REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 25057/2018

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

23 AUG 2019
SIGNATURE DATE

In the matter between:

VBS MUTUAL BANK (IN LIQUIDATION) Applicant

and

MADZONGA, MMBULAHENI ROBERT Respondent

JUDGMENT

MATOJANE J

[1] This is an application for the final sequestration of Mr Mmbulaheni Robert Madzonga ('Mr Madzonga'). The applicant avers that he was a co-perpetrator who knowingly participated in a fraudulent scheme which caused the VBS Mutual Bank ('VBS') a loss of at least R1 521 925 280.46 and that accordingly, as a joint wrongdoer, he is jointly and severally liable to the applicant for that loss.

[2] The estate of Mr Madzonga was provisionally sequestrated on 3 August 2018 by an order granted by His Lordship Mr Justice Tsoka.[1]

[3] Mr Madzonga denies that he is insolvent. His primary contention is that the applicant has failed to establish a liquidated claim against him as required in terms of s 9(1) as read with s 12 of the Insolvency Act 24 of 1936 (the 'Insolvency Act').[2] Secondly, Mr Madzonga avers that he disputes the applicant's claim on bona fide and reasonable grounds, and lastly, that the applicant has not made out a case for the relief it seeks.

[4] The crux of Mr Madzonga's defence is that he knew nothing of the fraudulent scheme or the financial position of VBS, or the financial position of Vele Investments (Pty) Ltd ('Vele'), a company that was the primary recipient of proceeds derived from the fraudulent scheme. He states that he did not knowingly benefit from the alleged fraudulent scheme.

Background

[5] The following facts are either common cause or at least not disputed. On 10 March 2018 VBS Mutual Bank ('VBS' or the 'Bank') was placed under curatorship in terms of s 81 of the Mutual Banks Act 124 of 1993 read with s 69(1)(a) of the Banks Act 94 of 1990. SizweNtsalubaGobodo Incorporated ('SNG'), a firm of auditors, was appointed as the curator of the Bank. Annosh Rooplal ('Rooplal'), a director of SNG, conducted preliminary investigations into VBS and found evidence of large-scale fraud. Mr Rooplal deposed to the founding affidavit in support of the present application. He stated that VBS had fallen prey to the fraudulent scheme from at least 2017 until his appointment in March 2018.

[6] Pursuant to Mr Rooplal's initial findings, the Deputy Governor of the South African Reserve Bank, in his capacity as the Chief Executive Officer of the Prudential

---

[1] *VBS Mutual Bank (In Liquidation) v Ramavhunga and Others* (2018/25062; 2018/25057) [2018] ZAGPJHC 516 (3 August 2018).

[2] The respondent argues that if the applicant fails to establish a liquidated claim, it naturally follows that the other requirements contained in section 12(1) of the Insolvency Act cannot be established i.e. of whether the debtor committed an act of insolvency or is insolvent; and of whether the sequestration of the debtor's estate would be advantageous to creditors.

Authority,[3] appointed Advocate Terry Motau SC as an investigator in terms of s 134 of the Financial Sector Regulation Act 9 of 2017 (the 'FSR Act') to conduct an investigation into the Bank. The investigation uncovered numerous serious irregularities, including wide-scale fraud, in the conduct of the banking business of VBS.[4]

[7] Mr Rooplal obtained an affidavit, dated 22 May 2018, deposed to by Mr Phophi Londolani Mukhodobwane ('Mukhodobwane') in terms of s 136 (1)(a) and s 140(6) of the FSR Act. Mr Mukhodobwane was the Head of Treasury at VBS and is a co-conspirator in the fraudulent scheme. In his affidavit, Mr Mukhodobwane sets out the role played by various individuals and entities involved in the fraudulent scheme. VBS relies on his evidence in the affidavit to assert that Mr Madzonga participated and benefited from the aforementioned fraudulent scheme, which involved Vele Investments (Pty) Ltd.

Hearsay Evidence

[8] Mr Madzonga submits that Mr Mukhodobwane's affidavit relied upon by VBS amounts to inadmissible hearsay evidence and ought to be struck out by the Court. Tsoka J, in his judgment provisionally sequestrating the estate of Mr Madzonga, has already determined that Mukhodobwane's affidavit does not constitute hearsay evidence and that even if it does, it is admissible under the Law of Evidence Amendment Act 45 of 1988. Tsoka J's decision on the admissibility of Mukhodobwane's affidavit is a finding of law and can only be overruled on appeal.[5] See *Macdonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another*.[6]

---

[3] Established in terms of section 32 of the Financial Sector Regulation Act 9 of 2017.
[4] Report by Advocate Terry Motau SC dated 30 September 2018 titled 'The Great Bank Heist: Investigator's Report to the Prudential Authority' (the 'Motau Report'),
[5] *VBS Mutual Bank (In Liquidation) v Ramavhunga* (note 1 above) paras 30-32.
[6] *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another* 1997 (1) SA 1 (A) at 27D-E. The Appellate Division in this case found that a decision on the admissibility of evidence is one of law.

Evidence

[9] For the reasons that follow, in my view, it is more probable than not that Mr Madzonga knew of and benefited handsomely from the fraudulent scheme. His denial of not knowingly participating in the fraudulent scheme is just not credible, and is inconceivable in light of his close association with the perpetrators and entities that benefited from the fraudulent scheme. Tsoka J, in his judgment provisionally sequestrating Mr Madzonga's estate, found him to have lied under oath.

[10] Mr Madzonga is an admitted attorney with more than 23 years' experience in the commercial and corporate finance business areas, which includes the legal and regulatory environment. He states in his answering affidavit that he initially became involved with VBS in February 2016 as a consultant and advisor, chiefly tasked with bringing in new business. Mr Madzonga further stated in this answering affidavit that he was appointed as the acting Chief Operating Officer ('COO') for VBS for three weeks during April or May 2016, pending approval from the Registrar of Banks for a permanent appointment in terms of the regulatory requirements.

[11] Mr Madzonga was required and attended to the completion of what is known as a DI 020 application form that is submitted to the Registrar of Banks for the approval of the appointment of a director or executive officer to a bank in terms of the regulatory requirements.

[12] The Registrar of Banks questioned Mr Madzonga's suitability about being the COO of VBS. In this regard, the Registrar referenced Mr Madzonga's failure to highlight in his DI 020 application form, that during the course of his employment with MTN (Pty) Ltd, the Hawks investigated his role in the ICT Indaba Sponsorship in 2013; that there were allegations of misconduct and irregularities while he was the Chief Corporate Officer of MTN; and that a comprehensive forensic report by PricewaterhouseCoopers on 'alarming evidence of corruption' at MTN specifically referenced him.

[13] The Registrar of Banks requested Mr Matodzi, the Chairperson of the Board of VBS, to provide further information regarding all considerations made by the VBS Board of Directors in its assessment of the appropriateness of appointing Mr

Madzonga as COO. In his third answering affidavit, Mr Madzonga falsely claimed that the Registrar of Banks merely advised VBS that it was not satisfied with his financial experience and that the Registrar requested to be furnished with reasons for his leaving his previous employment with MTN.

[14] The letter from the Registrar was addressed to Mr Matodzi and Mr Ramavhunga (the Chief Executive Officer of VBS) on 12 September 2016. On the same day, Matodzi forwarded the letter to Mr Madzonga to his VBS email address. This conclusively demonstrates that Madzonga was still employed by VBS on 12 September 2016, contrary to his allegations in his initial answering affidavit that he was appointed acting COO during April or May 2016 for only three weeks.

[15] Mr Madzonga, in his third answering affidavit, backtracked, asserting that while awaiting the outcome of the DI 020 application, he was appointed as Acting COO of VBS for a period of three months from August 2016 to October 2016.

[16] Given this contradiction, my conclusion is that Mr Madzonga, first, attempted to mislead the Registrar of Banks by withholding information that indicts his character. Second, he also sought to create an impression that his tenure as COO of VBS was of short duration in order to distance himself from any involvement in the fraud and theft committed against VBS, particularly in the 2017 year and thereafter.

Mr Madzonga's proximity to various entities that benefited from the fraudulent scheme

[17] Mr Madzonga admits receipt of the letter from the Registrar of Banks. He does not deny the contents thereof. Mr Matodzi, as Chairperson of the VBS Board, did not furnish the Registrar with the additional information required. Instead, Mr Matodzi, in his capacity as the Executive Chairperson of Vele, appointed Mr Madzonga as COO and later CEO for Vele.

[18] Mr Madzonga sits with Mr Matodzi on Vele's investment committee. He further sits on the board of Vele Financial Services with Matodzi. Madzonga serves as a director of Insure Group Managers (Pty) Ltd ('Insure'), Black Label Telecoms (Pty)

Ltd and Bonulog (Pty) Ltd. All these entities benefited directly from the fraudulent scheme.

[19] Significant fraudulent transactions that involved VBS, Vele and Insure, occurred during Mr Madzonga's tenure as Vele's COO (and later it's CEO) and a director of Insure.

[20] During March 2017, Mukhodobwane and Phillipus Nicholas Truter, the then Chief Financial Officer of VBS, on instructions from Mr Matodzi, created a 'VBS Corporate Suspense' account through the EMID System.[7] The account was fictitiously credited with an amount of R250 million. This created an impression in the EMID System that funds had been deposited into the VBS 'Corporate Suspense account' when no such deposit had been made.

[21] The fictitious deposit of R250 million was then transferred from the VBS Corporate Suspense account into Insure's bank account held with VBS. The depositor's funds were then transferred to third party accounts outside VBS and used to by the perpetrators to purchase immovable property, companies as going concerns, high-end motor vehicles and a helicopter.

[22] According to Mr Rooplal, on 6 March 2017, Vele fraudulently acquired shares valued at R80 million in VBS to become the majority shareholder of VBS. Insure deposited an amount of R80 million into VBS, which purported to be a payment by Vele for its shareholding in VBS. The deposit was placed with VBS for two weeks for a purpose unrelated to the VBS share acquisition transaction. On 13 March 2017, the deposit was withdrawn by Insure in the ordinary course of business with the result that Vele never paid for its shareholding in VBS.

[23] On 5 October 2017, a fictitious credit of R350 million was generated in Vele's account. According to Rooplal, on the same date, an amount of R5 million was transferred from Vele's accounts to the account of an entity, Foxburgh Capital (Pty) Ltd ('Foxburgh'). Following this payment, an amount of R3.93 million was transferred to Madzonga's VBS account from the Foxburgh account. Other payments were effected to other perpetrators. Mr Madzonga denies any knowledge of the fictitious

[7] The EMID system is an electronic banking platform which records the accounting entries relating to banking transactions.

amount of R350 million credited to Vele and states that these were accounts that were hidden from him.

Mr Madzonga's knowledge of VBS and Vele's financial position

[24] There are strong indications that Mr Madzonga had personal knowledge of the fraudulent scheme at VBS – contrary to his assertion that he only became aware of the fraudulent scheme upon reading the founding affidavit. In paragraph 26.2 of his first answering affidavit, Mr Madzonga states that the first he heard of any falsification of the records of VBS was on Sunday, 11 March 2018 when Mukhodobwane sought his advice as to whether he should delete the false contract finance accounts which he had collated on a Gmail account.

[25] He states that Mr Mukhodobwane called him aside and explained to him that he (Mukhodobwane) together with others in VBS, had created false contract finance assets on the books of VBS, which in turn created the false impression that VBS had such finance facilities as assets in its books of account.

[26] It is telling that Mr Madzonga never disclosed this information to the curator which he received from Mr Mukhodobwane on 11 March 2018.

[27] Mr Madzonga knew of the VBS liquidity crisis as early as February 2018. On his version, he was informed by Mr Mukhodobwane in early February 2018 that VBS was having 'a temporary cash-flow difficulty' which he was told would be resolved in two weeks. He states further that Mukhodobwane informed him that there were insufficient monies in the VBS account held with FNB to honour the payments that were to be made to creditors of Insure. Mr Mukhodobwane implored him to assist and pay monies into the VBS bank account held with FNB to address this temporary liquidity issue.

[28] Mr Madzonga states that he took it upon himself to pay R3 million from his FNB account to VBS' FNB bank account and that he obtained a 'loan from a friend' in an amount of R15 million, which sum was also paid into VBS' FNB bank account on 17 February 2018. This 'friend' is a reference to Tshepo Mathopo of Mathopo

Attorneys. Mr Madzonga states that because VBS became indebted to him for R15 million, he instructed VBS to credit R15 million into his bond account.

[29] Mr Madzonga's version regarding the R15 million loan from a friend is a falsehood that was intended to conceal the fraudulent scheme. Mr Mathopo states that no loan was advanced by him to Mr Madzonga. He denies that they are friends. Mr Mathopo filed an affidavit in which he explains that the R15 million payment he made to VBS from his trust account constituted an arms-length payment from his client, Ntsika Women Empowerment Solutions (Pty) Ltd ('Ntsika'), to Vele. This was a result of the cancellation of an agreement that his client had entered into to purchase shares in a company named Salt Investments No. 3 (Pty) Ltd.

[30] Mr Mathopo further explains that Mr Madzonga approached him shortly after this application was launched and requested that a representative of Ntsika provide him with a confirmatory affidavit to the effect that the amounts transferred out of the trust account constituted a loan to him. Mr Mathopo explained that both he and his client refused the request because such a statement would be false and that neither of them would be a party to such proposed perjury.

[31] I agree with Tsoka J, who rejected Mr Madzonga's explanation regarding the R18 million as false. He found that:

'Madzonga, in his affidavit, states that he did nothing wrong. According to him, he was at Vele, which is different from VBS. His conduct says something else. When VBS was experiencing a cash crisis, he first paid the amount of R18 million into VBS. The payment is not rationally explained. Why pay an amount of R3 million of your hard-earned money in an entity you have no relationship with? Why go to the trouble of raising a loan of R15 million in an attempt to rescue an entity which was in a financial crisis? This happened in circumstances when the board of VBS did not seek assistance from Vele. The board of the latter also did not resolve to assist VBS. Neither were senior executives of Vele asked for assistance.

The inevitable conclusion is that the advance of R18 million to VBS was an attempt on Madzonga's part to cover his tracks. Unfortunately, the damage had been done already. R18

million was insufficient to solve the cash crisis in VBS. That is why he later wrote an email to VBS to recover the R15 million allegedly paid into VBS by error.'[8]

[32] By instructing VBS to credit R15 million into his bond account, Mr Madzonga sought to fraudulently reduce his debt to VBS by appropriating funds intended for Vele to himself.

[33] Far from assisting VBS with its liquidity crisis, Mr Madzonga's actions were intended to conceal the liquidity crisis at VBS caused by the fraudulent scheme. It is implausible that Mr Mukhodobwane would have sought his assistance to bail out VBS from the looming liquidity crisis and confided in him if he was not a co-perpetrator in the fraudulent scheme. Madzonga was the CEO of Vele and a director of Insure, which was the subsidiary of Vele. Vele was the major shareholder in Insure and VBS. Vele had more than R63 million in one of the bank accounts. It is inexplicable why Mr Madzonga should pay his money into the VBS account instead of transferring the money from the Vele account to the VBS account at FNB.

Mr Madzonga's receipt of R4.5 million from a fictitious deposit in Vele

[34] Mr Mukhodobwane states that Mr Matodzi instructed him to deposit into the mortgage bond account of Madzonga in an amount of R4.5 million, using fictitious funds from Vele. This amount was paid to Mr Madzonga on 18 October 2017. In his answering affidavit, Mr Madzonga states that he did not know the origins of this money. He states that—

'...presumably, this amount of R4.5 million relates to the remuneration I was promised by Matodzi, and which I was led to believe was paid to me, upon my promotion from chief operating officer to chief executive officer of the Vele Group in October 2017.'

[35] I find myself in agreement with the conclusion reached by Tsoka J when he stated that :

'Once he received the R4.5 million from Vele, he paid this money as a deposit towards the purchase price of R9.4 million relating [to] a property described as Stand No. 42, Blue Hills

---

[8] *VBS Mutual Bank (In Liquidation) v Ramavhunga* (note 1 above) paras 36-37.

Country Estate Country Estate in Johannesburg. This resulted in VBS only lending him and mortgaging the property to the value of R4.9 million.

The objective evidence, however, reveals that Madzonga's explanation of the R4.5 million is a lie. The agreement entered into for the purchase of the Blue Hills property doesn't require a deposit. In fact, in terms of the agreement, the principal debt is still reflected as the amount of R9.4 million. On 31 October and 31 November 2017, VBS addressed two letters to him that are telling. The two letters record his loan as the amount of R9.4 million and that the monthly repayments, for a period of 60 months, is the amount of R214 000. However, other than few monthly repayments in the amount of R213 000, it does not appear that Madzonga regularly serviced the capital advanced to him by VBS. In any event, it is common cause that the transfer of the property into his name was effected on 29 September 2017. The amount of R4.5 million cannot therefore be a deposit on a property already transferred.

Surprisingly, there is no evidence that Matodzi ever kept his side of the bargain by paying the balance of R500 000 Madzonga appears to also have forgotten about claiming what was due to him in terms of his agreement between him and Matodzi. The ineluctable conclusion is that R4.5 million is an afterthought. The alleged promotion is nothing but a lie to explain the inexplicable.'[9]

[36] Madzonga, together with Matodzi and Ramavhunga, received monthly payments from Vele Petroport in the amount of R300 000. Vele Petroport was a joint venture between two entities, Mmapilo Petroleum (Pty) Ltd and Belton Park Trading 134 (Pty) Ltd. Mr Madzonga was the Chairman of Vele Petroport. This payment of R300 000 was made over seven months. According to Rooplal, Vele Petroport is a business with no income and it made these payments via an ever-growing overdraft which was cleared on 30 March 2017 by way of a fraudulent clearing of overdrafts.

[37] Mr Madzonga states that he was seconded from Vele to Vele Petroport in order to advance an empowerment deal involving Vele, Mmampilo Investments (Pty) Ltd and Belton Park, which ultimately collapsed. He admits receiving payment of 'remuneration' from Vele Petroport but alleges that he did not know from which account those monies came from.

---

[9] Ibid paras 27-29.

Disputes of fact

[38] It is trite that sequestration proceedings are designed to bring about a *concursus creditorem* to ensure an equal distribution between creditors and that such proceedings are an inappropriate forum for the resolution of a dispute as to the existence or otherwise of a debt. Consequently, where there is a genuine and bona fide dispute as to whether a respondent in sequestration proceedings is indebted to the applicant, the court should as a general rule dismiss the application. This is the so-called 'Badenhorst rule'.[10]

[39] Mr Madzonga denies that he knowingly benefited from the fraudulent scheme and denies that such assets as he owns are ill-gotten gains from that scheme. His version is littered with contradictions, he was intimately involved with the individuals and entities involved in the scheme, and he substantially benefitted from the scheme. These factors, taken together with his high-ranking positions within VBS, Vele, and other relevant entities, and his knowledge, education and experience, make it inconceivable that he was ignorant of the fraudulent scheme to which the Bank fell victim. In my view, Mr Madzonga's denials are so untenable that they do not raise a real, genuine dispute of fact and fall to be rejected on the papers.

[40] Mr Madzonga seeks to rely on the report by Terry Motau SC in which he stated that he was not in a position to make a definitive finding as to the specific role Mr Madzonga played in the fraudulent scheme. In this regard, Terry Motau SC acknowledged that the 'wholesale looting of VBS' did not take place while Mr Madzonga was an employee of VBS, but bore in mind that the principal beneficiary of the looting was Vele, of which Madzonga was COO and CEO. The reliance on the Motau Report is misplaced, as it does not exonerate Mr Madzonga. In fact, Terry Motau SC found that 'Madzonga's denial of any knowledge or involvement in the frauds and thefts rings hollow. What, however, is very plain is that Madzonga was highly rewarded for whatever is was that he did.'[11]

[41] Further, the issue with Mr Madzonga's reliance on the Motau Report is that Terry Motau SC did not have the same evidence before him that has been put before

---

[10] *Badenhost v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T) at 347-8.
[11] Motau Report (note 4 above) paras 58-60.

this Court. For example, although he found the Madzonga's explanation of the R15 million constituting a loan from Mathopo improbable based on the relevant documents, he did not interview Mr. Mathopo, who later deposed to an affidavit stating that Mr Madzonga asked him to depose to an affidavit falsely alleging that the trust monies Mathopo paid to Vele was a loan to him.

[42] In any event, the difficulty I have with this argument of Mr Madzonga is that the findings in the Motau Report constitute an irrelevant opinion in these proceedings. In *Graham v Park Mews Body Corporate*,[12] the High Court stated as follows:

'There seems to be a general rule that findings of another tribunal cannot be used to prove a fact in a subsequent tribunal. I also see no logical reason why the application of this rule cannot be extended to the findings, orders and awards of other tribunals, so as to exclude the opinion of triers of fact in these proceedings in civil or criminal matters.'

VBS has a liquidated claim within the meaning of the Insolvency Act

[43] Counsel for Mr Madzonga contended that VBS has failed to establish a liquidated claim against him. As regards the requirements for the granting of a final sequestration order, s 12 of the Insolvency Act provides:

(1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that-
   (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
   (b) the debtor has committed an act of insolvency or is insolvent; and
   (c) there is a reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may sequestrate the estate of the debtor.

(2) ...

[44] Section 9(1) of the Insolvency Act, in so far as is relevant to this matter, provides that a creditor who has a liquidated claim for not less than R100 against a debtor who has committed an act of insolvency or is insolvent, may petition the court for the sequestration of the estate of the debtor.

---

[12] *Graham v Park Mews Body Corporate & Another* 2012 (1) SA 355 (WCC) paras 58-64.

[45] The case for VBS rests mainly on circumstantial evidence. In *AA Onderlinge Assuransie Bpk v De Beer*,[13] the Appellate Division espoused the following notion—

'It is not necessary for a plaintiff invoking circumstantial evidence in a civil case to prove that the inference which he asks the Court to make is the only reasonable inference. He will discharge the onus which rests on him if he can convince the Court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences.'

[46] The inference that Mr Madzonga participated in and benefited from the fraudulent scheme is the most readily apparent. Had Mr Madzonga not appropriated the proceeds of the fraudulent scheme, VBS would not have suffered the loss to the extent that it did. The perpetrators' independent wrongful acts combined to produce the same damage, namely, the loss by VBS of the amount of at least R1 521 925 280.46. Mr Madzonga, as a concurrent wrongdoer, is accordingly liable for the full amount of VBS's loss.[14]

[47] In *Irvin & Johnson (Pty) Ltd v Basson*,[15] Basson, who was the manager of the applicant's branches, had been dismissed after he had misappropriated funds of the applicant. The investigation was not yet complete, and Basson had admitted to misappropriation in the amount of R16 000. The evidence established that the applicant had a claim of at least R103 925.49 against Basson. The court held that as the investigation had established liability over R100, the applicant had established that it had *locus standi*. The court stated as follows:

'For the present purposes, it is of no consequence, in my view, that the full extent of the respondent's liability may eventually prove to be in excess of the amount of R103 925,49. The evidence, as it stands, if it is accepted, establishes a liability of not less than the amount to which I have referred. Then, there is also the evidence that the respondent confessed or admitted to having misappropriated a fixed sum of R16 000. On that basis, and without expressing any views as to the conclusion to which a Court might come when all the affidavits are eventually considered, I am satisfied that, for the present purposes, the applicant has established that it has *locus standi*.'[16]

---

[13] Refer to headnote in *AA Onderlinge Assuransie Bpk v De Beer* 1982 (2) SA 603 (A).
[14] *Nedcor Bank Limited t/a Nedbank v Lloyd-Gray Lithographers (Pty) Limited* 2000 (4) SA 915 (SCA).
[15] *Irvin & Johnson Ltd v Basson* 1977 (3) SA 1067 (T).
[16] Ibid at 1072H-B.

[48] I accordingly find that VBS' claim of R1 521 925 280.46 is a liquidated claim and it, therefore, satisfies the requirements of sections 9(1) and 12(1)(a) of the Insolvency Act.

Factual insolvency

[49] There are two ways in which the applicant can prove that the debtor is insolvent if the creditor does not rely on an act of insolvency. Firstly, factual insolvency may be established by demonstrating that the liabilities of the debtor exceed his assets. Secondly, factual insolvency may be established inferentially.[17] As stated in *Cohen v Jacobs*, 'Factual insolvency may also be established indirectly by adducing circumstances indicative thereof – such as the facts that respondent's debts remain unpaid...'[18] This was also set out in *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others*,[19] where McEwan J held:

'One of the strongest proofs of solvency is that a man pays his debts and failure to do so gives rise to an inference that he is insolvent....'

[50] In this third answering affidavit, Mr Madzonga states that he does not owe VBS any monies which would lead to the factual insolvency of his estate. He states, without any substantiating evidence, that his estate is worth more than R30 million. According to Mr Madzonga, he currently only owes VBS a sum of R8 151 924.43, plus interest. This amount consists of debts relating to a mortgage and five vehicle finance agreements with VBS. On 26 March 2019, the attorneys for VBS, acting on Mr Rooplal's instructions, addressed a letter of demand to Mr Madzonga in respect of this debt. Mr Madzonga has acknowledged receipt of the letter of demand and does not dispute his indebtedness. He has failed to make payment of the outstanding balance; this is indicative of the fact that he is unable to repay his debts.

[51] Furthermore, Mr Madzonga, on his version, does not have assets over R1.5 billion. He is accordingly factually insolvent.

---

[17] *Absa Bank Ltd v Rhebokskloof (Pty) Ltd & Others* 1993 (4) SA at 443B-E.
[18] *Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd intervening)* [1998] 2 All SA 433 (W) at 443.
[19] *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others* 1976 (2) 856 (W) at 869C-D.

Advantage to creditors

[52] In *Stratford v Investec Bank Limited,*[20] the approach in evaluating the advantage to creditors was set out as follows by the Constitutional Court:

'The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in *Friedman*. For example, it is up to a court to assess whether the sequestration will result in some payment to the 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 the creditors.'

[53] In my view, there is a reasonable prospect that some pecuniary benefit will result to creditors as a result of an enquiry under the Act. The trustee of the estate will be in a position to conduct a proper enquiry into the affairs of Mr Madzonga, which may yield to a recovery of the debt, or a portion thereof.

The Court's discretion in sequestration proceedings

[54] Even if a court is satisfied that the three elements set out in s 12(1) of the Insolvency Act have been met, it is not obliged to grant the final order of sequestration. The court still has an overriding discretion to be exercised on a consideration of all the circumstances of a particular case.

[55] In *FirstRand Bank v Evans*,[21] Wallis J describes the exercise of this discretion as follows:

'Once the applicant for a provisional order of sequestration has established on a *prima facie* basis the requisites for such an order, the court has a discretion whether to grant the order. There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within that class of cases generally described as involving a power combined with a duty. In other words, where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to

---

[20] *Stratford and Others v Investec Bank Limited and Others* 2015 (3) SA 1 (CC) para 45 with reference to *Meskin & Co v Friedman* 1948 (2) SA 555 (W).
[21] *FirstRand Bank v Evans* 2011 (4) SA 597 (KZD) para 27.

establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour....'

[56] The courts have exercised their discretion in favour of debtors in circumstances where the debtor provided independent evidence to show that he was factually solvent;[22] or where the debtor has instituted a damages claim against the creditor which, if successful, would extinguish the creditor's claim.[23]

[57] There are no exceptional or unusual circumstances in this case that warrant the Court exercising its discretion in favour of Mr Madzonga.

[58] In all the circumstances, the applicant has discharged its onus for the order finally sequestrating the estate of Mr Madzonga. The following order shall issue:

It is ordered that:

1. The estate of the respondent is placed under final sequestration;

2. The respondent's estate is to pay the costs of this application, including the costs of senior counsel and all previously reserved costs.

K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 21 June 2019

Date of judgment: 23 August 2019

---

[22] See *Berrange NO v Hassan & Another* 2009 (2) SA 339 (N) at 368-369.
[23] *Swellendam Municipality v Kennedy* 1934 CPD 448.

Appearances:

Counsel for the Applicant:	Adv. Adv. M Antonie SC
	Adv. E van Vuuren SC
	Adv. Gishatha Singh
Instructing Attorneys:	Werksmans Attorneys
Counsel for the Respondent:	Adv. N C Bothma
	Adv. N Khumalo
Instructing Attorneys:	Tony Tshivhase Incorporated