

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024-060632

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

30 JULY 2025

Judge Dippenaar

In the matter between:

DANIEL SHAPIRO

APPLICANT

and

JONATHAN WOLPE

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 30th of July 2025.

DIPPENAAR J:

[1] The applicant seeks the provisional sequestration of the respondent on the basis that he has committed a deed of insolvency as envisaged in s 8(g) of the Insolvency Act 24 of 1936 ('the Act') and is factually insolvent.

[2] Prior to dealing with the merits of the application, two interlocutory applications must be addressed. The first, an application by the applicant for leave to supplement his case by way of a supplementary affidavit. That application is not opposed and the respondent has delivered an answering affidavit in response. No prejudice was contended for. The application is granted, so that the matter can be determined on its full facts.

[3] The second, a similar application by the respondent for condonation for the late filing of his supplementary affidavit, opposed by the applicant. The applicant has responded to the supplementary affidavit and does not claim prejudice. The applicant's basis of opposition is that the respondent, whilst being in possession of information pertaining to his alleged referral of the matter to the National Credit Regulator at the time of deposing to the answering affidavit, did not include that information in his answering affidavit. The respondent did not proffer any explanation for this failure. The applicant further submitted that the attachments to the affidavit do not support the averments in the affidavit and that its contents are irrelevant. There is merit in these submissions. Significantly, the proposed affidavit does not take the matter any further, given that the attachments to the affidavit do not support the contention that a complaint was lodged with the National Credit Regulator, as averred in the affidavit. This renders the contents of the proposed supplementary affidavit irrelevant to the issues to be determined in the

application. There is also merit in the applicant's submission that the respondent adopted a dilatory and cavalier approach to the matter, seeking to augment his papers at a belated stage and shortly before the hearing. In such circumstances, this court's discretion under r 6(5)(e) falls to be exercised against the respondent and the application is dismissed.

[4] Turning to the merits of the application, the applicant placed on record that it intended only to pursue his claim of R500 000, together with mora interest, based on his alternative claim for unjust enrichment. For purposes of the argument, the applicant accepted that his contractual claim falls foul of the National Credit Act. It is thus on the alternative claim that the matter will be adjudicated.

[5] In terms of s 10 of the Insolvency Act 24 of 1936:

'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 9¹, 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.'

[6] The background facts are by and large common cause between the parties. It is undisputed that the applicant advanced an amount of R500 000 to the respondent on 31 January 2024 in terms of a loan agreement, in terms of which the repayment date of the loan amount and interest was 14 February 2024. It is common cause that the respondent

¹ Being R100.

failed to make any payments to the respondent. He did not settle any part of the debt either on the repayment date or at any time thereafter. The validity of the loan agreement is in dispute. It is undisputed that the respondent signed an agreement of pledge of a Steinway concert piano as security for his debt, but failed to deliver it to the applicant, despite the applicant tendering to pay the costs associated with the transfer of the piano. It is similarly common cause that this court has jurisdiction and that the respondent is domiciled in and owns immovable property within its jurisdiction.

[7] The respondent's case is that the applicant is not a *bona fide* creditor, given that the applicant was not a registered credit provider at the time the loan agreement was concluded and was aware that the National Credit Act should be applicable. He further contends that the application is premature as the issues surrounding the loan agreement and enforcement of the enrichment claim should be referred to a trial court. He contends that the application has been brought *in terrorem* as it constitutes an attempt by the applicant to enforce his claim for repayment of the loan amount. Lastly, the respondent contends that it would not be to the advantage of creditors that his estate be sequestrated, given that he has few personal creditors and his assets far exceed his liabilities. Reliance is further placed on the fact that the applicant ranks behind the secured creditors that hold mortgage bonds over his immovable property.

[8] The respondent's argument disregards that the test at this stage is a *prima facie* one and that he has offered no defence to the applicant's alternative claim based on unjust enrichment.² His submission that the amount claimed is not liquid but only determinable, lacks merit, given his admission that he received the amount of R 500 000 advanced to him by the applicant. The facts do not establish any turpitude on the part of the applicant. On a *prima facie* basis, the applicant has established that its claim is unassailable. The respondent's submission that the applicant's claim is disputed on *bona fide* and reasonable grounds thus lacks merit, specifically in relation to the claim based

² *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) paras 15-18.

on unjust enrichment.³ The respondent fails to illustrate either that the claim is disputed either *bona fide* or on reasonable grounds.⁴ The contention that the application is premature also does not pass muster. The applicant has thus established his *locus standi* on a *prima facie* basis.

[9] The respondent's contention that the application is *in terrorem* to enforce payment of his claim, also lacks merit. Considering all the facts and the applicable principles, the proceedings have been instituted to set the law in motion to have the respondent declared insolvent.⁵ There is no basis to conclude that the application was launched with any ulterior motive. The respondent has left the majority of the averments in the applicant's papers pertaining to his financial position unchallenged.

[10] According to the applicant, the respondent has given notice in writing to him, as creditor, that he is unable to pay his debt as envisaged by s 8(g) of the Act. Reliance is placed on an extensive series of communication between the parties via WhatsApp, spanning a period of some three months. The applicant further relies on factual insolvency.

[11] Significantly, the respondent has failed to disclose his financial position and has failed to present any cogent and admissible evidence of his solvency. The context and tenor of the WhatsApp evidences multiple delays and excuses on the part of the respondent as to why he has not made any payment. It is sufficient if an inference of insolvency can fairly and properly be drawn from the proven facts.⁶

[12] It is well established that constant delays and pleading for time to pay a debt, as is evidenced by the WhatsApp exchange between the parties, would ordinarily give rise

³ *Robson v Wax Works (Pty) Ltd and Others* 2001 (3) SA 1117 (C) and the various authorities cited therein referring to the Badenhorst rule.

⁴ *Grenco Projects and Construction CC v Hermanus Esplanade Dev Co (Pty) Ltd* 2024 (6) SA 500 (WCC) paras 15-18.

⁵ *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 SCA para 4; *Estate Logie v Priest* 1926 AD 312 at 319; *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) paras 27-31.

⁶ *Absa Bank Ltd v Rhebokskloof (Pty) Ltd & Others* 1993 (4) SA 436 (C) at 443B-E.

to an inference that a debtor is unable to pay his debt.⁷ It is further apposite to refer to *De Waard*, wherein Innes CJ pointed out that the best proof of solvency is that a man should pay his debts.⁸

[13] Considering the proven facts, I am persuaded that an act of insolvency in terms of s 8(g) of the Act has been established, at least on a *prima facie* basis. Moreover, the facts seen cumulatively, justifies an inference, at least on a *prima facie* basis, that the respondent is indeed insolvent. His numerous promises to pay, made at a time before he raised the challenge to the validity of the loan agreement, all point to an inability to pay the applicant.

[14] On the respondent's own version, he is unable to pay for counsel and his attorney's services who have acted on a deferred fee basis. He is a director of some 25 companies, of which only four are active but in financial distress. Money judgments exist against two of the companies, United Charter Services and United Aircraft Maintenance in aggregate amounts exceeding R2.5 million. Significantly, the respondent has not placed his financial information before the court. Whilst disputing insolvency, he proffers no explanation why he made no attempt to pay at least the capital amount due to the applicant.

[15] On the issue of an advantage to creditors, it must be considered whether the sequestration would result in some payment to creditors, whether there is a substantial estate from which creditors could not get payment other than via sequestration or whether some pecuniary benefit would result for creditors.⁹

[16] The respondent has certainly not made a full disclosure of his financial position. On his own version, he has 'considerable assets' and 'few personal creditors'. The facts establish that he is possessed of an immovable property in which there is equity and a

⁷ *Court v Standard Bank of SA Ltd* 1995 (3) SA 123 (A); *Standard Bank of SA Ltd v Court* 1993 (3) SA 286 (C) at 293B.

⁸ *De Waard v Andrew & Thienhaus Ltd* 1907 TS 727 at 733.

⁹ *Stratford and Others v Investec Bank Ltd* 2015 (3) SA 1 (CC) paras 44-46.

Model D-Steinway & Sons Concert Grand Piano, with a considerable value. On the respondent's own version, generalised as it is, he has a substantial estate from which reasonably some pecuniary benefit would result to creditors. On the facts, I am further satisfied that the applicant has established reason to believe that as a result of investigation and enquiry, assets may be unearthed which will benefit creditors, at least *prima facie*.¹⁰

[17] The grounds advanced by the respondent in argument as to why no advantage to creditors would result, do not bear scrutiny. The respondent mostly raised potential issues which could possibly arise during the course of the sequestration proceedings. None of these detract from the evidence presented by the applicant.

[18] For these reasons I am satisfied that the requirements of s 10 of the Act have been met. There is no cogent basis to exercise any discretion against the granting of a provisional sequestration order.

[19] In his heads of argument, the respondent raised non-compliance with the requirements of s 9(4)(b) of the Act in that he failed to file an affidavit by the person who furnished a copy of the application in terms of s 9(4)(a) of the Act. I am not persuaded that this challenge has merit. Various service affidavits were delivered, including affidavits by the relevant Sheriff.

[20] Insofar as service on the respondent's employees are concerned, the applicant made various attempts to establish the relevant facts pertaining to the respondent's employees. Non-compliance with the service requirements do not bar the granting of a provisional order.¹¹ The service requirements in s 9(4) are also not aimed at providing a technical defence to an employer to 'avoid or postpone the evil hour' when a sequestration

¹⁰ *Absa Bank Ltd v Rhebokskloof (Pty) Ltd & Others* 1993 (4) SA 436 (C) at 443B-E; *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership and Others* 2006 (4) SA 292 (SCA) para 29.

¹¹ *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA) paras 12 to 26.

order is made.¹² It must be borne in mind that under s 197B of the Labour Relations Act 66 of 1995, an employer has obligations to disclose information pertaining concerning insolvency.¹³

[21] It would be appropriate to grant an order directing the respondent to disclose under oath whether he has any employees. He is to provide the names, contact details and addresses of such employees, so that they can be furnished with the application and order. A copy of the application and order should further be served on the respondent's attorney of record, where it must be made available to any employees of the respondent.

[22] It follows that a provisional sequestration order should issue. The costs, including the costs of the interlocutory applications on scale B are to be costs in the sequestration.

[23] I grant the following order:

[1] The applicant is granted leave to file a supplementary affidavit;

[2] The respondent's application for condonation to file a supplementary affidavit is dismissed;

[3] The respondent is placed under provisional sequestration in the hands of the Master of the High Court;

[4] A rule nisi is issued calling upon the respondent and any other interested parties to appear and show good cause, if any, on **6 OCTOBER 2025**, at 10:00 or so soon thereafter as counsel may be heard, as to why:

¹² Ibid para 8.

¹³ Ibid paras 6-7.

[4.1] the respondent ought not to be placed under an order of final sequestration; and

[4.2] the costs of the application, including the costs of the interlocutory applications referred to in 1 and 2 above, as well as the costs of counsel on Scale B, ought not to be costs in the sequestration of the respondent's estate;

[5] A copy of this provisional sequestration order must be served on:

[5.1] the respondent, by serving a copy thereof on his attorneys of record;

[5.2] the employees of the respondent, if any, as well as on any Trade Union, if any, representing such employee/s;

[5.3] the Master of the High Court Pretoria; and

[5.4] the South African Revenue Service;

[6] The respondent is directed to provide an affidavit stating whether he has any employees and, if so, providing the names, contact details and addresses of such employees, if any, within five days of date of this order;

[7] A copy of the application and order is to be served on the respondent's attorney of record, Ms Lomax where it must be made available to any employees of the respondent.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

HEARING

DATE OF HEARING : 24 JULY 2025

DATE OF JUDGMENT : 30 JULY 2025

APPEARANCES

APPLICANT'S COUNSEL : Adv. M De Oliveira

APPLICANT'S ATTORNEYS : Jason Michael Smith Incorporated

RESPONDENT'S COUNSEL : Adv. A Prinsloo

RESPONDENT'S ATTORNEYS : Tracey Lomax Attorneys