

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION – MAHIKENG**

**CASE NO: M608/22**

**R[...] M[...]**

**APPLICANT**

**AND**

**M[...] M[...]**

**RESPONDENT**

**Summary:** Sequestration in terms of section 8 of the Insolvency Act 24 of 1936- requirements- calculation of accrual in terms of section 3 of the Matrimonial Property Act 84 of 1988- applicable date of calculation of accrual- exception as envisaged in section 8-*locus standi* of applicant- abuse of court process- applicant must cohere with trite requirements for the provisional sequestration- failure of the applicant to *prima facie* establish a liquidated debt in excess of R100-00- application dismissed with costs

**ORDER**

The application is dismissed with costs.

## JUDGMENT

**REDDY AJ**

### **Introduction**

[1] This is an opposed application for the provisional sequestration of the respondent, predicated in terms of section 8 of the Insolvency Act 24 of 1936, (“the IA”). The applicant and respondent were cited as the plaintiff and defendant respectively in the concluded divorce action. By virtue of an order of court dated **15 August 2022**, the marriage between the plaintiff and defendant were dissolved. In what follows, I propose to follow the nomenclature of the parties as cited in this application.

### **The applicant’s version**

[2] The applicant and the respondent were married to each other out of community of property with the application of the accrual system as evinced in Chapter 1 of the Matrimonial Property Act 88 of 1984 (“the MPA”). The antenuptial contract was duly signed on 15 December 2000 and subsequently registered.

[3] The commencement values of each of the estates of the parties as at the date of the marriage was recorded as nil. No exclusions were noted for the determination of the accrual of each of the parties.

[4] During the divorce action the parties made declarations as envisaged in terms of section 7 of the MPA.

- [5] Extracting directly from the section 7 notice the applicant disclosed the following assets:
- (i) Two large rooms measuring 52.9 square meters and 52.2 square meters.
  - (ii) Two x Office spaces measuring 14.0 square meter and 12.25 square meter.
  - (iii) The properties are located at site [...] Gopane Village, Lehurutshe on Tribal Land and valued at R350 000.00.
- [6] Not to be outdone, the respondent made the following disclosure. I excerpt directly from the said notice:
- (i) A house located at [...], Lehurutshe, valued at R290 000.00.
  - (ii) Pension funds held at the Government Employees Pension.
  - (iii) Household goods with an estimated value of R22 500.00
- [7] On 15 August 2022, **Snyman J** (now **Reid J**) granted an order dissolving the bonds of marriage between the applicant and respondent. The ancillary order of relevance to this application was the appointing of Mr Herman Rousseau, (“Rousseau”), a professional accountant, to ascertain the accrual in the respective estates with specified powers.
- [8] On 19 September 2022, Rousseau produced his report on the valuation of the accrual of the estates of both parties reflecting the fair market value as of 31 August 2022. Rousseau concluded that in terms of his calculations an amount of R 2 517 072. 84 had to be paid to the applicant.
- [9] Although not forming part of the body of the report of Rousseau, at some point the respondent had resigned from the Government Employees Pension Fund (“the GEPF”) and withdrew her pension

interest. In so doing, she allegedly dissipated her assets purposefully with the explicit knowledge of effecting the accrual calculations of funds, which were due to the applicant.

[10] Notwithstanding the service of Rousseau's report and a valuation of the immovable property described as [...], Lehurutshe in the amount of R800 000.00 on the legal representative of the respondent, no positive reaction was triggered.

[11] It is the applicant's version that an order in terms of the provisions of section 8 (c) of the Insolvency Act 24 of 1936 be ordered as the respondent has dissipated assets. Further thereto, a trustee will be able to take charge of remaining the assets and uncover the whereabouts of the respondent's R 4 000 000.00 (four million rand) pension interest that was paid out to the respondent. Critically, the trustee will be essential in ensuring that the payment of the applicant's portion of the accrual is implemented. The intentional concealing of assets in the accrued estate by the respondent constituted an act of insolvency, which if carefully unpacked was an act of fraud.

[12] With regards to the statutory peremptory requirements, the version of the applicant is as follows:

- (i) This Court has geographical jurisdiction to adjudicate this application as the respondent permanently resides within this Courts' area of jurisdiction.
- (ii) Is a creditor having a liquidated claim of not less than R100-00.
- (iii) There is no security for the debt that is due and payable.
- (iv) The provisional sequestration of the respondent will be to the advantage of the applicant and other possible creditors.

## Respondent's Answer

- [13] The respondent submitted her intention to resign due to ill health on 14 March 2022, indicating her exit date from her employment would be the end of July 2022. At the time of submission of the respondent's intention to resign, the divorce action was still pending. Notwithstanding the pending divorce action, the version of the respondent is that the resignation was not under the ruse of dissipating assets.
- [14] On 3 August 2022, the pension interest in amount of R 4 656 654.67 was paid out. Using the latter amount, the respondent sought debt relief by the payment of creditors which had been causing financial strain. The respondent expressed the following contention:
- “ As I have indicated that I resigned due to ill health, I will no longer be covered by medical aid and I might incur medical bills in the future, thus I have invested some of the money for my survival, made some savings for my grandchildren , made provision for my policy premiums , municipal rates , and also gave some to my major unemployed kids for them to see if they can explore self-employment opportunities to empower them.( at the time of drafting I have not managed to obtain some annexures hereof due to public unrest/service delivery strike and loadshedding challenges.”
- [15] It is the version of the respondent that the applicant is not clothed with the necessary *locus standi* to move the application as “**he is not my creditor nor am I a ‘debtor’** in the ordinary sense of the word as envisaged in the IA. Secondly, the applicant's accrual claim is not a liquidated amount as the purported amount considered due is based on an inaccurate calculation. Embellishing on the latter, the respondent avers that the calculation of the accrual is misinformed as

her liabilities were not given due weight. To this end, the valuation of the immovable properties cited in her disclosure *via* section 7 of the MPA is questionable, as a proper valuation of immovable property would have combined the interior and exterior for the determination of a fair and reasonable market value. This was not done.

[16] The respondent firmly denied the averment that she had been unresponsive in resolving the accrual. The respondent contends:

“I deny the allegations made in this paragraph specifically that I am not cooperative in resolving the alleged dispute and that the applicant used his pension in the marriage. In amplification of my denial, I submit to the court that the applicant did not use his money in the marriage; he bought livestock which he later sold, he had a drinking problem and wasted money in car repairs as for the rest of this money I do not have knowledge what he did with it.

.... He had a house in Danville, Mahikeng which he sold for at least R900 000.00 and I do not have knowledge of what he did with his money but surely same was not spend on the marriage as alleged.

... I would like to indicate to the court that the applicant was not taking any financial responsibilities in the marriage, maybe its because we did not have any biological children together, so he did not care.”

[17] Given the material non-compliance with the provisions of section 8 of the IA, the respondent moved for the application to be struck from the roll with a punitive cost order.

**In reply**

[18] The applicant disputes that the present application is an abuse of the process. In the applicant’s view, the present legal process is the only legal remedy available as the respondent has committed an act of insolvency. On an evaluation of the respondent’s version, it is apparent that there exists no dispute that the respondent failed to pay the

calculated portion of the accrual, which irrefutably forms part of the dissolved marital regime. The appointment of a trustee vested with the necessary powers to investigate amongst other payments made to creditors, the legitimacy of same and the circumstances giving rise to such payments, will go a long way in ensuring the payment of the accrual.

[19] The respondent purposefully failed to disclose her resignation and payment of her pension interest and distribution of same, whilst the divorce proceedings were alive, without any consideration of the payment of the accrual due. This was, so the applicant reasoned, a breach of a legal obligation on the respondent as her clandestine conduct impacted on the accrual regime, which constituted an act of insolvency as predicated in section 8(c) of the IA.

[20] The applicant dismisses the contention that Rousseau's report was inaccurate, given the respondent's intentional elective not to positively react to the report. In respect of the averment that the applicant had also dissipated assets, the applicant avows that this allegation had to be challenged at the appropriate forum, which excludes this, Court.

### **Applicant's submissions**

[21] Miss Smit contended that the applicant's claim results from the marital regime that was governed by section 3 (1) and (2) of the MPA, the accrual system on the dissolution of the marriage. On dissolution of the marriage Rousseau did a calculation of the accrual and ascertained the claim of the applicant to be in the value of R 2 517 072.84.

[22] Given the litigating stance of the respondent and her failure to make a tender for payment towards the applicant's share of the accrual notwithstanding that there are assets still at the respondent's disposal are telling. It would therefore be in the interest of creditors if control is taken over the respondent's estate. Significantly, the appointment of a trustee who would assume control over the respondent's estate would be conducive to the investigation of dissipated assets.

[23] Miss Smit submitted that there is no dispute that the respondent is indebted to the applicant by virtue of the marriage out of community of property with the application of the accrual system. Afore, exhibiting a reluctance to make payment, the respondent has not presented controverting evidence to disturb the Rousseau report. In this regard, Miss Smit referred to the following authorities: *SJC v TRC [2022] ZAWCHC 256* at paragraph [39], *Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) (WCC)* at paragraphs [26] – [27].

[24] As there is no *bona fide* dispute raised by the respondent, the applicant should succeed in the attaining of the provisional sequestration order.

### **Respondent's submissions**

[25] Mr. Montshiwa submitted that the applicant did not acquire his claim for the accrual against the respondent's estate between the 3 -14 August 2022 when she received her pension interest from the GEPF and that same only arose upon the dissolution of the marriage on 15 August 2022. Mr. Montshiwa further pressed the contention that the applicant lost sight of the difference between the applicant's acquisition of the claim vis-à-vis his right to share in the accrual system and when to invoke same.



- [26] In support of explicating the difference between the applicant's right to share in the accrual system and when to invoke same, Mr. Montshiwa place much store on *Reeder v Softline and Another* [2000] 4 All SA 105 (W) wherein it was reiterated that a right of a spouse to claim half of the net accrual of the other spouse's estate is acquired at the dissolution of the marriage by divorce or death. In this regard Mr. Montshiwa contended that the further difference between a vested and contingent right had to be carefully considered. See: *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 175-176, *Durban City Council v Association of Building Societies* 1942 AD 27 at 33.
- [27] Therefore it was submitted that as between 3-14 August 2020, the applicant's right to claim had not arisen. Therefore, it is disingenuous for the applicant to allege that the respondent dissipated her assets; nor preferred other creditors over him when dealing with her pension interest and the payment of her liabilities.
- [28] The argument of Mr. Montshiwa further ran that the accrual calculations of Rousseau as of 31 August 2022, is an erroneous reflection of the respondent's accrual as the net value of the accrual is after all outstanding debts have been paid and includes all amounts owed to the estate. The latter contention is founded on the valuation report of Rousseau, who specifically ignored the ascertainment of liabilities and was fixated on assets causing him to lose focus of the liabilities, which led to a clear and obvious inaccurate calculation of the net accrual.

[29] Owing to Rousseau's failure to observe the terms of reference of his duties and secure the full details of the respondent's liabilities to correctly calculate the accrual, the applicant has not established a liquidated claim. A conspectus of the application leads to the ineluctable conclusion that the respondent did not commit any act of insolvency. More still, being the dissipation of her assets. Mr. Montshiwa concludes that the respondent was under no duty to disclose her resignation to the applicant and the pending divorce action at the time did not debar her from using her pension payout to settle her liabilities, and or deal with same as she sought to do.

**Points *in Limine*:**

[30] There are two points *in limine* that were raised. The first being an abuse of the court process and the second being the *locus standi* of the applicant. I offer to deal with the first at this juncture and defer the question of *locus standi* for consideration later.

**Abuse of the Court Process**

[31] The respondent asserts that the present application is an abuse of the court process. The phraseology "**abuse of process**" cannot simply be brandished around in the absence of facts that underpin such a contention. Given the lack of a clear all-embracing definition that could label an abuse of the court process, each application would have to be considered on its own exigencies and particularities. This Court is enjoined with an inherent jurisdiction to undoubtedly intervene and arrest an abuse of the court process that is unquestionably founded on an improper purpose or an ulterior motive. This power must be exercised with great caution.

[32] In *Lawyers for Human Rights v Minister in the Presidency and Others*, 2017 (1) SA 645 CC para [20]. the following posited as regards an abuse of process:

'In *Beinash*, Mahomed CJ stated that there could not be an all-encompassing definition of 'abuse of process' but that it could be said in general terms "that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective." The court held:

"There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in *Hudson v Hudson and Another* 1927 AD 259 at 268:

"When...the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse."

...It can be said in general terms...that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective."

[33] To my mind, the contention that the current application is an abuse of process is ill-contrived. It is apparent, that since the inception of the divorce action, the respondent has been a recalcitrant litigant. There is no *mala fides* on the part of the applicant. His application has no ulterior motive or purpose. It is simply founded on a legitimate expectation of the payment of his share of the accrual. Accordingly, there is no merit in this point *in limine*. It falls to be dismissed.

[34] I turn now to the law at the heart of the application, namely the provisional liquidation of the respondent.

### **The law on provisional sequestration**

[35] The empowering provisions are contained in section 10 which provides:

Section 10 of the Act provides for provisional sequestration as follows:

**“10. Provisional sequestration** – If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie*—

- (a) the petitioning creditor has established against the debtor a claim such as is 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 of the debtor if his estate is sequestrated,

it may make an order sequestrating the estate of the debtor provisionally.”

Section 9 of the Act reads as follows:

**“9. Petition for sequestration of estate—**

- (1) A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.”

[36] Extracting from a combination of sections 9 and 10 of the IA, for a creditor to be successful in the attaining of a provisional sequestration order, three jurisdictional requirements must be met. In terms of section 10 of the IA the court may grant a provisional sequestration order if it is satisfied that *prima facie* firstly, that the applicant has established a claim which entitles it, in terms of section 9(1) of the IA, to apply for the sequestration of the debtor's estate; secondly, that the

debtor has committed an act of insolvency or is factually insolvent and thirdly there is reason to believe that it would be to the advantage of the creditors of the debtor, if his/her estate is sequestrated.

[37] In *Renyolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 80G – 81A, the standard of proof in order to surpass the requirements of section 10 of the IA, was surmised as follows:

“It is based on the fact that [section] 10 authorises the Court, if it is of the opinion that the requirements of the section have been satisfied *prima facie*, in its discretion to grant a *provisional* sequestration order. Where the allegations of fact relied upon by the petitioning or applicant creditor are disputed by the respondent it has been held that the dispute should not ordinarily be referred to evidence, although it may be so referred where circumstances of an exceptional nature show such a step to be appropriate. The Court is required to adopt an approach which is not permissible in motion proceedings generally, viz contrary to the general rule 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, **in proceedings for a provisional sequestration order the Court is required to take affidavits, there is a balance of probabilities which favours the conclusion that the requirements of [section] 10 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.**”

[38] Put differently, even if the papers disclose disputes of fact, an applicant will nevertheless succeed in establishing a *prima facie* case where he or she can show that “**on a consideration of all the affidavits filed [that] a case for sequestration has been established on a balance of probabilities**”, though open to some doubt (*Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 978D-E).

[39] I now turn to deal with each of the jurisdictional requirements.

#### A liquidated claim

[40] Section 9 of the Insolvency Act provides that a creditor who has a liquidated claim against the debtor for not less than R100.00 may apply to the court for the sequestration, or provisional sequestration, of the debtor's estate. A liquidated claim is one that is sounding in money and which amount is fixed by agreement, judgment or otherwise.

[41] Central to the issue of a liquidated claim, is whether the calculation of the accrual by Rousseau was accurate and, if so, has the applicant a liquidated claim against the respondent of not less than R100.00. The applicant contends that he is a creditor to the tune of R 2 517 072 84.

[42] What should be determined by this Court in terms of the decree of divorce granted on 15 August 2022, was whether an accrual was payable by the respondent to the applicant in terms of the provisions of the antenuptial contract concluded between the parties, as read with the provisions of the MPA. It is common cause that the parties were married out of community of property in terms of an antenuptial contract, which incorporated the accrual system as provided for in Chapter 1 of the MPA.

[43] In terms of section 3(1) of the MPA:

“At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount

equal to half of the difference between the accrual of the respective estates of the spouses.”

[44] The parties as ad *idem* that relevant date on which the accrual should be established would be the date of the dissolution of the marriage which, *in casu*, was 15 August 2022.

[45] Sub-section (b)(iii) of the same section provides for the determination of the accrual of the estate of a spouse as follows:

“[T]he net value of that estate at the commencement of his marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the Gazette serves as prima facie proof of any change in the value of money.”

[46] It is common cause between the parties that at the conclusion of the marriage, the applicant and respondent declared a commencement value of each of their respective estates in the ante-nuptial contract to be nil. The parties signed the ante-nuptial contract which was given a protocol number and was duly registered. For the purposes of this judgment, the intricate mechanics of the workings of section 3 of the MPA, is not deserving of further attention.

[47] In *AB v JB*, 2016 (5) SA 211 (SCA) Tsoka AJA held that:

**‘...The provisions of the MPA are clear and unambiguous. In terms of section 3 thereof, a spouse acquires a right to claim an accrual at the “dissolution of a marriage”.** An exception arises in terms of section 8 of the MPA. In terms of this section, a spouse is entitled to approach the court for immediate division of the accrual, where his or her right to share in it at dissolution of the marriage “will probably be seriously prejudiced by the conduct or proposed conduct of the other

spouse". It is only then that the date for determination of an accrual is brought forward, instead of at "dissolution of the marriage". Furthermore, in terms of section 4 of the MPA the net value of the accrual of the estate of a spouse is determined at the dissolution of the marriage."

[48] Rousseau's report refers to "the purposes of this valuation is to determine the value of each person's accrual during the marriage." This clearly goes against the grain of trite legal principles regarding the date of quantification of the accrual, but for the exception evinced in section 8 of the MPA. It is clear cut from Rosseau's cursory report that it is inaccurate. The core of Rosseau's report is founded on an incorrect date. The calculation of the accrual of the parties failed to take due cognizance of the liabilities of the parties for the quantification of the accrual. The valuation of the respondent's immovable property is imprecise, given the absence of proper valuation which seeks to provide a market related valuation with a combination of the interior and exterior of the respondent's immovable property.

[49] The effect of an inaccurate quantification of the accrual is fatal to the relief sought by the applicant. So as to fall with the jurisdictional requires that coheres section 9 of the IA, the applicant is to establish *prima facie* that the respondent is a debtor for a liquidated amount more than R100-00. As I see it, this does not call for a speculative hypothesis as to the liquidated amount. The threshold is probably set at such a meagre amount which would be conducive to an applicant obtaining the relief. The threshold must nonetheless be met. An inaccurate quantification of the accrual casts serious doubt as to whether the applicant is a debtor in the amount of an excess of R100-00. This inevitably leads to the applicant infracting the first



jurisdictional requirement which ultimately equates to the applicant having no *locus standi*. This point *in limine* raised at the genesis of the application has merit. This signals the death knell for the applicant. For the sake of completeness, I turn to address the remaining jurisdictional requirements.

### **Act of insolvency**

[50] It is indisputable that the litigating conduct of the respondent has been nothing short of reprehensible. It is peremptory for the applicant to address this within the confines of the law. Given my finding on the first jurisdictional requirement, I make no finding on whether an act of insolvency has been committed.

### **Benefit to the Creditors**

[51] It is trite that preceding the court granting a sequestration order, it must be satisfied that there is reason to believe that it would be to the advantage of creditors if the debtor's estate is sequestrated. See: *Lotzof v Raubenheimer* 1959 (1) SA 90 (0) at 94.

[52] The apex court in *Stratford & Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC) posited that the meaning of the term 'advantage to creditors' is broad and should not be approached inflexibly. Facts put before the court must satisfy it 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 the creditors. I am unable to find that the provisional sequestration would be to the advantage of creditors, in the absence of evidence that creditors exist. This jurisdictional requirement need not detain this Court any further.

[53] As for costs, I see no reason not to follow the ordinary rule that costs follow the result.

**Order**

[54] In the premises, I make the following order:

The application is dismissed with costs.

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**A REDDY  
ACTING JUDGE OF THE HIGH COURT  
OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

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**Date Of Hearing:**

**19 October 2023**

**Date Of Judgment:**

**21 November 2023**