

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No:38645/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
28 October 2024

In the matter between:

EDUCATION AND TRAINING UNIT NPC

Applicant

and

EDWARD MWANANDIMAI

Respondent

(Zimbabwean Passport No: E[...])

JUDGMENT

SK HASSIM J

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

[2] The threshold which the applicant must overcome at this stage is contained in section 10 of the Insolvency Act, Act No 24 of 1936 ("the Act"). The applicant must establish that *prima facie* (i) it has a liquidated claim of not less than R100.00; (ii) reason to believe that the respondent has committed an act of insolvency contemplated in section 8 of the Act or is insolvent; and (iii) there is reason to believe that it will be to the advantage of the respondent's creditors if his estate is sequestrated.

[3] Even though a creditor does not establish the precise value of the debt, provided it establishes on a prima facie basis a liquidated debt of at least R100.00 its *locus standi* would be established.

[4] Section 10 confers upon a court the discretion to refuse a sequestration order upon the consideration of all the facts and circumstances of a particular case even if the requirements of section 10 are satisfied.¹

[5] The applicant avers that (i) the respondent owes to it R17 104 921.64. This is in the founding affidavit. In a reconciliation prepared by the applicant and handed to the respondent after 9 July 2021 (“the reconciliation”), the amount owed is reflected as R11 028 039.76. The discrepancy is not explained; (ii) the respondent has committed the act of insolvency contemplated in section 8(c), (e), and (g); and (iii) it will be to the advantage of the respondent’s creditors if his estate is sequestrated.

[6] The applicant has applied for leave to deliver a supplementary founding affidavit to include the averment that the applicant holds no security for the claim. There was no opposition to the application. Leave is granted to the applicant. However, there is no reason why the costs should be borne by the respondent’s estate. The applicant seeks the indulgence. It should pay the costs of the application for leave to deliver a supplementary founding affidavit.

[7] The respondent denies that (i) he is indebted to the applicant; (ii) he has committed an act of insolvency; and (iii) it is to the benefit of his creditors that his estate is sequestrated. The high-water mark on the status of his financial position (solvency) is a statement that he “believes” he is solvent. The respondent contended in the answering affidavit that several averments in the applicant’s affidavits fall to be struck out because they are irrelevant to the sequestration application, are vexatious, and scurrilous, and in some cases defamatory. In the case of the replying affidavit the respondent additionally complains that some of the

¹ Julie Whyte Dresses (Pty) Ltd v Whitehead 1970 (3) S A 218 (D) 219.

averments constitute new matter. The respondent applies for the striking out of averments in the founding and replying affidavits. I will return to this.

The circumstances giving rise to the acknowledgement of debt

[8] The respondent was employed by the applicant as an accountant from 1 July 2014 to 31 May 2020 when he resigned. After his resignation, the applicant discovered that during the respondent's employment he had misappropriated large sums of money. On 11 September 2020, the respondent signed an acknowledgement of debt ("AoD") admitting that he had stolen R6 797 715.60. He repaid this debt acknowledged by him. However, the amount stolen exceeded the debt admitted in the AoD. According to the founding affidavit the respondent owes to it R17 104 921.64. This is over and above the R6 797 715.60 and after the payment of R7 100 000.00 by the respondent. Against this, the reconciliation depicts the amount owing to be R11 028 039.76. This is over and above the amount the respondent had admitted owing on 11 September 2020 and after the payment of R7 100 000.00. The debt which the applicant asserts, whether R17 104 921.64 or R11 028 039.76, is the balance of the money stolen after the debt acknowledged in the AoD was paid.

The origin of the debt

[9] The respondent's access to the applicant's internet banking profile was limited to viewing the bank account. He was not given access, nor authorised, to transact on the account. However, he seems to have misled the applicant's staff into impermissibly granting him wider access to the internet banking profile to transact on the account and upload payments.

[10] The respondent perpetrated the theft by replacing the bank account number of legitimate creditors who had been uploaded as payees (or beneficiaries) on the applicant's online banking platform with either his personal bank account number, or that of his company, Lopdale Services and Investments (Pty) Ltd. The payee's name was not altered, only the bank account number was with the result that payments due to the applicant's legitimate creditors were not paid into the bank account belonging to the creditor but into a bank account belonging either to the respondent

or his company. This method was used amongst others to misappropriate for himself money which should have been paid to SARS for instance.

[11] The applicant's initial investigations had revealed that the respondent had misappropriated more than R17 million. However, the entire amount had not been verified when the AoD was signed on 11 September 2020. Only R6 797 715.60 had been verified as having been misappropriated. It was this verified amount which the respondent admitted on 11 September 2020 as owing by him. He also admitted amongst others that the capital debt was R6 797 715.60 and that he had stolen more than what was recorded as the capital debt.² It was also recorded in the AoD that the respondent had already repaid some of the money stolen. Additionally, that the respondent could at any time provide documentary evidence to show that the capital debt as at the date of the signature of the acknowledgment of debt was less than R6 797 715.60.

[12] It is common cause that the last payment made by the respondent was in June 2021.

[13] After the AoD was signed, the capital amount paid, and following further investigations to establish the extent of the theft, the applicant prepared a document, which is described as a "reconciliation" in the papers.³ It shows that on 7 July 2021 the respondent owed R10 313 562.10. However, after adjustments for further fraudulent transactions discovered, as well as the amounts due to SARS including additional tax, amounts which were verified to have been legitimately paid, and the payment of R7 100 000.00, the amount due to the applicant was R11 028 039.76. The reconciliation is the subject of the letter dated 6 September 2021 ("the September 2021 letter") from the respondent's attorney to the applicant. The letter is attached to the founding affidavit and the reconciliation to the answering affidavit.

[14] There is a discrepancy between the amount reflected in the founding affidavit to be owed and that reflected in the reconciliation. However, the parties' counsel did

² The respondent admitted that "he stole several million rand from the Creditor, the total amount stolen being in excess of the Capital Debt."

³ Annexure "B" to the answering affidavit.

not point this out in argument. The discrepancy has no bearing on the application because the applicant at this stage has to overcome the hurdle of *prima facie* establishing that it is owed R100.00.

[15] Based on the *dictum* in Badenhorst v Northern Construction Enterprises (Pty) Ltd⁴ the respondent's counsel argued that insolvency proceedings are inappropriate because the respondent disputes the indebtedness on *bona fide* and reasonable grounds. But the respondent has not asserted that he had not stolen more than the R6 797 715.60 which he admitted in the AoD to have stolen. In my view the existence of a debt has not been disputed, let alone disputed on *bona fide* and reasonable grounds. The dispute, if any, turns on the extent of the indebtedness. On the evidence, the respondent admitted in the September 2021 letter that R1 777 000.00 was owed to the applicant. In a letter dated 11 October 2021 ("the October 2021 letter") the respondent undertook to pay R10 907 928.90 over 72 months. The respondent submits that the letters are inadmissible in evidence because the admissions are contained in letters marked "without prejudice" by his attorney.

The striking out application

[16] The applicant applies to strike out averments in the founding affidavit relating to the theft and the manner in which it was carried out by the respondent, as well as the averments relating to the debt owed to a creditor, Mr Pillay, and his application to sequester the respondent's estate, on the basis that the averments are scandalous, vexatious, defamatory of the respondent, and irrelevant to an application for sequestration. The applicant argued that the application to strike out should be heard when the final sequestration order is sought. I am not inclined to adopt this approach because it would mean that I have decided this application on what may turn out at a later stage to be inadmissible evidence. Sequestration affects the status of a person, and the consequences are drastic. It will be prejudicial to the respondent if the application to strike out were to stand over. I will therefore consider the respondent's striking out application.

[17] The respondent admitted stealing several millions from the applicant and that he had stolen more than R6 797 715.60. In the circumstances, the complaint that the averments relating to the theft are scandalous, vexatious and defamatory, in my view, is misguided. The averments sought to be struck out are relevant to how the debt arose, what acts of insolvency were committed, how they were committed as well as why the respondent's creditors will benefit from the sequestration of his estate.

[18] The applicant also applies for averments in the replying affidavit to be struck out as being new "matter" in reply. The application in my view is ill-founded. The averments in the replying affidavit are in response to the averments in the answering affidavit. Even if I have erred in this regard, if the respondent believed that he was prejudiced he could have applied for leave to address the averments in a further affidavit. No such leave was sought.

[19] I am not satisfied that a case for striking out has been made out. Consequently, the application to strike out is dismissed.

Has the debt been discharged by payment?

[20] The respondent's counsel argued that the applicant's *locus standi* is based on the admission of a debt of R6 797 715.60 in the AoD, and with that debt having been paid the applicant has not made out a case for the sequestration of the respondent's estate. She argued furthermore that the non-variation clause in the AoD precludes the applicant from claiming anything more than R6 797 715.60. I disagree.

[21] The applicant's case is not that the respondent has not paid the R6 797 715.60 which he admitted in the AoD to be owed. Its case is that over and above the R6 797 715.60, the respondent owes to it a further R17 104 921.64 (or based on the reconciliation R11 028 039.76) which he had stolen. The applicant had consistently maintained that more than R17 million had been misappropriated. The founding affidavit explains why the AoD was limited to R6 797 715.60. The initial investigations had revealed that the respondent had misappropriated more than R17 million. However, by 11 September 2020 when the AoD was signed, the applicant had been able to verify and confirm the misappropriation of only R6 797 715.60. The

respondent signed the AoD when the evidence to support the theft of R6 797 715.60 was presented to him. This is why the AoD was limited to R6 797 715.60. In my view this explanation is consistent with paragraph 4.1 of the AoD which records that the respondent had admitted that he had stolen more than R6 797 715. 60. Significantly, the parties had not agreed that the AoD was in full and final settlement of any claim that the applicant may have against the respondent. The result being that the payment of the acknowledged debt, discharged only that debt. As far as the non-variation clause is concerned, my view is that it does not assist the respondent. The claim for the balance of the money misappropriated by the respondent is not a variation of the terms of the AoD, or the debt admitted therein. The amount recorded in the AoD is the amount which the applicant had by 11 September 2020 verified and confirmed as having been misappropriated. The amount over and above R6 797 715.60 was verified and confirmed after the AoD had been signed. The respondent has refused to sign a further AoD even though the amount which the applicant avers is owed, has been verified by the bank.

Has the respondent admitted the debt and if so, is the admission protected by privilege?

[22] The calculation of the total amount stolen by the respondent is depicted in the reconciliation to have been as follows: -

	R17 688 038.90 ⁵
Plus:	R321 890.00 ⁶
Plus:	R118 110.86 ⁷ :
Less:	<u>R7 100 000.00 ⁸</u>
Amount owed:	<u>R11 028 039.80 ⁹</u>

⁵ The amount should be R17 686 038.90 which is the value in the first line item on the reconciliation (annexure B") at CL: 21-43.

⁶ Described on the reconciliation as "additional fraud" is the total of R29 640.00, R91 200.00, R112 800.00 and R88 250.00

⁷ Described on the reconciliation as "Additional transaction identified. Date 2020/3/27 SARS additional tax"

⁸ The total amount paid by the respondent.

⁹ Due to the error noted in fn 5 above, the amount owed should have been reflected as R11 026 039.80.

[23] The R11 028 039.80 includes R6 242 558.21 which the respondent maintained he had paid to SARS on the applicant's behalf. (This amount is described on the reconciliation as an amount "to be verified with SARS").

[24] The respondent's response to the reconciliation is contained in the September 2021 letter marked "without prejudice" from the respondent's attorneys to the applicant. This letter is referred to in paragraph 6.8 of the founding affidavit and attached thereto marked "RA8". The applicant relies on the letter to establish an admitted debt owed to it and the commission of an act of insolvency by the respondent. The respondent on the other hand contends that the letter is privileged.

[25] In paragraph 53 of the answering affidavit, which is a response to paragraph 6.8 of the founding affidavit, the respondent contends that the September letter had been an effort to settle "the issue" between the parties and the proposals therein were without prejudice, thereby suggesting that the letter was not admissible as evidence of a debt. However, the respondent does not apply to have paragraph 6.8, nor the September letter, struck out on the basis that the September 2021 letter embodies an offer in a genuine attempt at settlement and is therefore privileged.¹⁰

[26] In paragraph 39 of the answering affidavit the respondent contends that "most of the allegations in paragraph 6 of the founding affidavit are scandalous, vexatious and irrelevant" because they are defamatory of the respondent, they burden the papers and do not advance the applicant's case nor support the application for sequestration and consequently they fall to be struck out. However, it is not clear to me whether this attack is also directed at paragraph 6.8 of the founding affidavit. In paragraph 51.1 of the answering affidavit the respondent lists the subparagraphs of paragraph 6 which are the target of the attack¹¹. He avers that he had been advised that the allegations were irrelevant, scandalous and vexatious, "[did] not advance the Applicant's claim any further", nor did anything turn on them "as far as this application is concerned". He therefore elected not to respond to those averments (i.e., in paragraphs 6.3 to 6.6; 6.9 and 6.10; and 6.12 to 6.19). However, subparagraph 6.8 is not mentioned as a target of an application to strike out.

¹⁰ Lynn & Main Inc v Naidoo and Another 2006 (1) SA 59 (N) para [22].

¹¹ Paragraphs 6.3 to 6.6; 6.9 and 6.10; and 6.12 to 6.19 are specifically listed.

Furthermore, the respondent responded to subparagraph 6.8. Notwithstanding the respondent's failure to apply for paragraph 6.8 of the founding affidavit and the September letter to be struck out, it is evident to me, as was evident to the applicant's counsel, that the respondent sought to exclude from consideration paragraph 6.8 of the founding affidavit as well as the September letter.

[27] Whilst, as a general rule, negotiations between parties with a view to settle a dispute are protected from disclosure regardless of whether they are stipulated to be without prejudice,¹² the words "without prejudice" on their own are not decisive¹³ whether the document is protected from disclosure in litigation. In Jili v South African Eagle Insurance Co Ltd it was found –

"No conclusive legal significance attaches to the phrase 'without prejudice'. The mere fact that a communication carries the phrase does not *per se* confer upon it privilege against disclosure, for example where there exist no dispute between the parties or it does not form part of a genuine attempt at settlement... nor is a communication unadorned by that phrase always admissible in evidence, for it will be protected from disclosure if it forms part of settlement negotiations."¹⁴

[28] One of the exceptions is that an offer made even on a 'without prejudice' basis is admissible in evidence as an act of insolvency because where a party concedes insolvency, public policy dictates that such admissions of insolvency should not be protected in insolvency proceedings even if the concession was made on a privileged occasion.¹⁵ If the September letter constitutes an act of insolvency, then section 8 (g) is met.

[29] However, for the indebtedness acknowledged therein to be protected from disclosure it must have been written during negotiations undertaken with a view to a settlement of a dispute. Trollip JA dealt extensively with the topic of communications

¹² Absa Bank Ltd v Hammerle Group 2015 (5) SA 215 (SCA) para 13

¹³ Gcabashe v Nene 1975(3) SA 912 (D) at 914 E-F

¹⁴ 1995 (3) SA 269 (N) at 275B

¹⁵ 00Absa Bank Ltd v Hammerle Group para 13.

“without prejudice” in Naidoo v Marine & Trade Insurance Co Ltd ¹⁶. He referred to a statement by Lord Mansfield in the 18th century on offers to compromise litigation not being regarded as admissions of liability because “it must be permitted to men ‘to buy their peace’ without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether any thing or what is due.” ¹⁷

[30] He found that what the author of a letter subjectively intended or meant in writing the words “without prejudice” is irrelevant. Instead, to ascertain what a party’s intention was, an objective approach should ordinarily be adopted and the “the true inquiry is how a reasonable man in the recipient’s position would have read and understood [the correspondence]” ¹⁸. Additionally, that on the objective approach it is necessary to refer to the whole of the correspondence. ¹⁹ In this case, on the face of it, there was no correspondence preceding the September letter to consider.

The September 2021 letter

[31] The September letter was in response to the applicant’s computation of what the respondent owed after the payments made by him are deducted from the total amount stolen by him. It reads as follows:

“2. Instruction reveals that our client entered into an Acknowledgement of Debt (....AOD) with your company...

3. Instruction also reveals that after signing the AOD..., our client kept to the terms of the agreement of [sic] paying R6 797 715.60 (....). These payments were paid in full by our client.

4. In terms of paragraph 4.2 and 4.3 of the AOD signedthe paragraph stated clearly that both parties ‘agreed that our client had repaid part of the money back’ and our client ‘acknowledges the capital debt which he owes’.

¹⁶ 1978 (3) SA 666 (A)

¹⁷ Naidoo v Marine & Trade Insurance Co Ltd 674A-B.

¹⁸ Naidoo v Marine & Trade Insurance Co Ltd 675 B-C.

¹⁹ Naidoo v Marine & Trade Insurance Co Ltd 675 C-E.

5. According to the reconciliation statement sent to our client ...it is stated that the total amount our client owed, which was R17 686 038.90 in the reconciliation statement. It was also confirmed that our client had paid R7 100 000.00 and you confirmed our client paid SARS on your behalf of [sic] an amount of R6 242 558.21 which has brought the outstanding balance owed ... to R4 071 003.89. Attached hereto the reconciliation statement as 'Annexure A2'

6. In addition, there were three payments in dispute by [the applicant] which our client paid on behalf of [the applicant] and it does not reflect on the reconciliation statement as yet.

[The applicant] is yet to confirm these payments which are payments for:

- Surge Partners (R560 000.00)
 - IPSOS (R1 000 000.00)
 - IPSOS (R533 487.63)
- TOTAL: R2 093 487.63

Please find the attached proof of payment of the above payments hereto as 'Annexure A3'

7. Instruction also revealed that our client received a statement from [the applicant] called 'Eddy transaction list'. On the list our client dispute [sic] 5 transaction [sic] stated to be used by our client. Our client denied being liable with the following on the transaction list which are:

- ...

Total: R541,182.94

8. Lastly after deducting the above amounts from R4 071 003.89 outstanding and the reconciliation statement the total amount owed by our client to [the applicant] will be R1 777 000.00.

9. Our client is willing to settle the amount outstanding of R1 777 000.00. However, he can only afford an amount of R100 000.00 (one hundred thousand rand) monthly due to the Covid-19 pandemic and the current looting and unrest, which has affected our client [sic] business.

...”

[32] In the September 2021 letter the respondent's attorney claimed that certain amounts fell to be deducted from the amount of R17 686 038.90. The respondent, albeit through his attorney, did not dispute that the total amount misappropriated was R17 686 038.90. In my view the object of the letter was to show that the respondent did not owe R11 028 039.76 to the applicant as per the reconciliation, but rather R1 777 000.00. To this end the respondent's attorney deducted from R17 686 038.90 the following:

- (a) The total amount repaid by the respondent, namely R7 100 000.00.
- (b) An amount of R6 242 558.21 which the respondent claimed he had paid to SARS on the applicant's behalf which payment according to the respondent the applicant had confirmed.
- (c) Three payments totalling R2 093 487.63 by the respondent on behalf of the applicant which the applicant is to confirm.
- (d) An amount of R541 182.94 relating to five transactions on a list of transactions described as the “Eddy transaction list” received from the applicant for which the respondent disputes liability.

[33] There is nothing in the letter to indicate that the parties were engaged in negotiations, nor for that matter that the respondent agreed to pay R1 777 000.00 to avert or stop litigation. The agreement to pay R1 777 000.00 was not an offer of compromise, it was an amount which the respondent's attorney calculated to be owing to the applicant instead of the R11 028 039.76 calculated by the applicant.

The acknowledgment that R1 777 000.00 was owed to the applicant in my view is not protected from disclosure.

The 11 October 2021 letter

[34] The letter dated 11 October 2021 (“the October 2021 letter”), is seemingly a response to a letter from the applicant’s attorney²⁰ attaching an excel spreadsheet. The respondent’s attorney maintained in the letter that the respondent had made payments to SARS on the applicant’s behalf and “all the requested documents will be provided as soon as possible, [the respondent was] busy putting the documents together”. This letter too, is marked “without prejudice”. The letter reads as follows:

“The subject matter refers dated 3rd October 2021.

1. We acknowledge the [sic] receipt of your letter and excel sheet.
2. On instruction, our client still maintains the fact that payments were paid to SARS on behalf of [the applicant]. All the requested documents will be provided as soon as possible, our client is busy putting the documents together.
3. However, for the sake of moving forward pending the finalisation of the SARS issues, our client therefore propose [sic] settlement of the following [sic]:
 - 3.1 Payment of the amount of R10,907,928. 90 (ten million nine hundred and seven thousand nine hundred and twenty-eight rands and ninety cent) over 72 months. First payment will be 31st of January 2022. Kindly note that the settlement proposal should not be construed as an admission that our client is liable for not paying to SARS. But, for the purpose of avoiding back and forth which will cost both parties [sic] time.

²⁰ The respondent could have attached the letter from the applicant’s attorney to his attorney even though the applicant had not attached it to the founding affidavit.

3.2 once the SARS issues is [sic] resolved or sorted the settlement agreement will be reviewed.”

[35] The respondent admits a debt of R10 907 928. 90 less what he paid to SARS, if anything. The statement that he is unable to repay R10,907,928.90, other than in instalments over six years, constitutes an act of insolvency as contemplated in section 8(g) of the Act. Even if the admission of a debt of R10 907 928.90 is protected from disclosure, the act of insolvency is not.²¹

[36] Though the October letter is marked “without prejudice”, the respondent does not contend that it is protected from disclosure as was done with the September letter. Instead, he contends that paragraph 6.9 of the founding affidavit, which is the sub-paragraph where the applicant discussed the October 2021 letter, and other sub-paragraphs of paragraph 6 “are irrelevant, scandalous and vexatious and do not advance the Applicant’s claim any further”²². The respondent does not claim, as he did with the September 2021 letter, that “...any further proposed settlement or increase in the amount from the one contained in the acknowledgment of debt was done to settle the issue between [the respondent] and the applicant without prejudice, and to ensure that the matter [was] finalised as soon as possible. Such proposals were done without prejudice.”. In my view the respondent’s failure to deal with the October 2021 letter either means that the October 2021 letter was not to settle a dispute and therefore not privileged, or the respondent waived privilege.

[37] The offer in the October 2021 letter was to pay R10 907 928.90 over six years (72 months) with the first payment on 31 January 2022. There are three indications that the offer of R10 907 928.90 may have been an effort to settle the matter between the parties. Firstly, the respondent’s attorney did state that “for the sake of moving forward pending the finalisation of the SARS issues, [his client] therefore propose [sic] settlement of the following:...” Secondly, the express reference to a settlement proposal in the letter. Thirdly, the respondent’s attorney offered R10 907 928. 90 which is less than what the applicant reflected to be owing on the reconciliation. However, admissions which are unconnected with settlement

²¹ Cf Absa Bank Ltd v Hammerle Group at para 13.

²² Paragraph 51.1 and 51.2 of the answering affidavit.

negotiations are not protected by the without prejudice rule.²³ I am required by the dictum in Naidoo v Marine Trade Insurance Co Ltd to adopt an objective approach and examine “the whole of the relevant correspondence that passed between the parties” which in this case would be the reconciliation and the October 2021 letter. In this exercise I must bear in mind that the admission of a debt may be separable from the negotiation about settlement.²⁴ The respondent undertook to pay R10 907 928.90 over six years. However, “for the sake of moving forward pending the finalisation of the SARS issues” he agreed to pay R10 907 928.90 but did not want the payment to be seen as an acknowledgement that “[he] is liable for not paying to SARS.” This reservation probably arises from the applicant’s attempt to hold the respondent liable for the payment of penalties, interest and additional tax to SARS due to the respondent’s failure to pay SARS. I infer this from the note on the reconciliation that “SARS penalties and interest will not be removed as [they were] incurred because of the theft” and the inclusion in the amount owed to the applicant of an amount of R118 110.86 being additional tax payable to SARS. In my view that portion of the R10 907 928.90 stated to be owing which related to the amount owed or owing to SARS, was the subject of the compromise. The respondent does not assert that that amount is less than R100.00.

[38] Even if I have erred in my interpretation of the October 2021 letter, the applicant has *locus standi* to apply for the respondent’s sequestration. At best for the respondent, the admitted debt is R1 777 000.00 (based on the September 2021 letter) and at worst (based on the October 2021 letter) either R10 907 928.90 or the difference between R10 907 928.90 and the amount owed by the applicant to SARS.

[39] Even though neither the September 2021 letter, nor the October 2021 letter, state that the respondent cannot pay the debt, the inference arising from the request for time to pay the amounts referred to in the letter as well as the undertaking to pay the amount by way of instalments, is that the respondent is unable to pay the debt.²⁵ Both letters constitute an act of insolvency contemplated in section 8(g) of the Insolvency Act and are admissible in evidence. Even if the offer to pay

²³ Cf. KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd 2017 (6) SA 55 (SCA) para

26.

²⁴ Ibid

²⁵ Cf. Standard Bank of South Africa Ltd v Court 1993 (3) SA 286 (C) at 293 B-C.

R10 907 928.90 in the October 2021 letter is protected from disclosure, the offer to pay the debt over 72 months (6 years) constitutes an act of insolvency under section 8(g) and is not protected from disclosure.

[40] The respondent's reliance on MacKay v Cahj²⁶ to argue that a request for time to pay a debt does not constitute an act of insolvency, is misplaced. It was in the context of section 8(e) (and not section 8(g)) that it was found that the respondent's offer of 25 cents in the Rand subject to him being allowed an extension of time to the end of the year to pay the balance, did not amount to an arrangement for releasing him wholly or partially from his debts on the facts of that case, and did not constitute an act of insolvency.

[41] I am though not satisfied that the applicant has established that the respondent has committed an act of insolvency under section 8(e) of the Insolvency Act.

[42] However, an act of insolvency under section 8(c) has been established. The acknowledgment of debt signed in favour of a creditor, Mr Pillay on 18 October 2021, around six weeks after the September 2021 letter and one week after the October 2021 letter, read with the correspondence by the respondent to the creditor Mr Pillay establishes *prima facie* that the respondent had by 4 January 2022 paid at least R1 000 000.00 to Mr Pillay, and possibly even R1 750 000.00. The respondent does not claim that his estate was solvent when he made these payments. He denies having committed an act of insolvency under section 8(c) because it has not been established that he had disposed of property which had the effect of prejudicing or preferring creditors. He also asserts that the applicant had not specified what property had been disposed of nor the manner of the disposition. This is not correct. The applicant made a disposition of his property by paying at least R1 000 000.00 to Mr Pillay. The payment was made at a time when the respondent had indicated that he was unable to pay his debt of R1 777 000.00 to the applicant other than in instalments of R100 000.00 per month and that he needed 6 years to pay the amount offered in the October letter, namely R10 907 928.90. The payment of R1

²⁶ 1962 (4) SA 193 (O) at 206.

000 000.00 to Mr Pillay prejudiced the applicant and preferred Mr Pillay above the applicant.

[43] The applicant's case for insolvency in the founding affidavit is not factual insolvency but rather that the respondent has committed three acts of insolvency. The applicant lists the respondent's known assets and liabilities and lists the purchase price of two of the three immovable properties. The assets have not been valued. The respondent admits the assets but denies the liability to the applicant. The respondent is very coy about his financial position. He asserts that he "considers [himself] solvent" and avers that he owns several immovable properties as well as movable properties and having evaluated his "liquidity" he "believes" that he is "solvent enough to defray his debts albeit that with Pillay [he] made an arrangement to pay him on a monthly basis...". The respondent does not positively assert that he is solvent, nor does he set out the basis on which he considers himself solvent. The respondent knows what assets he owns and the debts he owes. His failure to disclose the value of his assets and liabilities leads to the inference that he is not solvent.

[44] Therefore, apart from the applicant having established at least *prima facie* that the respondent has committed an act of insolvency, I am satisfied that the applicant has *prima facie* established that the respondent is insolvent. In this regard the oft-quoted words of Innes CJ that the best proof of solvency is that a man pays his debts, are apt.²⁷

[45] It is common cause that the respondent stole several millions from the respondent. It appears from the papers that Mr Pillay lent Lopdale Energy (Pty) Ltd ("Lopdale") whose director and sole shareholder is the respondent, considerable sums of money which resulted in an acknowledgment of debt signed by the respondent admitting that he and Lopdale owed to Mr Pillay R18 750 000.00. The applicant submits that a fair and equitable distribution of the respondent's estate amongst his creditors by a trustee is to the advantage of the creditors. Furthermore, that an investigation by a trustee may uncover assets which can be liquidated to pay

²⁷

De Waardt v Andrew & Thienhaus Ltd 1907 TS 727 at 733

the respondent's debts, thereby benefitting his creditors. This in my view establishes *prima facie* an advantage to creditors.

[46] The applicant has established the requirements for an order sequestrating the respondent's estate provisionally. The respondent has advanced no reasons why the discretion conferred by section 10 of the Act should be exercised in his favour, and I cannot find any.

[47] In the circumstances I make the following order:

1. Leave is granted to the applicant to deliver the supplementary founding affidavit deposited on 22 May 2023.
2. The applicant must pay the costs of the application for leave to deliver a supplementary founding affidavit.
3. The respondent's application to strike out is dismissed.
4. The respondent's estate is placed under provisional sequestration.
5. A rule *nisi* is issued, calling upon the respondent and all interested parties to show cause, if any, on 29 November 2024, at 10h00 why:
 - 5.1. the respondent's estate should not be finally sequestrated; and
 - 5.2. the costs of the sequestration application, and the costs of the respondent's application to strike out should not be costs in the sequestration.
6. This order must be served as follows:
 - 6.1. by the Sheriff on the respondent personally.
 - 6.2. by the applicant's attorney on the South African Revenue Service, and the Master of the High Court.

- 6.3. the respondent's employees, if any,
- 6.4. the trade union or trade unions, if any, to which the respondent's employees, if any, belong.
- 6.5. publication in the *Government Gazette* and a daily newspaper circulating in Gauteng.
- 6.6. known creditors by registered mail.

S K HASSIM

Judge: Gauteng Division, Pretoria

Applicant's Counsel: Adv AD Theart-Hofmeyr

Respondent's Counsel Adv HL Kelaotswe

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 October 2024.