TOWER PROPERTY FUND
LIMITED

Applicant
and

MAREK STEFAN
BURGCZAK

Respondent
ORDER

1.

The Respondent's application for condonation of late delivery of his answering affidavit is dismissed.

2.

The Respondent's estate is placed under provisional sequestration in the hands of the Master of the High Court, Pietermaritzburg.

3.

The Respondent and all other interested parties are called upon to show cause, if any, to this court on 22 May 2025 at 09h30, or so soon thereafter as Counsel may be heard, why-

3.1 the estate of

the Respondent should not be placed under final sequestration and

3.2 the

Respondent's attorneys should not pay the costs in respect of the application for condonation of the late delivery of the

Respondent's answering affidavit de bonis propriis.

4.

Service of the provisional sequestration order is to be effected on

4.1 The Respondent

personally

4.2 The South

Africa Revenue Services.

Heard:

13 March 2025

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail. The date and time for hand-down is deemed to be 12h00 on 03 April 2025.

JUDGMENT

NCUBE J

Introduction

[1] This is opposed application in which the Applicant seeks an order for the provisional sequestration of the Respondent's

estate. On the other hand the Respondent seeks condonation for the late filing of his answering affidavit. The application for condonation is also opposed. I shall start with the application for condonation.

Application for Condonation

[2] The Respondent has applied for condonation of late filing of both the answering affidavit and Heads of Arguments. The application for condonation of late filing of Heads of Argument was not opposed and it was granted immediately during argument.

However, the application for condonation of the late filing of the answering affidavit is opposed. In an application for

condonation the applicant must show good cause for the delay. The Respondent's answering affidavit was due on 10 June 2024 but was delivered on 5 August 2024, almost two months late.

Requirements for condonation

[3] The Respondent must show good cause for the delay in order to persuade the court to exercise its discretion in his favour. In *Melane v Santam Insurance co. Ltd*[1] Holmes JA expressed himself in the following terms:

"In deciding whether sufficient cause has been shown, the basic principle is that

the court has a discretion to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavit."

- [4] As mentioned earlier, in this judgment, the answering affidavit was late by two or three months. The explanation for the delay is important. The explanation tendered by the Respondent is that his attorneys could not attend to the drafting of his answering affidavit on time as they had another commitment. The attorneys had to attend to another matter at Mamelodi Magistrate Court to defend the son of a personnel member who was charged with the offence of Culpable Homicide. The Respondent states on paragraph 15 of his affidavit in support of his application for condonation that “a young man’s life on trial may be as more significant events than Respondent” this statement by the Respondent implies that the drafting of his answering affidavit was not important and it could wait, until the attorneys are done with the criminal case in Mamelodi. That is ridiculous. In paragraph 16 of the same affidavit the Respondent states that apart from drafting his answering affidavit, the attorneys were also involved in the finalisation of other trials and arbitration.
- [5] Clearly, according to what the Respondent says in his affidavit, the drafting and finalisation of his answering affidavit was not important, and it could wait until the attorney was done with other duties. That is highly unacceptable if the attorney is engaged with other duties, he should not accept the instruction to represent the client, if he cannot diligently discharge his duties towards the client. It is also telling that there is no confirmatory affidavit from the attorney concerned. There is no reasonable court, which can accept this explanation. In any, event the respondent does not have reasonable prospects of success on the main application.

Application for a provisional sequestration

- [6] It is important to note that in these proceedings the applicant is merely seeking an order for a provisional sequestration of the Respondent’s estate. It is not an application for the final sequestration of his estate.
- [7] On 28 November 2022, the Applicant obtained judgment against the Respondent for payment of R 4 001 328.85 with interest and costs as between attorney and own client. The Respondent applied for leave to appeal the judgment. That application was refused. The Respondent petitioned the Supreme Court of Appeal. The petition was also refused. The Applicant executed against the Respondent by way of a writ. The Respondent informed the Sheriff that he was unable to pay the judgment debt in full or in part. The Sheriff has filed a nulla bono return.
- [8] At the present moment, the Respondent is the Director of Twelve (12) companies. Before the judgment was obtained on 28 November 2022, the Respondent was the Director of 17 companies, and he resigned as a Director of five (5) companies. Although the Respondent has resigned his Directorship position, he must possibly still be a shareholder in those companies.

Issues

- [9] The Respondent denies that he is indebted to the Applicant. He also denies that he has committed an act of insolvency and he further contends that the sequestration of his estate will not hold any advantage for his creditors.

Discussion

- [10] It is undisputable fact that the Applicant obtained judgment against the respondent. The Respondent has exhausted

all legal avenues available to him. The Judgment debt remains unsatisfied, as according to the Sheriff, the Respondent has failed to indicate to the Sheriff, property which is sufficient to satisfy the judgment debt.

- [11] Section 8(b) of the Insolvency Act[2] the Act provides:

“ 8 A debtor commits an act of insolvency-

- (b) if a court has given judgment against him and fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to the 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 with judgment”

In Casu there is no dispute that the Sheriff has filed a nulla bono return. Therefore, the Respondent has committed an act of insolvency as contemplated in Section 8(b) of the Act.

- [12] The Applicant is a creditor of the Respondent, and it has a liquidated claim against the Respondent of not less than R100.00. The sequestration of the Respondent's estate will hold advantage for his creditors.

Order

- [13] In the result, I make the following order:

2. The Respondent's estate is placed under provisional sequestration in the hands of the Master of the High Court, Pietermaritzburg.

3.1 the estate of the Respondent should not be placed under final sequestration and

3.2 the Respondent's attorneys should not pay the costs in respect of the application for condonation of the late delivery of the Respondent's answering affidavit de bonis propriis.

4. Service of the provisional sequestration order is to be effected on

4.2 The South Africa Revenue Services

Judge of the High Court of South Africa

Kwazulu-Natal Division

Pietermaritzburg

Appearances:

For the Applicant : Adv Schaup Instructed by : Cliffe Dekker Hofmeyer 11 Buitengracht Street
Cape Town Tel: 021 481 6396 For the Respondents: Adv Mthlane Instructed by : Manley Manleys
Inc 179 Mackenzie Steet Brooklyn Pretoria Tel: 012 346 3388 Heard: 13 March 2025 Delivered on:
03 April 2025

[1] 1962(4) SA 531 (A) at C-F

[2] Act No 24 of 1936

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Prepared on 11 October 2026 · Esheria