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**REPUBLIC OF SOUTH AFRICA**



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

Case Number: 38645/22

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO THE JUDGES: YES/**NO**

(3) REVISED: YES/**NO**

DATE: 21/08/2025

SIGNATURE:

In the matter between:

**EDUCATION AND TRAINING UNIT NPC**  
**(Registration number: 2000/014669/08)**

Applicant

and

**EDWARD MWANANDIMAI**  
**(Zimbabwean Passport number: E[...])**

Respondent

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**JUDGMENT**

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**INTRODUCTION:**

[1] This is an application for the final sequestration of the Respondent's estate on the following grounds:

[1.1] Acts of insolvency as described in:

[1.1.1] section 8(c) of the Insolvency Act, 24 of 1936 ("the Act"), by making or attempting to make a disposition of property in a manner that could prejudice creditors or give preference to one creditor over another;

[1.1.2] under section 8(e) of the Insolvency Act, by offering to arrange with creditors for a release, either wholly or partially, from debts; and

[1.1.3] in terms of section 8(g) of the Insolvency Act, by notifying creditors of an inability to meet debt obligations.

**FACTUAL MATRIX:**

[2] The Respondent formed Lopdale Services and Investments (Pty) Ltd (Registration number: 2015/018619/07), with the company's start date noted as 10 February 2015 and with the Respondent serving as both the sole director and shareholder.

[3.1] A copy of the CIPC report for Lopdale Services and Investment (Pty) Ltd, registration number 2015/018619/07, reflects its registered address as 1[...] P[...] Road, Glen Austin, Midrand, Gauteng.

[3] The Respondent worked as an accountant at *EDUCATION AND TRAINING UNIT NPC ("ETU")*, the applicant, from 11 July 2014 until voluntarily leaving on or around 31 May 2020.

- [4] Following the respondent's resignation, the applicant became aware that, during his period of employment, the respondent had misappropriated substantial amounts of money. The respondent's misappropriation of the applicant's funds occurred in the following ways:
- [4.1] Payments meant for legitimate creditors like SARS were diverted to his or Lopdale Services and Investments' accounts (e.g., FNB 6[...]).
- [4.1.1] An ETU internal investigation showed these payments did not reach the intended recipients.
- [4.2] FNB account 6[...], linked to the Respondent, received *R678 972.22* between 14 January and 23 July 2015.
- [4.3] Lopdale Services and Investments received *R14 652 956.02* into FNB account 6[...], with payments made from 4 August 2015 to 17 December 2019.
- [4.4] Payments were made to account number FNB 6[...], totalling *R396 090.55*. The first payment to this account occurred on 23 March 2018, and the last was on 23 October 2018.<sup>1</sup>
- [4.5] The Respondent set up supplier accounts resembling existing ones, directing payments to accounts linked to himself.
- [4.6] The Respondent created a fake employee, C T Chipango, as part of the applicant's Discovery Medical Aid Scheme, leading to fraudulent contributions totalling *R160 845.00* from 1 September 2017 to 1 April 2020.
- [4.7] ETU paid *R239 819.00* for the Respondent's medical aid contributions to Bestmed from 1 November 2016 to 1 April 2020, without deducting these amounts from his salary.
- [4.8] ETU also covered the Respondent's cellular phone accounts, with no recovery from his salary.
- [4.9] The Respondent set up three debit orders on the applicant's account:
- [4.9.1] Old Mutual;
- [4.9.2] Omax Pearls;
- [4.9.3] 2 Omax Pearls.

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<sup>1</sup> "RA3", "RA4", and "RA5" at 05-1 to 07-1

- [4.10] The Respondent manipulated bank master data and payroll records to gain unauthorized benefits.
- [4.11] The Respondent initially had viewing rights to the banking system. Subsequently, staff granted him payment loading access after he requested further authorization.
- [5] The Respondent's actions were discovered after Mr. Ebrahim Lockhat became accountant and audited the accounts.
- [6] The first fraudulent ETU payment was made on 14 January 2015 to SARS, with a total of 384 such payments occurring during employment, the last being on 1 April 2020. The payments are itemised in RA6.<sup>2</sup>
- [7] Mr Lockhat's investigation found the Respondent misappropriated over *R17 million*, with *R6 797 715.60* ("the capital debt") confirmed.
- [8] ETU confronted the Respondent, who signed a written Acknowledgement of Debt ("AOD") on 11 September 2020.
- [9] The respondent acknowledged the use of funds from ETU and confirmed that the amount owed corresponds to the outstanding balance specified in Clause 4.3 of the signed Acknowledgment of Debt (AOD).<sup>3</sup>
- [10] The capital debt is defined in clause 3.1 of the AOD as follows:

*"The Debtor is truly and lawfully indebted and legally bound to the Creditor in the amount of six million seven hundred and ninety-seven thousand seven hundred and fifteen rand and sixty cents (6 797 715.60)."*

- [11] Clause 4 of the AOD reads as follows:

***"4. THE CAUSE OF DEBT***

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<sup>2</sup> 08-1

<sup>3</sup> RA7 at 09-1

[4.1] The Debtor admits that he stole several million rand from the Creditor, the total amount stolen being in excess of the Capital Debt.

[4.2] The Debtor has repaid certain of the money which he stole.

[4.3] The Debtor hereby acknowledges that the Capital Debt which he owes to the Creditor is the outstanding balance of the money which he stole from the Creditor.”

[12] ETU also filed a criminal case (Yeoville CAS 116/09/2020) for fraud.

### **PROVISIONAL SEQUESTRATION ORDER:**

[13] On 28 October 2024, Hassim J granted a provisional sequestration order, returnable on 29 November 2024.<sup>4</sup>

### **FINAL RELIEF SOUGHT:**

[14] The applicant in the final sequestration order relies on three acts of insolvency as outlined in:

[14.1] section 8(c) – involving the disposition or attempted disposition of property that could prejudice creditors or prefer one creditor over another;

[14.2] section 8(e) – involving an offer to arrange with creditors for partial or full release from debts;

[14.3] and section 8(g) of the Insolvency Act 24 of 1936 (“the Act”) – where notice was given to creditors regarding the inability to pay debts.

[15] The application is founded upon two letters, identified as RA8<sup>5</sup> and RA9<sup>6</sup>, and the disposition of capital amounts to a certain Mr. Pillay. Although both letters were marked “*without prejudice*”, prejudice is only claimed in respect of the

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<sup>4</sup> 0001-18

<sup>5</sup> 10-1

<sup>6</sup> 11-1

letter of 6 September 2021 - RA8. I will address this point later on in this judgment.

- [16] On or about 6 September 2021, correspondence was received from the Respondent's attorney indicating the following:<sup>7</sup>

*"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 (sic) due to the Covid-19 Pandemic and the current looting unrest, which has affected our client business."*

- [17] The contents of this letter suggest that the Respondent is attempting to settle the outstanding balance by proposing payment of the lesser amount of R100 000.00 on a monthly basis due to the Covid-19 Pandemic and the looting unrest.

- [18] In a letter dated 11 October 2021, the Respondent offered to pay R10 907 928.90, starting 31 January 2022 over a period of 72 months, which is less than the outstanding balance of R17 104 921.64.<sup>8</sup>

- [19] A certificate of balance indicating an amount of R17 104 921.64 was issued after all transactions were confirmed by the relevant banks.<sup>9</sup>

- [20] The Respondent has not made any payments since June 2021.

- [21] On 12 February 2022, ETU was informed of an urgent application regarding the sequestration of the Respondent and the liquidation of Lopdale Energy, a company of which the respondent is the sole director,<sup>10</sup> scheduled for hearing on 15 February 2022. The First Respondent acted as co-principal surety for investment loans given by Mr S Pillay to Lopdale Energy.

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<sup>7</sup> RA8 at 10-1

<sup>8</sup> RA9 at 11-1

<sup>9</sup> RA10 at 12-1

<sup>10</sup> RA11 at 13-1

- [21.1] It is apparent from a win-deed search – RA11<sup>11</sup> that the registered address of Lopdale Energy (Pty) Ltd (registration number 2019/054992/07) was initially reflected as 3[...] O[...] Avenue, Observatory, Johannesburg, Gauteng, which is the registered place of business of the applicant. It can be reasonably inferred that the Respondent operated his business from the premises without the consent of the applicant.
- [22] On 14 February 2022, the applicant communicated its intention to intervene in the proceedings.
- [23] On 15 February 2022, the applicant received notification that Mr Pillay, the creditor, had withdrawn his applications and would not be proceeding with them.
- [24] On 2 February 2022, the respondent asked Mr Pillay to renegotiate payment terms, as noted in RA13.<sup>12</sup>

“RE: SUMENTHBEN POOBALAN PILLAY/EDWARD MAWANANDIMAI AND  
LOPDALE ENERTY (PTY LTD

*The above subject matter.*

*It is our instruction to re-negotiate with you the terms surrounding the Acknowledgment of Debt signed by yourself and our client on 18<sup>th</sup> day of October 2021. In respect of this agreement our client undertook to pay R1 500 000.00 (One Million Five Hundred Thousand Rand) to you on or before the 4<sup>th</sup> day of each month following the month of January 2022 until the amount is liquidated.*

*Instruction reveals that our client also undertook to pay the same amount on or before the 4<sup>th</sup> of January 2022 but failed to pay the full amount. In respect of your letter pertaining to this shortfall you instructed our client to pay the amount of R250 000.00 on the 4<sup>th</sup> of January 2022 in order to have*

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<sup>11</sup> 13-1

<sup>12</sup> 15-1

*indulgence for the remaining outstanding balance which was to be paid on the 18<sup>th</sup> of January 2022.*

*We regret to inform you that our client's business is not performing as anticipated and that owing to same he will not be able to expunge the full R1 500 000.00 instalments on a monthly basis as agreed. We understand your frustration surrounding the financial commitments not being honoured and our client shares this sentiment as the circumstances are beyond his control as well.*<sup>13</sup> (my underlining)

- [25] The only reasonable inference drawn is that a payment was made to Mr Pillay, after which Mr Pillay withdrew the proceedings. As a result, a disposition or arrangement occurred with Mr Pillay that altered the Respondent's financial obligations to the applicant, either partially or entirely.

## **EVALUATION OF FINAL SEQUESTRATION ORDER**

- [26] Section 12 of the Act requires creditors to prove the following for a final sequestration order:

[26.1] Debt: The creditor has a liquidated claim of at least R100 against the debtor.

[26.2] Insolvency: The debtor's liabilities exceed his/her assets, or an act of insolvency has occurred.

[26.3] Advantage to Creditors: Sequestration is likely to yield a dividend for creditors.

- [27] The founding affidavit and Certificate of Balance submitted by the applicant states that the respondent owes R17 104 921.64<sup>14</sup>. A subsequent reconciliation dated after 9 July 2021 reports an amount of R11 028 039.76 owed.<sup>15</sup>

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<sup>13</sup> RA13 at 15-1

<sup>14</sup> 12-1

<sup>15</sup> 21-43

[28] The evidence indicates that, in a letter dated 6 September 2021, the respondent acknowledged that the amount of R1 777 000.00 was owed to the applicant.<sup>16</sup> Paragraph 9 thereof states:

“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 unrest, which has affected our client business.” (my underlining)

[29] In correspondence dated 11 October 2021 ("the October 2021 letter"), the respondent formally committed to paying the sum of R10 907 928.90 over a period of 72 months.<sup>17</sup>

“3. *However, for the sake of moving forward pending the finalization of the SARS issues, our client therefore propose settlement of the following:*

3.1 Payment of the amount of R10,907,928.90 (Ten Million Nine Hundred and Seven Thousand Nine Hundred and Twenty-Eight Rand Ninety Cent) over 72 months. First payment will be 31<sup>st</sup> of January 2022. Kindly note that this settlement proposal should not be construed as 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 time.

3.2 *Once the SARS issues is resolved or sorted the settlement agreement will be reviewed.*” (my underlining)

#### SEPTEMBER 2021 LETTER

[30] The respondent stated that the September 2021 letter is inadmissible as evidence because the admissions appear in the letter labelled "without prejudice" by his attorney.

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<sup>16</sup> RA8 at 10-1

<sup>17</sup> RA9 at 11-1

[31] As a general principle, negotiations between parties aimed at resolving a dispute are protected from disclosure, regardless of whether they are expressly marked as "*without prejudice*". However, simply including the phrase "*without prejudice*" does not, by itself, determine whether a document is protected from disclosure in litigation.

[31.1] In *Jili v South African Eagle Insurance Co Ltd*<sup>18</sup> 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.*"

[32] An offer made on a '*without prejudice*' basis can be used as evidence of insolvency. In insolvency cases, admissions of insolvency are generally not privileged, regardless of context, because of public policy.

[33] Indebtedness is protected from disclosure only if documented during settlement negotiations.

[33.1] In *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A), Trollip JA explained that "*without prejudice*" communications allow parties to negotiate settlements without such offers being considered admissions of liability, referencing Lord Mansfield's perspective on compromise offers.

[34] The author's subjective intention in using "*without prejudice*" is irrelevant. Instead, intention should be assessed objectively, based on how a reasonable

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<sup>18</sup> 1995 3 SA 269 N at 275B

recipient would interpret the correspondence as a whole. The objective assessment must be made having regard to all the correspondence.

[35] It is clear that there was no earlier correspondence before the September letter.

[36] In the September 2021 letter<sup>19</sup>, the respondent's attorney stated that certain amounts should be deducted from the total of *R17 686 038.90*. The respondent did not dispute this total.

[37] The letter stated that the respondent owed *R1 777 000.00*, not *R11 028 039.76* as shown in the reconciliation. Therefore, the respondent's attorney indicated that certain amounts should be deducted from the total of *R17 686 038.90*.

[37.1] The respondent repaid *R7 100 000.00*

[37.2] Of this, *R6 242 558.21* was reportedly paid to SARS on behalf of the applicant, with claimed confirmation.

[37.3] Three payments totalling *R2 093 487.63* were made for the applicant, pending confirmation.

[37.4] *R541 182.94* involves five "Eddy transaction list" items, which the respondent denied liability for.

[38] The letter does not refer to ongoing negotiations, nor does it demonstrate that the respondent agreed to pay *R1 777 000.00* to avoid litigation. This payment was calculated by the respondent's attorney as the actual amount owed, differing from the applicant's calculation of *R11 028 039.76*. The acknowledgment of the *R1 777 000.00* debt is not considered protected from disclosure.

#### OCTOBER 2021 LETTER

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<sup>19</sup> RA8 at 10-1

- [39] The letter dated 11 October 2021 (“the October 2021 letter”)<sup>20</sup>, appears to be in response to a letter from the applicant's attorney with an attached excel spreadsheet. The respondent's attorney stated that payments had been made to SARS on the applicant's behalf and that *"all the requested documents will be provided as soon as possible, [the respondent was] busy putting the documents together"*. The said letter is also labelled *"without prejudice"*.
- [40] The respondent in this letter concedes a debt of R10 907 928.90, less any payments already made to SARS.
- [41] His offer to repay this amount in 72 instalments constitutes an act of insolvency under section 8(g) of the Act. Whilst the debt admission may be protected, the act of insolvency is not.
- [42] Although the October letter is marked *"without prejudice"*, the respondent does not contend that it is protected from disclosure, which contrasts with the position taken concerning the September letter.
- [43] He argued that paragraph 6.9 of the founding affidavit—which addresses the October 2021 letter—as well as other sub-paragraphs of paragraph 6, were irrelevant, scandalous, and vexatious, and do not further the Applicant's claim.
- [44] Unlike with the September 2021 letter, the respondent did not claim that this letter was protected from disclosure.
- [45] The respondent's decision not to assert protection from disclosure of the October 2021 letter may be construed in one of two ways:
- [45.1] The October 2021 letter does not pertain to the settlement of a dispute and, as such, is not privileged; or
- [45.2] The respondent had waived privilege.

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<sup>20</sup> RA9 at 11-1

[46] The respondent cites *MacKay v Cahill* 1926 (4) SA 193 (O) at 206 as authority for the position that requesting additional time to pay a debt does not amount to an act of insolvency.

[46.1] In this case, it was determined within the context of section 8(e) of the Act (and not section 8(g)) that the respondent's proposal to pay 25 cents in the Rand, contingent on receiving an extension until the end of the year for payment of the balance, did not amount to an arrangement for release from debts, either wholly or partially, based on the facts presented. Consequently, it was not considered an act of insolvency.

[47] In the October 2021 letter, the respondent acknowledges a debt of *R10 907 928.90*, less any amounts paid to SARS. The assertion that repayment of *R10 907 928.90* can only be made in instalments over 72 months is regarded as an act of insolvency in terms of section 8(g) of the Act. While the admission of the debt may be protected from disclosure, the act of insolvency itself is not.<sup>21</sup>

#### MONIES LENT TO LOPDALE ENERGY – ACKNOWLEDGMENT OF DEBT

[48] Mr Pillay lent significant funds to Lopdale Energy (Pty) Ltd ("Lopdale"), whose director and sole shareholder is the respondent, leading to an acknowledgment of debt for *R18 750 000.00* signed by the respondent.

[49] The debt acknowledgment signed by Lopdale Energy (Pty) Ltd and the Respondent in favour of Mr Pillay on 18 October 2021, along with related correspondence and payments made, shows that by 4 January 2022 the respondent and Lopdale Energy (Pty) Ltd had paid Mr Pillay at least *R1 250 000.00* and subsequently more.<sup>22</sup>

[49.1] The said acknowledgment of debt states as follows:

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<sup>21</sup> Absa Bank Ltd v Hammerle Group 2015 (5) SA 215 (SCA) para 13

<sup>22</sup> EM6 at 43-1

*"We, the undersigned,*

***LOPDALE ENERGY (PTY) LTD***

*[Registration Number: 2019/054992/07]*

*and*

***EDWARD MWANANDIMAI***

*[Passport Number E[...]]*

***(hereinafter referred to as "the Debtors")***

*do hereby acknowledge ourselves to be truly Indebted unto and in favour of SUMENTHEREN POOBALAN PILLAY (hereinafter referred to as the "Creditor"), his successors in title or assigns, In the sum of **R18 750 000.00 (Eighteen million seven hundred and fifty thousand rand)** (hereinafter termed as the Capital Sum), being the agreed indebtedness due, owing and payable by the Debtors to the Creditor arising out of the three investment agreements as described in the settlement agreement."*

[50] The respondent does not claim his estate was solvent at the time of payment. He denies committing an act of insolvency under section 8(c), arguing there is no proof he disposed of property to prejudice or prefer creditors. He also notes the applicant failed to specify the property or its disposition. The respondent stated that "*Lopdale Energy (Pty) Ltd*" fulfilled its agreement with Mr Pillay and that it is a separate legal entity.

[51] Contrary to the respondent's claim that "*Lopdale Energy (Pty) Ltd*" fulfilled the agreement with Mr Pillay, payment records show funds came from accounts other than that of Lopdale Energy (Pty) Ltd, specifically:

[51.1] Lopdale Services and Investments and

[51.2] Mr. Edward Mwananadimai – Lopdale Business Account.<sup>23</sup>

[52] The foregoing indicates that Lopdale Services and Investments, another legal entity where the respondent holds a directorial position, also made payments

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<sup>23</sup> EM6 at 43-1

in connection with the agreement. Additionally, the respondent facilitated payments to Mr. Pillay through the Mr. Edward Mwanandimai – Lopdale Business Account, which is a business account managed by the respondent.

[53] The statement that the respondent failed to make payment to Mr Pillay is accordingly not correct.

[53.1] It is abundantly clear from the respondent's answering affidavit with reference to RA13<sup>24</sup> that the respondent had requested an indulgence from Mr Pillay to renegotiate payment of R500 000.00 instead of R1 500 000.00. The Respondent himself would have made these payments as is indicated here in below:

*"When regard is had to the Applicant's Annexure "RA13" as mentioned in paragraph 6.16 of the founding affidavit, being a letter dated 02 February 2022 to Pillay, in that letter, I had requested Pillay an indulgence to renegotiate the terms of the agreement to allow me to pay R500 000.00 to him instead of R1 500 000.00 that we had initially agreed on."* <sup>25</sup>

[54] The applicant used First National Bank's online system to check the FNB proofs of payment from the respondent, as shown in Annexure "SRRS1".<sup>26</sup> Fourteen payments were validated, but sixteen could not be verified. Since ABSA Bank lacks an online verification system, their proofs of payment could not be tested.

[54.1] The applicant alleged that it is concerned that:

[54.1.1] the respondent may have provided unverifiable proofs of payment and

[54.1.2] that without independent verification, there is no assurance that the payments are accurate.

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<sup>24</sup> 15-1

<sup>25</sup> Paragraph 24 at 21-6

<sup>26</sup> 23-202

[54.2] Therefore, the applicant argued for an independent review of the respondent's finances.

[55] Payment was made to Mr Pillay after the respondent indicated that he could pay his debt of *R1 777 000.00* to the applicant in monthly instalments of *R100 000.00*, requiring 72 months to fully settle the amount (as stated in the September letter). The October letter referred to the respondent's acknowledgment of indebtedness to the applicant in the amount of *R10 907 928.90*. It is evident that the payments made by the respondent to Mr Pillay led to Mr Pillay receiving payment before the applicant.

[56] The applicant argued that a fair and equitable distribution of the respondent's estate among creditors by a trustee serves the best interests of all the creditors. Additionally, the applicant asserted that a trustee's investigation may identify assets suitable for liquidation, thereby facilitating the repayment of the respondent's debts and providing further benefit to the creditors.

#### **RESPONDENT'S OPPOSITION TO SEQUESTRATION ORDER:**

[57] The respondent, in his supplementary answering affidavit, opposes the sequestration for the following reasons:

[57.1] The respondent is factually solvent.

[57.2] The respondent disputes the amount of debt claimed by the applicant.

[57.3] Sequestration of the respondent is not expected to benefit creditors.

[57.4] The court may use its discretion not to grant a final sequestration order.

[58] I will address these grounds for opposing the final sequestration order in the sequence as set out here in above.

*FACTUALLY SOLVENT*

[59] The respondent asserted that he is solvent.

[60] The respondent however failed to fully disclose his assets in his initial answering affidavit, only addressing them in his supplementary answering affidavit. He claims his balance sheet “*EM1*”<sup>27</sup> lists all assets and liabilities, with equities – shares and securities of *R145 021 256.52*. However, there is no confirmatory affidavit from the accounting officer – Tshepisho Moshapo - or any other supporting documentation, such as a sworn appraisal, provided to substantiate his claim of solvency, except for an offer to present documents at the hearing. Counsel for the respondent sought to submit documentation to the court on the date of the hearing to support his claim of solvency; however, counsel for the applicant objected. The objection was upheld on the grounds that the respondent had sufficient opportunity to disclose these documents in both the answering and supplementary answering affidavits but failed to do so. The applicant also did not have insight in these documents before the hearing date.

[60.1] According to *EM1* - the balance sheet - the value of the respondent’s assets and liabilities both amount to *R153 201 256.52*, indicating they are equal and offset each other.

[61] The applicant relies upon acts of insolvency in this application for a final sequestration order rather than factual insolvency.

[62] The Insolvency Act 24 of 1936 has designated certain acts or omissions by a debtor as “*acts of insolvency*” and, if the sequestrating creditor can prove to the satisfaction of the court that the debtor has committed one of these acts of insolvency, it is not necessary to prove actual insolvency.<sup>28</sup> It accordingly follows that a debtor’s estate may be sequestrated even though he or she is technically solvent.<sup>29</sup>

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<sup>27</sup> 36-1

<sup>28</sup> *Agricultural & Industrial Mechanisation (Vereeniging) (Edms) Bpk v Lombard* 1974 1 SA 291 O 293; *De Villiers v Maursen Properties (Pty) Ltd* [1983] 4 All SA 517(T); 1983 4 SA 670 (T).

<sup>29</sup> *DP du Plessis Prokureurs v Van Aarde* 1999 4 SA 1333 (T) 1335

[63] The applicant relied upon committed acts of insolvency in the September and October letters. I will deal with these letters here in below:

*SEPTEMBER 2021 LETTER*

[64] The September letter 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 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 signed ...the 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.*
- 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 | R        | 560 000.00          |
| • IPSOS          | R        | 1 000 000.00        |
| • IPSOS          | R        | 533 487.63          |
| <u>TOTAL:</u>    | <u>R</u> | <u>2 093 487.63</u> |

*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] the 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 unrest, which has affected our client business.* (my underlining)

10.

[65] In the September 2021 letter, the respondent's attorney acknowledged the misappropriated amount of R17 686 038.90 but argued that certain deductions applied. The purpose of the letter was to contend that the respondent owed R1 777 000.00, not R11 028 039.76 as claimed by the applicant.

[66] The said letter was neither part of negotiations nor to stop litigation.

[67] The agreement to pay R1 777 000.00 was also not an offer of compromise.

[68] The said letter is also not protected from disclosure. In *Lynn & Main Inc v Naidoo* 2006 1 SA 59 (N) 65–67; [2005] JOL 15372 (N), it was held that an act of insolvency could be proved and relied upon even though it was contained in a letter marked 'without prejudice'.

- [69] An offer, even if made '*without prejudice*', is admissible as evidence of insolvency because public policy requires that admissions of insolvency not be protected in insolvency proceedings, regardless of privilege.
- [70] In terms of subsection 8(g) of Act 24 of 1936, a debtor commits an act of insolvency '*if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts.*'
- [71] A typical instance of a section 8(g) notice arises when the debtor, or their legal representative, sends correspondence to the creditor indicating that the debtor is currently unable to discharge the debt in full and proposes to settle the obligation through instalment payments.<sup>30</sup>
- [72] In the September correspondence, the respondent stated a willingness to settle the amount of *R1 777 000.00*. However, he noted that, as a result of the COVID-19 pandemic and the looting unrest, he was only able to commit to monthly payments of *R100 000.00*.<sup>31</sup>
- [73] Even though the September 2021 letter, does not 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.<sup>32</sup>
- [74] In *Standard Bank of SA Ltd v Court 1993 (3) SA 286 (C)* at 132 the Court said:

*"A debtor who gives notice that he will only be able to pay his debt in the future gives notice in effect that he 'is unable' to pay. A request for time to pay a debt which is due and payable will, therefore, ordinarily give rise to an inference that the debtor is unable to pay a debt and such a request contained in writing will accordingly constitute an act of insolvency in terms of s 8(g).*

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<sup>30</sup> *Goldblatt's Wholesalers (Pty) Ltd v Damalis* 1953 (3) SA 730 (O) 732.

<sup>31</sup> Paragraph 9 at 10-3

<sup>32</sup> *Standard Bank of South Africa Ltd v Court* 1993 (3) SA 286 (C) at 293 B-C.

*This is particularly so where the request is coupled with an undertaking to pay the amount due and payable by way of instalments".*

[75] A letter requesting instalments to pay debts in full serves as an indication that a person cannot meet their debts through normal means, and is considered written notice of inability to pay any debts under section 8(g) of the Insolvency Act. Precedent for this interpretation is found in cases such as *Chenille Industries v Johannes Hendrik Vorster* 1953 (2) SA 691 (O); *Union Bank of SA Ltd v Fainman* 1939 WLD 303; *Joosub v Soomar* 1930 TPD 773; *Lipworth v Alexander & Barkhan* 1927 TPD 785.

[76] Therefore, the respondent has committed an act of insolvency as contemplated in section 8(g) of Act 24 of 1936.

#### *OCTOBER 2021 LETTER*

[77] The October 2021 letter reads as follows:

*"The subject matter refers dated 3<sup>rd</sup> 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 31" 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.*

3.2 *Once the SARS issues is [sic] resolved or sorted the settlement agreement will be reviewed."*(my underlining)

[78] The October letter is marked "*without prejudice*"; however, the respondent does not claim that it is exempted from disclosure.

[79] In the October correspondence, the respondent therefore proposed to settle the amount of *R10 907 928.90* (Ten Million Nine Hundred and Seven Thousand Nine Hundred and Twenty-Eight Rand and Ninety Cents) over a period of 72 months. The initial payment was scheduled for 31 January 2022.

[80] This also constituted an act of insolvency in terms of section 8(g) of Act 24 of 1936. Even if the admission of a debt of *R10 907 928.90* is protected from disclosure, the act of insolvency is not.<sup>33</sup>

#### *ACKNOWLEDGEMENT OF DEBT – MR PILLAY*

[81] The acknowledgment of debt signed in favour of Mr Pillay, a creditor, on 18 October 2021—approximately six weeks after the September 2021 letter and one week after the October 2021 letter—together with correspondence from the respondent to Mr Pillay, indicates that by 4 January 2022 the respondent and Lopdale Energy (Pty) Ltd had paid at least *R1 250 000.00* to Mr Pillay, and even far more if one has regard to the payments made to Mr. Pillay.<sup>34</sup> The respondent does not state whether his estate was solvent when these payments were made. It is furthermore clear from the respondent's answering affidavit that the respondent had requested an indulgence for himself to pay to Mr Pillay an amount of *R500 000.00*:

*"When regard is had to the Applicant's Annexure "RA13" as mentioned in paragraph 6.16 of the founding affidavit, being a letter dated 02 February*

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<sup>33</sup> Absa Bank Ltd v Hammerle Group 2015 (5) SA 215 (SCA) at paragraph 13.

<sup>34</sup> EM6 at 43-1

*2022 to Pillay, in that letter, I had requested Pillay an indulgence to renegotiate the terms of the agreement to allow me to pay R500 000.00 to him instead of R1 500 000.00*". (my emphasize and underlining)

- [82] The respondent denied committing an act of insolvency, arguing there's no proof he disposed of property to the detriment or preference of creditors. He also states the applicant failed to specify the property or how it was disposed of.
- [83] Mr Pillay was paid at least *R2 250 000.00* from the respondent's Lopdale business account in addition to payments made by Lopdale Service and Investments and Lopdale Energy's accounts in the approximate amount of *R12 550 000.00*.<sup>35</sup>
- [84] These payments were 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 72 months to pay the amount offered in the October letter, namely *R10 907 928.90*.
- [85] The respondent explained that the debt was between S. Pillay and Lopdale Energy (Pty) Ltd, a separate legal entity. He only signed as surety, which becomes relevant only if the debtor defaults, but that Lopdale Energy paid its debt in full. The respondent asserted he did not commit an act of insolvency, nor did he pay as surety; the company fulfilled its own obligation.
- [86] The respondent annexed notifications of payments as Annexure *EM6*.<sup>36</sup>
- [87] These notifications indicate that payments were received not only from Lopdale Energy (Pty) Ltd but also from the respondent's other legal entity Lopdale Services and Investments and from Mr. Edward Mwanandinai - Lopdale Business' Account.

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<sup>35</sup> EM6 at 43-1

<sup>36</sup> 43-1

[88] About *R2 250 000.00* was paid by the respondent from his Lopdale Business Account to Mr Pillay, which disadvantaged the applicant by giving preference to Mr Pillay.

[89] This behaviour is an act of insolvency in terms of section 8(c) of Act 24 of 1936. This section stipulates that a debtor is deemed to have committed an act of insolvency if they make, or attempt to make, any disposition of their property with the intent to disadvantage their creditors or to favour one creditor over others.

[89.1] A disposition of property occurred at a time when the respondent had stated that he was unable to settle his debt of *R1 777 000.00* to the applicant except by making monthly instalments of *R100 000.00*, and that he would require 72 months (6 years) to pay the amount proposed in the October letter, specifically *R10 907 928.90*.

[89.2] Such dispositions effected and prejudiced the applicant.

[90] The applicant's case is accordingly founded on acts of insolvency based upon sections 8(c) and 8(g) of the Act and not on factual insolvency.

[91] In his answering affidavit, the respondent did not specify the value of his assets and liabilities. This information was provided only in the supplementary answering affidavit as Annexure EM1.<sup>37</sup> In his supplementary answering affidavit he disclosed:

[91.1] Nedbank Home Loan and BMW Finance as his creditors;

[91.2] that he acts as a surety for Lopdale Services and Investment (Pty) Ltd and for an FNB business overdraft on behalf of the same company.

[91.3] that his liability as surety is *R4 000 000.00*, monthly serviced;

[91.4] his total personal and surety liabilities amount to *R8 000 000.00*.

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<sup>37</sup> 36-1

- [92] The respondent submitted his individual balance sheet, labelled "EM1",<sup>38</sup> which lists all his assets and liabilities. The net worth (equity) the respondent recorded as approximately R145 021 256.52. However, the respondent's assets and liabilities both amount to R153 201 256.52, indicating they are equal and offset each other.
- [93] On computing the respondent's liabilities and equity as set out in EM1 it became clear that the total amounts to R153 416 575.80 and not to R153 201 256.52. Annexure "EM1" is accordingly incorrect and is further unsupported by a confirmatory affidavit of the accounting officer. Its evidentiary value is in my mind questionable.
- [94] The unresolved issue is further why the respondent, with assets of R145 021 256.52, did not pay the amounts of R1 777 000.00 and R10 907 928.90 as proposed.
- [95] In *De Waard v Andrew and Thienhaus Ltd* 1907 TS 727 at 733, Chief Justice Innes held that the stance of a debtor who fails to settle their debts, yet contends that his assets substantially outweigh his liabilities, is subject to scrutiny.

*"The Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of debtor who says, I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities'. To my mind the best proof of insolvency is that a man should pay his debts - and therefore I always examine in a critical spirit the case of a man who does not pay what he owes,"*

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<sup>38</sup> 36-1

[96] In *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd & others* 1993 (4) SA 436 (C) at 443D-F, the court examined the onus placed on the respondent to demonstrate in the High Court that the debtor was “actually” insolvent, as well as the approach to evaluating the evidence on this matter:

*“... where ... it is incumbent on [a debtor’s] unpaid creditor seeking to sequester the former’s estate to establish actual insolvency on the requisite balance of probabilities, it is not essential that in order to discharge the onus resting on the creditor if he is to achieve this purpose that he set out chapter and verse (and indeed figures) listing the assets (and their value) and the liabilities (and their value) for he may establish the debtor’s insolvency inferentially. There is no exhaustive list of facts from which an inference of insolvency may be drawn, as for example an oral admission of a debt and failure to discharge it may, in appropriate circumstances which are sufficiently set out, be enough to establish insolvency for the purpose of the prima facie case which the creditor is required to initially make out. It is then for the debtor to rebut this prima facie case and show that his assets have a value exceeding the sum total of his liabilities. ... It is true that in the *De Waard v Andrews* case the question of solvency or insolvency on the part of the debtor turned on the commission of an act of insolvency but there is no good reason to confine the language used in that case to those cases only in which an act of insolvency is involved. ... That [the respondent] is actually insolvent was sufficiently established and certainly so on an inferential basis where a precise assessment of his assets and liabilities cannot be made”* (my underlining)

[97] Other courts have found respondents factually insolvent based on their failure to present rebuttal evidence, even without proof of an act of insolvency. For instance, in *Van Wyk Von Ludwig & Hanekom Inc v Ferguson* [2001] 2 All SA 592 (C) at paras 24–28, although the respondent claimed in a further affidavit that his finances had improved, the court noted:

*“... he does not ... elaborate to what extent his position has improved. He, likewise, dismisses [the applicant’s] allegations of his assets and liabilities and gives a terse and unconvincing response. He submits that his assets exceed*

R13 million. He, however, does not specify how they are made up. This information is peculiarly within the respondent's knowledge. He does not take the court into his confidence." (my underlining)

- [98] The respondent, despite being given a chance to clarify and substantiate his estate, submitted annexure *EM1*, which is unverified and contains a calculation error. At the hearing, his counsel sought to introduce further documents to support the estate's value, even though there were previous opportunities to do so in both the answering and supplementary affidavits. As previously indicated, these documents were likewise not furnished to the Applicant's counsel prior to the hearing.
- [99] No explanation has been offered in relation to the September and October correspondence as to why the payment terms were not met, notwithstanding the presence of a considerable estate.
- [100] The respondent has not demonstrated transparency or candour in disclosing the value of his estate. The details concerning the value of his estate are uniquely within his knowledge. He has not refuted the applicant's established prima facie case of insolvency.

*DISPUTED DEBT:*

- [101] The respondent disputes the debt in both the answering and supplementary affidavits, contending that debt determination is not the purpose of a sequestration application, citing *Badenhorst v Northern Construction Enterprises Ltd 1956 (2) SA (T)*.
- [102] The Acknowledgment of Debt specifies a capital debt of R6 797 715.60 under clause 3.1, as well as an additional amount exceeding the capital debt. Clause 4, which states the cause of debt, is set out as follows:<sup>39</sup>

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<sup>39</sup> RA7 at 09-4

*“4. THE CAUSE OF DEBT*

*[4.1] The Debtor admits that he stole several million rand from the Creditor, the total amount stolen being in excess of the Capital Debt.”*

[103] Upon examination of the Acknowledgment of Debt executed between the applicant and the respondent, it is clear from clause 4.1 that the respondent's liability extends beyond the capital debt (amount) owed.

[104] It is evident that any sum exceeding the capital debt constitutes an outstanding payment obligation. This position contradicts the respondent's affidavit, in which he claims no debt exists due to a payment of R7 100 000.00 under the AOD.

[105] The respondent's admissions that he stole several million rand from the applicant and that the amount is more than the capital debt is in itself telling. These admissions contradict the respondent's allegation in his answering affidavit that he denies liability.<sup>40</sup>

[106] The respondent contended that:

[106.1] there is a factual dispute about the amount owed, which cannot be settled in liquidation proceedings and that

[106.2] the applicant had properly initiated trial proceedings to address this dispute.

[107] The respondent's admission that the debt amount is disputed and should be decided in court indicates acceptance of some indebtedness which is in line with the signed AOD.

[108] The computation of the sum due and owing by the respondent's attorney, as set out in the September 2021 letter, further substantiates both the existence

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<sup>40</sup> Paragraph 18 at 21-5

of the respondent's indebtedness to the applicant and the respondent's recognition thereof.

[109] Based on the September 2021 letter, the respondent did not contest the amount of R17 686 038.90; this figure was used by the respondent's attorney to calculate the respondent's indebtedness at R1 777 000.00. Additionally, as stated in the October 2021 letter, the acknowledged amount is either R10 907 928.90 or the difference between R10 907 928.90 and the amount owed by the applicant to the South African Revenue Services (SARS).

[110] It is evident that there is a debt which significantly exceeds R100.00 and is easily ascertainable.

[111] If a debt is disputed it should however always be on reasonable *and bona fide* grounds.

[111.1] *"It is not sufficient for a respondent in a sequestration application merely to dispute the claim of an applicant creditor. A claim must be disputed on bona fide grounds" (SJC v TRC (10837/2016; 19689/2016; 17728/2021) [2022] ZAWCHC 256 (11 May 2022) par 39).*

[112] In these sequestration proceedings, there is no *bona fide* or substantial dispute capable of impeding the Applicant. At most, the Respondent contests the precise amount of the debt relied upon by the Applicant; however, such contestation lacks reasonable grounds. *"In other words, the applicant has prima facie discharged the onus of showing that it has an enforceable claim upon which to base its application. The fact that the exact amount of that claim is disputed, does not affect the position (cf. Re Tweeds Garages Ltd [1962] 1 All ER 121)" (Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd 1976 (2) SA 856 (W) at 867).* Aside from disputing the amount owed, the Respondent does not present a substantive defence to the Applicant's claim. The evidence indicates that the Respondent owes a debt to the

Applicant. Therefore, the Applicant has established a *prima facie* case that the Respondent is indebted in the amount of at least R100.00.

- [113] Whilst the respondent challenged the exact amount of the applicant's claim, it is undisputed that the applicant is a creditor under section 9(1) of the Act.

*ADVANTAGE TO CREDITORS:*

- [114] The responsibility to prove the existence of an advantage to creditors lies with the sequestrating creditor at all times, even if it is evident that the debtor has committed an act of insolvency - *Wilkens v Pieterse 1937 CPD 165*. In addressing this matter in *Paarl Wine & Brandy Co Ltd v Van As 1955 (3) SA 558 (O)*, De Villiers J stated at 560:

*“The fact that an act of insolvency has been committed is in itself not necessarily material to the question whether sequestration will be to the advantage of creditors. While some acts of insolvency, from their nature, tend to show that sequestration will be to the advantage of creditors, as, for instance, where the debtor has given preference and there is consequently matter for investigation, other acts of insolvency, such as a nulla bona return, provide no reinforcement for the contention that the sequestration will be to the advantage of creditors.”*

- [115] The applicant has alleged that the granting of the sequestration order will be to the benefit of the *concursum creditorum*.

- [116] The Insolvency Act aims to liquidate an insolvent person's estate and distribute assets fairly among creditors according to set preferences. The trustee is responsible for collecting, realising, and distributing these assets. To protect the estate, sequestration transfers ownership from the debtor to the Master, and then to the appointed trustee.

- [117] It is not necessary for the applicant to demonstrate direct financial gain, as other benefits may exist, such as preventing the inequitable distribution of the

respondent's assets among only certain creditors, facilitating the examination of the respondent, or enabling a trustee to investigate the respondent's affairs<sup>41</sup> in addition to the broader legal mechanisms provided by the Insolvency Act.<sup>42</sup> It should be noted, however, that the mere right to conduct investigations or examinations does not, in itself, constitute an advantage to creditors. Such rights become advantageous only when there is a reasonable likelihood that the investigation will uncover or recover additional assets.

[118] In *Standard Bank v Van Zyl* 1999 (2) SA 221 (O) the applicant contended that an insolvency interrogation was essential in the circumstances as there was a reasonable possibility that additional assets could be located, which possibility had to be pursued.

[118.1] The court held that it was clothed with a discretion to establish whether there would be an advantage to creditors. This discretion required the Court to conduct an analytical investigation and evaluation of all the relevant facts and circumstances in order to decide which process or method was the most advantageous for the creditors as a group. (At 225A-B.)

[119] The applicant argued that it would be beneficial for all creditors if:

[119.1] the respondent had a substantial estate with a nett worth amounting to R145 021 256.52 as alleged or even more.

[120] In this matter, the respondent has failed to fully and transparently disclose his current assets and liabilities despite being given sufficient opportunity through his answering and supplementary affidavits.

[121] Annexure "EM1" to the supplementary answering affidavit does not substantiate the respondent's claim of solvency. The respondent has not

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<sup>41</sup> *Pelunsky & Co v Beiles* 1908 TS 370 372; *Wilkins v Pieterse* 1937 CPD 165 170.

<sup>42</sup> *Stainer v Estate Bukes* 1933 OPD 86 90.

provided supporting documentation, such as a sworn statement of assets and liabilities, to enable the Court to assess his financial status with confidence. The accounting officer did not submit a confirmatory affidavit, and the calculations of liabilities and equity contain inaccuracies as previously mentioned. During the hearing, documentary evidence was presented to proof the estate, however the applicant raised an objection which was upheld, for reasons as explained here in before.

[122] The respondent states that he owns four immovable properties with a net value exceeding *R20 400 000.00*, as well as shares and securities valued at approximately *R145 021 256.52*. Based on this, creditors could benefit financially if the respondent's estate is placed under sequestration.

[123] In accordance with sections 80bis and/or 82 of the Insolvency Act 24 of 1936, the trustee is authorised to assume control of the assets and may dispose of them through private treaty.

[124] Furthermore, through the machinery of the Insolvency Act, the respondent's trustee/s can:

[124.1] exercise the respondent's shareholding in any company and, if determined to be appropriate, realise the same for the benefit of his creditors;

[124.2] call up any loan accounts in his companies;

[124.3] determine whether the respondent earns an income from his directorships, which can be dealt with in terms of section 23(5) of "the act;

[124.4] any shares held by the respondent in the companies can be exercised on his behalf by his duly appointed trustees and ultimately realized for the benefit of his creditors;

[125] Except as previously indicated, the respondent's financial interests remain unidentified and require further examination by a trustee. Such an inquiry may elucidate the respondent's true financial position. Accordingly, a trustee's

investigation may uncover funds and assets pertinent to the interests of the respondent's creditors.

[126] Whilst investigating, the trustee will examine, among other matters, the assets, business affairs, and any entities in which the respondent holds an interest. Should any assets be identified, the trustee is obligated to assume control over them to prevent their removal or disposition to the potential detriment of creditors. The trustee must also implement appropriate measures to safeguard the interests of the respondent's creditors.

[127] An investigation will reveal the nature and extent of any assets for the benefit of the general body of creditors.

[128] Payments were also made to Mr Pillay in terms of the acknowledgement of debt signed with Lopdale Energy (Pty) Ltd<sup>43</sup> by another legal entity – Lopdale Services and Investments and the respondent's Lopdale business account. These payments may warrant investigation. The payments also constituted acts of insolvency as defined in section 8(c) of the Act, representing dispositions made subsequent to the First Respondent's expressed intention to make payments outlined in the September and October 2021 letters, which themselves qualify as acts of insolvency under section 8(g) of the Act. The trustee possesses the authority to administer this process.

[129] In *Dunlop Tyres (Pty) Ltd v Brewitt 1999 (2) SA 580 (W)* at 583 the following was stated in respect of an advantage to creditors:

*"it will be sufficient that a creditor in an overall view on the papers can show for example that there is a reasonable ground for coming to the conclusion that on a proper investigation by way of an inquiry and section 65 a trustee may be able to unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors."*

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<sup>43</sup> RA16 at 18-1

[130] This court must evaluate whether sequestration will result in some payment which will benefit the body of creditors.

*“For example, it is up to the court to assess whether the sequestration will result in some payment to creditors as a body: that there is a substantial estate from which the creditors cannot get payment, except through sequestration, or that some pecuniary benefit will redound to creditors.”<sup>44</sup>*

[131] It would be advantageous for all creditors if the transfer of capital to Mr Pillay were subjected to investigation. There will be the advantage of a full investigation of the respondent’s affairs under the very extensive powers of enquiry given by the Act. (*Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559)

[132] In *Hillhouse v Stott; Freban Investments (Pty) Ltd; Botha v Botha* 1990 (4) SA 580 (W) at 585C-D Leveson J held:

*“To return to the proposition made by Roper J in the Meskin case supra, the Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that that will be so. That in turn, in my opinion, leads to the conclusion that the expression ‘reason to believe’ means ‘good reason to believe’. The belief must be rational or reasonable and, in my opinion, to come to such a belief, the Court must be furnished with sufficient facts to support it.”*

[133] There is ‘good reason to believe’ that a trustee will be able to ascertain and investigate the value of the respondent’s estate and any dispositions made.

**COURT EXERCISE DISCRETION:**

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<sup>44</sup> Stratford and others v Investec Bank Ltd and others 2015 (3) SA 1 (CC) par [45] at 19.

[134] Even if the court is satisfied that the three *facta probanda* enumerated in the Insolvency Act<sup>45</sup>, namely:

[134.1] a claim of at least R100.00,

[134.2] an act of insolvency of insolvency and

[134.3] reason to believe that it will be to the creditors advantage, have been established on a balance of probabilities,

it still has a discretion, which must be judicially exercised, to grant a final order or not to do so.<sup>46</sup> Each case turns and must be decided upon its own facts.

[135] Sequestration is a discretionary remedy and, in each case, the court's overriding judicial discretion must be exercised in the light of the facts and circumstances proved in the affidavits.<sup>47</sup>

[136] With regard to the meaning of advantage to creditors the courts have repeatedly cited the dictum in *Meskin & Co v Friedman* (1948 2 SA 555 (W) 559) that there must be “a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors”. In *Meskin*, the court discussed the concept of “indirect” advantages (see also *Stainer v Estate Bukes* 1933 (OPD) 86 at 90), referring to benefits that are not inherently pecuniary, such as the ability to investigate the affairs of the insolvent under the statutory powers of enquiry. The court clarified that the right to investigation does not constitute an advantage *per se* (see also *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (N) 592 at para 559; *Mamacos v Davids* 1976 1 SA 19 (C) 22 at paras 21F-22C). Instead, this right serves as a potential mechanism for securing material benefit for creditors, for instance through the recovery of improperly disposed property or the

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<sup>45</sup> Section 12 (1)(a) – (c) of Insolvency Act 24 of 1936.

<sup>46</sup> *Trust Wholesalers & Woollens (Pty) Ltd v Mackan* [1954] 2 All SA 74 (N); 1954 2 SA 109 (N) 113; *Julie Whyte Dresses (Pty) Ltd v Whitehead* [1970] 3 All SA 303 (D); 1970 3 SA 218 (D) 219; *Terblanche v Offshore Design Co (Pty) Ltd* 2001 1 SA 824(C) 828. Cf *Port Shepstone Fresh Meat & Fish Co (Pty) Ltd v Schultz* 1940 NPD 163 in which the court expressed the view that if an applicant has proved an act of insolvency, and there is reason to believe that sequestration will be to the advantage of creditors, very special considerations are necessary to disentitle the applicant to his or her order.

<sup>47</sup> *Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 (3) SA 218 (D) 1970 (3) SA 218 (D); [1970] 3 All SA 303 (D) 304.

disallowance of questionable or collusive claims. The decision in *Meskin* further establishes that it is not necessary to demonstrate the existence of assets in the insolvent estate. Rather, it is sufficient to show a reasonable prospect that an investigation pursuant to the Insolvency Act may lead to the discovery of assets for the benefit of the creditors (*Meskin supra para 559*).

[137] It has been established that, in applications for compulsory sequestration, an advantage to creditors is generally demonstrated when the petitioning creditor shows that the debtor possesses a substantial estate available for sequestration and that creditors are unable to secure payment by any means other than sequestration (see *Hill & Co v Ganie 1925 (CPD) 242 245*; *Trust Wholesalers & Woolens (Pty) Ltd v Mackan 1954 2 SA 109 (N) 111*; *Realizations Ltd v Ager 1961 4 SA 10 (N) 11*; *Mamacos v Davids supra par 20C*).

[138] The advantage to creditors requirement plays a central role in the exercise of the court's discretion. Courts focus on creditors' interests in assessing this requirement because the Act mandates it for sequestration applications.

[139] I have addressed the benefit to creditors, as well as the reasons why it aligns with the interests of the creditor group. Importantly no creditor should obtain any undue advantage over other creditors. In this case, significant capital sums were distributed to Mr. Pillay. Further investigation and examination of both the insolvent party and relevant witnesses may uncover assets that have been disposed of, potentially resulting in a benefit for the creditors.

[140] The respondent directed my attention to *Chenille Industries v Vorster 1953 (2) SA 691 (O)*, in which the court exercised its discretion to decline sequestration. The decision was made after the debtor submitted independent evidence indicating the solvency of their estate, even though there was an act of insolvency and all other requirements for a sequestration order were met.

[141] The aforementioned case is distinguishable from the present matter, as the respondent's claim of solvency is based on Annexure "EM1", which lacks

substantiation and appears to be inaccurate. The respondent has managed and disclosed his estate with insufficient transparency, and supporting documentation was presented solely at the hearing, notwithstanding the prior submission of both an answering affidavit and a supplementary answering affidavit.

- [142] In my considered view, the interests of justice are most effectively served by the court exercising its discretion to grant a final sequestration order. Issuing such an order would be advantageous to the creditors, as it would activate the relevant provisions of the Insolvency Act to enable an investigation of the estate for their benefit.

#### *PENDING CRIMINAL CASE*

- [143] Whilst judgment was pending in the provisional sequestration application, a combined summons (case number 2024-112995) was served on the respondent. The summons advances claims against the respondent and two additional defendants relating to the same debt that is the subject of both the sequestration and related criminal proceedings. Counsel for the applicant stated that action proceedings were initiated to prevent the applicant's (plaintiff's) claim from becoming prescribed.

- [144] The respondent alleged that the funds were deposited into his account following approval from certain directors of the applicant, who were aware of the intended purpose of the payment. He also claims that the applicant has not fully disclosed to the court the extent of his responsibilities, stating that his role was limited to being an accountant with viewing rights only.

- [145] The respondent also stated that depositing funds into his bank account required authorisation from two company directors with payment authority. According to the applicant's standard operating procedure, all transactions and transfers of funds from its account had to be authorised by two individuals.

[146] I was referred to *Gilfillan t/a Grahamstown Veterinary Clinic and Another v Bowker 2012 (4) SA 465 (ECG)*, in which the respondent contested the granting of a final order of sequestration on the basis that such an order could be detrimental to her position in ongoing criminal proceedings.

[146.1] The applicant in the aforesaid matter had filed theft charges against the respondent with the South African Police Service (SAPS). In *Standard Bank of South Africa Ltd v Johnson 1923 CPD 303*, as referenced in *Gilfillan t/a Grahamstown Veterinary Clinic and Another v Bowker*, the court indicated that a provisional order of sequestration should be set aside if criminal proceedings are pending. The court stated:

*"It seems to me that danger might arise if the provisional order were allowed to stand and the matter be postponed. The sum of £5,525.00 forms part of the amount involved in the criminal proceedings, and I do not think that I can make the order final. If I did, I would really find that Johnson owed the money whereas the matter is in dispute in the criminal proceedings. Johnson denies his indebtedness, and says that in view of the criminal proceedings, he cannot go into the matter."*

[147] The court however in *Gilfillan t/a Grahamstown Veterinary Clinic and Another v Bowker 2012 (4) SA 465 (ECG)* with reference to Cilliers et al *Herbstein & Van Winsen: Civil Practice of the High Court of South Africa* 5 ed vol 1 at 314 stated that: There is no rule of law which precludes civil proceedings continuing in circumstances where there is a pending criminal prosecution.

[148] This matter is distinguishable from the one before me in that the respondent did not allege that the final sequestration order will prejudice him in the criminal proceedings.

[149] I agree with Goosen J that an applicant in seeking final relief must on a balance of probabilities meet the requirements for a final sequestration order. This involves evaluating whether:

- [149.1] the applicant has a liquidated claim over R100 against the respondent,
- [149.2] whether the respondent is insolvent or has committed an act of insolvency, and
- [149.3] whether granting sequestration would benefit creditors.

[150] The evaluation is based upon the evidence presented in a case.

[151] Goosen J stated that the prosecution in a criminal trial is required to prove each element of the alleged offence beyond a reasonable doubt using admissible evidence. Additionally, the findings in a civil case are not binding on other courts, even if similar evidence is presented.<sup>48</sup>

[152] In determining whether to grant the final sequestration order, it is not necessary to determine the dispute regarding the exact amount owed by the respondent. It suffices that the applicant possesses a liquidated claim exceeding R100.

[153] The respondent's acknowledgment of the misappropriating of funds constitutes a liquidated claim (see *Irvin & Johnson Ltd v Basson* 1977 (3) SA 1067 (T)). Furthermore, the respondent has admitted to owing in excess of the capital debt. Both the September and October 2021 letters indicate that the amounts acknowledged by the respondent are greater than R100.

## CONCLUSION

[154] Having considered all the evidence the applicant has on a balance of probabilities established the requirements for a final sequestration order in terms of section 12 of the Act.

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<sup>48</sup> Gilfillan t/a Grahamstown Veterinary Clinic and Another v Bowker 2012 (4) SA 465 (ECG)

[154.1] There is an admitted debt (excess) of more than R100, which is admitted in the AOD.

[154.1.1] Clause 4.1 provides as follows:

*“4. THE CAUSE OF DEBT*

*[4.1] The Debtor admits that he stole several million rand from the Creditor, the total amount stolen being in excess of the Capital Debt.*

[154.2] The applicant committed acts of insolvency in terms of section 8(g) and section 8(c) of the Act.

[154.2.1] The evidence indicates that, in a letter dated 6 September 2021, that the respondent acknowledged that the amount of R1 777 000.00 was owed to the applicant.<sup>49</sup> (section 8(g) Paragraph 9 thereof states:

*“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 unrest, which has affected our client business.”*

[154.2.2] In the October 2021 letter, the respondent acknowledges a debt of R10 907 928.90, less any amounts paid to SARS. The assertion that repayment of R10 907 928.90 can only be made in instalments over 72 months is regarded as an act of insolvency in terms of section 8(g) of the Act. While the admission of the debt may be protected from disclosure, the act of insolvency itself is not.<sup>50</sup>

[154.2.3] Mr Pillay was paid at least R2 250 000.00 from the respondent's Lopdale business account in addition to payments made by Lopdale Service and Investments

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<sup>49</sup> RA8 at 10-1

<sup>50</sup> Absa Bank Ltd v Hammerle Group 2015 (5) SA 215 (SCA) para 13

and Lopdale Energy's accounts in the approximate amount of *R12 550 000.00*.<sup>51</sup>

[154.2.3.1] These payments were 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 72 months to pay the amount offered in the October letter, namely *R10 907 928.90*. (section 8(c))

[154.3] It will be to the advantage of the creditors if there is a final sequestration. More so because there was a disposition of amounts to Mr Pillay at a time when the respondent in terms of the September and October 2021 letters proposed payments over 72-month periods.

[155] The respondent failed to rebut the applicant's prima facie case of insolvency, which was based on acts of insolvency. Furthermore, the respondent did not manage or disclose his estate with sufficient transparency, and supporting documentation was provided only at the hearing, despite the prior submission of both an answering affidavit and a supplementary answering affidavit.

[156] In my considered opinion, the interests of justice are best served by the court exercising its discretion to grant a final sequestration order. The issuance of such an order would benefit all the creditors by invoking the pertinent provisions of the Insolvency Act, thereby facilitating an investigation of the estate for their advantage.

*Order:*

[1] The estate of the respondent is placed under final sequestration

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<sup>51</sup> EM6 at 43-1

**S VAN ASWEGEN**  
**ACTING JUDGE OF THE HIGH COURT**  
**PRETORIA**

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|---------------------|--------------------------------------------------------|
| For the Applicant:  | Adv R Peterson instructed by<br>Glover Kannieappan Inc |
| For the Respondent: | Adv HL Kelaotswe<br>instructed by Alabi Inc Attorneys  |