

Dispute Resolution

ALERT | 28 October 2025



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SOUTH AFRICA

The consequences of selective payments to creditors by insolvents



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The consequences of selective payments to creditors by insolvents

In sequestration proceedings, achieving equity for the body of creditors must prevail over the interests of a select few. This was the central point in *Astra Constantine Inc v Jones and Another* (25801/2024) [2025] ZAWCHC 238.

This judgment is significant as it highlights how the general body of creditors can be prejudiced by an insolvent favouring one creditor over others in an attempt to avoid payment to the larger creditor cohort, and how provisional sequestration can be a mechanism to provide some hope to that cohort.

Factual background

In this case, Astra Constantine Inc (Astra) brought an application for the provisional sequestration of Mr Alan George Jones, the first respondent. The catalyst for this application was a judgment debt granted on 22 November 2023 in favour of Astra against Jones for R920,500.

Prior to the judgment, Jones transferred half of his ownership in an immovable property to his ex-wife without receiving any payment in return.

After the judgment, Jones sold his remaining immovable property for R12 million. From the proceeds, he settled an outstanding mortgage with Investec for R3 million, which left him with a surplus of R9 million.

In addition to his debt to Astra, Jones was indebted to the South African Revenue Service (SARS) to the amount of R3 million and had judgment debt with two other creditors totalling over R770,000.

On 16 October 2024, Jones declared in a sworn statement that he had no immovable property registered in his name.

On 4 November 2024, the Sheriff attempted to execute a writ of attachment and demanded payment from Jones of the R920,500 owed to Astra. Jones asserted that he had no money, property, or disposable assets that could satisfy the debt. The Sheriff was unable to find disposable property to satisfy the writ, and, given Jones' affidavit that he owned no immovable property, the Sheriff issued a nulla bona return.

Consequently, Astra brought an application for the provisional sequestration of Jones and his wife, arguing that the selective disposal of assets by Jones favoured only select creditors. Astra argued that to prevent other creditors from being disadvantaged, Jones had to be placed under provisional sequestration and his estate investigated.

Provisional sequestration

As per the requirements of the Insolvency Act 24 of 1936 (Act), the court reiterated that Astra had to establish that (i) it had a liquidated claim against Jones; (ii) Jones had committed an act of insolvency; and (iii) there would be an advantage to creditors in the sequestration of Jones' estate.

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Liquidated claim

The court found that Astra had a liquidated claim by virtue of its judgment debt.

Replying on *Pheko and Others v Ekurhuleni City* [2015] (5) SA 600 (CC), the court confirmed that:

"[D]ecisions issued by a court are binding on all individuals to whom they apply and no one, [sic] may interfere with the functioning of the courts in any manner. It follows that disobedience towards court orders or decisions risks rendering our courts impotent, and judicial authority a mere mockery."

Further, the court applied the test created in *Badenhorst v Northen Construction Enterprises (Pty) Ltd* [1956] (2) SA 346 (T), which provides that that if the indebtedness of the respondent has been shown on a balance of probabilities then the onus falls on that respondent to show the debt is "contested on genuine or bona fide grounds".

The court found that the first respondent had failed to provide any plausible explanation for his failure to satisfy the debt and had not made any attempts to make any payments towards it. Astra had a liquid claim with no pending litigation challenging it. The court concluded that a liquidated claim had been proven on a balance of probabilities and that Jones was bound by the judgment.

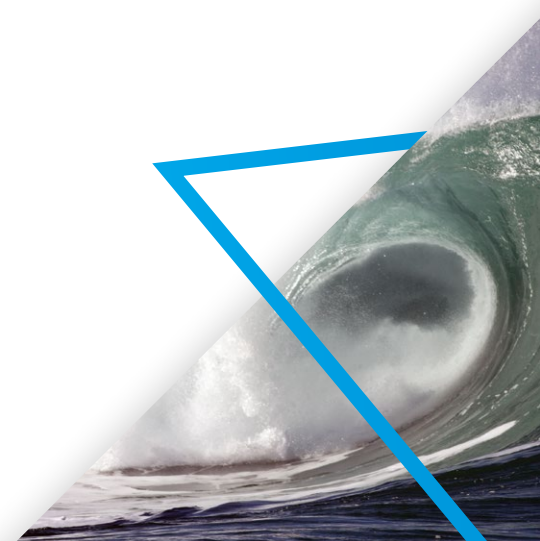
Act of insolvency

The court further found that Jones committed an act of insolvency when he stated that he had no money, property or disposable assets which could satisfy his debt. In light of his affidavit and the nulla bona return issued by the Sheriff, the court held that it was common cause that Jones had committed an act of insolvency.

Advantage to creditors

Jones argued that placing him under provisional sequestration would be of no advantage to creditors as he had no realisable assets.

Again, the court was not convinced, and stated that his actions were not consistent with those of a person who is factually insolvent. There was over R9 million from the sale of his immovable property that was unaccounted for. Furthermore, his selective transactions of donating property for no value to his then wife and the payment to Investec and his offer of R3 million to SARS on the eve of his sequestration application made it necessary that his financial affairs be investigated for the benefit of the general body of creditors.



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By applying *Meskin & Co v Friedman* [1948] (2) SA 555 (W) at 559 the court confirmed that the right to investigate a sequestrated estate is not in itself an advantage but:

"[A]s a possible means of securing ultimate material benefit for the creditors ... It is not necessary to prove that the insolvent has any assets. Even if there is none at all, but there are reasons for thinking that as a result of the enquiry under the [Insolvency] Act some may be revealed or recovered for the benefit of creditors, that is sufficient".

The court in this case concluded that placing Jones under provisional sequestration would allow for an investigation into his financial affairs, which would be the best way to ensure an equitable material benefit for the general body of his creditors.

Conclusion

Placing an insolvent under provisional sequestration may be beneficial in certain circumstances. It is important to remember that creditors are not left destitute where a debtor seeks to manipulate and avoid their obligations to certain creditors by seemingly depleting their estates of assets and only advantaging select creditors. This judgment illustrates the courts' no-nonsense attitude towards such behaviour and should serve as a warning to recalcitrant debtors.

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