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

Case Number: 21546/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
20 August 2024	_____
DATE	SIGNATURE

In the matter between:

THE PRUDENTIAL AUTHORITY Applicant

AND

ADELAIDE MUSA DUMA Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 August 2024.

Key words: Provisional sequestration

Mini Summary: The application for provisional sequestration is brought by the Prudential Authority, in terms of sections 83(3)(b), as read with 84(1A) (c) of the Banks Act, 94 of 1990. The essential dispute between the parties in this matter was whether it would be to the benefit of the respondent's creditors to place her estate

under provisional sequestration. Section 10 of the Insolvency Act, 24 of 1936 requires that the court be prima facie of the opinion that there is reason to believe that the sequestration of the first respondent will be to the advantage of his creditors. The court was of such opinion and granted the provisional sequestration order.

JUDGMENT

Mudau, J:

[1] This is an application by the Prudential Authority for the provisional sequestration of the respondent's estate in terms of sections 83(3)(b) as read with 84(1A) (c) of the Banks Act[1]. The allegation is that the respondent has committed an act of insolvency as contemplated in terms of section 83 (3) (b) of the Banks Act further read with section 8 of the Insolvency Act[2].

The parties

[2] The Prudential Authority is established in terms of section 32 and incorporated in terms of the Financial Sector Regulation Act[3] ("Financial Sector Act") of the Republic of South Africa. It has its principal place of business at 370 Church Street, Pretoria.

[3] The respondent, Adelaide Musa Duma ("Duma") is an adult female and businesswoman. The respondent resides at a property situated at Seven Oaks, 105, 2nd Avenue, Johannesburg, which address falls within the jurisdiction of this Court.

[4] Section 83 (3) of the Banks Act, which is to be read with section 8 of the Insolvency Act, relied upon provide as follows:

"Any person who refuses or fails to comply with a direction under subsection

[1] 94 of 1990.
[2] 24 of 1936.
[3] 9 of 2017.

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

Background facts

[5] Based on what is said to be "South Africa's biggest pyramid scheme", the Prudential Authority investigated the business practices of Travel Venture International and/or TVI Express and/or related persons commonly known as the "TVI Schemes". The TVI Schemes marketed the sale of travel vouchers, which purportedly gave recipients substantial discounts for international travel and accommodation. However, the alliance partners who are purportedly linked to the TVI Schemes are not in fact partners, and the marketed relationships are in fact, fraudulent. The scheme constituted a deposit-taking arrangement falling within the definition of "the business of a bank" as defined in section 1 of the Banks Act. After investigations, the respondent was identified as a related person to the TV1 Scheme.

[6] Subsequently, on or about 2 August 2013, a warrant was obtained in terms of section 5 (1) (b) of the Inspection of Financial Institutions Act[4] ("the IFI Act"), to enter the respondent's premises and require production of any documents relating to the affairs of the TVI Schemes, including all bank account statements for the full trading period of all the accounts of the TVI Schemes.

[7] From Ms Duma's bank statements, it was found that the respondent had actively participated in the TVI Schemes by receiving and paying out money from investors. The respondent had for instance 254 (two hundred and fifty-four) inflows in an aggregate amount of R2 574 072.54 (two million five hundred and seventy four thousand seventy two Rand and fifty four cents) and 959 (nine hundred and fifty

[4] 80 of 1998.

nine) outflows in the aggregate amount of R2 569 456.58 (two million five hundred and sixty nine thousand four hundred and fifty six Rand and fifty eight cents) from her First National Bank ("FNB") account number 6[…].

[8] From the bank account statements of the respondent trading as TVI Simply the Best, obtained from FNB under a separate account number 62[…], the Inspectors were able to ascertain the following: The Respondent had 312 (three hundred and twelve) inflows in an aggregate amount of R2 093 819.48 (two million ninety three thousand eight hundred and nineteen Rand and forty eight cents) and 618 (six hundred and eighteen) outflows in the aggregate amount of R2 093 819.48 (two million ninety three thousand eight hundred and nineteen Rand and forty eight cents). The Respondent has receipted and paid out money from and to various investors in the TVI Scheme.

[9] This conduct constitutes "bank business practice", which was done by the respondent without being registered as a bank, nor authorised as envisaged in section 18A (1) of the Banks Act and Mutual Banks Act[5]. In terms of section 11(1) of the Banks Act, "no person shall conduct the business of a bank unless such person is a public company and is registered as a bank in terms of this Act". Business of a bank includes conduct such as the acceptance of deposits from the public as a regular feature of the business in question.

[10] On 20 February 2015, the applicant issued notices in terms of section 83 (1), read with section 84, of the Banks Act, directing the respondent to repay all the monies obtained by them pursuant to the TVI Schemes ("the section 83 Notice"). The notice was served on the respondent on 5 December 2016. On 5 December 2016, the Notice stated inter alia, that the respondent acted in contravention of the Banks Act; that the applicant demanded repayment of monies obtained, inclusive of interest. In addition, that failure to comply with the Notice could result in the respondent being found guilty of an offence and be deemed unable to pay his debts and/or to have committed an act of insolvency. The respondent has failed to repay the applicant as contemplated in the Section 83 Notice. The respondent is

[5] 124 of 1993.

accordingly deemed unable to pay her debts and/or to have committed an act of insolvency.

[11] Subsequently, On 30 November 2016, a rule nisi order was granted to search the respondent's premises and attach funds and belongings of the respondent.15 (fifteen) such assets were attached as a preservation measure, which order was confirmed and made final on 5 February 2018. The Solvency Report that followed shows that the respondent has total assets of approximately R77 350.00, rendering her factually insolvent as against the indebtedness. In terms of section 84 of the Banks Act and the true amount, according to the Solvency Report was found to have been R2,144,200.00 (two million one hundred and forty-four thousand two hundred Rand). This amount has increased to R2,978,529.83 (two million nine hundred and seventy-eight thousand five hundred and twenty-nine Rand and eighty-three cents), which includes the interest incurred and costs associated with the investigation.

[12] In the answering affidavit the respondent confirms her involvement in the TVI Scheme and admits that received deposits from the public in respect of the TVI Schemes into her bank accounts. She also alleges that her involvement in the TVI Scheme was *bona fide* and that there was no intention to conduct the business of a bank. On her version, monies obtained were "paid out immediately to further investors or in respect of vouchers for further investors". It is confirmed that the respondent has not repaid any monies back in terms of the Notice as required. The amount claimed is not the "true amount obtained" but less by approximately a million. The respondent also suggested that there is no advantage for creditors.

[13] Accordingly, there is no dispute that, the respondent willingly participated in the TVI Scheme and that her participation constituted the unlawful conducting of the business of a bank, thus contravening the Banks Act. Also apparent is that the amounts obtained were not repaid to the persons that deposited those amounts.

[14] In *FirstRand Bank Limited v Evans*[6], Wallis J, as he then was, quoted the often-recited words of Innes CJ in *De Waardt v Andrew & Thienhaus Ltd*[7] that:

[6] 2011 (4) SA 597 (KZD) at para 33.
[7] 1907 TS 727 at 733.

> "Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him. . .Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities. 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."

[15] As to whether the provisional liquidation of the respondent will be to the advantage of the creditors, Brand J (as he then was) summarised in *Payslip Investment Holdings CC v Y2K TEC Ltd*[8], in summarising the legal approach said the following:

> "Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in *Kalil v Decotex* (*Pty*) *Ltd and Another* 1988 (1) SA 943 (A). According to these guidelines a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, *inter alia*, the strength of the respondent's case and the prospects of *viva voce* evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and *bona fide* grounds. In this event it is not sufficient that the applicant has made out a

[8] 2001 (4) SA 781 (C) at 783F-I.

case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general."

[16] In this case the applicant's claim is not disputed by the respondent on reasonable and bona fide grounds. Self-evidently, the machinery of the Insolvency Act is accordingly more advantageous to creditors than trial procedure on these facts. In light of the uncontested claim and the failure by the respondent to pay the monies deposited into her bank accounts, a provisional trustee will be able to clarify this by way of an enquiry, far much speedily than the institution of action proceedings. Section 10 of the Insolvency Act requires that the court is prima facie of the opinion that there is reason to believe that the sequestration of the respondent will be to the advantage of his creditors. Due to the above facts, I am accordingly of this opinion. The sequestration of the respondent may well result in the proceeds being brought back into the estate for the benefit of the applicant and general body of creditors.

[17] I accordingly grant the following order:

1.The estate of the respondent, Adelaide Musa Duma is hereby placed under provisional sequestration in the hands of the Master of the High Court of this Division.

2.A rule nisi is issued calling upon all persons who have a legitimate interest to advance reasons, if any, at 10h00 on 14 April 2025 to show cause why:

2.1.A final sequestration order should not be granted; and

2.2. The costs of this application should not be costs in the sequestration of the respondent's estate.

3.The applicant is to deliver a copy of this order to the Master of the High Court and to the South African Revenue Service.

4.A copy of this order shall be served on:

4.1.The respondent by way of service on her attorneys of record, Leofi Leshabana Inc Attorneys, at their address and by email;

4.2. The employees of the respondent, if any; and

4.3.Any registered trade unions which represent any employees of the respondent, if any; and

4.4 By publishing in any local newspaper.

5.The costs of this application are costs in the administration of the respondent's insolvent estate.

TP MUDAU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing:	14 August 2024
Date of Judgment:	20 August 2024

APPEARANCES

Counsel for the Applicant:	Adv. D Mokale
Instructed by:	ENS Africa Inc.
Counsel Respondent:	Mr. L Leshabana
Instructed by:	Leofi Leshabana Inc.Attorneys