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REPUBLIC OF SOUTH AFRICA



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

CASE NO.: 2025-016669

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 2 June 2026

E van der Schyff

In the matter between:

SUSAN MARJORIE VERMAAK

FIRST APPLICANT

THOMAS JOHN VERMAAK

SECOND APPLICANT

GORDON DINNER

THIRD APPLICANT

and

HARRY KIBEL

FIRST RESPONDENT

[ID: 4[...]]

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JUDGMENT

VAN DER SCHYFF J

Introduction

[1] This is an application for the final sequestration of the respondent's estate in terms of the Insolvency Act 24 of 1936. The applicants contend that the respondent is indebted

to them in the aggregate amount of R1.5 million arising from three written acknowledgments of debt, that he has failed to satisfy those obligations despite demand, and that the statutory requirements for a final sequestration order have been established. The respondent opposes the application, contending principally that the indebtedness is genuinely disputed and that the sequestration proceedings constitute an impermissible attempt to enforce a disputed debt that is already the subject of pending action proceedings between the parties.

[2] The application arises from the sale by the applicants of their interests in Venture Storage (Pty) Ltd ("the Company") to the respondent. On 11 August 2022 the parties concluded a written Sale of Shares Agreement in terms of which the respondent purchased the entirety of the issued share capital of the Company for a purchase price of R9.5 million. The agreement contemplated the transfer of ownership of the business to the respondent and regulated the manner in which the purchase price would be distributed amongst the applicants and the Company.

[3] It is common cause that transfer of the shares was subsequently effected and that the respondent assumed control of the Company during May 2023. The applicants contend that they duly performed their obligations under the sale agreement and that the shares were transferred to the respondent on 19 May 2023. The respondent does not dispute that he acquired and thereafter operated the business.

[4] On or about 2 March 2023 — approximately six and a half months after the conclusion of the sale agreement, and before either the transfer of the shares or the payment of any portion of the purchase price — the respondent executed three separate acknowledgments of debt in favour of the applicants. The amounts acknowledged in those instruments correspond to the amounts allocated to the applicants in the distribution account, which was approved and signed by all parties on 18 March 2023.

[5] In terms of the acknowledgments of debt, the respondent acknowledged indebtedness to the first applicant in the amount of R253 277, to the second applicant in the amount of R703 285, and to the third applicant in the amount of R543 438. Each acknowledgment of debt provided that the obligation became operative upon the successful transfer of the entire issued share capital of the Company into the

respondent's name, with the full amounts payable by no later than 30 June 2023, and interest accruing at prime plus 7.5% per annum, calculated daily and capitalised monthly, in the event of non-payment by the due date.

[6] The shares were transferred to the respondent on 19 May 2023. Shortly thereafter, on or about 29 May 2023, the respondent paid R8 million towards the purchase price, representing the first tranche. The balance of R1.5 million — the precise amounts of which had been acknowledged in the three acknowledgments of debt signed two and a half months earlier — thereupon became due and payable. The applicants contend that the respondent failed to discharge this indebtedness when it fell due on 30 June 2023 and has remained in default despite demand.

[7] During July 2023 the applicants addressed a letter of demand to the respondent. When payment was not forthcoming, they instituted action proceedings under case number 2023-118775 to recover the indebtedness. Those proceedings remain pending. The procedural history of the action includes an application for summary judgment, proposed amendments to the respondent's plea and counterclaim, and an exception brought by the applicants to the respondent's proposed counterclaim. That exception was removed by agreement on 26 November 2024, by order directing the respondent to deliver a fresh notice of amendment and to pay the wasted costs of the removal on Scale B. The respondent had not complied with that order by the time the present application was heard.

[8] In the pending action, the respondent seeks to resist liability principally on the basis that he was induced to enter into the share sale agreement by negligent misrepresentations regarding the Company's financial performance and turnover. He contends that material financial information was not disclosed to him and that he is entitled to a reduction of the purchase price. The respondent relies on these allegations to demonstrate the existence of a *bona fide* dispute concerning the indebtedness relied upon by the applicants.

[9] The applicants dispute the existence of any misrepresentation. They contend that the respondent was afforded an opportunity to conduct due diligence before the transaction was concluded, that he had access to the Company's financial information,

and that the acknowledgments of debt were executed approximately six months after the share sale agreement concluded. According to the applicants, the respondent's reliance on alleged misrepresentations does not constitute a *bona fide* defence to the acknowledged indebtedness.

[10] Against that backdrop, the applicants launched the present sequestration application. They rely on the acknowledged indebtedness, the respondent's failure to satisfy the debts when due, and the provisions of the Insolvency Act. The respondent opposes the application, denies that he is insolvent, contends that the indebtedness is genuinely disputed, and submits that the sequestration proceedings constitute an impermissible attempt to employ insolvency proceedings as a debt-collection mechanism in circumstances where action proceedings concerning the same indebtedness remain pending.

[11] Subsequent to the granting of a provisional sequestration order, further affidavits were exchanged. The applicants contend that events occurring after the provisional order provide further indication of the respondent's insolvency and dealings with assets under the control of the provisional trustees. The respondent disputes those allegations. To the extent necessary, these contentions will be considered later in the judgment.

Admission of the supplementary opposing affidavit

[12] Subsequent to the grant of the provisional sequestration order, the respondent sought leave to file a supplementary opposing affidavit. The affidavit was directed principally at the issue of solvency and sought to place before the court additional information concerning the respondent's assets and liabilities. The applicants indicated that they do not oppose the introduction of the supplementary answering affidavit for the sake of finality..

[13] The admission of further affidavits in motion proceedings is a matter falling within the court's discretion. Relevant considerations include the adequacy of the explanation for the failure to place the evidence before the court at an earlier stage, the relevance and materiality of the proposed evidence, the prejudice that may be occasioned to the opposing party, and the interests of justice.

[14] The explanation advanced by the respondent for the late filing of the affidavit is not particularly compelling. However, the evidence sought to be introduced relates directly to the respondent's alleged solvency, which lies at the heart of the present proceedings. The affidavit is therefore plainly relevant to issues that the court is required to determine.

[15] More importantly, the applicants suffered no material prejudice as a consequence of the late filing. They were afforded a full opportunity to respond to the allegations contained in the supplementary affidavit and did so in a comprehensive supplementary replying affidavit. The applicants were therefore able to meet the respondent's case fully, and no procedural disadvantage arose.

[16] In these circumstances, and having regard to the interests of justice, I am satisfied that the supplementary opposing affidavit should be admitted. Whether the allegations contained therein are persuasive, and the weight to be attached to them, are separate questions to be determined in the evaluation of the evidence.

Did the applicants establish a liquidated claim?

[17] There can be little dispute that the applicants hold a liquidated claim as contemplated in section 9(1) of the Insolvency Act. The respondent executed three written acknowledgments of debt on 2 March 2023 in terms of which he expressly acknowledged indebtedness to the applicants in the aggregate amount of R1.5 million. The amounts are fixed, ascertainable, and became due following the transfer of the shares in Venture Storage (Pty) Ltd. The respondent admits both the execution of the acknowledgments and their terms.

[18] The real question is not whether the claim is liquidated. The question is whether the respondent has demonstrated that the indebtedness reflected in the acknowledgments of debt is *bona fide* disputed on reasonable grounds. If he has done

so, the *Badenhorst* principle¹ becomes applicable notwithstanding the liquidated character of the claim.

Is the indebtedness bona fide disputed on reasonable grounds?

[19] It is trite that sequestration proceedings are not designed to determine genuinely disputed claims and should not be used to pressure a debtor to pay a debt that is *bona fide* disputed on reasonable grounds. The respondent bears the burden of demonstrating that the dispute is bona fide and rests on reasonable grounds. Mere assertion is insufficient.²

[20] The respondent relied on *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd*.³ Properly understood, that decision does not assist the respondent. It confirms that the existence of pending action proceedings does not, without more, preclude insolvency proceedings and that the court must determine whether the alleged dispute is *bona fide* and rests on reasonable grounds. In the present matter, the existence of the action has been taken into account. The difficulty for the respondent is that, for the reasons discussed below, the allegations relied upon to dispute the indebtedness remain insufficiently particularised and substantiated to satisfy the Badenhorst standard.

[21] The respondent's case is that the applicants induced him to enter into the sale agreement through negligent misrepresentations regarding the financial performance and turnover of Venture Storage (Pty) Ltd. He contends that he is entitled to a reduction of the purchase price and that the acknowledgments of debt are inextricably linked to the underlying transaction and must fall with it if the sale agreement is vitiated. There are, however, substantial difficulties with this defence, both on the facts and in law.

[22] The first difficulty is chronological and factual. The acknowledgments of debt were not executed in isolation from the broader contractual architecture of the transaction.

¹ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) – “An application for the liquidation of a company should not be resorted to to enforce the payment of a debt which is *bona fide* disputed by the company.”

² *Imobrite (Pty) Ltd v DTL Boerdery CC* (1007/2020) [2022] ZASCA 67 913 May 2022) at para 14.

³ 2023 (6) SA 452 (WCC).

They represent the second tranche of the purchase price as quantified in the distribution account, a document that all parties, including the respondent, approved and signed on 18 March 2023.

[23] The respondent therefore not only executed the acknowledgments of debt before taking transfer of the shares or making any payment, but thereafter reaffirmed, by his signature of the distribution account, the precise amounts owing to each applicant. The respondent had already been afforded the contractual due diligence opportunity contemplated in clause 5 of the sale agreement, during which he was provided with twelve months of month-by-month bank statements, Pastel accounting records and petty cash documentation. In addition, the respondent's son, Brad Kibel, engaged an independent valuator, Mr Russel McGregor, who was afforded access to the Company's financial records for purposes of assessing the value of the business.

[24] The agreement contains a detailed suite of warranties regarding the company's affairs. The respondent has not identified which specific warranty is alleged to have been breached, nor how any such breach translates into the reduction in purchase price now asserted.

[25] The second difficulty is legal. The respondent has not identified any representation contained in the agreement itself that was false, nor has he explained how the alleged extra-contractual representations are reconciled with the agreement's integration clause. Without deciding that question, it suffices to note that the respondent's allegations remain insufficiently particularised to establish a *bona fide* dispute resting on reasonable grounds.

[26] The third difficulty concerns the quality of the defence advanced. The respondent alleges that he was induced to conclude the transaction by misrepresentations regarding the Company's turnover and financial performance. However, the allegations remain broadly stated and insufficiently substantiated. The respondent does not provide a sufficiently detailed factual exposition of the alleged misrepresentations, the circumstances in which they were made, the respects in which they were false, or the evidential basis upon which the alleged reduction in purchase price is calculated. Nor does he place before the court any financial analysis or objective material capable of

demonstrating that the acknowledged indebtedness is not in fact due. The allegations therefore remain largely conclusory. The *Badenhorst* burden requires more than the assertion of a potentially arguable defence; it requires sufficient factual material to satisfy the court that the dispute is genuine and rests upon reasonable grounds.

[27] The respondent's reliance on the existence of the pending action proceedings does not, without more, discharge the *Badenhorst* burden. The existence of litigation is a relevant consideration, but the court must evaluate the substance of the defence and not merely its procedural form. In this regard, the respondent's own conduct in the action is instructive. Despite the order of 26 November 2024, made by agreement between the parties, directing the respondent to deliver a fresh notice of amendment within ten days and to pay the wasted costs of the removal of the exception on Scale B, the respondent had not delivered the fresh notice of amendment contemplated in that order by the time this application was heard.

[28] A party who contends that a pending action vindicates a genuine dispute, yet takes no discernible steps to advance that action, weakens the credibility of that contention. The prolonged failure to regularise the pleadings sits uneasily with the assertion that the pending action demonstrates a genuine dispute urgently requiring judicial determination. The respondent's reliance on the pending action is therefore difficult to reconcile with his prolonged failure to take the procedural steps necessary to place the defence upon which he relies properly before the trial court.

[29] The respondent also raises the *exceptio non adimpleti contractus*. Even assuming the *exceptio* is legally available, the respondent has not established facts demonstrating non-performance sufficient to render the debt bona fide disputed on reasonable grounds.

[30] Having regard to all of the above, the respondent's execution of the acknowledgments of debt before taking transfer and before making any payment, his subsequent signature of the distribution account confirming the same amounts, the absence of particularised facts supporting the alleged misrepresentations, the legal difficulty arising from the respondent's reliance on alleged extra-contractual representations in circumstances where the agreement contains an integration clause, and the respondent's apparent lack of urgency in prosecuting the very action upon which

he relies, I am not persuaded that the respondent has discharged the *Badenhorst* burden. The indebtedness reflected in the acknowledgments of debt has not been shown, on the papers before me, to be *bona fide* disputed on reasonable grounds.

[31] The applicants have accordingly established a liquidated claim which is not shown, on the papers before me, to be *bona fide* disputed on reasonable grounds.

Did the applicants establish that the respondent has committed an act of insolvency or is insolvent?

[32] The applicants rely upon both factual insolvency and acts of insolvency. I approach the question of factual insolvency with caution. The respondent has placed before the court a schedule compiled by his accountant purporting to show assets substantially exceeding liabilities. If accepted at face value, the schedule would indicate considerable solvency.

[33] The difficulty for the respondent is not that no evidence of solvency has been produced. The difficulty lies in the evidential quality of that material. The schedule prepared by Mr. Steven Miller is unsupported by a confirmatory affidavit from Mr. Miller and is not accompanied by valuation reports, financial statements, title documentation, actuarial evidence or other primary material capable of substantiating the values reflected therein. In *Yardley v Watson and Another*,⁴ the court declined to attach significant weight to an alleged valuation where the valuator had not confirmed the valuation under oath and the underlying material was not placed before the court. Similar difficulties arise in the present matter.

[34] A further difficulty is that the schedule does not clearly distinguish between assets owned personally by the respondent and assets owned by separate corporate entities. The respondent states that the assets are held “in my personal name and through various legal entities”, yet the schedule does not identify which assets vest in him personally, which are owned by companies or other entities, the extent of his interests in those

⁴ (6717/2016) [2016] ZAWCHC 146 (28 October 2016) at paras 28-35.

entities, or the basis upon which the values attributed to the underlying assets translate into value available to him personally.

[35] The difficulty extends beyond the absence of a confirmatory affidavit from Mr Miller. The respondent has produced virtually no primary documentation establishing ownership of the assets reflected in the schedule. No title deeds, deeds office searches, share certificates, policy schedules, investment statements, company financial statements or other objective records are annexed. Even the schedule's reference to cash in hand is unsupported by any documentary proof. The position is particularly striking because many of the assets relied upon are of a kind that could readily have been substantiated. While the respondent was not required to prove solvency with mathematical precision, a debtor seeking to rebut an inference of insolvency would ordinarily be expected to produce at least some objective evidence demonstrating ownership and value of the principal assets upon which he relies. The absence of such material further diminishes the evidential weight that can be attached to the schedule.

[36] The Miller schedule therefore constitutes evidence of the respondent's contentions regarding solvency, but it cannot be accepted at face value as conclusive proof that his assets exceed his liabilities by the amounts alleged. A debtor seeking to rebut an inference of insolvency is required to place before the court a full, true, and accurate picture of his assets and liabilities.⁵

[37] The respondent also relies on an ABSA account statement reflecting an available balance of approximately R3 million immediately prior to the granting of the provisional sequestration order. He contends that the account was thereafter frozen following the grant of the provisional order. The documentary evidence does not support that explanation.

[38] Correspondence from ABSA indicates that a hold was placed on the account on 12 November 2025 but was removed on 13 November 2025, whereafter substantial funds were transferred from the account. The accompanying bank statement reflects that on 13

⁵ *Absa Bank v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 444E-F.

November 2025 an amount of R2.7 million was transferred from the account, reducing the balance from approximately R2.745 million to approximately R15 130.17.

[39] The respondent does not engage directly with this evidence, nor does he explain the subsequent disposition of the funds. In circumstances where the respondent seeks to rebut an inference of insolvency, the absence of a full explanation concerning a substantial liquid asset materially diminishes the weight that can be attached to the bank statement as proof of continuing solvency.

[40] Conversely, the respondent has failed for an extended period to discharge an admitted indebtedness of R1.5 million. As was observed in *De Waard v Andrew and Thienhaus Ltd*,⁶ the best proof of solvency is ordinarily the payment of one's debts. Persistent failure to pay an admitted debt remains a powerful indicator of insolvency, although not conclusive proof thereof.

[41] The position is strengthened by the events following the grant of the provisional sequestration order. The applicants allege that substantial funds were dealt with after the provisional order notwithstanding the restrictions flowing therefrom and contend that this conduct may constitute a further act of insolvency. While I do not consider it necessary finally to determine those allegations, they do little to enhance the credibility of the respondent's assertion that he possesses abundant assets and readily available means to satisfy the debt.

[42] The respondent's evidence falls materially short of providing the full, true and accurate picture required of a debtor seeking to rebut an inference of insolvency. The court is therefore unable to place significant reliance on the respondent's assertions regarding the extent of his assets and net worth. Whether characterised as evidence of commercial insolvency, inability to meet obligations as they fall due, or evidence supporting the commission of acts of insolvency relied upon by the applicants, the respondent's financial disclosure does not avail him in circumstances where the remaining requirements for sequestration have been established.

Is there reason to believe that sequestration will be to the advantage of creditors?

⁶ 1907 TS 727 at 733.

[43] The threshold imposed by section 12(1)(c) is relatively modest. The applicants need not prove that sequestration will necessarily yield a dividend. They need to establish only a reason to believe that sequestration may result in some pecuniary benefit to creditors.⁷

[44] The evidence establishes the existence of immovable property registered in the respondent's name together with interests in a number of corporate entities. The precise value of those assets remains uncertain. Yet that uncertainty itself demonstrates why sequestration may be advantageous. A trustee would be empowered to investigate the respondent's affairs, determine the true extent and value of his assets, examine transactions entered into before sequestration and, where appropriate, recover assets for the benefit of creditors. The fact that the applicants are the only creditors presently before the court is not decisive where the evidence discloses assets and financial affairs requiring investigation.

[45] This is not a case where the applicants rely upon vague speculation that undisclosed assets may exist. There are identified assets and identified corporate interests. What remains uncertain is their true value and the extent to which they may be available to satisfy creditors.

[46] I am accordingly satisfied that there is reason to believe that sequestration will be to the advantage of creditors.

ORDER

In the result, the following order is granted:

- 1. The estate of the respondent is placed under final sequestration in the hands of the Master of the High Court;**
- 2. The costs of the application are costs in the sequestration on Scale C.**

E VAN DER SCHYFF

⁷ *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559, *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC) at paras 43-45.

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

For the applicants:
Instructed by:

Adv. C. J. Welgemoed
VDT Attorneys

For the respondent:
Instructed by:

Adv. M. D. Köhn
DS Attorneys

Date of the hearing:

20 May 2026

Date of judgment:

2 June 2026