IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/8951

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**

(Signed)

25 August 2020 .....

SIGNATURE

In the matter between:

PETRA NERA BODY CORPORATE Applicant

and

SEKGALA, RAMMUTLANA BOELIE Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. This is an application for the provisional sequestration of the respondent's estate.

2. The respondent is unrepresented. His substantive defence to the case made out by the applicant is that the debt on which it relies is not due and payable. He also contends that the applicant is precluded from relying on any grounds to support the application other than those set out in the initial founding affidavit.

3. Furthermore the respondent raised numerous technical or procedural issues *in limine* and pursued Rule 30A procedures most which were dealt with during the hearing and will not be repeated. However I had indicated that in respect of others I would give reasons, albeit that it should have been clear to the respondent during the course of the hearing why the lacked merit.

MAIN IN LIMINE POINTS

Rule 37A arguments

4. The respondent challenged the competence of the court to hear the matter on the grounds that;

    a. it had received the matter to case manage under rule 37A which, according to the respondent, was limited to trial matters;

    b. there was no basis to refer the matter for special treatment;

    c. since the matter had been referred for case management the judge allocated to deal with the matter could not, by reason of rule 37A (15), also determine the matter without the consent of both parties.

5. During the hearing the court explained to the respondent why the points raised were no good. I will do so again.

6. For ease of reference the provisions of Rule 37A which require consideration in light of the respondent's argument are subrules (1), (2)(a) and (b), (5)(a), (11), (13) and (15). They provide:

37A Judicial Case Management

(1) A judicial case management system shall apply, at any stage after a notice of intention to defend is filed—

(a) to such categories of defended actions as the Judge President of any Division may determine in a Practice Note or Directive; and

(b) to any other proceedings in which judicial case management is determined by the Judge President, of own accord, or upon the request of a party, to be appropriate.

(2) Case management through judicial intervention—

(a) shall be used in the interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases;

(b) the nature and extent of which shall be complemented by the relevant directives or practices of the Division in which the proceedings are pending;

…

(5) (a) Notwithstanding the allocation of a trial date, a case that is subject to judicial case management shall not proceed to trial unless the case has been certified trial-ready by a case management judge after a case management conference has been held, as provided for in subrule (7).

…

(11) Without limiting the scope of judicial engagement at a case management conference, the case management judge shall—

(a) explore settlement, on all or some of the issues, including, if appropriate, enquiring whether the parties have considered voluntary mediation;

…

(13) The record of the case management conference, including the minutes submitted by the parties to the case management judge, any directions issued by the judge and the judge's record of the issues to be tried in the action, but excluding any settlement discussions and offers, shall be included in the court file to be placed before the trial judge.

…

(15) Unless the parties agree thereto in writing, the case management judge and the trial judge shall not be the same person."

In addition the respondent referred to the numerous provisions of Rule 37A which are exclusively directed to trial proceedings.

7. A comparison between the wording of subrules (1) (a) and (1) (b) immediately reveals that the latter covers all other court proceedings which are not "*defended actions".* All motion proceedings, of which sequestration applications is one, therefore are covered under sub-rule (1) (b). This disposes of the first objection

8. The decision of the Judge President or the Acting Judge President (as is the case in this Division) to allocate a matter to a particular judge, outside the usual manner in which it is enrolled through the Registrar's office, and in the circumstances identified under sub-rule 2(a) or (b) is not an administrative decision subject to challenge by any party. It is a power exercised in relation to the internal management of courts which vests in that judge. This disposes of the second point.

9. The third point raised in relation to Rule 37A is that the respondent did not consent to the matter being disposed of by me.

   It is evident from Rule 37A (11) (a) that a judge allocated to case manage a matter will during the case management conference explore the possibility of settlement and in doing so may become privy to matters

which could influence the outcome of the case. It is for this reason that sub-rule (13) excludes these discussions from forming part of the record of the conference which is placed before the trial judge.

10. I informed the respondent during the hearing that on receiving the allocation from Acting Deputy Judge President Sutherland ("*ADJP")* to case manage this matter, and after considering the papers, I had formed the view that case management was unnecessary. A copy of the directive I then issued was forwarded to the ADJP. I received the go-ahead to deal with the case to finality without the necessity of a case management conference.

11. It is evident that Rule 37A (15) presupposes that a case management conference is held in its terms enables the parties to engage in frank settlement discussions before the case management judge. If there is no case management conference, as here, then rule 37A(15) serves no purpose, irrespective of whether the matter had initially been allocated for case management and irrespective of whether the initial directive was issued pursuant to such an allocation. It remained within the ADJP's power relating to internal management of cases to decide whether the judge who had been allocated the matter should proceed with the matter on any other basis.

12. Accordingly this point too must fail.

The Directive to proceed with the merits of the case

13. Much of the other points taken by the respondent are directed at the consequences of my directions.

14. Two matters need to be mentioned by way of a brief introduction.

Firstly the respondent had been debarred from arguing one of the interlocutory matters, because he had failed to file his heads of argument. He then sought to set aside this order. These events had the consequence of diverting the case into side issues. In the meanwhile the status of the respondent and the interests of creditors were already impacted, bearing in mind the timing of a *concursus creditorum,* The interests of justice therefor required finality one way or the other, particularly as the respondent may have been successful in opposing the magistrates' court proceedings and would be prejudiced if he had any sequestration proceedings still hanging over his head.

Secondly the respondent had never dealt with the merits of the application in his opposing affidavit and was now precluded from doing so by reason of the order referred to earlier. I believed that he should be given an opportunity to do so, particularly as he had alleged that the claim on which the application had been founded of arrear levies had been the subject of a rescission application after the applicant had successfully applied for default judgment in the magistrates' court. If the applicant's claim had subsequently failed, then *caedit questio*.

15. The directive issued read as follows:

> *"Judge Spilg has been allocated to deal with this matter by Acting Deputy Judge President Sutherland.*
>
> *Due to the Lockdown regulations and the Judge President's Consolidated Directive of 11 May 2020 this matter will be dealt with by way of e-mail communications and if necessary by way of either tele- or video- conference.*
>
> *To this end the Judge has directed the following:*

1. *Each party is required to make submissions by way of email addressed in the same transmission to both Judge Spilg and the other party so that the Judge can be satisfied from the addressees appearing on the email to him that the other party has also received it simultaneously. The term "deliver" and "delivered" in this directive shall mean the simultaneous transmission to the Judge and the other party of the email in question by no later than 17:00 on the day in question;*

    a. *at the email addresses of the parties as set out herein, being the addresses which are set out in the papers; and*

    b. *At the email address of Judge Spilg's registrar, Ms Nomaswazi Mvula, being nmula@judiciary.org.za .*

2. *The applicant in the sequestration application, The Body Corporate of Petra Nera ("Petra Nera") is to upload onto CaseLine the Answering Affidavit of the respondent, Mr Sekgala, in the sequestration application.*

3. *Having regard to the fact that the main application is one affecting status and that the last affidavit filed by Petra Nera in the main application was in October 2018 , both Petra Nera and Mr Sekgala are to give reasons by email to be delivered by no later than Monday 18 May 2020 why the following order should not be made:*

    a. *That Petra Nera is to file a supplementary affidavit in the sequestration application to be delivered by way of email by no later than Friday 22 May 2020 setting out;*

i. *whether there has been any payments made ,or the incurring of further debt with the basis thereof being set out, by Mr Sekgala to Petra Nera since October 2020;*

ii. *the current amount owing, if any, by Mr Sekgala to Petra Nera and attaching a current statement of account;*

iii. *the status of any magistrates' court proceedings in relation to the alleged debt claimed by Petra Nera to be owed to it by Mr Sekgala*

iv. *whether Mr Sekgala is still the registered owner of the property within the Petra Nera complex and if not when it was transferred out of his name*

v. *details of any further facts of which it is aware that are relevant to determining whether or not the order sought should be granted;*

b. *That after delivery of Petra Nera's affidavit, Mr Sekgala file a supplementary affidavit in the sequestration application to be delivered by way of email by no later than Monday 8 June 2020 dealing with;*

i. *His response to any matter raised by Petra Nera in its affidavit referred to in the preceding sub-paragraph (a);*

ii. *Any other matter set out in sub-paragraph (a) not raised by Petra Nera and which is relevant to determining whether or not the order sought by it should be refused*

c. *That Petra Nera, if it intends to deliver a relying affidavit in response to any supplementary affidavit of Mr Sekgala, shall do so by email by no later than Friday 12 June 2020*

d. *That the presentation of argument shall be by way of submissions contained in an email to be delivered by no later than Thursday 18 June 2020 and that if either party wishes to be heard orally then such hearing will be by way of video-conferencing, or if not available, by tele-conferencing on Monday 22 June at 10:00*

e. *That Petra Nera shall be responsible for;*

i. *uploading all court papers and Judge's directives, including this one, onto CaseLine;*

ii. *Inviting Mr Sekgala onto CaseLine;*

iii. *Providing an index and pagination which shall also be delivered by email by no later than Friday 19 June 2020*

f. In the event that Mr Sekgala does not accept the invitation or otherwise does not access CaseLine then delivery of the emails referred to in this directive will suffice for the purposes of the hearing.

g. The costs of all the interlocutory applications shall also be decided at the hearing and to that end such arguments as the parties wish to make in that regard must be included in the emails referred to in sub-paragraph (d)

16. I believe that some of the terms of the directive were later modified after I had rejected certain technical points raised by the respondent.

17. Of relevance is that the applicant had previously filed a supplementary affidavit which explained how it came to rely in its founding affidavit to the sequestration application on the default judgments it had obtained against the respondent and the *nulla bona* return for grounding an act of insolvency under s 8(b) of the Insolvency Act 24 of 1936 ("*the Act")*. Although still claiming that the debts were owed and that the respondent was unable to pay then, it explained that the default judgment and act of insolvency could no longer be relied on as the respondent had been able to obtain a rescission of those judgments.

18. The applicant sought to introduce new matter in the nature of subsequent events relative to the two magistrates' court cases, expanded on the extent of the applicant's failure to pay levies which had allegedly increased considerably, still without any payment, and relied on factual and commercial insolvency under s 9 of the Act.

19. The applicant contended that it was unaware of an application to strike out certain allegations in its papers which had been granted and set out why. I

am satisfied that the applicant was unaware of the application and it is evident that at best the order was an interlocutory one granted because the applicant was unaware of it.

20. At this stage I am satisfied, as I indicated to the respondent during the hearing, that as long as the rights of action remains the same (as opposed to the cause of action) there can be no reason why the contents of the applicant's first supplementary affidavit, as now also contained in the second supplementary affidavit, cannot be received. Moreover there can be no prejudice to him since at the time he never filed an opposing affidavit on the merits and would be out of time to do so now, yet in terms of my directive he had been given a further opportunity to do so without requiring further condonation.

21. In consequence of my directive the applicant dealt with the eventual fate of the original two magistrates' court actions. It appeared that despite obtaining the rescission of judgments the respondent failed to plead and was barred. For reasons that are difficult to appreciate the magistrates' court has still not granted default judgment despite the applications lying with it for a considerable time.

22. The applicant also referred to two subsequent actions where default judgment had been granted against the respondent for subsequent arrear levies, and where it was evident that he had failed to point out any assets which, on his version, could be subject to attachment, thereby again triggering an s 8(b) act of insolvency.

23. The applicant then attached a full statement of arrears which covered all the amounts claimed in the magistrates' court cases. There are no duplications as respondent initially suggested. It demonstrates not only that the respondent failed to pay any amounts whatsoever for a

considerable number of years but that the amounts also included municipal water and electricity charges which he has never disputed.

24. By contrast the respondent in his affidavit persisted that the applicant was making out a new case in reply and that none of the levies were due since it required a resolution of the body corporate before the applicant could proceed to claim.

THE DEFENCES TO THE PROVISIONAL SEQUESTRATION APPLICATION

25. The first main defence was that the applicant was pursuing a different case to that made out in its founding appears.

I had explained to the applicant that there is a difference between a cause of action and a right of action. In the founding papers the applicant was relying on the respondent's failure to pay levies and the municipal charges that had accumulated for a substantial period and at that stage had amounted to some R198 000 excluding any interest, and that this amount had continued to increase without any payment in sight. It was evident that the respondent simply never paid his levies and the municipal charges for water and electricity he had consumed. His non-payment for whatever reason obviously affected every other unit holder as clearly set out in the papers.

26. In regard to the allegation of insolvency the applicant had initially relied on s 8(b) of the Insolvency Act 24 of 1936 which reads:

> *"if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that 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 the judgment;"

27. While the applicant initially relied on s 8(b) the right of action remained a claim for arrear levies in excess of the minimum required under s 9(3)(a)(iii) of the Act and that the respondent was insolvent as provided for by s 9(3)(a)(v) either because he has committed an "*act of insolvency*" under s 8 or was "*in fact insolvent*" , a state of affairs which was already foreshadowed by the facts contained in the founding affidavit.

28. The fact that the respondent did not deliver a plea in the magistrates' court case, did not file an answering affidavit to deny owing the levies or contend that he was able to pay it, while persisting in his failure to pay levies despite the obvious prejudice to all other individual unit holders was simply further evidence to support the initial allegations of insolvency under s 9(3) (a) (v) of the Act.

29. I have just mentioned that the respondent was given ample opportunity to set out a defence to the claim for payment of the substantial accumulation of levies and municipal charges but did not do so when the provisional sequestration application was launched, nor when given an opportunity by the court to do so previously, which was at his express request, and despite managing to obtain a rescission of judgment in the magistrates' court. These matters were covered in the applicant's subsequent affidavit before me and accordingly it was unnecessary for it to rely on the initial supplementary affidavit.

30. In the most recent supplementary affidavit, being the one in terms of my directive, the applicant provided an update which alleged that the respondent had been barred from pleading in the initial two magistrates' court proceedings. The applicant referred to two further applications for default judgment in the magistrates'' court for subsequent arrear levies

totalling a further R370 000 which had not been paid and writs that had been issued. In all some R600 000 were now in arrear while the respondent had been sued in other matters with judgments against him, while incurring debt to the applicant month by month without any expectation of repayment.

31. This brings me to the belated defence to the merits; namely that the levies are not due because no resolution has been passed by the body corporate entitling it to raise them.

32. Leaving aside the fact that the levies go back many years, the applicant stated enough in its papers regarding the passing of the budgets at the annual general meetings of the body corporate, supported by relevant minutes which were attached, to demonstrate that there is no merit whatsoever in the defence raised. Moreover there were local authority charges for water and electricity consumed by the respondent which were not disputed and which alone far exceeded the required sum for purposes of bringing a sequestration application.

ORDER

33. It is essentially for these reasons that the provisional sequestration order was granted returnable on 25 August 2020 with service and notice in the usual form, save that in addition the court directed service by email mail on all known creditors including all bondholders of property owned in the name of the respondent (to which reference had been made in the papers). I considered this to be necessary as they may have an interest in either assisting the respondent or in the appointment of a provisional trustee.

(Signed)

SPILG, J

DATES OF HEARING:	22 June, 3 July and 25 and 26 August 2020
DATES OF DIRECTIVES AND ORDERS	11 May, 22 June, 25 August 2020
DATES OF JUDGMENT	25 August 2020
DATE OF REVISION:	26 August 2020
FOR APPLICANT:	Adv AJJ du Plooy Richards Attorneys
FOR RESPONDENT:	In person