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**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 10837/2016

Case number: 19689/2016

Case number: 17728/2021

In the matter between:

**S[....] J[....] C[....]**

Applicant/Defendant

and

**T[....] R[....] C[....]**

Respondent/Plaintiff

**JUDGMENT (1) DELIVERED ON 11 MAY 2022**

**VAN ZYL AJ:**

**Introduction**

1. The parties are embroiled in a long-running divorce action instituted in June 2016 under case number 10837/2016, in which the applicant in this application is the defendant, and the respondent is the plaintiff. The parties were married on 7 January 2006. They have two minor children, the eldest of whom suffers from diabetes, pervasive developmental disorder and other chronic conditions.

2. I shall refer to the parties as, respectively, the “applicant” and the “respondent”.

3. What is in dispute in the divorce action is, *inter alia*, whether certain funds provided by the respondent to the applicant in the course of their marriage were not gifts, but were loans repayable on divorce. This issue features prominently in these proceedings.

4. There are essentially five opposed applications before me:

4.1. An application instituted by the applicant for the provisional sequestration of the respondent's estate under case number 17728/2021.

4.2. An application brought in September 2021 under case number 19689/2016 by the respondent in terms of Rule 43(6), seeking a variation of an order made in terms of Rule 43 on 4 April 2017.

4.3. A counter-application to the respondent's Rule 43(6) application under the same case number, in which the applicant seeks an order holding the respondent in contempt for failure to comply with the Rule 43 order granted on 4 April 2017 and the directions made for the purposes of trial preparation by the relevant case management judge (the Honourable Justice Dolamo) on 6 February 2018, 7 October 2020, and 26 November 2020.

4.4. A procedural complaint raised by the respondent that the applicant may not raise the respondent's contempt by way of a counter-application.

4.5. An application by the respondent for the setting aside of a writ of execution obtained by the respondent on 8 November 2021 under case number 19689/2016.

5. The same facts inform most of these applications. In what follows I shall address the sequestration application first, as the fate of Rule 43(6) application and the application for the setting aside of the writ of execution depends upon the outcome of the sequestration application.

6. I shall, in a follow-up judgment, deal with the applicant's contempt application

and the respondent's objection as to the competence thereof.

7. Both parties had delivered certain affidavits late, and they both applied for condonation in respect thereof. Condonation was duly granted.

### **The applicant's application for the sequestration of the respondent's estate**

8. Section 10 of the Insolvency Act provides as follows:

*"If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie-*

*(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and*

*(b) the debtor has committed an act of insolvency or is insolvent; and*

*(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,*

*it may make an order sequestrating the estate of the debtor provisionally."*

9. The claim mentioned in section 9(1) is a claim of at least R100,00.

10. Even if the papers disclose disputes of fact, an applicant will nevertheless succeed in establishing a *prima facie* case where he or she can show that "*on a consideration of all the affidavits filed [that] a case for sequestration has been established on a balance of probabilities*", though open to some doubt (*Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 978D-E).

11. I proceed to consider each of these requirements in turn.

### **The applicant's claim against the respondent**

#### **The claim of R4,5 million**

12. The applicant relies, firstly, for the purposes of *locus standi* upon a claim of R4,5 million against the respondent.

13. The applicant and respondent are married to each other out of community of property with the application of the accrual system. In terms of their declaration of assets, read with an agreement concluded between them on 28 December 2005, the parties agreed that the applicant would be "*regarded as being the owner of a one half share of [Erf [...], Cape Town] and have the same rights and obligations as if she were a registered owner.*" Erf [...] is also known as [...] E[...] Avenue, Kenrock Estate, Hout Bay, and is the parties' former common matrimonial home.

14. In terms of clause 3 of the 2005 agreement, upon the disposition of that property the respondent would be liable to pay to the applicant 50% of the net proceeds of the sale. Clause 4 of the 2005 agreement enjoined the respondent from seeking the applicant's permission prior to disposing of Erf [...].

15. On 23 March 2011 the applicant acquired another property in the same development, namely [...] F[...] Lane in Kenrock Estate. The F[...] Lane property was occupied by the applicant's father and his partner until September 2014. It was thereafter placed on the market to be sold. The proceeds of the sale were to be paid to the applicant, as she was the registered owner. The respondent, however, asked to borrow those proceeds from the applicant. That led to the applicant and the respondent concluding a further written agreement on 22 October 2014.

16. In terms of the 2014 agreement the applicant would lend R4,5 million of the proceeds of the sale of [...] F[...] Lane to the respondent. The respondent would be liable to repay the loan to the applicant on the date on which the transfer of the former matrimonial home, Erf [...], was registered. On the date of registration, the respondent would become liable to pay to the applicant the sum of R4,5 million or, if half of the proceeds of the sale was higher than R4,5 million, then the respondent was to pay to the applicant half of the proceeds of the sale.

17. There is a dispute between the parties as to whether the 2014 agreement was concluded to substitute the 2005 agreement. The respondent says that that was the case, and that the applicant had abandoned her claim in relation to the 50% nett proceeds of Erf [...] in a statement of issues in dispute formulated for the purposes

of the divorce action. Apart from the fact that the “abandonment” was made on a without prejudice basis and in an attempt to settle and narrow the issues in the divorce action, the dispute is not material to this application. Either way, the respondent would be indebted to the applicant in the sum of at least R4,5 million or half of the net proceeds of the sale of Erf [...] should it exceed R4,5 million. Alternatively, if the 2005 agreement and the 2014 agreement co-exist, then the respondent is liable to pay to the applicant R4,5 million (pursuant to the 2014 agreement) and half of the proceeds of the sale of Erf [...], or R4,5 million (pursuant to the 2005 agreement), totalling at least R9 million.

18. In October 2016 the applicant brought a Rule 43 application. The respondent was in court for the hearing of the application. His counsel conceded that, when the matrimonial home (Erf [...]) was sold then the respondent would become indebted to the applicant in the sum of R4,5 million. The respondent did not object to that concession. (I pause to mention that the respondent also admitted that at least R4.5 million was due to the applicant on registration of the transfer of Erf [...] in his particulars of claim, insofar as he asked for an order implementing the terms of the antenuptial agreement. The admission was repeated in the respondent’s plea to the applicant’s counterclaim.)

19. Despite the provisions of clause 4 of the 2005 agreement, which required the applicant’s permission prior to the respondent’s disposing of Erf [...], the respondent concluded a sale agreement in respect of that property on 7 May 2021. Transfer was registered on 27 July 2021. In terms of the agreements between the parties, the respondent became liable to pay to the applicant at least R4,5 million on that date. The applicant was not aware of the sale and transfer at the time, and the respondent did not repay the loan to the applicant as he was obliged to do.

20. Instead, he used the proceeds of the sale to settle various expenses, including unvouched loans in the amount of more than R3 million made to him by his brothers, friends, and his late father’s estate. He also repaid his current account overdraft and credit card debt, settled his legal fees and accommodation expenses, and settled some of the arrear maintenance owed to the applicant in terms of the rule 43 order. The respondent accordingly depleted the proceeds of the sale and (so

the applicant contends) preferred other creditors above the applicant.

21. The respondent opposes the applicant's claim for payment of the R4,5 million loan, alleging that the applicant is in fact indebted to him in the sum of more than R9 million. He relies on set-off to indicate that the applicant in fact owes him money. The respondent alleges that the applicant's indebtedness towards him arises from seven loan agreement concluded between the parties during the subsistence of their marriage. These loans are, however, undocumented and there is no contemporaneous detail as to the dates on which they were advanced, what the agreed terms were, and what the agreed repayment date would have been.

22. The respondent says, correctly so, that the status of these loans is still to be determined by this Court at the finalisation of the divorce action. He therefore concedes that he would have to prove at the divorce trial that there was a meeting of the minds between the parties to conclude seven loan agreements, repayable on divorce, and what the terms were. He must prove that the amounts alleged to have been lent were in fact advanced to the applicant and have been correctly calculated in accordance with the provisions of the respective loan agreements. It is clear that in the circumstances the respondent cannot rely on set off.

23. *In Gilliat v Sassin* 1954 (2) SA 278 (C) the issue was whether the applicant creditor had a liquidated claim in circumstances where she relied on an amount due to her as heir in terms of the first and final liquidation and distribution account in her late mother's estate, which the respondent, the executor, had misappropriated out of the estate. The respondent took the point that the estate account had not yet been finally approved by the Master, and that it was possible that the Master might require amendments to the estate account, in which case the amount due to the applicant would be subject to alteration. The court was called upon to determine whether, in these circumstances, the applicant had a liquidated claim entitling her to apply for the sequestration of the respondent's estate. The court held as follows at 280A-D:

*"To be regarded as a liquidated claim the petitioner's claim must be fixed and determined. This Court, in the case of Stephan v Khan 1917 CPD 24 – a decision which has frequently been followed not only in this Court but in*

*other Courts – held that “liquidated claim”, as those words are used in sec. 9(1) of the 1916 Insolvency Act, mean a claim the amount of which has been determined by a judgment of the Court, by agreement or otherwise.*

*Now, in the present case the amount of the petitioner’s claim – and indeed whether she will have a claim at all – is conditional upon whether the account in the estate of the petitioner’s late mother is accepted in the form in which it presently stands. The account has, however, still to be advertised and objection may successfully be taken thereto, which might have the effect of reducing her claim or even eliminating it altogether. Mr. Meyerowitz stated that in any event she had a prima facie claim to the amount appearing in this account and that it was highly probable that an amount would eventually be found to be due to her which would be in excess of £ 50. This may be so, but to my mind this does not go far enough to satisfy the provisions of sec. 9(1), which require a liquidated claim.”* (Emphasis added.)

24. To my mind the reasoning in *Gilliatt v Sassin* is equally apposite in relation to the respondent’s claim against the applicant.

25. Setoff comes into operation when two parties are mutually indebted to each other, and both debts are liquidated and fully due (*Fatti’s Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 738E-H). The respondent’s claims are clearly unliquidated at this stage.

26. It appears further that the respondent has failed to comply with various pretrial directives in terms of which he was to provide details and supporting evidence of the loans, including their quantification. I agree with the applicant’s counsel that the schedules annexed to the answering affidavit do not constitute sufficient proof of the alleged loans. They are not contemporaneous, and were obviously created for the purposes of these proceedings. The bank statements attached by the respondent also do not provide substantiation for the alleged loans; as they just reflect payments made to a conveyancing attorney. In fact, the answering affidavit displays a startling paucity of information in relation to what is alleged to be a very substantial total loan obligation.

27. Moreover, the alleged loans date back to 2009. As counsel for the applicant points out, an absurdity arises on the respondent's allegations: if the respondent's version is correct, then he effectively concluded the 2014 agreement with the applicant so as to borrow money from himself. He did not both conclude loans with the applicant in 2011 and 2012, in terms of which the applicant would be indebted to him in the sum of more than R5,5 million, just so as to borrow money from the applicant in 2014 which, on his version, was his own.

28. The essence of the respondent's defence is thus that he has a possible contingent claim against the applicant, which he wishes to set off (in the face of the established requirements for set-off) against the claim for payment of R4,5 million as acknowledged by him in court and in his pleadings. His claim is a "possible" one because the existence of such claim depends on the outcome of the divorce proceedings, and not on the happening of some certain future events such as the arrival of specific date for the debt to become due. The applicant's claim is not in the same category, despite the respondent's submission in his heads of argument that such loan "*stands to be determined as part of the consequences and determination of the parties' matrimonial estate as part of their divorce proceedings.*" The applicant's claim is already admitted, and is liquidated, due and payable.

29. In determining whether a person is solvent, contingent liabilities are only one of the factors taken into account, including the remoteness of the contingency. A court cannot simply add up contingent and prospective liabilities: what it must do is to take into account the contingent liabilities, whether such liabilities are likely to become present and, if so, when: see *Henochsberg on the Companies Act* 61 of 1973 (5ed) at page 711. By analogy in relation to the respondent's contingent claim, I agree with the applicant's counsel that in the present case the seven loans that the respondent seeks to set off against the already due R4.5 million (in respect of which a written agreement, concessions made in court, and a written undertaking exist) are significantly remote contingent claims.

30. In any event, why would the parties be punctilious in recording the loan from the applicant to the respondent in the 2014 agreement, whilst not once recording in writing any such agreement in relation to the substantial sums allegedly lent by the



respondent to the applicant over the years? The respondent was, after all, the businessman in the relationship.

31. If the respondent cannot prove the loans but can show that he thought that they were loans whilst the applicant thought that they were gifts, the respondent might notionally fall back on a claim for unjustified enrichment. The problem is that this argument has never been pleaded by the respondent at any stage in these proceedings or the divorce proceedings in general and, moreover, any enrichment claim that he may have enjoyed against the applicant as regards the payments made during the period 2009 to 2016 has already become prescribed in terms of section 11(d) of the Prescription Act 68 of 1969.

32. The respondent argues that there is a presumption against donations, in support for his argument that the parties had concluded loan agreements over the course of their marriage.

33. He relies, in this regard, on the decision of *Barkhuizen v Forbes* 1998 (1) SA 140 (E), and he contends that there is sufficient evidence before this Court to consider the payments made by him to the applicant as loans, and therefore as debt owed by the applicant to the respondent. When those payments are considered to be loans, the respondent establishes a dispute sufficient to resist the sequestration application.

34. A reading of *Barkhuizen v Forbes* indicates, however, that it is distinguishable from the present matter on a number of grounds, the most important being that those parties were in a romantic relationship, but they were not married and they did not cohabit. The Court found (at 151I-152C) that those facts advocated against the presumption of donations between spouses established in the Appellate Division's decision in *Smith's Trustee v Smith* 1927 AD 482:

*"A further factor to be considered is how the close relationship between the parties may affect the issue of onus. In Smith's Trustee v Smith... it was pointed out that 'although apparently no presumption can be based merely upon the close relationship between the parties . . . Mascardus (Idem No 43)*

points out that there is a presumption of a gift on the grounds of blood or other relationship where no cause appears from which such presumption can be rebutted'.

*In this case the Court was concerned with the relationship between a husband and a wife. In the present case we are not dealing with any blood relationship nor is the relationship anywhere near as close as husband and wife where the parties may make donations in order to protect themselves against various legal problems which may arise. In this case the parties did not even cohabit and, although plaintiff was in love with the respondent, this is not, in my view, sufficient to create a presumption that the amounts now claimed were donations. In any event, and insofar as plaintiff has presented acceptable evidence that the amounts now claimed were loans, there appears a 'cause' from which any presumption of a donation can be rebutted."*

35. In *Smith's Trustee* the Court found (at 486) that the presumption against donations does exist but that it does not apply to the case of a husband and wife for various reasons.

36. The *Smith's Trustee* presumption is regarded as the exception to the general rule relating to the presumption against donations. This spousal exemption was also referred to by this Court in its full bench decision in *Mogudi v Fezi* (A67/07) [2007] ZAWCHC 46 (28 August 2007) where the court remarked at para [36], following a discussion of *Smith's Trustee*, that the probabilities, based on the conduct of the appellant of the nature and the parties' relationship, pointed to an act of generosity and benevolence rather than to a loan. See also, in this respect, *PGJ v AEJ* (unreported decision of the Free State Division under case number 49498/2013, delivered on 19 May 2016) at paras [1] and [24].

37. The Court in *Barkhuizen v Forbes* was of the view that it was important to have regard to the nature of the payments to determine, on the probabilities, whether the payments constituted gifts or loans (at 149H). In the present matter, disregarding the payments made not to the applicant but to third parties, the respondent made payments to the applicant for the purposes of acquiring [...] F[...] Lane so that the

applicant's father could reside in close proximity in order to assist in caring for their eldest child who suffers from certain medical issues; gifting the applicant with offshore funds (up to a maximum of R4 million); and securing a rental property for the applicant and the minor children in fulfilment of the respondent's maintenance obligations towards them.

38. I am, however, not required to make a finding as regards the nature of these payments to determine whether they constituted gifts or loans. What I must decide is whether the respondent's defence, namely that he enjoys a contingent loan claim against the applicant, is sufficient to resist the sequestration application.

39. Is the applicant's claim disputed to such an extent that the grant of a provisional order of sequestration is excluded? 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 (*Laeveldse Koöperasie BPK v Joubert* 1980 (3) SA 1117 (T) at 1120H). The respondent relies on the so called *Badenhorst* rule (with reference to *Badenhorst v Northern Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H-348C) which states that a court will refuse an application for the provisional winding-up of a company if the company *bona fide* disputes the applicant's claim on reasonable grounds.

40. This Court considered this issue in *Gap Merchant Recycling CC v Goal Reach Trading* 55 CC 2016 (1) SA 261 (WCC) at paras [26]-[27]:

*"I see no reason for adopting a different approach when considering, in liquidation proceedings, whether the applicant's claim is bona fide disputed on reasonable grounds. Bona fides relates to the respondent's subjective state of mind while reasonableness has to do with whether, objectively speaking, the facts alleged by the respondent constitute in law a defence. The two elements are nevertheless inter-related because inadequacies in the statement of the facts underlying the alleged defence may indicate that the respondent is not bona fide in asserting those facts. As Hülse-Reutter makes clear, the objective requirement of reasonable grounds for a defence is not met by bald allegations lacking in particularity; and, as appears from*

Breitenbach and El-Naddaf, *bald allegations lacking in particularity are unlikely to be sufficient to persuade a court that the respondent is bona fide.*

...

*The foregoing discussion treats the Badenhorst rule as laying down a rigid legal test: if the application is bona fide disputed on reasonable grounds, the application must as a rule of law be dismissed. That is far from being settled in our law. In Kalil v Decotex (Pty) Ltd & Another 1988 (1) SA 943 (A) Corbett JA, after listing a number of decisions in which the rule in slightly varying formulations had been adopted, said the following (at 980F-I):*

*‘This rule would tend to cut across the general approach to applications for a provisional order for winding-up which I have outlined above as it is conceivable that the situation might arise that the applicant could show a balance of probabilities in his favour on the affidavits, while at the same time the respondent established that its indebtedness to the applicant was disputed on bona fide and reasonable grounds. Whether the Badenhorst rule should be accepted then as an exception to the general approach relating specifically to the locus standi of the applicant as a creditor, and the further question as to whether it should be applied inflexibly or only when it appears that the applicant is in effect abusing the winding-up procedure by using it as a means of putting pressure on the company to pay a debt which is bona fide disputed ... need not, however, be decided in this case. The point was not argued before us and, as I shall show, it seems to me that for various reasons the Badenhorst rule should not be applied here.’”*

41. Incidentally, the Court also referred at para [28] to the opinion expressed in recent case law in this Court that the *Badenhorst* rule, to the effect that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt the existence of which is *bona fide* disputed on reasonable grounds, may not go to *locus standi*, and that it is rather a self-standing and possibly flexible principle. See also the discussion of the rule in *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and another* 2015 (4) SA 499 (WCC) at paras [7] to [13], and *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at paras [92] to [93].

42. In the present case, the respondent's contingent claim against the applicant is an unliquidated claim, and a remote one at that for reasons set out earlier, dependent on the divorce court eventually making a finding in favour of the respondent.

43. In contrast, the applicant has an admitted liquidated claim in the sum of R4,5 million, based on the written loan agreement concluded between the applicant and the respondent on 22 October 2014. As mentioned previously, at the hearing of the Rule 43 application the respondent's counsel, with the respondent in attendance at court, conceded that the latter would become liable to repay the R4,5 million loan to the applicant on the date on which transfer of Erf [...] was registered. The loan was admitted in the respondent's pleadings. The respondent was required to repay the loan on 27 July 2021, which he failed to do. He used the funds for his own purposes.

44. In the circumstances, I am of the view that the respondent cannot dispute his indebtedness to the applicant on *bona fide* and reasonable grounds. His unliquidated contingent claim does not constitute a defence on reasonable grounds for the purposes of section 10 of the Insolvency Act. There is no basis on the papers for me to exercise my residual discretion in the respondent's favour in the face of the applicant's fulfilment of the requirements of section 10 (see *Firststrand Bank v Evans* 2011 (4) SA 597 (KZD) at paras [27] and [33]; *Investec Bank v Lambrechts* 2019 (5) SA 179 (WCC) at para [60]).

45. The applicant denies that the parties had concluded personal loan agreements in respect of any funds given to her during the course of the marriage. She alleges that the funds paid to her were gifts, as the respondent was at that stage very wealthy and generous towards the applicant, whom he at that stage appreciated had given up her career to make a home and raise their two children. This is plausible evidence, given the relationship that had existed between them at the time.

46. Where a respondent raises a dispute about his indebtedness, he has an onus, in the sense of an evidentiary burden, to show that the dispute is raised *bona fide* and on reasonable grounds (*Kalil v Decotex supra* at 956H). The respondent

disputes his indebtedness to the applicant and contends that the applicant does not have *locus standi* in the sequestration application. In the light of the discussion set out above, I do not think that the respondent has discharged the onus to show that his allegations establish a *bona fide* dispute and that they are premised upon reasonable grounds.

47. In these circumstances, I am satisfied that the applicant has a *prima facie* claim against the respondent in the sum of at least R4,5 million, in satisfaction of the requirement set out in section 10(a) of the Insolvency Act.

*The applicant's claim under the Rule 43 order*

48. The applicant relies, secondly, upon a claim for arrear maintenance under a Rule 43 order made on 4 July 2017, which obliged the respondent to make monthly maintenance to the applicant pending the finalisation of the divorce action. The applicant claims that the sum of R334 998, 02 is owing on account of arrear maintenance. This is disputed by the respondent.

49. In *Gobel v Gobel* (6935/13) [2013] ZAWCHC 91 (28 June 2013) this Court also considered an application for the sequestration of a spouse's estate in the course of divorce proceedings. The applicant's claim was for arrear maintenance and other payments due under a Rule 43 order. The respondent had previously brought a Rule 43(6) application in which he asked for an order retrospectively to vary the original Rule 43 order. The Court found that, in those circumstances, the applicant's claim was not certain, as a subsequent finding by the Court determining the Rule 43(6) application with retrospective effect could result in the applicant having no claim at all. In the present matter, the respondent's Rule 43(6) application does not seek a retrospective amendment of the Rule 43 order and *Gobel* is thus distinguishable.

50. Be that as it may, given the conclusion to which I have come in respect of the applicant's claim for R4,5 million, I do not need to address the maintenance claim at this juncture. I shall do so in a follow-up judgment in relation to the applicant's contempt application arising from the respondent's alleged non-compliance with the

order.

### The respondent's factual insolvency and acts of insolvency

51. In fulfilment of the requirements of section 10(b) of the Insolvency Act, the applicant relies on the respondent's factual insolvency, as well as certain acts of insolvency said to have been committed in the course of the litigation between the parties.

52. In *Ullman Sails (Pty) Ltd v Jannie Reuvers Sails (Pty) Ltd and Others; Ullman Sails International Incorporated and Others v Reuvers and another; Ullman Sails International Incorporated and Others v Reuvers and another* (8225/2021; 8231/2021; 8232/2021) [2022] ZAWCHC 38 (22 March 2022), this Court held as follows at para [48]:

*"It is not incumbent on an applicant relying on factual insolvency to adduce evidence that would enable the respondent's assets and liabilities to be finitely determined in rands and cents. It would be a rare case, other than in the context of so-called friendly sequestrations, for an applicant to be able to do that. It is well established that an applicant can discharge the onus of establishing a prima facie case on the basis of factual insolvency by adducing sufficient evidence to justify the inference as a matter of probability that the respondent is insolvent. Once an applicant does that, the respondent attracts an evidential onus to rebut the inference by showing that he does possess sufficient assets to be able to settle his liabilities, see Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others 1993 (4) SA 436 (C) at 443D-G and Mackay v Cahi 1962 (4) SA 193 (O) at 204F-G. A strong and persuasive indicator of insolvency is the failure by a respondent to pay his debts; cf the oft cited observation by Innes CJ in De Waard v Andrews & Thienhans Ltd 1907 TS 727 at 733: 'To my mind the best proof of solvency 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'. (Emphasis supplied.)"*

53. The respondent has indicated that he has had to sell his vehicle and the former matrimonial home to pay his debts. The value of his 25% interest in two close corporations has been reduced to zero following the sale of the corporations' assets. He has had to draw down on his capital and has allegedly incurred loans totalling more than R3,5 million to meet his monthly obligations.

54. Whilst the respondent alleges that his assets exceed his liabilities by almost R400,000, he attaches no substantiation for this allegation in his papers opposing the sequestration application. More importantly, the liabilities listed by the respondent do not include his obligation towards the applicant in the sum of R4.5 million. That must clearly be taken into account. It follows that the respondent's liabilities exceed its assets by more than R4 million. His negative net asset value considered together with his admitted financial demise, discloses that the respondent is factually insolvent.

55. In relation to the alleged acts of insolvency, the applicant relies, firstly, on the provisions of section 8(g) of the Insolvency Act. That section provides that where a debtor gives notice in writing to any of his creditors that he is unable to pay any of his debts, he commits an act of insolvency.

56. In the respondent's founding affidavit in the Rule 46(3) application he alleges that he does not have the funds to pay any portion of his erstwhile attorney's fees, and in an email dated 2 July 2021 he admits to having a lack of cash flow which has resulted in him not being able to make the maintenance payments required in accordance with rule 43 order granted on 4 July 2017. He has thus expressly indicated that he cannot pay his debts.

57. In *Gobel supra* the respondent made statements in his Rule 43(6) application to the effect that he was unable to comply with the Rule 43 order due to a material change in his financial circumstances. The Court held that, in the particular circumstances of that case, those statements did not qualify as acts of insolvency in terms of section 8(g) of the Insolvency Act, because they were made in relation to disputed debts (with reference to what is stated about *Gobel* earlier in this judgment) which were subject to change with retrospective effect. *Gobel* is accordingly



distinguishable from the present matter on this basis, too.

58. Another act of insolvency upon which the applicant relies is section 8(c) of the Insolvency Act, which provides that where a debtor makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another, he commits an act of insolvency.

59. As regards this act of insolvency, the Court in *Ullman Sails* remarked as follows:

*“[46] The difficulty with an application for the sequestration of a person’s estate based on act of insolvency in terms of s 8(c) of the Insolvency Act is that it will often be impossible to determine whether the disposition in issue has or would have the effect of prejudicing his creditors or preferring one creditor above another without an adequate overall insight into the respondent’s proprietary affairs. Thus, if the respondent is factually solvent it would generally be difficult to establish that the disposition of any property that would not put his balance sheet into the red would prejudice his creditors. It would, however, defeat the object of s 8(c) if it could find a basis to operate only if an applicant established that the disposition in question had or would have the effect of rendering the respondent factually insolvent; ... Therefore, having regard to the object of the establishment of ‘acts of insolvency’ in terms of s 8, which is to relieve applicants of the often daunting evidential burden of establishing factual insolvency, it seems to me that the sort of disposition that the legislature must have primarily had in mind when it enacted s 8(c) must have been the sort that by its very character, seen in isolation, was likely to have the postulated effect.”*

60. The 2014 agreement identifies the applicant as a creditor of the respondent, who was required payment of the amount of at least R4,5 million on the sale of Erf [...]. I have already found that this is an admitted liability, due and owing to the applicant.

61. Upon the registration of transfer of Erf [...], the respondent spent the proceeds of the sale by making payments to various of his alleged creditors to such an extent that a negative balance is remaining. In dissipating the proceeds of the sale, the respondent preferred his friends, family and his late father's estate above his obligation to maintain his children and his wife. He is still indebted to the applicant in the sum of R4,5 million which he was required to pay to her on 27 July 2021 when transfer of the property was registered.

62. The respondent's balance sheet calculation discloses that he cannot make payment of the R4,5 million (as well as arrears owed to the applicant in respect of the rule 43 maintenance order which I have not had to consider for the purposes of this application). In settling the debts owed to his other creditors, the respondent preferred them over the applicant and in doing so committed the act of insolvency contemplated in section 8(c) of the Insolvency Act.

63. In these circumstances, I am satisfied that the applicant has established, *prima facie*, that the respondent is factually insolvent and that he has, in any event, committed acts of insolvency, in fulfilment of the requirement in section 10(b) of the Insolvency Act.

#### Advantage to creditors

64. As to an advantage to creditors, it was stated in *Ullman Sails* at para [60] as follows:

*"The prospect of a significant dividend to unsecured creditors does not look promising on the papers, but, as explained in Stratford and Others v Investec Bank Limited and Others ... 2015 (3) SA 1 (CC) ... at para 43-45, that is not necessary to establish that there would be an advantage to creditors if the respondents' estates were sequestrated. The Constitutional Court there endorsed the approach stated in Meskin & Co v Friedman 1948 (2) SA 555 (W) at 559, where Roper J held that if the facts before the court satisfied it that there was 'a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit would result*

*to creditors' that would be sufficient. The learned judge elaborated: 'It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors that is sufficient'."*

65. See also *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) at 592F; *Cohen v Jacobs* 1949 (4) SA 474 (C) at 481; *Botha v Botha* 1990 (4) SA 580 (W) at 584H-585D.

66. In the present matter, if the dispositions made by the respondent (whether six months or two years preceding the date on which the application was instituted) is set aside, the applicant anticipates that a dividend of approximately 57 cents in the rand may be paid to the respondent's creditors. That is on the basis that all of the creditors listed by the respondent in his reconciliation are in fact genuine. Given that no substantiation in relation to these debts was attached to his opposing affidavit it is by no means clear what the status of those creditors is.

67. The applicant also anticipates non-patrimonial advantages, namely that the respondent's creditors will be assured of equal treatment and that the respondent will not be able to incur further debts to diminish his already insolvent estate. It is in any event clear that his financial dealings require investigation.

68. In the circumstances I am of the view that the applicant has in satisfaction of the requirement in section 10(c) of the Insolvency Act *prima facie* shown a benefit to creditors.

### Conclusion

69. The respondent argues that the sequestration application is an abuse of the process of court and an opportunistic tactic to obtain an advantage in the pending divorce proceedings between the parties. That may well be the respondent's perception given the parties' acrimonious relationship, but the fact remains that the applicant has made out a proper case for the sequestration of the respondent's

estate. The respondent, on the other hand, has placed no evidence before the court credibly to disclose his financial position.

70. In all of these circumstances the applicant has made out a case for the provisional sequestration of the respondent estate and it will be so ordered.

**The applications under Rule 43(6) and the application to set aside the warrant of execution**

71. In the light of the finding in the sequestration application, I refrain from considering these applications.

72. Insolvency does not terminate the respondent's maintenance obligations towards the applicant and their minor children (*Weinberg v Weinberg* 1958 (2) SA 618 (C)). It will be the task of the trustee to make maintenance payments under the Rule 43 order, taking into account what the estate can afford. It will also be the trustee who will have to decide whether to proceed with these applications in due course.

73. A trustee may furthermore apply for the setting aside of disposition made by the respondent six months (or two years, depending on the nature of the disposition: see section 26 and section 29 of the Insolvency Act) prior to the sequestration of his estate. Those dispositions (which the applicant contends constitute acts of insolvency) are among the facts upon which the respondent relies for the purposes of his Rule 43(6) application. If those dispositions are set aside, there might be sufficient funds in the estate to pay the maintenance due in terms of the Rule 43 order. Payments made under the Rule 43 order will not be set aside as they constitute dispositions in compliance with an order of court as contemplated in section 2 (sv "disposition") of the Insolvency Act. (For this reason I do not agree with the respondent's counsel that I should refuse to grant a provisional sequestration order because it would be prejudicial to the interests of the parties' minor children.)

74. The respondent's application under Rule 43(6) and his application to set aside the writ of execution obtained on 8 November 2011 are accordingly postponed *sine*

die.

## **Order**

25. In the circumstances, it is ordered as follows:

### **In case number 17728/2021:**

25.1. The estate of the respondent is placed under provisional sequestration in the hands of the Master of this Court.

25.2. A rule *nisi* does hereby issue calling upon the respondent to appear before this Honourable Court on **Thursday, 23 June 2022** at 10:00 or as soon thereafter as the matter may be called to show cause why:

25.2.1. his estate should not be placed under a final order of sequestration, and

25.2.2. why the costs of this application should not be costs in the sequestration.

25.3. The provisional order must be served by the Sheriff on the respondent personally and copies thereof must also be served as provided in terms of section 11(2A), read with section 11(4), of the Insolvency Act 24 of 1936.

25.4. Notice of the provisional order must, in addition, be given by prepaid registered post to all creditors whose claims exceed R25 000,00.

25.5. The Sheriff shall attach all moveable property in the insolvent estate and shall, immediately after effecting the attachment, report to the Master in writing that the attachment has been effected and shall submit with such report a copy of the inventory in terms of section 19 of the Insolvency Act.

### **In case number 19689/2016**

25.6. The respondent's application under Rule 43(6) for the variation of the Rule 43 order granted on 4 April 2017 is postponed *sine die*, with costs to stand over for later determination.

25.7. The respondent's application for the setting aside of the writ of execution obtained by the application on 8 November 2021 is postponed *sine die*, with costs to stand over for later determination.

**P. S. VAN ZYL**  
**Acting judge of the High Court**

**Appearances:**

**For the applicant:** R. G. Patrick (with him H. Beviss-Challinor), instructed by Werksmans

**For the respondent:** P. C. Eia, instructed by Fairbridges Wertheim Becker