

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2025-034789

DATE: 2 May 2025

In the matter between:

S A SPORTSBOOK (PTY) LIMITED t/a YESPLAY

Applicant

and

K P

First Respondent

J P

Second Respondent

Neutral Citation: *SA Sportsbook t/a YesPlay v P and Another (2025-034789)*
[2025] ZAGPJHC --- (2 May 2025)

Coram: Adams J

Heard: 29 April 2025

Delivered: 2 May 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 2 May 2025.

Summary: Civil procedure – urgent application for provisional sequestration of respondents – demonstrated by respondents that the existence of the debt is disputed on *bona fide* and reasonable grounds – therefore, they have

successfully raised a complete defence to the sequestration application – this is fatal to applicant's cause –

'Without prejudice' correspondence generally inadmissible – admissible in sequestration applications if the debtor an 'unequivocal admission' of its liability to the creditor or 'admitted his/her insolvency' – if not, as *in casu*, such communications are privileged from disclosure as being between parties undertaken with a view to a settlement of their disputes –

Application to have struck portions of founding affidavit in terms of Uniform Rule of Court 6(15) – all of these allegations are averments and conclusions relating to 'without prejudice' and 'without admission of liability' settlement discussions between the parties – therefore, case made out by respondents to have those portions of the affidavit struck out – application granted –

Urgent application should also fail due to lack of urgency – any urgency self-created –

Urgent application struck from the roll for lack of urgency.

ORDER

- (1) The first and second respondents' interlocutory application dated 11 April 2025 to strike out certain portions of and certain annexures to the applicant's founding affidavit, succeeds and is hereby granted with costs.
 - (2) The applicant shall pay the first and second respondents' costs of the said interlocutory application, including the costs of Counsel on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.
 - (3) The applicant's urgent application be and is hereby struck from the urgent court roll for lack of urgency.
 - (4) The applicant shall pay the first and the second respondents' costs of this urgent application, such costs to include Counsel's charges on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.
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JUDGMENT

Adams J:

[1]. The applicant ('YesPlay') applies, on an urgent basis, for the provisional sequestration of the joint estate of the first and the second respondents, who are married to each other in community of property. YesPlay is an online betting operator, duly registered with and licensed by the Western Cape Gambling and Racing Board. The YesPlay platform offers a variety of means in terms of which its customers may place bets online. YesPlay customers can, by way of example, choose to place bets between *inter alia* casino games, sports betting or slots. The first respondent registered and created an account online with YesPlay on or about 24 April 2022 and the second respondent registered and created her account with YesPlay on 3 June 2024.

[2]. The applicant avers that the respondents are indebted to it in the amount of no less than R6 075 903.42, being the sum total of amounts they actually received as a result of a fraudulent exploitation of a system fault on its online betting platform. Following the discovery of the respondents' alleged fraudulent conduct, so it is contended by the applicants, the respondents, through their attorneys of record, made various full and final settlement offers in an attempt to be released from this debt. This constitutes an act of insolvency, so the contention continues, as contemplated in section 8(e) of the Insolvency Act 24 of 1936 ('the Insolvency Act'). Moreover, so the applicant alleges, the respondents have admitted their inability to repay this debt, which is also an act of insolvency, as contemplated in section 8(g) of the said Act. And they have disposed of their property which has or would have the effect of prejudicing their creditors, or of preferring one creditor above another, which action also constitutes an act of insolvency as contemplated in section 8(c) of the Act.

[3]. It may be apposite, at this juncture, to cite the aforesaid provisions of the Insolvency Act in full to place in context the issues in this urgent application. Sections 8(c), (e) and (g) and the other relevant provisions read as follows: -

'8 Acts of insolvency

A debtor commits an act of insolvency –

... ..

- (c) if he 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;
- (d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;
- (e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;

... ..

- (g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts;

... ..'

[4]. Section 9(1) and section 10 of the Insolvency Act provides as follows: -

‘9 Petition for sequestration of estate

- (1) A creditor ... who has a liquidated claim for not less than [R100] ... against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.

... ..

10 Provisional sequestration

If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* –

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may make an order sequestrating the estate of the debtor provisionally.’

[5]. The applicant's claim for the aforesaid sum is a claim for contractual damages based on an alleged breach of the ‘gambling agreement’ concluded between the parties, which incorporated expressly by reference the general terms and conditions to which the respondents bound themselves when they signed up on the YesPlay platform. Alternatively, so the applicant contends, the respondents were unjustly enriched in the said amount as a result of a *iustus error*.

[6]. The alleged fraudulent and unlawful conduct on the part of the respondents, and the breaches of contract, allegedly occurred during the period from May 2024 to August 2024, and it was in the form of the respondents taking advantage of an ‘unintended flaw’ in the so-called ‘Free Spins’ feature on the YesPlay platform.

[7]. The respondents deny, and have all along denied, any unlawful or fraudulent conduct as alleged by YesPlay. They maintain that, at all times, on their respective accounts, both of which accounts were verified by YesPlay, they engaged in a variety of betting games / online slot machines and did so in

accordance with the rules of said respective games and with the intention of gambling, in the hope of receiving a winning or winnings. They never defrauded, nor have they ever attempted to defraud YesPlay by abusing the 'flaw' in the platform. All they did, so the respondents contend, was to do what one does when gambling in the hope of winning more than one puts into a game.

[8]. The respondents' case is that the fact that YesPlay's system had an 'unintended flaw' was not known to them nor did they exploit the flaw. They simply engaged in standard gameplay on YesPlay's platform, winning and receiving payouts legitimately. At no point did they act outside normal user behaviour or deliberately manipulate the system. The platform's failure to prevent such occurrences, so the respondents contend, reflects on its own technical and operational controls rather than on any wrongdoing by the respondents. In sum, the respondents submit that they cannot be held responsible for a defect in the platform of the applicant, who is in fact the one that should take responsibility for the flaw and its consequences.

[9]. The respondents furthermore contend that the applicant's reliance on what is clearly 'without prejudice' communiques between the parties aimed at settling the dispute between them, is misplaced. Such correspondence, so the respondents' argument goes, is inadmissible and should be struck out. These 'without prejudice' communiques, in any event do not demonstrate that they, so the respondents argue, are factually insolvent nor that they have committed acts of insolvency. It simply evidences an attempt by the respondents – without in any way admitting any liability for any amounts owing to the applicant – to settle, by way of compromise, a dispute between the parties with a view to avoiding costly and time-consuming litigation.

[10]. In sum, the respondents oppose the sequestration application on the basis that their indebtedness to the applicant is reasonably disputed on *bona fide* grounds. The alleged indebtedness, so the respondents contend, is not based on the existence of a liquid, undisputed debt and a recognised creditor-debtor relationship. The respondents therefore argue, in conclusion on this

point, that the applicant has neither proven such a debt nor established the existence of any lawful claim against them.

[11]. Therefore, in issue in this opposed urgent sequestration application is whether the applicant has demonstrated that the respondents are undisputably indebted to it in the amount claimed. Put another way, the question to be considered by this Court is whether the respondents indebtedness to the applicant is reasonably disputed on *bona fide* grounds.

[12]. These issues are to be decided against the factual backdrop which are dealt with in the paragraphs which follow.

[13]. As I have already indicated *supra*, the respondents deny that they are indebted to the applicant in the amount claimed or in any sum whatsoever. They deny any fraudulent conduct on their part or that they acted in breach of the gambling agreement concluded between the parties.

[14]. The applicant contends that the total amount of the 'winnings' was not due to the respondents. This sum – whether received by fraud or in error or received in breach of the agreement or outside of the agreement altogether – falls to be repaid by the respondents.

[15]. In my view, the facts in the matter are not as clear cut as the applicant would have the Court believe. In that regard, it cannot, in my view, be said with any conviction that the version of the respondents that they were simply doing what one does when gambling and hoping to make some money in the process, can and should be rejected out of hand as being untenable and far-fetched. Far from it, it appears to me that there is a ring of truth to this claim in that the respondents' understanding of what was happening is the very definition of gambling. And once it is accepted that there is no indebtedness to the applicant by the respondents, which is not reasonably disputed on *bona fide* grounds, the rest of the applicant's case in this urgent application falls flat. That would include the applicant's case based on the alleged acts of insolvency relating to

the settling of the respondents' indebtedness the first respondent's father by the transfer of their immovable property to him. The point is that, if it is accepted that it has not been demonstrated that the respondents are indebted to the applicant for the sum in excess of R6 million, the transfer of the immovable property to the father cannot be said to be a voidable preference under section 29 of the Insolvency Act at a time when the respondents were insolvent. It was therefore not an act of insolvency under section 8(c).

[16]. As for the 'without prejudice' correspondence, which, according to the applicant, provides further evidence of the respondents preferring creditors, I find myself in agreement with the respondents' contention that these communiques are simply privileged 'without prejudice' missives aimed at settling disputes, which do not even begin to admit liability to the applicant of the amounts claimed by it. One needs to look only at the contents of these letters to understand that contextually and textually the intention of the respondents is not to make an admission of their liability to pay to the applicant the amounts claimed. Nor do these communications contain statements demonstrating that the respondents are unable to pay their debts.

[17]. As an example of the foregoing, a letter dated 22 October 2024 from the respondents' attorneys, Barter McKellar, to the attorneys for the applicants, in the relevant part reads as follows: -

- '(8) In addition to the above, it is important to note that [the respondents] do not have access to the total winnings, amounting to R6 075 903.42 (six million, seventy-five thousand, nine hundred and three rand and forty-two cents). [The respondents] have utilised a portion of these funds to settle debts and alleviate the significant financial pressures brought on by the current high cost of living crisis affecting most South Africans.
- (9) Keeping in line with the above sentiment, [the respondents] hereby offer the following revised settlement offer, in full and final settlement of any and all claims, *without prejudice and off the record*:
- (9.1) your client retains the Balances (as previously defined);

- (9.2) [the respondents] make a payment of R3 000 000 (three million rand) to [the applicant] in full and final settlement of any and all claims between the parties, paid as follows:
- (9.2.1) R2 000 000 (two million rand) paid on or before the close of business on 31 October 2024; and
 - (9.2.2) R1 000 000 (one million rand) paid by way of monthly instalments of R15 000 (fifteen thousand rand) per month starting on 30 November 2024;
- (9.3) the terms of such a settlement are reduced to writing between the parties.’
(Emphasis added).

[18]. The applicant contends that it is entitled to present the evidence relating to these ‘without prejudice’ communiques on the basis of *Absa Bank Ltd v Hammerle Group*¹, in which the Supreme Court of Appeal (per Mbha JA) held as follows at para 13:

‘[13] It is true that, as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a ‘without prejudice’ basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest. A *concurso creditorum* is created and the trading public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged. This is explained in the words of Van Schalkwyk J in *Absa Bank Ltd v Chopdat*, when he said:

“(A)s a matter of public policy, an act of insolvency should not always be afforded the same protection which the common law privilege accords to settlement negotiations.

¹ *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA).

A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. I would therefore be inclined to draw an analogy between the individual who seeks to protect from disclosure a criminal threat upon the basis of privilege and the debtor who objects to the disclosure of an act of insolvency on the same basis."

In the final analysis, the learned judge said at 1094F:

"In this case the respondent has admitted his insolvency. Public policy would require that such admission should not be precluded from these proceedings, even if made on a privileged occasion."

[14] Moreover, in this case *the unequivocal admissions of liability by the respondent* were not even made in the course of any negotiations, but in response to a letter of demand for payment of the arrear instalments due in terms of the loan agreement. The court a quo accordingly erred in granting the application to strike out reference to the respondent's admissions of liability.

[15] The further consequence of my finding *that the respondent unequivocally admitted its liability to the appellant of the amount claimed in the letter of 24 June 2011*, is that the plea of prescription cannot be sustained. This is because such admission would have interrupted the running of prescription, if any.' (Emphasis added)

[19]. The takeaway from this SCA authority, from which I have quoted extensively, is that in the 'without prejudice' correspondence the debtor should have made an 'unequivocal admission' of its liability to the creditor or should have 'admitted his/her insolvency'. *In casu*, none such unequivocal admissions are made by the respondents in the communications, which means that the default position is reverted to, that being that negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure.

[20]. In sum, I find myself in agreement with the contention on behalf of the respondents that they have raised a complete defence to the sequestration application in that it has been demonstrated by them that the existence of the

debt is disputed on *bona fide* and reasonable grounds. Moreover, the applicant's claim is, by all accounts, not a 'liquidated claim', but is in fact an 'unliquidated' claim for damages for breach of contract or for alleged unjust enrichment, which means that the applicant is required to prove the quantum of such damages or the value of such alleged enrichment before it can be said, with certainty, that the respondents are indebted to it for the amount claimed or for any other sum.

[21]. As was held by Rogers J in *Gap Merchant Recycling CC v Goal Reach Trading 55 CC*², the rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is *bona fide* disputed on reasonable grounds, is part of the broader principle that the court's processes should not be abused. The Court went on and held as follows: -

'Liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. The rule is generally known as the "Badenhorst rule", after one of the leading cases on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348C. A distinction is thus drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the respondent's liability, on the other hand, the question is whether the applicant's claim is disputed on reasonable and *bona fide* grounds; a court may reach this conclusion, even though on a balance of probabilities (based on the papers) the applicant's claim has been made out (*Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783G – I). However, where the applicant at the provisional stage shows that the debt *prima facie* exists, the onus is on the company to show that it is *bona fide* disputed on reasonable grounds (*Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 218D – 219C).'

[22]. Applying this authority *in casu*, I am persuaded that the grounds advanced by the respondents for their disputing the applicant's claims are not

² *Gap Merchant Recycling CC v Goal Reach Trading 55 CC* 2016 (1) SA 261 (WCC).

unreasonable. I do not think that it is necessary for the respondents at this juncture to adduce on affidavit, or otherwise, the actual evidence on which they would rely as a basis for them disputing their indebtedness to the applicant.

[23]. For all of these reasons, I conclude that the applicant's sequestration application should fail.

[24]. There is another reason why the applicant's application should fail and that relates to the issue of urgency. The first and the second respondents also oppose the urgent application on the grounds that the application is not urgent. In the event that it is determined that there is any urgency, then it is submitted on behalf of the respondents, that the urgency is entirely self-created.

[25]. It is contended on behalf of the respondents that, if the applicant truly considered the respondents 'without prejudice' settlement offers during September / October 2024 to be acts of insolvency, it has not explained why it waited some five months from receipt of said letters to launch this urgent sequestration application. What is more is that the dispute between the applicant and the respondents arose as far back as August 2024.

[26]. It is so, as contended on behalf of the respondents, that the applicant's delay and conduct contradict any claim of urgency or that that applicant will not be afforded substantial redress in due course. If the matter were truly urgent, the applicant would have approached the court at the first available opportunity, rather than delaying.

[27]. I find myself in agreement with the submissions on behalf of the first and the second respondents. The simple fact of the matter is that howsoever one views this matter the applicant should have launched this application much sooner than it actually did.

[28]. This Court has consistently refused urgent applications in cases when the urgency relied-upon was clearly self-created. Consistency is important in

this context as it informs the public and legal practitioners that Rules of Court and Practice Directives can only be ignored at a litigant's peril. Legal certainty is one of the cornerstones of a legal system based on the Rule of Law.

[29]. For all of these reasons, I am not convinced that the applicant has passed the threshold prescribed in Rule 6(12)(b) and I am of the view that the application ought to be struck from the roll for lack of urgency.

[30]. The application therefore falls to be struck from the roll with costs.

Respondents' Application to Strike Out

[31]. There is one last issue which I need to deal with and that relates to an interlocutory application by the respondents to have struck out – in terms of Uniform Rule of Court 6(15) – certain portions and a number of paragraphs of the applicant's founding affidavit.

[32]. The respondents, in particular, apply for an order that the following paragraphs be struck out from the Founding Affidavit dated 12 March 2025 as they are scandalous, vexatious, irrelevant and constituted privileged correspondence sent by the respondents without prejudice and off the record: paragraphs 10.1, 10.2, 10.3, 16.2, 40, 41, 41.1, 41.2, 42, 43, 44, 44.1, 44.2, 44.2.1, 44.2.2, 45, 46, 47, 48, 49, 50, 51, 62, and 66.1 of the founding affidavit, as well as annexures 'FA3' and 'FA4' to the said affidavit.

[33]. These paragraphs and the named annexures relate almost exclusively to the negotiations between parties, which, according to the respondents, were undertaken with a view to a settlement of the disputes or differences, and are therefore privileged from disclosure.

[34]. For the reasons referenced *supra*, I am of the view that the said application should succeed. The simple point is that most, if not all of the allegations which the respondents wish to have struck out, are averments and conclusions relating to 'without prejudice' and 'without admission of liability'

settlement discussions between the parties. I am persuaded that the respondents have made out a case to have those portions of the affidavit struck out.

[35]. Rule 6(15) reads as follows: -

‘(15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.’

[36]. Accordingly, I reiterate that the application to strike out certain paragraphs should succeed with costs,

Order

[37]. In the result, I make the following order:

- (1) The first and second respondents' interlocutory application dated 11 April 2025 to strike out certain portions of and certain annexures to the applicant's founding affidavit, succeeds and is hereby granted with costs.
- (2) The applicant shall pay the first and second respondents' costs of the said interlocutory application, including the costs of Counsel on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.
- (3) The applicant's urgent application be and is hereby struck from the urgent court roll for lack of urgency.
- (4) The applicant shall pay the first and the second respondents' costs of this urgent application, such costs to include Counsel's charges on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	29 April 2025
JUDGMENT DATE:	2 May 2025 – Judgment handed down electronically
FOR THE APPLICANT:	A C Botha SC
INSTRUCTED BY:	HBGSchindlers Attorneys, Melrose Arch, Johannesburg
FOR THE FIRST AND SECOND RESPONDENTS:	K Howard
INSTRUCTED BY:	Barter McKellar, Linden, Johannesburg