IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

DATE**: 06 JUNE 2024**
SIGNATURE:.

Case No: 025536/2023

In the matter between:

THE BODY CORPORATE OF UNIVER **APPLICANT**

And

ELIZABETH MARIANNE PRETORIUS **RESPONDENT**

Coram: **ACTING JUDGE KEKANA**

Heard on: 29 APRIL 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system.

JUDGMENT

KEKANA AJ

[1] In this matter the Applicant is applying for an order for a provisional sequestration against the Respondent in terms Section 9(1) of the Insolvency Act, Act 24 of 1936 . The Respondent is opposing the application and has filed an Opposing Affidavit. The application arises from a Judgment obtained by the Applicant on 23 February 2022, for the amount of **R18 946 08** plus interests and costs. The amount has since increased to an updated amount of **R73 984 56.**

[2] According to the evidence presented before me and from the papers submitted, the Respondent has failed to make any payment and has neither rescinded the Judgment granted against the Applicant on 23 February 2022. The Applicant demanded payment from the Respondent by way of a Warrant of Execution, the return of execution of the warrant was a *nulla bona* return.

It must be emphasised that in an application for a provisional sequestration order, the court has discretionary power to grant or refuse such an order[1].

[3] The applicable test for a provisional sequestration order is based on three grounds:

- the Applicant must establish against the debtor a liquidated claim for not less than R100 00;
- the debtor has committed an act of insolvency, or is insolvent; and

[1] *Epstein v Epstein* 1987(4) SA 606 (C).

- there is reason to believe that it will be to the advantage of the creditors of the debtor if the estate is sequestrated[2].

[4] The claim by the Applicant is based upon a Judgment obtained of the amount of **R18 946 08,** the interests and the costs thereon as directed by the order and the Judgment of 23February 2022. The Respondent is has knowledge of the debt and has to date not paid nor satisfied the debt, I am satisfied that the first requirement has been met.

[5] I now come to the second requirement, that the debtor must have committed an act of insolvency. When the sheriff was sent to execute the Warrant of Execution, the sheriff gave a *nulla bona* return, meaning there were no assets to satisfy the claim by the Applicant. This in itself constitute an act of insolvency in terms of section 8(b) of the Insolvency Act. At the date when the matter was heard by this Court, the Respondent has not yet paid the debt that arose out of the Judgment of 23 February 2022. There is no doubt that the Respondent is factually insolvent, the actual proof of one's solvency is actual payment of one's debt[3]. That the Respondent is factually insolvent warrants a sequestration application not on mere act of insolvency but also in terms of Section 10(b) and 12(b) of the Insolvency Act.

[6] I now turn to the third requirement, that there is reason to believe that it will be to the advantage of the creditors of the debtor if the estate is sequestrated, in a case where a provisional sequestration is sought there need only be prima facie proof of those facts[4]. The phrase reason to believe predicates facts which engender belief that must be proved by the applicant, prima facie at the stage when a provisional order is sought and on a balance of probabilities when a final order is sought[5]. That

[2] Section 10 of the Insolvency Act, Act 24 of 1936.
[3] *Fedco v Meyer* 1988 (4) SA 207 (ECD) at 212 F-H.
[4] *London Estates (Pty) Ltd v Nair* 1957(3) SA 591 N at 593.
[5] *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (N) at 593.

there is reason to believe that sequestration will be to the creditors' advantage is established if there are facts proved which indicate 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[6]. Meyer J in the case of ***Seevnarayan v Ramjathan***[7](para 13) goes on to say that it is sufficient if the applicant demonstrates that there is a prospect not too remote that upon a proper investigation of the debtor's affairs may result in the discovery of disposable assets for the benefit of creditors. I am satisfied that the applicant has prima facie established that there is a prospect, which is not too remote, that an investigation into the financial affairs of the respondent may result in some pecuniary benefit.

[7] I cannot say much on the Respondent heads of arguments but sympathise with her as she had no legal representative to assist her in drafting her papers. While she appeared in person, she fails to deal with key issues pertaining to this application as brought before this Court but chooses to address many side issues not related to the application. The Respondent does not deny the existence of a Judgment debt neither does she deny that the *nulla bona* return from the sheriff.

[8] I'm satisfied that the three requirements needed in an application for a provisional sequestration are met. Side issues raised by the Respondent are not relevant in this application.

[9] I accordingly make the following order:

1. The application for provisional sequestration is therefore granted.

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6 *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559.
7 (2021) ZAGPJHC 46 (16 April 2021).

2. The rule nisi is issued calling upon the Respondent to show cause, if any, to this Court on 12 August 2024 why a final Order of Sequestration should not be granted against the Respondent' s estate.

3. The costs of this application are to be costs in the sequestration.

HEARD ON:	29 APRIL 2024
JUDGMENT DELIVERED ON:	06 JUNE 2024
COUNSEL FOR THE APPELLANT:	ADV Z SCHOEMAN
RESPONDENT IN PERSON:	ELIZABETH MARIANNE PRETORIUS