(Western Cape Division, Cape Town)

[REPORTABLE]

Case No: 16623/2021

In the matter between:

MAXWELL M MOKOTELI	**First Applicant**
NOSICELO MOKOTELI	**Second Applicant**

vs

THE BODY CORPORATE OF VILING VILLAS SECTIONAL TITLE SCHEME (SS352/2012)	**First Respondent**
DANIEL SANDILE NDLOVU N.O.	**Second Respondent**
STACY SAFFY N.O.	**Third Respondent**
MASTER OF THE HIGH COURT	**Fourth Respondent**
ABSA HOME LOANS	**Fifth Respondent**

JUDGMENT DELIVERED ELECTRONICALLY ON 6 JUNE 2022

MANTAME J

A Introduction

[1] The applicants seek an order rescinding the order of sequestration which was granted in default by this Court on 12 January 2021 under Case No: 14809/2020. This application is brought in terms of Section 149 (2) of the Insolvency Act 24 of 1936 *("the Insolvency Act")* and common law. This application is opposed by the first respondent. The second to fifth respondents did not oppose this application.

B Condonation

[2] The applicants were late in filing the replying affidavit. An application for condonation was filed explaining the reasons for such lateness. It was not disputed that the replying affidavit was due to be filed on 5 January 2022. The applicants stated that they travelled to the Orange Free State Province in December 2021 for holidays. In early January 2022, there was a bereavement in the family which required their attention. Upon return, they attended consultations with their attorneys and ascertained that there was documentation which required to be attached in the replying affidavit and was not readily available to them. These included documentation from the first applicants' investment portfolios, Government Pension Fund values and valuations of his assets. This information took some time to collate. Since it was important for him to support his case before this Court, it was important for this information to be included in the replying affidavit. This resulted in the replying affidavit being filed on 22 April 2022.

[3] The first respondent opposed this application and submitted that the test for condonation is well established. In *Melane v Santam Insurance Company Limited*[1] Holmes JA set out the applicable principles as follows: *"...the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, 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 will be no point in granting condonation. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. On the importance of the issue and strong prospects of success may tend to compensate for a long delay. The Respondents interest in finality must not be overlooked".*

[4] Further, the first respondent contended that it is also trite that a *bona fide* defence and good prospects of success are not sufficient in the absence of a

[1] 1962 (4) SA 532 (A)

reasonable explanation for the default. This was confirmed in the matter of *Chetty v Law Society Transvaal*[2] where it was held that:

> *"But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation for the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that the Appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the Appellant's prospects of success."*

[5] In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*[3]*,* it was held that it was appropriate that an application for condonation be considered and granted if that is in the interest of justice and refused if it is not. The interest of justice must be determined with reference to all relevant factors including the nature of the relief sought, the extent and the cause of delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defects.

[6] It is trite that in a condonation application, the Court has a duty to exercise its discretion judicially. The Court has to weigh the factors as set out above against the facts that have been presented in requesting condonation. It was the applicant's assertion that this matter is of utmost importance to him. It was therefore important that all the supporting documents be put before Court. The three and half months that took the applicant to collate this information is not specifically accounted, notwithstanding, the delay in filing the replying affidavit appears to be considerably long. In taking into account the objective conspectus of these facts, it is trite that the importance of the issue and strong prospects of success may tend to compensate for a long delay.

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[2] 1985 (2) SA 756 (A) at 765.

[3] 2000 (5) BCLR 465; 2000 (2) SA 837 (CC) at para 3; See also Van Wyk v Unitas Hospital and Another (Open Democracy Advice Centre as Amicus Curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20

[7] The applicant raised important points on the merits that warranted the attention of this Court. Should this Court in my view, refuse to admit the applicant's replying affidavit due to its lateness, it will greatly prejudice the applicant in its application to the rescission of the sequestration order. It is common cause that these supporting documentation were requested by the applicants from different institutions. It was not within his control to produce them. Prior to this exercise, the applicants had to attend to the bereavement in the family in another province. In such circumstances, I am satisfied that the applicant made up a case for condonation. The applicants replying affidavit will therefore be admitted.

C Background Facts

[8] The first applicant purchased Unit 15 Viking Villas Sectional Title Scheme, Kraaifontein, Western Cape ("*immovable property*") during 2013. In 2015, he got married to the second applicant in community of property and such marriage still subsists. The first respondent is the body corporate of the Viking Villas Sectional Scheme. When the immovable property was registered, the first applicant registered a mortgage bond No SB 640/2013 in favour of the fifth respondent for the sum of R387 000.00.

[9] It appears that since the applicants occupied the immovable property, he and the first respondent have been embroiled in a long-standing dispute in respect of payment of levies and other issues which they put on much of their energy, effort and resources. These unresolved disputes, although started small escalated to a bigger scale for lack of proper and better management. As a result of this mismanagement, these unresolved disagreements culminated in a litany of litigation by the first respondent in two different magistrate's courts (Kuils River and Bellville) and ultimately to this Court when the final order of sequestration of the first applicant was granted. The first applicant asserted that it was incorrect for the first applicant to ask for an order of sequestration only against himself, having been so married in community of property. In advertently, the order will have dire consequences on the second applicant. In addition, proper facts were not put before the sequestration court, and that is the reason for this application.

[10] The first applicant states that the genesis of this dispute, *inter alia*, relates to a security gate that he installed on the front entrance of his unit upon taking occupation of the immovable property. The first respondent insisted that he remove it as it fell short of its specifications and standards. The first applicant refused to remove it, and he cited other units that had exactly the same type of security gate and nothing consequential resulted from those units. The relations between the first applicant and the first respondent quickly deteriorated and the first respondent started debiting the first applicant's account with a fine of R500.00 on a monthly basis for his refusal to remove the security gate. Further, the first respondent suspended the first applicant's privileges in the sectional title scheme. The first applicant was no longer provided with his monthly instalments and was no longer invited to attend the annual general meetings like any other homeowner in the title scheme. In protest for this manner of treatment, the first applicant stopped paying levies and did not pay fines and interest associated with the security gate. In resorting to this stance, the first applicant was irked and convinced that he was being racially profiled by the first respondent.

[11] As stated above, from 2013, the first respondent instituted action against the first applicant for the recovery for arrear levies and such other ancillary costs. Further summons were issued against the first applicant during 2013 – 2017 in which the first respondent obtained default judgment for various amounts. In December 2017 the first respondent instituted an application in terms of Section 66(1)(a) of the Magistrate's Court Act 32 of 1944 (as amended) and obtained an order to have the immovable property declared specifically executable. During 2018, the first applicant made an application for the rescission of the order as it was granted in default. This was after the Sheriff of the Court had attended at and attached the immovable property. In this instance, the parties reached an agreement that the first applicant would pay to the first respondent monthly contributions towards the arrears as well as the levies, as and when they become due, failing which the first respondent would be entitled to proceed with the sale in execution of the immovable property without having to adduce any further evidence with regards to the quantum. This agreement was made on 21 November 2018.

[12] The applicant did not fulfil some payments in terms of the settlement agreement. This then motivated the first respondent to seek a final order of

sequestration against the first applicant on 12 January 2021. The applicants asserted that the granting of this order was incompetent as the first applicant, in particular is factually solvent.

[13] In opposing this application, the first respondent stated that the first applicant had ample opportunity to oppose the granting of the final sequestration order between the period of the provisional order and the final order of sequestration. It could have put forward his case that it is solvent. The first applicant cannot be allowed to raise factual issues regarding his solvency and his ability to pay at this late stage. That amounts to nothing more than a rehearsal of the sequestration application. The factual basis upon which the first applicant assumes his solvency is flawed since none of the two (2) additional assets being a motor vehicle and an Old Mutual Policy is supported by documentary proof. As a result, the reasonable value cannot be ascertained.

D Submissions

[14] *First,* the applicants argued that it is noteworthy that the first respondent conveniently omitted to mention in its sequestration application that the first applicant had consented to have an order which would allow for the immovable property to be attached and sold in execution should he breach the settlement agreement. Had the Court been made aware that there is equity to cover the first respondent's claim, the sequestration order would not have been granted as there were no grounds for the granting of the sequestration order.

[15] *Second*, the first respondent did not establish that the first applicant had committed an act of insolvency in terms of Sections 8 (a), 8 (c) and 8 (d) of the Insolvency Act, although it relied on these sections in its application. The property that the applicants are the registered owners on its own would have raised enough equity to satisfy the debt. In *Zadi and Another v Body Corporate of Outeniqua and Others*[4]*,* the Court remarked as follows:

[4] 2011 ZAGPPHC 163 at paras 10 and 12

"*[10] The first applicant relies on the fact that the first respondent abused the process of the court in order to obtain a sequestration order against him. He points out that if the first respondent had attached and sold the Outeniqua property in execution the first respondent would have recovered its claim and legal costs in full and that would have been the end of the matter.*

(1) The first respondent obviously knew that the applicant owned a property in the scheme yet the first respondent never issued a writ of execution against the property itself. This is inexplicable in view of the fact that on 9 January 2007 (i.e. one year before the first respondent obtained judgment against the first applicant) a Deeds Office search had been conducted by the first respondent or its agent which showed that the first applicant had purchased the property for R140 000 and registered a mortgage bond over it for R77 500 (94). On the face of it, there was sufficient equity available to pay the first respondent's claim and costs. It is noteworthy that in the sequestration application the first respondent's relied on a valuation for the property of R280 000. The warrant of execution issued on 10 March 2008 omitted the description of the immovable property on which the warrant may be executed (96). This was not remedied even after the sheriff reported that he could not serve the warrant of execution and pointed out that the warrant is against movable property only and that the services of a locksmith were necessary to gain access to the premises (63). The failure to execute against immovable property is simply not explained. Despite knowing all these facts the first respondent obviously decided to apply for the sequestration of the first applicant;

…

[12] In view of these facts I am of the view that there are exceptional circumstances present. The first respondent systematically misled the court about the first applicant's whereabouts and the need for a sequestration order. The facts alleged by the applicants show that they would never have had an opportunity to oppose the magistrates' court action or the sequestration application and that at least prima facie they have a valid and bona fide defence to the application."

[16] The applicants always disputed the first respondent claims and requested a breakdown of the amounts of the total amounts claimed, that to date has not been forthcoming from the first respondent. According to the applicants, the fact that the applicant's bond repayments were up-to-date is a true reflection that the applicants were under protest on the amounts that the first respondent claimed. Notably, besides the first respondent, the fifth respondent was the only other creditor of the applicants. The sequestration procedure is resorted to if the debtor is insolvent not the solvent debtor like the applicants who has one creditor who is already armed with judgments against the debtor.

[17] *Third,* the first applicant's estate was not and has never been in a state of insolvency. In attending the Court in the sequestration proceedings the first applicant was hoping to settle the matter, but unfortunately was not aware that he was supposed to request postponement in order to file answering papers, hence the application remained unopposed and the order was taken in default. In *Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm*[5], it was stated:

> *"[11] In my view where opposing papers have not been filed there is a "default" even if the Respondent in the matter or his legal representative is present in Court. See: Morris v Auto quip (Pty) Ltd 1985 (4) SA 398 (WLD); First National Bank of SA Ltd v Myburgh and Another 2002 (4) SA 176 (CPD).*
>
> *[12] The question of what is meant by "default" was considered in Katritsis v De Macebo 1966 (1) SA 613 (A). In this matter the Appellate Division (as it then was) held that "default" which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim. In casu the judgment was granted in the absence of an opposing affidavit by the Appellant and was therefore a "default judgment" even if it was not a default in the sense of the absence of the party".*

[5] [2017] ZALMPPHC 35 AT PARA [11]- [12]

[18] Essentially, the applicants contended that the first applicant is capable of paying the first respondents claim. The fact that the first applicant disputed the first respondent's clam of R155 000.00 does not make him incapable of paying his debts. As security, the first applicant has made available an amount of R155 000.00 to their attorneys of record's Trust Account for purposes of settlement. The first respondent's claim that the sequestration application was the only available remedy to recover monies owed was flawed. It was not correct that the applicants made its case in the replying affidavit. The replying affidavit merely bolstered a case that was already made in the founding affidavit. In any event, it was not disputed that the first applicants' estate is factually solvent and worth in excess of R1 550 763.54 at the time of the granting of the sequestration order.

[19] Although the Court ordered the first applicant to pay R50 000.00 by the 12 January 2021, he had always maintained that according to his calculations, he owed an amount of about R32 000.00. In reality, he was not in breach of a court order, the amounts claimed were disputed.

[20] In circumstances where the sequestration order was granted despite the non-joinder of the second applicant who stood to be affected adversely by the first respondent's sequestration order, it was strongly submitted that the first respondent has abused the Court's process in bringing this application; and that exceptional circumstances exist for the granting of the rescission application as the sequestration order was undesirable.

[21] *Lastly,* the first respondent's contention that the first applicant had other remedies at his disposal as he would have proceeded in terms of Section 150 of the insolvency Act was said to be misplaced. The said section deals with the appeal on the merits. In a situation where the correct facts and or merits were not properly placed before Court, that procedure was incompetent. In addition, the debt arose as a result of the unlawful penalties, interests and levies that were claimed arbitrarily without any justification. As the sequestration application was an abuse of power, this Court should grant a rescission of the order and show its displeasure by making a punitive cost order against the first respondent.

[22] The first respondent's Counsel argued that the filing of the first applicants opposing affidavits in the sequestration application would have served no purpose as his issues were already canvassed during the settlement negotiations.

[23] In addition, it was made known to this Court during argument by the Counsel of the first respondent that this matter is somewhat different from the normal *default* position for the following reasons:

> 23.1 The provisional stage of the sequestration application was heard by Binns-Ward, J. At that hearing the first applicant was present, and made submissions;
>
> 23.2 The first applicant was duly heard when he disputed the total amount claimed by the first respondent. Subsequently, the first applicant agreed that at least an amount of R50, 000.00 was due and payable to the first respondent and agreed to make payment of the said amount before the hearing of the final order. This was made an order of Court.
>
> 23.3 Having heard the parties at the hearing of the final order of sequestration by Fortuin J, the Court was informed that the first applicant failed to make such payment as was ordered by Binns-Ward, J. The first applicant could not give a plausible answer for his failure. Consequently, the first applicant's insolvency and his ability to pay his debts were duly heard and argued before Fortuin, J.

C Discussion

[24] It is the first and second applicants' assertion that this application was brought in terms of Section 149(2) of the Insolvency Act and the common law. Section 149(2) states that:

> " *The court may rescind or vary an order made by it under the provisions of this Act*"

[25] The common law stipulates that an applicant for rescission of a judgment taken against him by default, must show "sufficient cause"[6] and ought to establish that –

25.1 there is a reasonable and acceptable explanation for his default;

25.2 the application is made *bona fide*;

25.3 the applicant has a *bona fide* defence to the claim which *prima facie* has some prospect of success.

[26] It appears that the first applicants' lamentations that the sequestration order was taken in default was a bit downplayed by the first respondent on the basis that it would not serve any purpose for him to file answering affidavit in the sequestration application as those issues were already canvassed in their settlement negotiations. The first applicant's Counsel in so arguing, failed to appreciate that these were motion proceedings, the first applicant and the respondents' cases have to be presented in affidavit form – following the requisite three sets of affidavits. Whatever came to the knowledge and / or attention of the parties during such settlement negotiations was without prejudice to the first applicants' rights to defend the sequestration application. At no stage did the first applicant waive and or renounce his right to formally oppose the sequestration application. In my view, it is inappropriate for the first respondent to state that the opposing affidavits of the first applicant would have served no purpose.

[27] Further, the informal inquiry that was made by Binns-Ward J and later on Fortuin J in an open court cannot be elevated to the first applicants having made submissions on the merits and / or his ability to pay the debt. Submissions are normally made by a party based on the opposing papers filed on record. In this scenario, no opposing papers were filed. What court be gleaned from the court file is that the rule was extended for the first respondent to pay the undisputed R50 000.00. There is no mention of submissions that were made by the first applicant. Despite this be the case, the first respondent disputed that he agreed to pay the R50 000.00. According to him, he disputed the said R50 000.00 and stated that his calculations were that he owed at least R32 000.00. The fact that he did not pay the R50 000.00

[6] De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042F – 1043C; Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)

was because it remained in dispute. With regard to Fortuin J's order, nothing could be gathered from the court file as to what was argued, let alone a court order that was made.

[28] The first applicant argued that this Court must exercise its discretionary power to rescind a sequestration order if the application itself was defective (e.g. because the debtor's estate had already been sequestrated or was *prima facie* solvent[7]). It was the first applicant's submission that the first applicants' primary focus was to have the sequestration order rescinded on the basis that his estate was factually solvent.

[29] The first respondent did not dispute the fact that the first applicant is solvent. It took issue with the fact that the applicants had an opportunity to rehearse the sequestration application proceedings and further that no values of the first applicant's assets were provided by the first applicant. In the circumstances where the first respondent claimed R155 000.00 (which on its own is disputed), it is incomprehensible as to how the final sequestration order was granted as his assets exceeded his liabilities. The first applicant contended that in the first respondent's annexures V1 to SARAF1 of the respondent's replying affidavit, it is abundantly clear that the first applicant's estate was worth in excess of R1 550 763.54 at the time of the sequestration order was granted. On the first respondent's own valuations, the sale of the immovable property would have generated enough funds to cover for its claim.

[30] The first applicant noted that the first respondent in the sequestration application, convincingly omitted to mention that the first applicant had consented to have an order which would allow for the immovable property to be attached and sold in execution, should he breach the settlement agreement. It was submitted that, had the Court been made aware that there was in fact enough equity to cover the first respondent's claim, the sequestration order would not have been granted. In the circumstances, the Court may set aside an order of sequestration if it is satisfied that there has been an abuse of its process. This Court tend to agree with the applicants

[7] Ex Parte Mavromati 1948 (3) SA 886 (W) at 890

that the route to sequestration of the first applicant's estate was meant to embarrass and exclude him from participation in the title scheme. In essence, the sequestration order was meant to limit his right in every day's life and inadvertently that of the second respondent. The fact that the terms of the settlement agreement were not put before Court in the sequestration proceedings give credence to the fact that the first respondent had ulterior motives.

[31] Even so, was it competent for that Court to grant a sequestration order, even though the available facts from the first respondent (applicant in the sequestration application) supported the fact that the first applicant's estate was in fact solvent. On the basis of the first applicants' unit alone in the title scheme, which is worth R760 000, the disputed R155 000 would have been satisfied, should the first respondent put the true facts to the attention of the Court and / or employed the provisions of the settlement agreement. The facts in this matter are indeed strikingly the same as that of *Zaid (supra).* The first respondent systematically misled the sequestration court about the litigation route the parties have embarked upon.

[32] Should the first applicant been legally represented during these proceedings, he would in my view successfully opposed the granting of the sequestration order as he has a *bona fide* defence to the sequestration application.

[33] Despite the application being brought in terms of Section 149(2) of the Insolvency Act and the common law, this Court vests with the discretion to grant or refuse the rescission application. Such discretion must be exercised judicially and in line with the prescripts of Section 173 of the Constitution. In circumstances where the correct facts were not properly ventilated before the sequestration court, it follows that Section 150 is incompetent. The principles applicable to applications in terms of Section 149(2) are stipulated in *Storti v Nugent and Others*[8] are as follows:

33.1 The Court's discretionary power conferred by this section is not limited to rescission on common law grounds;

33.2 Unusual or special or exceptional circumstances must exist to justify such relief;

[8] 2001 (3) SA 783 (W) at 806 D-G

33.3 The section cannot be invoked to obtain a rehearing of the merits of the sequestration proceedings;

33.4 Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for a common – law rescission;

33.5 Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship to be confined to the ordinary rehabilitation machinery, or the circumstances should be very exceptional;

33.6 A court will not exercise its discretion in favour of such an application if undesirable consequences would follow.

[34] In my judgment, the first applicant has shown good cause for the order to be rescinded. The applicants' application cannot be characterised as malicious and certainly a reasonable explanation for the default has been made. This application is not to delay the applicant's claim which has been proved to be negligible as compared to the first applicant's entire estate. Should the first applicant be afforded an opportunity to defend his case, he will be able to demonstrate that *prima facie* he has good prospects of success. Most importantly, the first respondent failed to disclose the previous terms of the settlement agreement that would have proved to have catered for the first respondent's claim and there would have been no need for the sequestration order. The contention that the first applicant made his case on the replying affidavit is unfounded as the first applicant always made his case known in the founding affidavit. What the replying affidavit did was to bolster the applicants' case that was already in the founding affidavit. These are the relevant factors which this Court needed to take into account in exercising its discretionary power in this application.

[35] Further, the rescission of judgment under common law, requires that 'sufficient cause' must be shown for the order to be granted. Miller JA in *Chetty (supra)*[9] described 'sufficient cause' as having three essential elements that:

(i) that the party seeking relief must present a reasonable and acceptable explanation;

[9] At 765 A-C; Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)

(ii) that the application is made *bona fide;*

(iii) that on the merits such party has a *bona fide* defence which *prima facie* carries some prospects of success.

[36] Either way, it is my considered opinion that, the first applicant has demonstrated sufficient and triable case that exceptional circumstances exist to justify such relief; in the circumstances where the proper merits were not put before court, this is not a rehearing of the matter; the facts put before this Court suggest that the rescission order should be granted; a sequestration order would place undue hardship both in the applicants personal and professional lives; in circumstances where no act of insolvency has been committed by the first applicant, a sequestration order is undesirable; *prima facie* the applicants have prospects of success. In my view, there are no justifiable reasons to refuse the rescission order.

[37] In the result, the following order is made:

37.1 The sequestration order granted against the first applicant on 12 January 2021 is rescinded and set aside;

37.2 The first and second applicant are ordered to file their answering papers within ten (10) court days of this order;

37.3 The first respondent is ordered to pay the costs of this application.

MANTAME J
WESTERN CAPE HIGH COURT

Coram	**:**	**B P MANTAME, J**
Judgment by	**:**	**B P MANTAME, J**
FOR APPLICANTS	**:**	**ADV Z HAFFEJEE** **076 433 1502** **zia.haffejee@capebar.co.za**
Instructed by	**:**	**Borchards Attorneys** **021 824 8542**
FOR RESPONDENTS	**:**	**ADV E J SMIT**

		021 422 5948 **herbertraub1@gmail.com**
Instructed by	**:**	**Gerrit Truter Inc** **021 897 1525**
Date (s) of Hearing	**:**	**02 June 2022**
Judgment delivered on	**:**	**06 June 2022**