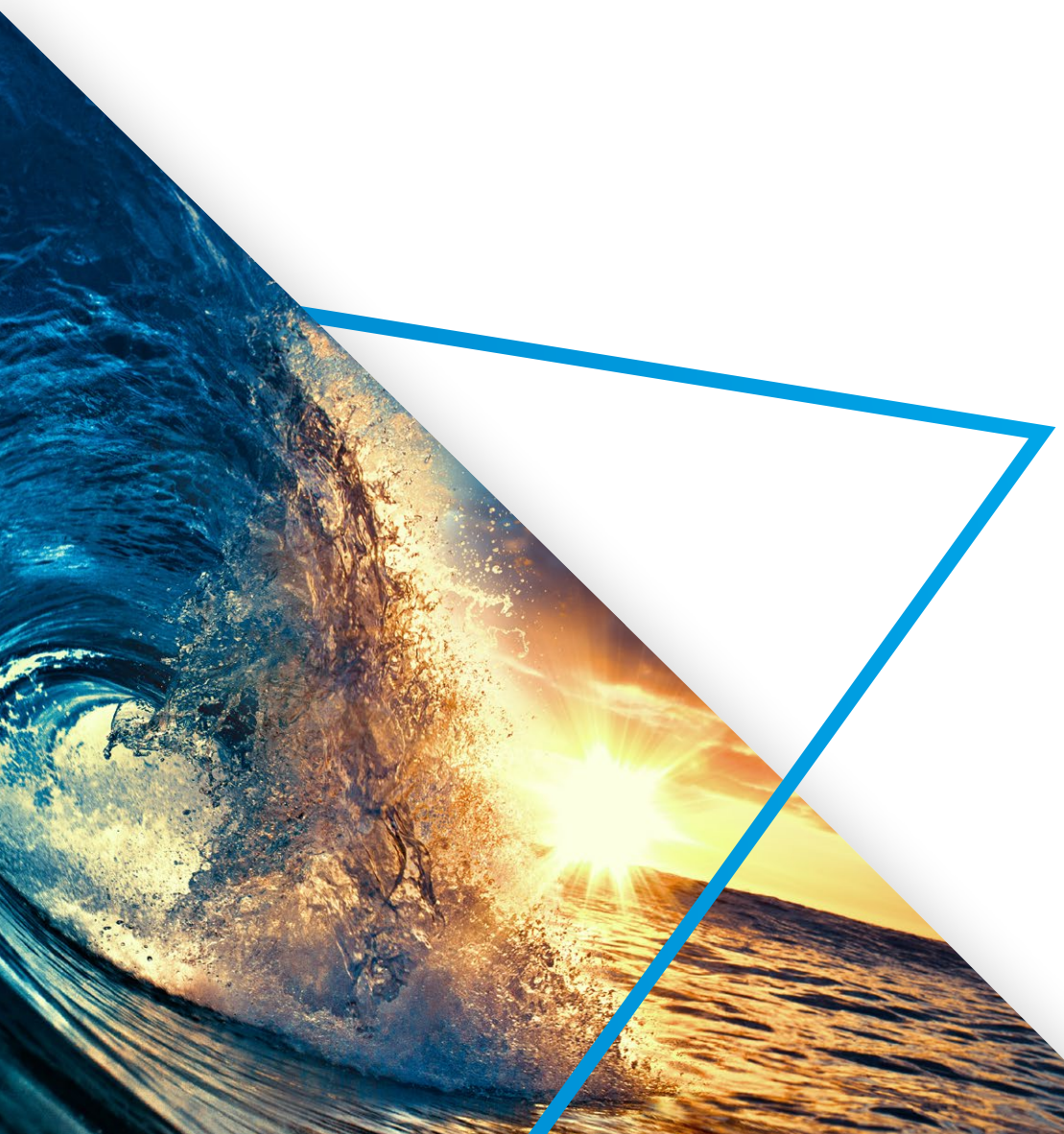
Dispute Resolution

ALERT | 10 June 2025



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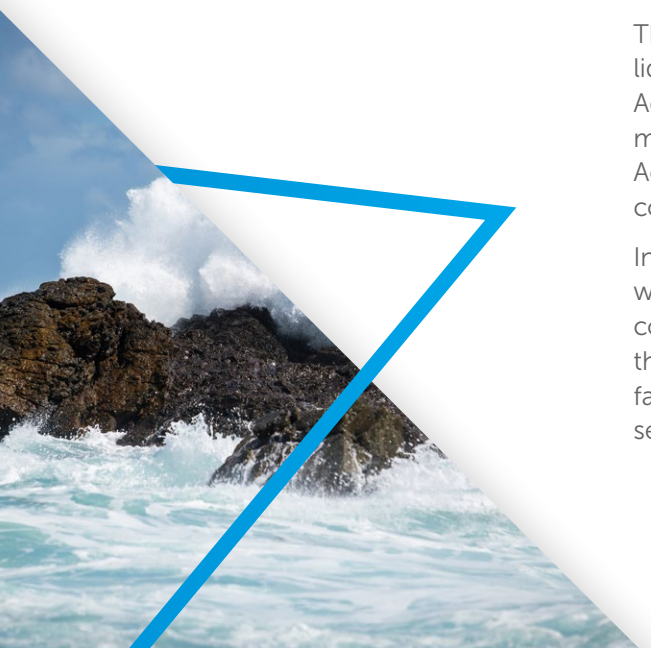

The recent High Court judgment in *Victor N.O and Others v Liebenberg* ZAGPPHC 116 (31 January 2025) provides creditors, intent on launching compulsory sequestration proceedings, key points to consider before doing so.

In Victor, Mr Louis Petrus Liebenberg, the respondent, was one of the two directors of Tariomix (Pty) Ltd t/a Forever Diamonds and Gold, which was placed in final liquidation on 12 April 2024. The applicants, appointed as joint provisional liquidators of Tariomix, sought the sequestration of Liebenberg, alleging that he misappropriated company funds and was therefore indebted to the insolvent estate. The claimed indebtedness amounted to R200,153,637.04.

Liebenberg opposed the application, arguing that the debt was either non-existent, misinterpreted or prescribed. He contended that Tariomix was merely a financier in the diamond trade and not engaged in wrongdoing.

The court considered whether the applicants had a valid liquidated claim under section 9(1) of the Insolvency Act 24 of 1936 (Insolvency Act). It held that prescription may be delayed under section 13(1)(e) of the Prescription Act 68 of 1969 (Prescription Act) when a debtor is a company director.

In coming to its decision, the court had to determine whether Liebenberg was factually insolvent or had committed an act of insolvency. The evidence showed that his liabilities far exceeded his assets (i.e. indicating factual insolvency), and thus the court granted a provisional sequestration order against Liebenberg's estate.

This alert unpacks and sheds light on various noteworthy aspects relevant to the application of compulsory sequestration proceedings as decided in Victor, including whether a bill of costs may constitute a liquidated claim to afford an applicant *locus standi* to launch sequestration proceedings; whether statements or utterances, such as social media posts, by a debtor regarding existence of assets, can, without more, establish liability on the part of the debtor and be deemed a liquidated claim to afford an applicant *locus standi* to apply for sequestration; and whether the tender of payment of a bill of costs constitutes an act of insolvency.

Is a bill of costs a liquidated claim?

First, for a court to grant a provisional sequestration order in terms of section 9(1) of the Insolvency Act, the court ought to be satisfied that, on a prima facie basis (i) the applicant is a creditor who has a **liquidated claim** of not less than R100 against the respondent, as a debtor; (ii) the respondent-debtor is i**nsolvent or has committed an act of insolvency**; and (iii) there is reason to believe that sequestration will be to the **advantage of the creditors** of the debtor.

Thus, an untaxed bill of costs or costs order may constitute a liquidated claim to afford an applicant *locus standi* to launch sequestration proceedings provided that the bill of costs is taxed or agreed as at the hearing of the application for sequestration. This means that an **applicant may rely, for purposes of bringing a sequestration application, on a liquidated claim which did not exist at the time of launching the application.** Of course, there is the risk for an applicant who relies solely on this type of claim to

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pursue a sequestration application in that the hearing may arrive sooner than the consummation of the debt into a liquidated claim. However, the possibility of risk does not detract from the fact that a creditor may have a good reason to launch the application sooner rather than later, for example, where there is threat of dissipation of assets by a clearly insolvent debtor.

Social media utterances

It is interesting to note regarding standing and the use of social media that the court held that statements or utterances such as social media posts by a debtor regarding the existence (or lack thereof) of certain assets, without more, cannot serve as a basis to establish a debt equating to a liquidated claim for the purposes of affording an applicant *locus standi* to apply for sequestration. However, the posts may be relevant when urging the court to consider a possible advantage to creditors which may result from the discovery or recovery of assets through investigation by the liquidators.

Tendering payment: An act of insolvency?

Section 8 of the Insolvency Act provides for acts of insolvency. Acts of insolvency are not linked to factual insolvency of a debtor but represent another basis for seeking sequestration of a debtor's estate. Relevant to this alert are subsections (c) and (e) which read as follows: (c) "*if [the debtor] makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another*"; and (e) "*if [the debtor] makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts.*"

The court in *Victor* held that **the tender of payment of a bill of costs** (in fact, the tender of payment of **any** debt) **would constitute a voidable preference in terms of section 8(c)**. The court emphasised that it ought to be borne in mind that sequestration is not an enforcement or demand for payment of a particular debt, but a collective debt-collection mechanism.

Furthermore, the court held that **a debtor does not commit an act of insolvency** envisaged in section 8(e) of the Insolvency Act by **merely making an arrangement to pay their creditors the full amount** even where the full payment is partially postponed or an extension of time to pay is granted. The act of insolvency within the subsection involves the **release** of the debtor either "*wholly or partially from his debts*". The ability of a debtor to pay off their debts should not lead the court to consider any arrangement regarding payment entered into by a debtor with their creditor(s) to equate to an act of insolvency when there is no evidence of the debtor arranging to be fully or partially released from their debt(s), but arranging to pay the debt(s) in full. Otherwise, a mere commercial arrangement or even court-sanctioned settlement between persons not near the realm of insolvency would be discouraged or hampered.

Conclusion

This is relevant for any creditor seeking to establish their *locus standi* or to satisfy the various requirements before they can successfully launch an application for the sequestration of their debtor.

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