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

Case Number: 42356/2020

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

	25 July 2023
.....	……
SIGNATURE	DATE

FIRST RAND BANK LIMITED Applicant

and

ERIC MALIGANA MAFUNA Respondent

JUDGMENT

FORD, AJ

Introduction

[1] The applicant seeks a final sequestration order against the respondent on the following grounds:

1.1 he committed acts of insolvency as contemplated in sections 8 (e) and (g) of the Insolvency Act[1];

[1] Insolvency Act 24 of 1936

1.2 his liabilities exceed his assets by over R3 million, based on the valuations on the farm Ndou and 37 Kleve Hills Park properties; and

1.3 he is factually insolvent.

[2] The respondent opposes the application.

Brief factual matrix

[3] The material facts in this matter are largely common cause.

[4] On 21 October 2016, at Woodmead, Janetha Beleggings (Pty) Ltd ("Janetha"), represented by the respondent, and the applicant, represented by Ms. Nerissa Maharaj, entered into a loan agreement.

[5] The terms of that loan agreement are, *inter alia*, as follows:

5.1 the applicant afforded Janetha a loan in the amount of R5,000 000.00 (Five million rand);

5.2 the loan period was for 60 calendar months;

5.3 Janetha agreed to repay to the loan, together with interest thereon, in 60 equal monthly instalments of R103,806.65;

5.4 Interest on the outstanding loan would accrue at an interest rate of prime plus 1.5%, and would be calculated daily on the outstanding balance on a normal annual compounded monthly basis, capitalised in arrears;

5.5 that the security required, included *inter alia*:

5.5.1 a cession of certain life assurance policies held by the respondent in favour of the applicant; and

5.5.2 the registration of a covering mortgage bond, in favour of the applicant by the respondent, over Farm Ndou No 68, Lephalale, Limpopo;

5.6 in addition to the above securities, the applicant also required an unlimited suretyship to be executed by the respondent, in favour of the applicant for the obligations of Janetha;

5.7 Janetha agreed to indemnify the applicant against all costs and expenses (including legal fees and costs on the attorney and own client basis), together with any VAT incurred in or in connection with the preservation and/or enforcement of the agreement;

5.8 an event of default would occur if Janetha, *inter alia*, failed to pay any amount due in terms of the loan agreement;

5.9 upon the occurrence of an event of default, the applicant would, in addition to and without prejudice to any other rights it may have in terms of the loan agreement or in law, including, without limitation, its right to claim damages, have the right, without further notice, to *inter alia:*

5.9.1 accelerate or place on demand payment of all amounts owing, whether in respect of principal, interest or otherwise, and all such amounts shall immediately become due and payable; and/or

5.9.2 call up and execute any security and security documents which it holds.

5.10 a certificate signed by any manager of the applicant (whose appointment or authority as such, shall not be necessary to prove), certifying any amount outstanding in terms of the loan agreement which has become due and payable to the applicant, as well as the rates of interest and other charges applicable thereto, shall be *prima facie* proof of matters therein stated for all purposes;

5.11 no latitude, extension of time or other indulgence which may be given or

allowed by either party to the other. in respect of the performance of any obligation under the loan agreement, and no delay or forbearance in the enforcement of any right of any party under the loan agreement, shall in any circumstances be construed to be implied consent. or election by such party or operate as a waiver or a novation of or otherwise affect any of the party's rights in terms of or arising from the loan agreement or estop or preclude any such party from enforcing at any time and without notice, strict and punctual compliance with each and every provision or term thereof; and

5.12 no addition or variation, consensual cancellation or novation of the loan agreement and no waiver of any right arising from the loan agreement, or its breach or termination shall be of any force and effect unless reduced to writing and signed by all of the parties, or their duly authorised representatives.

[6] On even date (21 October 2016), the respondent executed an unlimited suretyship, in favour of the applicant for the debts and obligations of Janetha. Prior hereto. and on 8 September 2014, the respondent executed an unlimited suretyship, in favour of the applicant for the debts and obligations of African Leadership Group (Pty) Ltd ("ALG").

[7] On 17 November 2016, a first covering mortgage bond was registered by the respondent in favour of the applicant over Farm Ndou. In terms of the bond, the respondent declared and acknowledged himself to be truly and lawfully indebted, and firmly bound to and in favour of the applicant in the sum of R8,000 000.00 (Eight million rand), together with an additional sum of R1,600 000.00 (One million, six hundred thousand rand) arising from and being in respect of various causes, including monies lent and advanced and/or to be lent and advanced, and/or lent and advanced by the applicant to, or on behalf of the respondent from time to time.

[8] On 4 August 2017, at Woodmead, Janetha represented by the respondent, and the applicant represented by a duly authorised employee, concluded a written facility agreement.

[9] On 15 November 2017, also at Woodmead, the applicant represented by a duly authorised employee, and ALG, represented by the respondent, concluded a written overdraft agreement.

[10] On 8 August 2018, and at the specific instance and request of ALG, the applicant agreed to grant ALG a temporary increase to its overdraft facility in the amount of R700 000.00 (Seven hundred thousand rand) together with interest. The temporary increase would be effective until 8 November 2018, at which date the utilisation of the facility had to be decreased to the original facility sum of R1,300 000.00 (One million, three hundred thousand rand).

[11] The applicant contends that Janetha breached the terms and conditions of its facility and loan agreement in that it:

11.1 failed to pay the monthly installments in accordance with the terms of the Janetha loan agreement;

11.2 failed to reduce the overdraft facility by R15,000 per month, as contemplated in the Janetha facility agreement.

[12] ALG breached the terms and conditions of the ALG facility agreement, in that it failed to reduce the R700 000.00 temporary increase by November 2018.

[13] As a result of the breaches listed above, the applicant issued letters of demand, addressed to both Janetha and ALG on 5 November 2018. Notwithstanding the demand, Janetha and ALG failed to make payments of the amounts demanded and on 12 November 2018, the accounts were handed over to its (the applicant's) commercial recoveries department.

[14] Pursuant hereto, settlement negotiations ensued on 8 August 2019, a memorandum of agreement was concluded between the applicant and the respondent (both in his personal capacity and as the sole director of Janetha and ALG).

[15] The agreement set out the respondent's indebtedness and acknowledgement

thereof in favour of the applicant. The parties undertook, jointly and severally to make payment of the total outstanding amounts owed by Janetha and ALG to the applicant, on or before 15 January 2020, alternatively, to furnish the applicant with acceptable guarantees in favour of the applicant for payment of the total outstanding debt on or before 15 January 2020.

[16] The debt in respect of the Janetha facility agreement was fully paid by 8 August 2019, and the account was subsequently closed by the applicant. The debts in respect of the Janetha loan agreement and the ALG facility agreement, however remain unpaid.

[17] In October 2019, the respondent requested an extension from 31 October 2019 to 30 November 2019, to make payment of R1,000 000.00 (One million rand) as agreed to in the settlement agreement. A further extension was subsequently sought to 31 January 2021. The applicant agreed to the extension on condition that, in the event of the respondent failing to make the payment as agreed to, the applicant would be entitled to:

17.1 market and sell the farm (farm Ndou) in terms of a special power of attorney to be executed in respect of the property; and

17.2 apply to a court of competent jurisdiction, for judgment against the debtors for payment of the entire amounts of the debts then outstanding.

[18] On 31 January 2020, the respondent in turn sought a further extension to pay the R1,000 000.00 (One million rand) by 31 March 2020. The applicant accepted the request and advised, on 17 February 2020, that it was amenable to granting the respondent a further extension to 31 March 2020, on condition that the respondent agrees to sign an addendum to the original settlement agreement, and that the applicant would not be granting the respondent any further indulgences. Further that should the respondent fail to make the payment by 31 March 2020, the applicant would invoke its rights in terms of the special power of attorney signed by the respondent, and sell the property.

[19] On 19 February 2020, the respondent accepted the applicant’s proposal. As the 31 March 2020 was looming, the respondent’s attorneys advised the applicant that it

was unlikely that the respondent would be able to pay the R1,000 000.00 (One million rand) lumpsum by 31 March 2020.

[20] A number of further discussions and negotiations ensued. The respondent proposed to pay R4million in full and final settlement of all debts. The applicant rejected the proposal, in turn requiring that the respondent pays the full outstanding balances.

[21] The applicant advised further, that in respect of Janetha, it will accept a lumpsum payment in the amount of R2.2million by no later than 31 July 2020, and that the balance remaining thereafter, be paid in 6 equal monthly payments of R349 497.43. In respect of ALG, the applicant advised that it will accept a lumpsum of R1,5million by no later than 31 July 2020, and that the remaining balance be paid in 6 equal monthly instalments of R208 296.74.

[22] On 18 July 2020, the respondent advised that it is not in a position to make payment as demanded by the applicant.

[23] No payment has been made by the respondent to the applicant since October 2019, despite indulgences extended to the respondent.

[24] On 20 April 2022 Mudau J, granted an order placing the estate of the respondent in provisional sequestration. Pursuant hereto, Ms. N.A. Choshane and Mr. T.W. van den Heever were appointed by the Master as the Joint Provisional Trustees.

[25] The Joint Provisional Trustees issued a report which shows that:

25.1 the Farm Ndou (owned by the respondent) suffers from severe neglect and is not income generating (with the costs to preserve the assets being required to be paid by the secured creditor, the applicant);

25.2 there are very few assets in the insolvent estate; and

25.3 there is no source of income which could be used by the provisional trustees, to either preserve the assets or to make payment of the historical debt owed by the respondent.

Certified indebtedness

[26] The respondent's indebtedness to the applicant is not in dispute and is computed as follows:

26.1 R4, 550 037. 39 plus interest thereon at the rate of prime plus 1.5% per annum, calculated daily and compounded monthly from 2 December 2020 until date of payment, in respect of suretyship obligations to Janetha and as co-principal debtor in respect of that debt;

26.2 R2, 980 252.96 plus interest thereon at the rate of prime plus 9% per annum, calculated daily and compounded monthly in arrears from 1 December 2020 until date of payment, in respect of suretyship obligations to Janetha and as co-principal debtor in respect of that debt.

[27] The applicant contends, that the respondent has committed acts of insolvency as contemplated in section 8(e) and (g) of the Act[2] in that:

27.1 he has offered various arrangements to the applicant (a creditor) to release him wholly or in part from his debts; and

27.2 he has given notice in writing (to the applicant) that he is unable to pay his debts.

[28] On 2 April 2020, the respondent (as stipulated in a letter from his attorneys) made the following written offer of arrangement to the applicant:

> Recognising that adverse circumstances have caught up with our client (and your client) would it be possible that an amount of capital can be agreed upon at this stage and that this amount be paid by way of the deposit of R1,3million referred to above and the balance through the instalments of R50,000 per month? That no further interest be charged on the capital amount to be agreed?

[29] This proposal as phrased by the respondent's attorneys, the applicant argued,

[2] Insolvency Act 24 of 1936

constituted an offer of arrangement to the applicant to partially release the respondent from his debts. The applicant argued, although the respondent's attorneys claimed that the proposal was sent to the applicant without the respondent's approval, that the surrounding circumstances suggest that the respondent was aware of the proposal. This is so, for the following reasons:

29.1 the respondent was copied in the email in which the proposal was conveyed and as such had knowledge of the proposal;

29.2 at no given time, after the proposal was made, on his behalf, did the respondent express to the applicant, either in writing or verbally, that he did not agree with the proposal.

[30] On 19 May 2020, the respondent's attorneys, made a further written offer to the applicant, with the object of partially releasing the respondent from his indebtedness to the applicant:

> Without prejudice, would your clients (the applicant) be prepared to consider a payment of R4million in full and final settlement of their claims if such payment were made before say the end of October?

[31] The applicant contends, that the aforesaid offer was significantly less than the amounts owing to the applicant at the time (approximately R7million) and if accepted, would have released the respondent of more than R3million from his indebtedness to the applicant.

[32] In terms of clauses 1.19 and 1.20 of the memorandum of agreement, the respondent acknowledged that he is unable to immediately pay the debts as defined in clauses 1.4 and 1.8 of the agreement. In addition, in a number of correspondences exchanged between the applicant and the respondent's attorneys, it was expressly stated that the substantial interest rate being charged over a portion of the debt, increases the amount due so that it is nearly impossible [for the respondent] to ever catch up. Further, that there is no chance of the applicant recovering all their monies in the present situation. This is buttressed by a correspondence sent by the respondent's attorneys in which it is stated:

> As previously advised, with the best will in the world it is simply not possible for our client to pay R2million by the end of this month and then to pay R349 497.43 for six months thereafter – and that is only for Janetha Belegging's liabilities! The further claim of R1.5milion and R208 297.74 per month makes it quite clear that your client does not want to settle this matter at all, but is making demands that they know cannot be met[3].

[33] The applicant contends that all of the above, coupled with the respondent's non-payment of the debt, and his repeated requests for extensions to repay the debt, the respondent has given written notice of his inability to pay his debts to the applicant.

[34] The applicant submitted further that the respondent's financial position is perilous. Apart from his liabilities to the applicant for more than R7,5million, he is also indebted to other credits:

34.1 on 12 June 2019, Logetta Property Investments (Pty) Ltd obtained judgment against the respondent for an amount of R199 665 in the Randburg Magistrates Court;

34.2 the respondent is indebted to Firstrand Bank Limited (acting through its Private Wealth Division) for an amount of R3,728 943.16.

[35] The applicant submits that the respondent's liabilities total an amount of R11, 488 967.30 and that he is unable to make payments to his creditors as and when payments are due. The only inference to be drawn, according to the applicant, is that the respondent is insolvent.

[36] The respondent submits that the applicant's attempt to prove the alleged insolvency of the respondent, is largely drawn from the fact the applicant places reliance on the selective correspondence between, the respondent's erstwhile attorney, Mr. van Der Watt and Ms. Kgame, but that those correspondences do not convey the

[3] Annexure FA30 to the Founding Affidavit

interpretation preferred by the applicant.

[37] The respondent submits that some of the correspondence was made without prejudice and without the approval of the respondent. Further, that the ground of insolvency based on section 8(e) of the Act, is based on a complete misreading of email correspondence and letters between the applicant's attorneys and the respondent's erstwhile attorneys. The respondent submitted that the correspondence must be read as a whole, and not in a piece-meal fashion in order for one to understand the meaning and the context of the correspondence.

[38] According to the respondent, the correspondence was about the prospects of investors buying the property, and the proposal for settlement. Further that it is clear from a reading annexure "(FA24") that the applicant's attorney of record noted that:

> In this regard, please take note that the terms of settlement as proposed below are not financially feasible and have been rejected by our client.

[39] The above response, so it was submitted, merely related to the issue of an indulgence which was granted by the applicant up until 31 May 2020.

[40] The respondent, in order to, counter the claims raised by the applicant, raised the defense of *vis major* as a result of the outbreak of the COVID-19 pandemic, and prevailing bad economic climate due mainly to the COVID outbreak. The correspondence between the parties, in its relevant parts provides as follows:

> Mr Mafuna has considered the option of selling some of the wild animals on the game farm, but is currently prohibited from doing so due to the travel ban and other restrictions imposed by national lockdown.
>
> Having regard to the above, our client expressed it would be amenable to pending legal action, provided your clients provide it with a palatable repayment proposal which could be presented to its credit committee for consideration.[4]

[41] The respondent contends that the applicant was willing to consider the settlement proposal, and recorded that the parties thereafter agreed that the respondent would send the applicant a settlement proposal for its consideration.

[4] Annexure FA29 to the Founding Affidavit

[42] The respondent denies that he is unable to pay his debts as contended by the applicant.

Advantage to creditors if the debtor if the debtor's estate is sequestrated

[43] The applicant submits that the respondent is the registered owner of two properties, namely; the farm Ndou and ERF 37 Kleve Hills Park. Both these properties are bonded to the applicant.

[44] The applicant contends that the sequestration of the respondent's estate will be advantageous to the creditors for *inter alia* the following material reasons:

44.1 on 6 November 2020, the applicant procured the services of WH Auctioneers, to conduct an auction value assessment of the Farm Ndou. And in terms of the auction valuation assessment, the market value of Farm Ndou is approximately R17, 388 000.00 and the auction value has been estimated at R11,302 200.00;

44.2 the estimated value of the Kleve Hill Park property is R2,600 000;

44.3 despite the respondent's contention that the value of the game and the Ndou property have deteriorated to such an extent that it would be very difficulty to find value for these assets in excess of R8million, it would appear that even on the worst-case scenario, the property can be sold on auction for an amount of R11,302 200.00

44.4 the combined value of the Farm Ndou and the Kleve Hill Park property is approximately R19,988 000.00;

44.5 the market value of the respondent's known assets exceeds that of his known liabilities of R11,4888 967.30. The properties can therefore be sold by the appointed trustees for the benefit of the creditors of the respondent's estate;

44.6 if the property is sold, the monthly payments due in terms of the property will fall away. So too, other expenses in respect of the properties will no longer be payable;

44.7 a trustee can utilise the mechanisms of the insolvency legislation, to investigate the financial affairs of the respondent and unearth assets to liquidate same for the benefit of creditors.

[45] The applicant argued that while Farm Ndou is valued at an estimated auction value of R11,302 200.00, the respondent has been unable to sell the property privately and that the respondent values the property at less than R8million. The applicant contends further, that it provided the respondent with numerous extensions to make payment of his debts, but despite such extensions the respondent has been unable to make payment. Further that the respondent incurred further debts and has been unable to sell his properties in order to satisfy his debts.

[46] The applicant is of the view, having regard to the respondent's version, in respect of the Farm Ndou that the respondent's assets decrease in value over time. And that any further time extended to the respondent will only prejudice the creditors.

[47] The respondent in turn contends that it would not be to the benefit of creditors to place his estate in final sequestration, for the following reasons:

47.1 before the provisional sequestration order was granted, the respondent was in communication with a prospective buyer who was prepared to buy the Farm Ndou for R40million;

47.2 if the Rule *Nisi* is discharged, he will be able to sell the farm to Trophy Trackers Africa (Pty) Ltd, and be able to pay his debt owed to the applicant and other creditors;

47.3 a final sequestration order will render him unable to continue with his lucrative consulting business, which would enable him to discharge all his debts in a reasonable time.

[48] The applicant argues, in opposing the defenses raised by the respondent, that the

offer the respondent relies upon was rejected by the joint trustees owing to the cumbersome and unrealistic conditions attached to them. Further, that the respondent is not the only director of ALD and that the business would be able to continue without him as director.

Analysis

[49] Section 12 of the Insolvency Act 24 of 1936 sets out the requirements for a final sequestration order. The court may grant a final sequestration order if satisfied that:

49.1 the petitioning creditor (the applicant in this instance) has established a liquidated claim of at least R100 against the debtor;

49.2 the debtor has committed an act of insolvency or is factually insolvent; and

49.3 there is reason to believe that it will be to the advantage of creditors of the debtor if the debtor's estate is sequestrated.

[50] In order for a final order to be granted, these three elements must be established on a balance of probabilities. The respondent's indebtedness to the applicant and the extent thereof is not in dispute. This disposes of the first requirement. This leaves the remaining requirements, which I address in sub-headings below.

Whether the debtor has committed an act of insolvency or is factually insolvent

[51] In terms of section 8 of the Insolvency Act, 24 of 1936, a debtor commits an act of insolvency, under the following circumstances:

(a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;

(b) if a Court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;

(c) if he 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;

(d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;

(e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;

(f) if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section 6 or 7, he fails to comply with the requirements of subsection (3) of section 4 or lodges, in terms of that subsection, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on which such application is to be made;

(g) if he gives notice in writing to anyone of his creditors that he is unable to pay any of his debts;

(h) if, being a trader, he gives notice in the *Gazette* in terms of subsection (1) of section 34, and is thereafter unable to pay all his debts.

[52] In *Goldblatt's Wholesale (Pty) Ltd v Damalis* the Court held:

> A letter stating that a creditor is unable to pay his debts in full unless his creditors are prepared to give him time and to accept payment in instalments, is an intimation that he cannot pay his debts in the ordinary course and amounts to a notice in writing that he is unable to pay any of his debts, in terms of sec. 8 (g)" of the Insolvency Act[5].

[53] Even if the papers disclose disputes of fact, as evinced in the matter before me, an applicant will nevertheless succeed in establishing a *prima facie* case where it 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.[6]

[54] In *Standard Bank of SA Ltd v Court* the Court held

> "A debtor who gives notice that he will only be able to pay his debt in the future gives notice in effect that he 'is unable' to pay. A request for time to pay a debt which is due and payable will, therefore, ordinarily give rise to an inference that

[5] 1953 (3) SA 730 (O) at 732.
[6] *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 978D-E

> the debtor is unable to pay a debt and such a request contained in writing will accordingly constitute an act of insolvency in terms of s 8(g). This is particularly so where the request is coupled with an undertaking to pay the amount due and payable by way of instalments".[7]

[55] In *Optima Fertilizers (Pty) Ltd v Turner*[8] the Court considered the statement *"I hereby acknowledge the sum of R5,610.64 (in words and figures) is at present due, owing and payable by me to (the petitioner). I am at present unable to pay the said sum of R5,610.64 to (the petitioner)"*. The debtor went further to undertake to pay off the debt by way of instalments of R2,250.00 and further monthly instalments of R700.00. The Court held that:

> The statement relied upon in the present case, however, is a bald statement of inability to pay the debt owing to the petitioner; this is contained in an acknowledgment of indebtedness in which the respondent undertakes to make payments by instalments. Nothing on the record, even if facts and circumstances extrinsic to the document and known to the petitioner can be taken into consideration, indicates that the petitioner should have construed the statement otherwise than as a statement by the respondent that he was unable to pay his debt to the petitioner.

[56] Our courts have found that a debtor has committed an act of insolvency in terms of section 8(g) where:

56.1 a debtor's attorney wrote to creditors stating that his client had consulted him as to his financial affairs, that he had been instructed to advise creditors that his client was not in a position to liquidate his debts at the moment, that his client was unable to meet the demands of creditors, and offering to make monthly payments;

56.2 a statement by the debtor that he cannot pay his debts and requires three to five years in which to effect payment;

56.3 a letter to creditors stating that the debtor was unable to pay in full and offering to pay his debts in full in twenty monthly instalments[9].

[57] The respondent's indebtedness in the present matter is not in dispute. It is also not

[7] 1993 (3) SA 286 (C) at p.132
[8] 1968 (4) SA 29 (D) at 33G
[9] See: Mars: The Law of Insolvency in South Africa, p99 to 100.

materially in dispute that the respondent has been unable to pay his debts as they fall due. The respondent sought to distance himself from the proposals made on his behalf, by his erstwhile attorney on grounds that he was unaware of such proposals and that the proposals were communicated on a *"without prejudice basis"*.

[58] The above defenses raised by the respondent are not absolvitory. The respondent was aware of the correspondence exchanged on his behalf and could at any stage have intervened if his interests were not properly or adequately represented. This he failed to do. Moreover, the law of agency dictates that a party is entitled to accept what is presented by an agent as if done with the full knowledge of his principal.

[59] In *ABSA Bank Ltd v Hammerle Group*[10] the SCA held as follows:

> It is true. As a general rule, negotiations between parties which are undertaken with a view to settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be on a "without prejudice". However, there are exception to this rule. One of these exceptions is that an offer made, even on a without prejudice basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest.

[60] Having considered the facts in this matter, I am satisfied that the respondent has committed an act of insolvency as contemplated in section 8(e) and (g) of the Act, in that he has been unable to pay his debts as they fall due and sought indulgences to repay the debt, and to lessen his liability in resect thereof.

Advantage to creditors

[61] The Act does not define the term, *"advantage to creditors".* It is generally accepted that the phrase 'advantage to creditors' means that there should be a reasonable

[10] 2015 (5) SA 215(SCA)

prospect of some pecuniary benefit to the general body of creditors as a whole.[11] Our courts have generally held that this requirement is fulfilled where it is established that there is fair reason to believe that there will be advantage to a 'substantial proportion' or the majority of the creditors.

[62] In the present instance, I am persuaded, having considered all the facts, that a final sequestration order will be of benefit to the applicant, who, on all accounts, constitutes a substantial portion of creditors.

[63] In the result, I make the following order:

Order

1. The estate of the respondent, Mr. **Eric Maligana Mafuna, is placed under final sequestration.**

2. The respondent is ordered to pay the applicant's costs on attorney and client scale, such costs to include the costs of two counsel.

_____

B. FORD
Acting Judge of the High Court
Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 25 July 2023 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 July 2023

Date of hearing: 24 April 2023
Date of judgment: 25 July 2023

[11] See *Lynn and Main Inc. v Naidoo & another* 2006 (1) SA 59 (N) paras 33-35; *Ex Parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP) para 13.

Appearances:

For the applicant:	Adv. J. Vorster
Heads of argument by:	Adv. C. Gibson
Instructed by:	Werksmans Incorporated
For the respondent:	Adv. S. Masimene
Instructed by:	J.L. Rahlagane Attorneys