IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 10995/2024P

In the matter between:

THE PRUDENTIAL AUTHORITY **APPLICANT**

and

VALUKUFA JANE NDULI **FIRST RESPONDENT**

(Identity Number: 6[...])

(Married in community of property to Sibusiso Christopher Nduli)

(Identity Number: 6[...])

SIBUSISO CHRISTOPHER NDULI **SECOND RESPONDENT**

(Identity Number: 6[...])

(Married in community of property to Valukufa Jane Nduli)

(Identity Number: 6[...])

ORDER

The following order is granted:

1. The rule *nisi* which was issued on 7 August 2025 is confirmed and the estate of the respondents is placed under final sequestration.
2. The costs of the application are costs in the sequestration.

JUDGMENT

Pietersen AJ:

Introduction

[1] This is an application for an order placing the respondents' joint estate under final sequestration. On 7 August 2025, Marion AJ granted an order placing the respondents' estate under provisional sequestration. In terms of the provisional sequestration order, the respondents and any interested persons were directed to show cause why the estate of the respondents should not be finally sequestrated and why the costs of the application for sequestration should not be costs in the sequestration of the first and second respondents' joint estate.

[2] The first respondent subsequently delivered a supplementary answering affidavit together with a notice of motion seeking leave for this affidavit to be delivered. This application was not opposed by the applicant. No other affidavits were delivered in the matter after the provisional sequestration order was granted.

[3] The respondents do not require leave for the delivery of a supplementary answering affidavit, as the rule *nisi* directed the respondents and all interested persons to show cause why a final sequestration should not be granted. The delivery of a supplementary answering affidavit is therefore appropriate for purposes of complying with the court order.

[4] The applicant is the Prudential Authority, a juristic person established in terms of

s 32 of the Financial Sector Regulation Act 9 of 2017 (FSRA), which operates within the administration of the South African Reserve Bank (SARB). Since 1 April 2018, when s 5 of the FSRA came into effect, the Prudential Authority has been responsible for exercising the powers and duties set out in the Banks Act 94 of 1990 (the Banks Act) and the FSRA. Those powers and duties previously reposed in the office of the Registrar of Banks (the registrar). When the FSRA took effect, the Prudential Authority was:

(a) Empowered to continue with pending inspections or investigations commenced by the registrar;[1] and

(b) Substituted in place of the registrar in pending proceedings.[2]

[5] The respondents, Mrs Valukufa Jane Nduli and Mr Sibusiso Christopher Nduli (the Ndulis), are married to each other in community of property.

[6] It is not disputed that pursuant to inspections conducted in terms of the Banks Act, read with the South African Reserve Bank Act 90 of 1989 (the SARB Act), the registrar was satisfied that Mrs Nduli obtained money by conducting the business of a bank without being registered or authorised to do so. The registrar proceeded to direct Mrs Nduli to repay all monies she obtained from depositors while conducting the business of a bank. Mr Johannes George Kruger (Mr Kruger) was appointed to ascertain the true amount that Mrs Nduli obtained through her unlawful conduct and to manage and control the repayment process. The registrar subsequently directed Mrs Nduli to repay the sum of R179 100, which was the sum Mr Kruger determined she obtained by conducting the business of a bank, in contravention of the Banks Act. Mrs Nduli failed to repay this amount in accordance with this directive.

[7] In its founding affidavit, the applicant relied on Mrs Nduli's undisputed indebtedness and argued that she has committed an act of insolvency by failing to honour the repayment directive, as s 83(3)*(b)* of the Banks Act deems the failure to

[1] Section 296 of the FSRA.
[2] Section 300(2) of the FSRA.

repay the amount in the directive to be an act of insolvency. The applicant also submitted that, in terms of s 84(1A)*(a)* of the Banks Act, the Ndulis were factually insolvent as, on their own version, their liabilities exceeded their assets.

The statutory context

[8] In terms of s 11(1) of the Banks Act, persons are prohibited from conducting the business of a bank unless they are a public company and registered or authorised to conduct the business of a bank. Section 1 of the Banks Act defines 'the business of a bank' to include the acceptance of deposits from members of the general public as a regular feature of business and inter alia:

'*(e)* Any other activity which the Authority has, after consultation with the Governor of the Reserve Bank, by notice in the Gazette declared to be the business of a bank…'

[9] On 27 March 1997, the registrar (who was then the 'authority' contemplated above) published a notice in the *Government Gazette* titled 'Designation of Activities that are the Business of a Bank' (the Notice).[3]

[10] The Notice applies to activities that are a regular feature of 'a business practice' rather than a regular feature of 'a business'. The Notice defines a business practice as (a) an agreement or understanding regardless of its enforceability, or (b) a scheme, practice, or method of trading, including a method of marketing or distribution.

[11] The Notice declares the following activities as 'the business of a bank' for the purposes of the Banks Act:

(a) First, accepting or obtaining money from members of the public with the prospect of those persons (called 'participating members') receiving payment or other money-related benefits, directly or indirectly –

(i) On or after introducing new members of the public (called 'new participating members') to the business practice, from whom money is accepted or obtained;

[3] Designation of Activities that are the Business of a Bank, GN 498, *GG* 17895, 27 March 1997.

(ii) On or after promotion, transfer, or a change in status of participating members or new participating members within the business practice, or

(iii) From funds obtained from participating members or new members in the business practice.

(b) Second, the solicitation of, or advertisement for, money and/or persons for their introduction into, or participation in, the business practice described above.

[12] The Notice is directed at pyramid schemes, which the Notice now designated as 'the business of a bank'. The Notice effectively proscribes participation in pyramid schemes by targeting activities which typically occur in such schemes. Persons cannot engage in the identified activities unless they are registered with the registrar in terms of s 17 of the Banks Act.

[13] In terms of s 12 of the SARB Act, the Governor or the Deputy Governor of the SARB is empowered, if they have reason to suspect that a person is unlawfully conducting the business of a bank, to establish whether this is so. The Governor or Deputy Governor may direct the registrar to launch an investigation into that person's affairs, which investigation is conducted by an inspector appointed under s 11(1) of the SARB Act.

[14] If, as a result of the investigation, the registrar is satisfied that 'any person' obtained money by unlawfully conducting the business of a bank, then:

(a) The registrar issues a directive to that person to repay all the money so obtained, including interest and other amounts owed in respect of that money (the repayment directive).[4]

(b) The registrar simultaneously appoints a repayment administrator to manage and control the repayment of monies pursuant to the repayment directive.[5] The repayment

[4] Section 83(1) of the Banks Act.
[5] Section 84(1) of the Banks Act.

administrator is empowered to take possession of the person's assets;[6] and is required to investigate that person's affairs to, inter alia:[7]

(i) Establish the true amount of money unlawfully obtained by the person subject to the repayment directive;

(ii) Establish the identities of persons from whom the subject of the investigation obtained that money; and

(iii) Trace the unlawfully obtained funds and the assets into which those funds were converted, as the case may be.

[15] Apart from constituting an offence, the failure to comply with the repayment directive is deemed to be an act of insolvency and the Prudential Authority may apply for the sequestration of the person's estate. This is set out in s 83(3)*(b)* of the Banks Act, which provides that:

'(3) Any person who refuses or fails to comply with a direction under subsection (1)—

…

(*b*) shall for the purposes of any law relating to the winding-up of juristic persons or to the sequestration of insolvent estates, be deemed not to be able to pay the debts owed by such person or to have committed an act of insolvency, as the case may be, and the Authority shall, notwithstanding anything to the contrary contained in any law, be competent to apply for the winding-up of such a juristic person or for the sequestration of the estate of such a person, as the case may be, to any court having jurisdiction.'

[16] The repayment administrator is also required to report on whether the person subject to the repayment directive is solvent, and if not, to opine on whether the person is technically or legally insolvent.[8] If the repayment administrator concludes that the person is insolvent, then s 84(1A)*(c)*, allows the Prudential Authority to:

'…notwithstanding anything contrary contained in any law relating to liquidation or insolvency apply to a competent court for… sequestration in terms of the Insolvency Act…'

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[6] Section 84(1A)*(b)*(i) of the Banks Act.
[7] Section 84(4)*(a)*(i), (ii) and (iii) of the Banks Act.
[8] Section 84(1A)*(a)* of the Banks Act.

The material facts

[17] It is common cause that Mrs Nduli was involved in the Travel Ventures International (TVI) Scheme (the TVI Scheme), which commenced operation in South Africa in 2009. The Ndulis did not dispute that the TVI Scheme fell within the business of a bank in terms of the Banks Act, but say that at the time, Mrs Nduli was unaware of it. Mrs Nduli also stated that she was at the time unaware that the TVI Scheme was a pyramid scheme and that she 'was a victim of TVI and duped into purchasing vouchers…'.

[18] Briefly, as a matter of background, it is common cause that in terms of a presentation by TVI, it described itself as an international direct selling company, which promised opportunities to travel and to earn additional income. The presentation indicated that upon becoming a distributor, one would be entitled to travel discounts and access to resorts and hotels which partnered with TVI. TVI referred to this as a business opportunity:

'For those of you who are interested in supplementing your income by telling others about TVI's products and services, please continue with the PowerPoint Presentation, to learn more about the TVI Express Business Opportunity.'

[19] The TVI Scheme then offered four income streams which were all dependent upon the participant introducing new participants. According to the evidence of Mr Kruger, these income structures ultimately mean that a participant could earn money merely by introducing new participants and the scheme did not require retailing of products or anything to be sold. Persons earned money by introducing members on the promise of them, in turn, earning money by introducing more members. Therefore, TVI fell within the expanded definition of the business of a bank and essentially operated as a pyramid scheme.

The Ndulis' defences

[20] In argument before me, the Ndulis submitted that there is no proof or acceptable evidence of the fact that the repayment directive was received by Mrs Nduli, and if Mrs

Nduli did not receive the repayment directive, it means that the applicant has failed to prove that she has committed an act of insolvency (or deemed to have committed an act of insolvency), because she did not know that she had to repay the money. It was further argued that there was an undue delay by the applicant to institute the sequestration proceedings against the Ndulis and that this is a factor to be taken into account by the court in exercising its discretion in the dismissal of the application. The Ndulis further argued that the repayment administrator failed to comply with the provisions of s 84 of the Banks Act by failing to establish the true amount of money unlawfully obtained by Mrs Nduli, as it refers in its report to 'probable investor deposits' and 'possible investor deposits'. Lastly, the Ndulis argued that the sequestration of the joint estate will not be to the advantage of their creditors as, according to the evidence of Mr Kruger, the net value of the Ndulis' immovable property is R390 000 and the Ndulis' movable assets are limited to a Mercedez-Benz E-Class vehicle, which is at least 15 years old. The Ndulis, therefore, conclude that their assets are of insufficient value for the payment of the costs of sequestration and the administration of the insolvent estate.

Hearsay and lack of proof of receipt of the repayment directive

[21] The Ndulis' arguments about hearsay evidence and the lack of proof that the repayment directive was received by Mrs Nduli can be swiftly disposed of. The arguments hinge on the premise that there is no confirmatory affidavit by Mr Kruger who investigated the matter and on whose information the deponent to the applicant's affidavit relies. The Ndulis thus argue that the deponent's evidence constitutes hearsay evidence and the report of Mr Kruger thus constitutes inadmissible evidence. However, it is simply incorrect to say that Mr Kruger has not deposed to a confirmatory affidavit. Mr Kruger's confirmatory affidavit was duly annexed to the applicant's replying affidavit and in this confirmatory affidavit, Mr Kruger confirmed that he has read the answering affidavit (which can only be a reference to the applicant's founding affidavit deposed to by Nomfundo Tshazibana). As a result, there is no merit in the Ndulis' arguments about hearsay evidence and the lack of proof that the repayment directive was received by Mrs Nduli.

Undue delay

[22] Counsel for the Ndulis, Mr *Snyman SC*, appearing with Ms *Ngcobo*, submitted that this court should note the inordinate delay by the applicant to institute the sequestration application against the Ndulis and that this undue delay should be taken into account as a factor in the exercise of the court's residual discretion. In this regard, counsel provided the following helpful timeline:

(a) 18 March 2011: Mr Kruger was appointed to investigate this matter;

(b) 4 June 2013: Mr Kruger executed a search warrant of Mrs Nduli's residential premises;

(c) 5 July 2013: Mr Kruger served a notice on Mrs Nduli summoning her to appear at the offices of Bowman Gillfilan;

(d) 20 November 2013: Mr Kruger presented his final inspection report to the registrar and issued a repayment directive to Mrs Nduli;

(e) 2 December 2014: Mrs Nduli became aware that the applicant may bring a sequestration application when the repayment directive was issued;

(f) 13 March 2015: Mr Kruger obtained a *rule nisi* confirming his statutory duty and power to take possession of Mrs Nduli's assets;

(g) 27 July 2015: Mr Kruger's offices served the *rule nisi* and repayment directive on Mrs Nduli.

(h) September 2015: Mr Kruger issued a report in which he recommended that the joint estate be sequestrated;

(i) 1 October 2015: Mr Kruger submitted a draft solvency report to the registrar; and

(j) 16 July 2024: The present application papers were issued.

[21] It was properly conceded by Mr *Snyman* that an undue delay on its own is insufficient to constitute a reason for the dismissal of an application for sequestration.[9]

[22] Whilst the above timeline clearly shows an inordinate delay of almost nine years

[9] *Prudential Authority v Dlamini and Another* [2024] ZASCA 133; 2025 (1) SA 365 (SCA) (*Dlamini*) para 80.

between when Mr Kruger submitted a draft solvency report to the registrar and when the application papers were issued, I am not satisfied that this delay prejudiced the Ndulis. The Ndulis failed to present any evidence in support of any finding of prejudice. The undue delay relied on by the Ndulis, therefore, is an insufficient reason for dismissal of the application.

Section 84 of the Banks Act

[23] The Ndulis submitted that the applicant has failed to comply with the jurisdictional requirements of s 84 of the Banks Act in that the draft report by the repayment administrator, Mr Kruger, did not specify the identities of the persons who deposited the funds and did not mention the true amounts paid into Mrs Nduli's account. This is denied by the applicant.

[24] As indicated above, sections 83 and 84 of the Banks Act include two express provisions conferring on the applicant the competence to apply for the sequestration of a person's estate who is subject to a repayment directive. First, s 83(3)*(b)* provides that a person who fails to comply with a repayment directive

'shall for the purposes of any law relating to the winding-up of juristic persons or to the sequestration of insolvent estates, be deemed not to be able to pay the debts owed by such person or to have committed an act of insolvency, as the case may be, and the Authority shall, notwithstanding anything to the contrary contained in any law, be competent to apply for… [his or her] sequestration'.

Second, under s 84(1A)*(c)*, if the report filed by the administrator concludes that the person concerned is insolvent, the Prudential Authority may, notwithstanding anything contrary contained in any law relating to liquidation or insolvency, apply to a competent court for the sequestration of the person's estate.

[25] In the instant case, the applicant sought the provisional sequestration order on two grounds, first, on the basis of the deemed act of insolvency in terms of s 83(3)*(b)*. The second was in terms of s 84(1A)*(c)*, on the ground that Mr Kruger concluded that the Ndulis are insolvent. In this regard, the applicant relied on the solvency report issued by Mr Kruger on its behalf in terms of s 84(1A)*(a)*, which established their

indebtedness.

[26] The court held as follows in *Dlamini* regarding ss 83 and 84:

'[25] The high court erred in dismissing the application. It is common cause that the Authority's application was founded on ss 83 and 84 of the Banks Act. The Dlaminis failed to repay the amount within the period stipulated in the repayment directive. They also did not challenge the directive by way of review despite being entitled to do so. Therefore, the Dlaminis were, in terms of s 83, deemed to have committed an act of insolvency.

…

[30] … The Authority did not have to rely on the s 84 report to establish a case based on s 83. Section 83(3)*(b)* is a self-contained provision that allows the Authority to bring the sequestration application in an instance where a person, who is subject to a directive, has failed to repay the amount unlawfully obtained and does not challenge the directive. The Dlaminis were, by virtue of their failure to comply with the directive, deemed to have committed an act of insolvency. This is a separate ground upon which a sequestration order may be granted, and the Authority was entitled to proceed on that ground alone, without, in addition, having to establish actual insolvency under s 84.

…

[38] In this case, the evidence established that the Dlaminis obtained money through their participation in the TVI scheme which entailed carrying on the business of a bank without being authorised to do so. The amount which they were directed to repay was disclosed in the directive that was issued and they failed to repay it as directed. In terms of s 83, they were deemed to have committed an act of insolvency. In terms of s 84(1A)*(f)*, the Authority is regarded as a creditor and he or she has the same rights of a creditor in terms of the law relating to liquidation and insolvency. Whilst it is correct that the list containing the amounts collected by the Dlaminis does not specify the creditors, in my view, the lack of such information is not fatal to the Authority's case because, as already stated, the Authority is regarded as a creditor, and it must collect all money unlawfully obtained and distribute same to the investors once their identity is established.'

[27] Therefore, any non-compliance with s 84 is similarly not fatal to the applicant's case herein.

Advantage to creditors

[28] Before the court can grant a final order of sequestration, it must be satisfied that there is reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated. This is in terms of s 12(1)*(c)* of the Insolvency Act 24 of 1936 (the Insolvency Act).

[29] The applicant alleged that Mrs Nduli is indebted in the sum of R179 100, which is the amount that she received through the TVI Scheme, conducting the business of a bank. The sum of R179 100 attracts interest at the rate of 9% per annum, calculated from the date of delivery of the repayment directive, which was on 2 December 2014. The Ndulis submitted that 9% interest on R179 100 equals R16 119 per annum and over 11 years, equals R177 309. This amount is then added to the capital of R179 100, which gives a total of R356 409, according to the Ndulis.

[30] The Ndulis further submitted that, according to the evidence of Mr Kruger, the net value of the Ndulis' immovable property is R390 000.

[31] As far as movable assets are concerned, the Ndulis submitted that these are limited to a Mercedes-Benz E-Class vehicle, which was seized by the applicant. The vehicle is apparently at least 15 years old and was obtained by the Ndulis during 2010. According to the Ndulis, they do not own any other vehicles.

[32] It was submitted that the personal debts of Mrs Nduli amount to R1 649 551.84. Therefore, so the Ndulis argue, their liabilities total R2 005 069.84 (R1 649 551.84 (personal liabilities) plus R356 409 (which must be paid to the applicant)).

[33] Therefore, compared to the net value of the Ndulis' estate, being the value of the immovable property, it was submitted on behalf of the Ndulis that the costs of sequestration would result in the benefit to creditors being negligible.

[34] It is so that the onus of establishing an advantage to creditors remains on the

sequestrating creditor throughout, even when it is clear that the debtor has committed an act of insolvency.

[35] The applicant submitted that there can be no doubt that there is a reasonable prospect that some pecuniary benefit will be derived through the sequestration of the estate.

[36] In *Stratford and Others v Investec Bank Ltd and Others,*[10] the Constitutional Court stated as follows:

'The meaning of the term "advantage" is broad and should not be rigidified. This includes the nebulous "not-negligible" pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or "not-negligible" benefit in the context of a hostile sequestration where there could be many creditors is unhelpful.' (Footnote omitted.)

[37] The court in *Firstrand Bank Limited v Nel*[11] held that

'I do not agree with the contention by the respondent that because of what he avers regarding the alleged lack of advantage to creditors as "he is hopelessly insolvent", the Court should not favourably consider the application. The contention losses sight of the fact that the applicant has no statutory authority to conduct an inquiry envisaged in the Act.'

[38] The court in *Nel*[12] referred to *Mercantile Bank Limited A division of Capitec Bank Limited v Ross and Another*,[13] where Twala J, in the case where the respondent raised the defence that it would not be to the advantage of creditors to sequestrate his estate, held as follows on the purposive interpretation of the Insolvency Act:

'Even if I am wrong in finding that the respondent's estate should be sequestrated on the basis of the reasons stated above, it should also be borne in mind that the purpose of the Insolvency Act is not only for securing the pecuniary benefit to the creditors, but to protect the general body of the public from people who behave in this manner. It would be an absurdity to interpret s

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[10] *Stratford and Others v Investec Bank Ltd and Others* [2014] ZACC 38; 2015 (3) SA 1 (CC) (*Stratford*) para 44.
[11] *Firstrand Bank Limited v Nel* [2025] ZAGPJHC 617 (*Nel*) para 15.
[12] *Nel* para 20.
[13] *Mercantile Bank Limited A division of Capitec Bank Limited v Ross and Another* [2023] ZAGPJHC 435 (*Ross*) para 25.

12(2) of the act in a way that, even if the creditor has established and met the requirements of s 12(a) and (b), but the debtor does not have any assets which when realised may yield a dividend to the benefit of the body of creditors, an order sequestrating the estate of the debtor should not be granted because the sequestration of the estate will not be to the advantage of the creditors. I say so because that would be a narrow and rigid interpretation of s 12(2) of the Act.'

[39] The court in *Nel* went on to find that there was an advantage to the general body of creditors, that the respondent's estate should be sequestrated and that the inquiry into his affairs may yield some benefit.

[40] In *Trust Wholesalers and Woollens (Pty) Ltd v Mackan*[14] it was decided by Selke J that:

'…it seems clear that it is for the petitioner to satisfy the Court that there is reason to believe that creditors will derive advantage from the sequestration, and I venture to think that what the petitioner has thus to show is that on the facts before the Court there is a reasonable likelihood that sequestration will yield, at the least, a not negligible dividend.'[15]

[41] I am satisfied that the sequestration of the Ndulis' joint estate will constitute an advantage to creditors. The advantage to creditors, or reason to believe that there will be an advantage to creditors, is not too remote – being the immovable property and the likelihood that as a result of an investigation and enquiry, assets may be unearthed that will benefit creditors.[16]

[42] The Ndulis' assets are not so small that they will not be sufficient for the payment of the cost of sequestration and administration.[17]

[43] A sequestrating creditor seeking a final sequestration order on the return day of

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[14] *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) at 111G-H.
[15] See also *Stratford* para 43.
[16] *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership and Others* [2006] ZASCA 51; 2006 (4) SA 292 (SCA) para 29.
[17] *Trade Discount CO v Steele* 1949 (4) SA 121 (O) at 122-123.

the *rule nisi* granted in the provisional order has the onus to show, on a balance of probabilities, that the order should be made final. There is no onus on the respondents, only an evidential burden to establish that the confirmation of the provisional order is being resisted on *bona fide* and reasonable grounds. If the respondents succeed in doing so, the provisional order must be discharged and the application for final sequestration dismissed.

[44] Furthermore, it is so that even if this court is satisfied that the requirements for a final order of sequestration have been established on a balance of probabilities, it is not bound to grant a final order of sequestration. In each case, it has an overriding discretion, to be exercised upon a consideration of all the circumstances.[18] No exhaustive rule can be laid down as to how the court should exercise the discretion, each case depends on its own particular facts.[19]

[45] In the exercise of its discretion, the courts have in the past refused to sequestrate an estate where the debtor had no assets at all, or very small assets.[20]

[46] I am satisfied that the requirements for a final sequestration order have been met by the applicant. I further find no reason to exercise my residual discretion in favour of the Ndulis.

Order

[47] The following order is made:

1. The rule *nisi* which was issued on 7 August 2025 is confirmed and the estate of the respondents is placed under final sequestration.
2. The costs of the application are costs in the sequestration.

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[18] *Braithwaite v Gilbert (Volkskas Bpk Intervening)* 1984 (4) SA 717 (W) at 718C-D; *Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 (3) SA 218 (D) at 219A.
[19] *Pelunsky & Co v Beiles and Others* 1908 TS 370 at 372.
[20] *Smith v Smith* 1918 CPD 331 at 335.

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PIETERSEN AJ