THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 36/2023

In the matter between:

THE PRUDENTIAL AUTHORITY **APPELLANT**

And

MKHULULI NOBLE DLAMINI **FIRST RESPONDENT**

NOSIPHO PRUDENCE DLAMINI **SECOND RESPONDENT**

Neutral citation: *The Prudential Authority v Dlamini and Another* (36/2023) [2024] ZASCA 133 (02 October 2024)

Coram: ZONDI, MBATHA and KGOELE JJA and SEEGOBIN and KEIGHTLEY AJJA

Heard: 5 March 2024

Delivered: 02 October 2024

Summary: Provisional sequestration order sought on the grounds of s 83 and s 84 of the Banks Act 94 of 1990 – *prima facie* proof of non-compliance with the Prudential Authority's directive issued under s 83 sufficient to found sequestration application – the fact that reliance was also placed on s 84 to establish insolvency of the respondents is of no moment as long it is shown on either ground that sequestration will be to the advantage of creditors – appeal against refusal to grant provisional sequestration upheld.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Ploos van Amstel J, sitting as court of first instance):

1 The appeal succeeds with costs.

2 The order of the high court is set aside and replaced with the following order:

'(a) The joint estate of the first respondent, Mkhululi Noble Dlamini (Identity Number: 760719 5375 089) and the second respondent, Nosipho Prudence Dlamini (Identity Number: 750925 1152 081) be and is hereby placed under provisional sequestration in the hands of the Master of the Kwa-Zulu Natal Division of the High Court, Pietermaritzburg ('the Master').

(b) The Master is directed to appoint the person nominated by the applicant to act as provisional trustee of the respondents' joint estate, in accordance with the provisions of s 84(1A)(*b*) of the Banks Act 94 of 1990.

(c) A rule *nisi* is issued calling upon all persons with a legitimate interest to advance reasons, if any, on a date to be determined by the court, why the estate of the respondents should not be placed under final sequestration in the hands of the Master.

(d) The costs of the application are to be costs in the administration of the insolvent estate.'

JUDGMENT

Zondi JA (Seegobin and Keightley AJJA concurring):

[1] This is an appeal against the judgment and order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) in which it dismissed the appellant's application for the provisional sequestration of the joint estate of the first and second respondents in terms of ss 83(3)*(b)* and 84(1A)*(c)* of the Banks Act 94 of 1990 (the Banks Act). The first respondent is Mr Mkhululi Dlamini and Mrs Nosipho Dlamini is the second respondent (the Dlaminis). They are married to each other in community of property. The appellant is the Prudential Authority (the Authority). It fulfils the role of the Registrar of

Banks and has the powers and obligations to act in accordance with the provisions of the Banks Act.

[2] The application for the sequestration of the Dlaminis was founded on two grounds. The first was that they had committed an act of insolvency by failing to comply with a directive issued by the Authority in terms of s 83(1) of the Banks Act directing them to repay money they had obtained by carrying on the business of a bank in contravention of that Act. The second was that, in terms of s 84(1A)*(a)*, the Dlaminis were factually insolvent. The high court dismissed the application on the basis that the Authority had failed to show that the Dlaminis were *prima facie* insolvent and relied further upon the exercise of its discretion. The appeal is before this Court with the leave of the high court.

[3] The issues therefore are, first, whether ss 83 and 84 of the Banks Act require proof of factual insolvency for the sequestration of a person under those sections, or whether mere proof of non-compliance with a directive issued under s 83 is a sufficient ground for sequestration. Secondly, whether this Court may interfere with the high court's discretion to refuse the application. The facts within which these issues must be determined are largely not in dispute and are straightforward.

[4] Before setting out the facts that gave rise to this appeal, it is necessary to set out the statutory framework against which this matter must be considered. What gave rise to the application for the sequestration of the Dlaminis were two events. The first was a finding by the Governor of the Reserve Bank, in terms of s 12 of the South African Reserve Bank Act 90 of 1989 (SARB Act), that the Dlaminis were conducting the business of a bank without being registered or authorised to do so. The second was the issuance of a directive by the Authority in terms of s 83 of the Banks Act.

[5] Section 12(1) of the SARB Act provides that if the Governor or a Deputy Governor of the Reserve Bank has reason to suspect that anybody not registered as a bank or as a mutual bank, is carrying on the business of a bank or a mutual bank, he or she may direct the Authority to appoint an inspector to cause the affairs or any part of the affairs of such party to be inspected (s 12 directive). The purpose of the inspection is to establish

whether the business of a bank or mutual bank, as the case may be, is being carried on by that party.[1]

[6] If, as a result of such inspection, the Authority is satisfied that any person obtained money by carrying on the business of a bank without being registered as a bank or without being authorized to carry on the business of a bank, the Authority may, in terms of s 83(1), in writing, direct that person to repay all money he or she so obtained (repayment directive).[2] The repayment directive requires the person to repay, subject to the provisions of s 84 and in accordance with such requirements, and within such period as may be specified in the directive, all monies obtained by that person, including any interest.

[7] In terms of s 84(1) of the Banks Act, simultaneously with the issuing of the directive, or as soon thereafter as may be practicable, the Authority must appoint a repayment administrator (the administrator) to manage and control the repayment of money in

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[1] Section 12(1) of the SARB Act provides as follows:
'If the Governor or a Deputy Governor has reason to suspect that any person, partnership, close corporation, company or other juristic person who or which is not registered in terms of the Banks Act, 1990 (Act No. 94 of 1990), as a bank or in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993), as a mutual bank, is carrying on the business of a bank or a mutual bank, he or she may direct the Registrar of Banks referred to in section 4 of the Banks Act, 1990, to cause the affairs or any part of the affairs of such person, partnership, close corporation, company or other juristic person to be inspected by an inspector appointed under section 11 (1), in order to establish whether or not the business of a bank or mutual bank, as the case may be, is being carried on by that person, partnership, close corporation, company or other juristic person.'

[2] Section 83(1) and(3) of the Banks Act provides as follows:
'(1) If as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Authority is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank or without being authorized, in terms of the provisions of section 18A (1), to carry on the business of a bank, the Authority may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements and within such period as may be specified in the direction, all money so obtained by that person in so far as such money has not yet been repaid, including any interest or any other amounts owing by that person in respect of such money.
…
(3) Any person who refuses or fails to comply with a direction under subsection (1)—
(*a*) shall be guilty of an offence; and
(*b*) shall for the purposes of any law relating to the winding-up of juristic persons or to the sequestration of insolvent estates, be deemed not to be able to pay the debts owed by such person or to have committed an act of insolvency, as the case may be, and the Authority shall, notwithstanding anything to the contrary contained in any law, be competent to apply for the winding-up of such a juristic person or for the sequestration of the estate of such a person, as the case may be, to any court having jurisdiction.'

compliance with the directive by the person subject thereto[3]. On appointment, the administrator must recover and take possession of all the assets of the person subject to the relevant directive;[4] and all actions, legal proceedings, the execution of all writs, summonses and other legal processes against that person stayed and may not be instituted or proceeded with without the leave of the court.[5] The administrator must, at the request of the Authority, report to the Authority regarding the solvency of a person subject to the directive and, if he or she finds that the person concerned is insolvent, he or she must comment on whether that person is technically or legally insolvent.[6]

[8] It is clear from what I have set out in the preceding paragraphs that one of the objectives of s 84 is to regulate repayment of the money the administrator receives from the person, pursuant to the directive issued under s 83. In particular s 84(1A) regulates two functions in the management and control, by the repayment administrator, of repayment of money obtained in contravention of the Banks Act. Firstly, in terms of s 84(1A)*(a)*, the administrator must report to the Authority whether the person who is subject to the directive is in his or her opinion solvent or not. If the repayment administrator finds that the person subject to the directive is insolvent, the administrator must comment on whether such person is technically or legally insolvent. Secondly, s 84(1A)*(b)*(*i*) obliges the administrator to recover and take possession of all assets of the person subject to the direction.

[9] Significantly, ss 83 and 84 include two express provisions conferring on the Authority the competence to apply for the sequestration of a person who is subject to a repayment directive. First, s 83(3)(b) provides that a person who fails to comply with a

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[3] Section 84 of the Banks Act states as follows:
'84. Management and control of repayment of money unlawfully obtained.
(1) Simultaneously with the issuing of a direction under section 83(1), or as soon thereafter as may be practicable, the Authority shall by a letter of appointment signed by him or her appoint a person (hereinafter in this section referred to as the repayment administrator) to manage and control the repayment of money in compliance with the direction by the person subject thereto: Provided that the Authority may afford the person subject to the directive a reasonable period of time to devise and implement an alternative plan of action that is in the interests of the investors and to which the Authority has no objection.'
[4] Section 84(1A)(*b*)(i).
[5] Section 84(1A)(*b*)(ii).
[6] Section 84(1A)(*a*).

repayment directive 'shall for the purposes of any law relating to the winding-up of juristic persons or to the sequestration of insolvent estates, be deemed not to be able to pay the debts owed by such person or to have committed an act of insolvency, as the case may be, and the Authority shall, notwithstanding anything to the contrary contained in any law, be competent to apply for … (his or her) sequestration.' Second, under s 84, if the report filed by the administrator concludes that the person concerned is insolvent, the Authority may, notwithstanding anything contrary contained in any law relating to liquidation or insolvency, apply to a competent court for the sequestration of the person concerned.[7] As I discuss later, the Authority relied on both these provisions in the high court.

[10] It is trite that, in the ordinary course, sequestration proceedings are not to be used to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds.[8] If the claim is disputed on *bona fide* and reasonable grounds, an order ought not to be granted. Such an application may amount to an abuse of the process of court.[9] Where, however, the respondent's indebtedness has, *prima facie*, been established, the onus is on the respondent to show that this indebtedness is indeed disputed on *bona fide* and reasonable grounds.[10] Notwithstanding that the creditor is able to establish all the elements of the case for sequestration, the court still has a discretion as to whether or not to grant the provisional sequestration order.[11]

[11] With this background, I now turn to consider the facts. It is common cause that the Dlaminis participated in the Travel Ventures International scheme (TVI scheme) in 2009. They claim that the TVI scheme was represented to them as a legitimate business opportunity from which they could derive an extra income. The business of TVI was modelled on a scheme which marketed the sale of travel vouchers which purportedly provided the recipient with significant discounts for international travel and

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[7] Section 84(1A)*(c)*.
[8] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 348B; *Kalil v Decotex (Pty) Ltd and Another* [1987] ZASCA 156; [1988] 2 All SA 159 (A); 1988 (1) SA 943 (A) (*Kalil*) at 945E-F.
[9] *Exploitatie- en Beleggingsmaatschappij Argonauten 11BV and Another v Honig* [2011] ZASCA 182; 2012 (1) SA 247 (SCA); [2012] 2 All SA 22 (SCA) para 11.
[10] Op cit *Kalil* at 980C.
[11] Section 10 of the Insolvency Act 24 of 1936.

accommodation. The Dlaminis opened various bank accounts into which they deposited money they received from the investors. The same bank accounts were used to make payments to the investors.

[12] Following the s 12 directive by the Governor, and the subsequent inspection of the Dlaminis' affairs, they were found to have obtained money by conducting the business of a bank without being registered as a bank and without being authorized to do so. The TVI scheme was held by this Court, in *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another*,[12] to have amounted to the unlawful carrying on of the business of a bank and a pyramid scheme in contravention of the Banks Act. It is therefore common cause that the Dlaminis received monies unlawfully under the SARB Act. They claim to have stopped participating in the scheme in 2010, but this claim is not borne out by the bank statements. They indicate that in 2013 they still received payments of various amounts from the investors.

[13] The Authority, acting as Registrar of Banks, appointed Mr. J G Kruger as the repayment administrator (the administrator) on 6 March 2015. On 14 March 2016, the Authority served on Mr Dlamini a copy of the appointment letter, together with the repayment directive, also dated 6 March 2015. The latter informed Mr Dlamini that the repayment process would be controlled by the administrator and warned him of the consequences of failure to comply with the repayment directive. In turn, on 14 March 2016, the administrator served on the Dlaminis the appointment letter, together with a letter referring to the repayment directive issued on 6 March 2015 and confirming his appointment as an administrator. In the letter, the administrator advised the Dlaminis that the inspection that had been conducted revealed that the true amount of money unlawfully obtained by them was R2 827 450. They were directed to pay this amount into the trust account of Bowman Gilfilian Incorporated, alternatively, to make a repayment plan. They

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[12] *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another* [2016] ZASCA 163; [2017] 1 All SA 1 (SCA) para 2.

were advised that they had a right to review or appeal against the directive under s 9(1)[13] of the Banks Act within 30 days after the directive. The amount was expressed to be subject to further investigation and variation. The administrators demanded that the Dlaminis repay this amount within ten days, with interest at 9 per cent, per annum from date of the directive. The directive further informed the Dlaminis that a worksheet containing comprehensive calculation of the amount was available on request.

[14] The Dlaminis neither submitted the repayment directive for review in terms of s 9(2)[14] of the Banks Act, nor repaid the amount demanded from them. Therefore, the directive and the amount payable, became unassailable.[15] Additionally, by virtue of s 83(3)(*b*), they were deemed to have committed an act of insolvency. In consequence, the Authority became entitled to make application for the sequestration of their joint estate.

[15] As already stated, the Authority sought the provisional sequestration order on two grounds. First, on the ground of the deemed act of insolvency in terms of s 83(3)(*b*). The second was in terms of s 84(1A)*(c)* of the Banks Act, on the ground that the repayment administrator concluded that the Dlaminis are insolvent. In this regard, the Authority relied on the draft solvency report issued by the administrator on its behalf in terms of s 84(1A)*(a)* of the Banks Act, which established their indebtedness to the Authority in the amount of R2 827 450 plus interest at the rate of 9 per cent, per annum from the date of the directive.

[16] The Dlaminis opposed the application on the ground that the Authority lacked *locus standi* to bring the sequestration proceedings. They disputed the amount claimed by the Authority. They averred that the amount sought to be repaid was an estimate and that the

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[13] Section 9 of the Banks Act 90 of 1994 as it stood on 6 March 2015, when the repayment directive was served on the Dlaminis. Section 9 has since been repealed with effect from 28 September 2018, published under GN 1019 of 28 September 2018 (*GG* 41947 of 28 September 2018).
[14] Ibid.
[15] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) paras 35-36; *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) 211(CC) paras 41-44.

true amount owing was yet to be established in parallel litigation in the Gauteng Division of the High Court, Pretoria. In that litigation, the Dlaminis and other plaintiffs seek an order declaring that, with reference to ss 83 and 84 of the Banks Act, only such amounts that were paid into the respective accounts of the plaintiffs arising from the TVI scheme and which were not paid over to other participants in the scheme and which truly remained under his/her control for his/her benefit and utilisation, constitute monies that stand to be repaid.

[17] The Dlaminis also took issue with the distinction drawn in draft solvency report between 'confirmed investors, probable investors' deposits and possible investor deposits'. They argued that the Authority was only entitled to claim the 'true amount unlawfully obtained' which according to them was R151 000. They contended that, at best for the Authority, it was entitled to claim the 'possible investor deposits' as well as the sum of R381 700. They denied that the sum of R2 413 360, constituting 'possible investor deposits', met the threshold of establishing a claim on a balance of probabilities and was the 'true amount unlawfully obtained'.

[18] The Dlaminis denied further that the sum of R2 946 050, as claimed by the Authority, represented the 'true amount unlawfully obtained' by them as contemplated in s 84*(a)*(*i*) of the Banks Act. They alleged that some of the amounts reflected in their bank accounts as TVI payments were monies which they had received through some of their businesses but that, in order to improve their credit profile, they had reflected them as TVI receipts. The Dlaminis stated '[they] did not know that at the time that receival of any money in such circumstances [was] unlawful'. They claimed that payments they received from the participants or investors for the purchase of the travel vouchers were immediately or soon thereafter, paid over to further investors in purchasing so called 'vouchers'.

[19] The Dlaminis contended that the maximum amount they had received through the TVI scheme was R408 000 and that they had stopped participating in the scheme 2010. It appears, however, from the repayment administrator's interim report that the Dlaminis received payments into their bank accounts up until 2013.

[20] The Dlaminis denied further that they were factually insolvent or that their liabilities exceeded their assets by the amount contended for by the Authority. They disputed the value placed by the Authority on their residence. According to them, based on the sworn valuation report, the value of the property is R2.9 million and the outstanding amount on the bond is R488 654.87. The Dlaminis listed the assets which they stated they owned including pension fund and retirement annuities. They maintained that the value of these assets was over R2.3 million.

[21] The high court dismissed the sequestration application on the grounds that the Authority had failed to establish that the Dlaminis are *prima facie* insolvent and further, that the Authority had unreasonably delayed in bringing the application. According to the high court, the draft solvency report, on which the Authority relied, contained several shortcomings, which in its view, rendered it unreliable to support the application for the sequestration of the Dlaminis' joint estate. The high court's criticism of the draft solvency report was based on the following grounds:

'(a) It is headed "Draft Solvency Report";

(b) It states that Kruger did not warrant the information relating to the respondents' assets and liabilities to be an accurate and exhaustive depiction of their financial position;

(c) It does not identify a single investor, and does not say that their identities can be established;

(d) Para 5.4.1 reads as follows:

"Funds that were received in the account to the value of R2 700 or multiples thereof and/or where the transaction description positively identifies same as TVI related and where we were able to trace the investor/s, obtain affidavits and match their stated invested amount/s disclosed in the affidavit to bank statements in the name of the institution and/or related entities, were categorised as "confirmed investors."

The only "confirmed investor deposit" in the report is an amount of R151 000. This is not a multiple of R2 700, nor was the investor traced or an affidavit obtained. Para 5.4.1 is plainly the product of a so-called "cut and paste" exercise;

(e) The report concludes that the "confirmed investor deposit" amounted to R151 000, the "probable investor deposits" R381 700 and "possible investor deposits" R2 413 350. Deposits are categorised as "possible investor deposits" where the "transactional description appeared to indicate that it was a TVI investor deposit and/or there was a strong reason to believe that the

deposit was related to TVI". The reasons for categorising particular deposits as possible investor deposits are not stated in the report. Nor does it appear from the worksheet that was provided to the respondents;

(f) The definition of insolvency in paras 10.2.1.1, 10.2.2.4, and 10.2.2.5 does not apply to natural persons, and appears to be another example of "cut and paste". "Commercial insolvency" exists when a company is unable to pay its debts as described in section 345 of the Companies Act 61 of 1973. Actual insolvency is not a requirement, and even a wealthy company may be wound-up if it is in terms of section 345 deemed to be unable to pay its debts. In the case of a natural person, section 9(3) of the Insolvency Act 24 of 1936 provides that an act of insolvency or actual insolvency is required;

(g) The value assigned to the respondents' residence in the report is R1 850 000, which Kruger says is an estimate obtained from a "Windeed Automated Valuation Report". There is no explanation as to what this report is, who prepared it, when it was prepared and on what basis the valuation was done. I have not even been able to find the conclusion reached in the report;

(h) The conclusion in para 10.6.2 that the respondents do not have sufficient capital to repay their "quantifiable liabilities" to the investors and are therefore deemed to be "cash flow" or "legally" insolvent, is an inappropriate reference to commercial insolvency;

(i) The report does not conclude that the respondents are factually insolvent.'

[22] Based on what it found to be shortcomings, the high court held that it was not satisfied that the Authority was authorized by s 84(1A)*(c)* to apply for the sequestration of the Dlaminis' joint estate. The high court reasoned that the Authority could only have done so if the report concluded that they were actually insolvent, which it did not. The high court proceeded to consider whether the documents relied upon by the Authority established actual insolvency. It rejected as unreliable the figures the Authority used to determine the insolvency of the Dlaminis. The high court reasoned that in the case of a natural person, s 9(3) of the Insolvency Act 24 of 1936 (the Insolvency Act), an act of insolvency or actual insolvency is required.

[23] It was submitted on behalf of the Authority that the high court erred in dismissing the application for the provisional sequestration of the Dlaminis on the basis that the Authority failed to establish that the Dlaminis were *prima facie* insolvent. This was not the only basis of its application. The Authority based its application both on s 83(3)(*b*) and

s 84(1A)(*c*) of the Banks Act and, so it contended, either of the two sections was sufficient to found a case for the sequestration of the Dlaminis' joint estate. It was argued on behalf of the Authority that, in the light of the deeming provision in s 83 (3)*(b)*, it was not necessary for it to establish, in addition, that the Dlaminis were insolvent.

[24] On the other hand, counsel for the Dlaminis submitted that it was not enough to rely on a 'deemed commission of act of insolvency'. The administrator's report prepared in terms of s 84 had to find that the Dlaminis were factually insolvent. This was so, proceeded the argument, because the Banks Act, envisages as a first step an inspection by the Authority to establish whether a contravention of the Act has occurred. It is only after the issue of a repayment directive that s 84 comes into play. This happens when the administrator is appointed to investigate, among other things, what the true amount is that was unlawfully obtained. It was accordingly submitted that the act of issuing a repayment directive and the failure to comply with it by a person subject to it, do not, without more, establish a sufficient basis for bringing sequestration proceedings. This could happen only after the administrator has established what the true amount is that was unlawfully obtained and, in addition, that the person subject to the repayment directive is actually insolvent.

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

[26] An act of insolvency is a statutory concept which obviates the necessity of proving actual insolvency.[16] A debtor's estate may be sequestrated even though he or she is technically solvent.[17] However, it was submitted on behalf of the Dlaminis that the Banks Act provides differently. This is because s 83(1) expressly states that repayment under a repayment directive is 'subject to the provisions of s 84'. As already noted, s 84(1A)(*c*)

[16] *De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T); [1983] 4 All SA 517 (T) at 676D-E.
[17] *D P Du Plessis Prokureurs v Van Aarde* 1999 (4) SA 1333 (T) at 1335F.

permits the Authority to apply for a person's sequestration if the administrator finds that he or she is insolvent. The argument proceeded that the two sections must be read together, such that the deemed act of insolvency on its own is insufficient. In addition, it was argued, the Authority must show actual insolvency to establish a lawful ground for sequestration. In bolstering the argument, it was pointed out that sequestration should be ordered only as a last resort.

[27] I am not persuaded by the Dlaminis' interpretation of these sections. Whilst it is correct that there is a reference in s 83 to s 84, on the plain wording of the sections the entirety of s 83 is not made subject to s 84. Significantly, s 83(3)(*b*) is not made subject to s 84. This on its own discounts the correctness of the Dlaminis' interpretation. The cross-reference to s 84 is in s 83(1) alone, the relevant portion reading '. . . the Authority may in writing direct that person *to repay, subject to the provisions of s 84* and in accordance with such requirements and within such period as may be specified in the direction, all money so obtained. . . ' (Emphasis added.)

[28] Section 84 is headed 'Management and control of repayment of money unlawfully obtained'. It permits the administrator to control and manage the assets and funds of the person subject to a repayment directive with the objective of ensuring that the repayment is made. The purpose of s 84 is simply to provide a practical mechanism for securing and managing the repayment of the amount identified in the repayment directive. It outlines the powers and obligations of the administrator and his or her relationship with the Authority. Properly interpreted, the cross-reference in s 83(1) to s 84 means no more than that the repayment of the amount identified in the repayment directive is governed by the scheme outlined in s 84. It cannot be interpreted to limit the Authority's power to seek sequestration under the deemed act of insolvency provision in s 83(3)(*b*) by making it necessary, in addition, to establish that the affected person is insolvent. This does not accord with the plain wording and purpose of the sections.

[29] There is also no public policy reason for reading the sections so as to limit the power of the Authority to seek sequestration as contended for by the Dlaminis. On the

contrary, the whole purpose of the provisions is to ensure that people who have contravened the Act should be held accountable to repay the monies unlawfully obtained. Public policy requires that the Authority ought to be properly empowered to secure this objective, not hamstrung by having to establish two bases for sequestration, as suggested by the Dlaminis.

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

[31] Of course, the Authority may, on the other hand, or in addition, seek to rely on s 84(1A)*(c)* of the Banks Act as a ground for sequestration on the basis that the person subject to the directive is insolvent. It is apparent from s 84 that a finding of insolvency in the administrator's report is a prerequisite before the Authority can bring the sequestration application under s 84. However, the court faced with the sequestration application would, in addition, have regard to all evidence relevant to the status of the estate before granting or refusing a sequestration order based on s 84(3)(*b*).

[32] The next question is whether the word 'insolvent' appearing in s 84(1A)*(c)* of the Banks Act includes both factual and technical insolvency. It was submitted on behalf of the Authority that the ordinary, grammatical meaning of the word 'insolvent' is not limited to a factual determination. It was argued that, in the context of sequestration, the word is used to describe either factual or commercial insolvency and that either, if established, will suffice to establish a *prima facie* case of insolvency.

[33] I disagree. In terms of s 9(1) of the Insolvency Act sequestration of the debtor's estate may be brought either on the basis that he or she is factually insolvent or has committed an act of insolvency. Proof of commercial insolvency will be sufficient in the case of winding-up of a company, but it will not be sufficient for the purpose of obtaining a sequestration order.[18] In the case of a natural person, the respondent's liabilities must actually exceed the value of his or her assets.[19] Actual insolvency may be proved by the applicant by setting out the respondent's liabilities and assets valued on oath at their market value,[20] or by setting out such facts from which the inference can be drawn that the respondent's liabilities exceed his or her assets.[21]

[34] The draft insolvency report on which the Authority relied concluded that the joint estate of the Dlaminis was insolvent. That conclusion was based on the findings of the administrator that the likely net value of the assets he had secured was R2 296 865 with the outstanding capital liability payable to the investors of R2 946 050, leaving a shortfall of R649 185. Based on these figures, the administrator formed the opinion that the Dlaminis did not have sufficient capital to repay the investors and that they were deemed to be 'cash flow' or 'legally' insolvent'. The high court interpreted the administrator's conclusion to mean that the Dlaminis are commercially insolvent rather than actually insolvent. According to the high court, this conclusion did not mean that their liabilities exceeded their assets fairly valued. In terms of s 84(1A)*(c)*, reasoned the high court, the Authority could only apply for the sequestration of the Dlaminis' joint estate if the report concluded that that they were actually insolvent.

[35] As I have already noted, the high court erred in approaching the matter on the basis that, despite the deemed act of insolvency under s 83(3)(*b*) the Authority in addition, had to establish insolvency under s 84(1A)(*c*). For this reason, the question of whether the administrator had concluded that the Dlaminis were commercially, as opposed to

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[18] P M Meskin *Insolvency Law and its Operation in Winding-Up* Service Issue 60 at 2-20 para 2.1.3.
[19] *Ohlsens Cape Breweries Ltd v Totten* 1911 TPD 48 at 50.
[20] *Investec Bank Ltd v Lambrechts NO and Others* [2014] ZAWCHC 175; 2019 (5) SA 179 (WCC) para 30.
[21] *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C); [1993] 2 All SA 534 (C**)** at 443E-F.

actually, insolvent was irrelevant to the underlying issue of whether the Authority's application was well-founded. Section 83(3)(*b*) provided a lawful basis for the application. However, the question of whether the Dlaminis' estate is insolvent is not entirely irrelevant. It is relevant to the exercise of the court's discretion to grant or refuse the application.

[36] The high court misdirected itself in exercising its discretion against the granting of the sequestration order. In terms of s 10 of the Insolvency Act, if the court that hears an application for the sequestration of a debtor's estate is of the opinion that *prima facie* the applicant has established against the debtor a liquidated claim for not less than R100; the debtor has committed an act of insolvency; or is insolvent; and there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may grant a provisional sequestration order. In the context of this matter, as the Dlaminis had opposed the application, the Authority had to establish a case for sequestration on a balance of probabilities.[22] In *Kalil,*[23] although the court was concerned with the application for provisional liquidation under the 1973 Companies Act, what it said regarding the procedure to follow in assessing whether the evidence adduced constitutes a *prima facie* case applies in relation to provisional orders for sequestration. The court stated that:

'The determination of the question as to whether the evidence adduced by the party bearing the *onus* constitutes a *prima facie* case is thus undertaken purely on a consideration of that evidence and without regard to any evidence which may be, or may have been, adduced in rebuttal.'[24]

[37] According to the court in *Kalil*, the procedure is somewhat different where the application for provisional liquidation is opposed, and real and fundamental factual issues arise on the affidavits. In such a case, the concept of the applicant, upon whom the onus lies, having to establish a *prima facie* case for the liquidation of the company seems wholly appropriate.[25]

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[22] *Provincial Building Society of South Africa v Du Bois* 1966 (3) SA 76 (W); [1966] 1 All SA 98 (W) at 78B-E.
[23] Op cit fn 8.
[24] Ibid at 976G-H.
[25] Ibid at 976H.

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

[39] It is also important to bear in mind that the capital amount specified in the directive does not include the interest which they are obliged to pay under s 83(1). According to the Authority, when the interest is calculated, it increases the amount due under the repayment directive to over R4 million. This means that even if the Dlaminis' valuation of their immovable property as being worth R2.9 million is relied upon, the amount due under the repayment order far exceeds the value of their assets.

[40] I am also satisfied that from the evidence adduced by the Authority that there is reason to believe that it will be to the advantage of creditors if the Dlaminis' joint estate is sequestrated. The Authority does not have to furnish positive proof that sequestration will be to the advantage of creditors. All that it is required to show, is that there is a reason to believe that sequestration will be to the advantage of creditors.[26] According to the administrator, the value of the Dlaminis' joint estate is approximately R2.3 million and their liabilities are about R2.95 million leaving the difference of approximately R650 000. It is clear from these facts that there is a reasonable prospect that some pecuniary benefit will result to creditors. In the circumstances, the requirements for the provisional

[26] *AMOD v Khan* 1947 (2) SA 432 (N); [1947] 1 All SA 138 (N) at 437.

sequestration of the joint estate of the Dlaminis were met and the high court therefore erred in dismissing it.

[41] As regards the high court's refusal to grant a sequestration order on the ground of the Authority's unreasonable delay in bringing the application, in my view, the high court misdirected itself. The delay was not attributable to the Authority. The high court ignored the period of delay that occurred when the parties attempted to settle the matter and its failure to consider this relevant fact constituted a material misdirection. It cannot be said that it exercised its discretion judiciously. This Court, because of the material misdirection committed by the high court, is entitled to interfere with exercise of the discretion by the high court.[27]

[42] In conclusion, on the facts, I am satisfied that the Authority should have been granted the provisional sequestration order. It discharged the onus on a balance of probabilities that the amount which the Dlaminis unlawfully obtained by conducting a business of a bank in contravention of the Banks Act; the Authority directed them to repay the amount; the Dlaminis failed to repay the amount. As a result of their failure, s 83 of the Banks Act deemed them to have committed an act of insolvency which entitled the Authority to apply for the sequestration of their joint estate. There is a reason to believe that their sequestration will be to the advantage of creditors.

[43] In the result I make the following order:

1 The appeal succeeds with costs.

2 The order of the high court is set aside and replaced with the following order:

1 The appeal succeeds with costs.

2 The order of the high court is set aside and replaced with the following order:

'(a) The joint estate of the first respondent, Mkhululi Noble Dlamini (Identity Number: 760719 5375 089) and the second respondent, Nosipho Prudence Dlamini (Identity Number:

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[27] *National Coalition for Gay and Lesbian Equality and Others v Ministers of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 para 11.

750925 1152 081) be and is hereby placed under provisional sequestration in the hands of the Master of the Kwa-Zulu Natal Division of the High Court, Pietermaritzburg ('the Master').

(b) The Master is directed to appoint the person nominated by the applicant to act as provisional trustee of the respondents' joint estate, in accordance with the provisions of s 84(1A)(*b*) of the Banks Act 94 of 1990.

(c) A rule *nisi* is issued calling upon all persons with a legitimate interest to advance reasons, if any, on a date to be determined by the court, why the estate of the respondents should not be placed under final sequestration in the hands of the Master.

(d) The costs of the application are to be costs in the administration of the insolvent estate.'

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DH ZONDI

JUDGE OF APPEAL

Mbatha and Kgoele JJA (dissenting)

[44] We have had the benefit of reading the majority judgment of our colleague, Zondi JA, who concluded that the appeal should succeed. With respect, we hold a different view. Our view is that the judgment of the high court is sound and the appeal should be dismissed with costs.

[45] First, we highlight that we agree with the factual background espoused by the majority judgment, and the need to repeat same falls away. Second, we emphasise that it was not an issue before the high court that the Dlaminis obtained money by carrying on a business of a bank without being authorised or registered to do so, and, that the Authority had directed them to pay back the money in terms of s 83(1) of the Banks Act, but they failed to do so. They accepted that, as a result, they were deemed to have committed an act of insolvency. The application for the provisional sequestration was resisted only on the basis that they were not insolvent. Lastly, as a result of the fact that a provisional order was sought, it was also common cause that the onus rested on the

Authority to, at least, establish a *prima facie* case against the Dlaminis and the high court was alive to that.

[46] The application for the provisional sequestration of the Dlaminis was not premised on the basis that they had failed to satisfy a judgment debt or committed an act of insolvency as per s 8*(b)* and *(g)* of the Insolvency Act 24 of 1936 (Insolvency Act).[28] The basis of the alleged insolvency emanates from the directive issued by the Authority in terms of s 83. As correctly stated by the majority judgment, the Authority relied on two grounds namely: failure to comply with the directive in terms of s 83(3)*(b)* and factual insolvency in terms of s 84(1A)*(c)* of the Banks Act.

[47] We define the issues slightly differently from those outlined by the majority judgment. The first issue is whether, in light of the deeming provision in s 83(3)*(b)*, there is any need to establish that the Dlaminis are insolvent. If the answer to this question is in the affirmative, it is the end of the matter and the second issue does not arise. In our view, the second issue arises because, as it will be seen later, the stance taken by the majority judgment appears to us, with respect, not to be correct. The second issue is whether the Authority made a *prima facie* case for the provisional sequestration of the Dlaminis. The third is whether this Court may interfere with the discretion exercised by the high court in refusing to grant the provisional order.

[48] The answer to these issues requires a consideration of the provisions and the interpretation of s 12 of the SARB Act and ss 82 to 84 of the Banks Act. The Insolvency Act also plays a role in aiding the interpretation of these sections.

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[28] The Insolvency Act 24 of 1936
'…(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;
…
(g) if he gives notice in writing to anyone of his creditors that he is unable to pay any of his debts;'

[49] Section 82(1) of the Banks Act 94 of 1990, correctly interpreted, is limited to the establishment of the question whether a person carries on the business of a bank in contravention of the provisions of the Banks Act. The heading to s 82(1) expressly refers to the exacting of information by the Authority. This is the first step when regard is had to s 12 of the SARB Act, as referred to in s 83 of the Banks Act. Section 12(1) of the SARB Act provides as follows:

'If the Governor or a Deputy Governor has reason to suspect that any person, partnership, close corporation, company or other juristic person who or which is not registered in terms of the Banks Act, 1990 (Act No. 94 of 1990), as a bank or in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993), as a mutual bank, is carrying on the business of a bank or a mutual bank, he or she may direct the Registrar of Banks referred to in section 4 of the Banks Act, 1990, to cause the affairs or any part of the affairs of such person, partnership, close corporation, company or other juristic person to be inspected by an inspector appointed under section 11 (1), in order to establish whether or not the business of a bank or mutual bank, as the case may be, is being carried on by that person, partnership, close corporation, company or other juristic person.'

[50] Section 83 of the Banks Act deals with the mandate of the Authority to direct the said person to pay. Thus, the reference to 'inspection' as mentioned in s 83(1) requires the Authority to establish whether the business of a bank was carried on unlawfully or not, and if so, to direct the said person to pay. It does not involve a full-scale investigation as to the exact amount that is actually owed to the investors. This is the task of the repayment administrator in terms of s 84. It is important to note that s 83(1) makes specific reference to an inspection conducted under s 12 of the SARB Act. Notably, s 83(3)*(a)* and *(b)* deals with what happens to a person who fails to comply with the direction of the Authority. We will deal with s 83(3)*(b)* later as it is key to the interpretation we prefer.

[51] The relevancy of s 84(1) is that it specifically deals with the appointment of the repayment administrator to manage and control the repayment of the money so unlawfully obtained. He must, after completing his investigation, compile a report determining the solvency of the person concerned in terms of s 84(1A)*(a)*, read with s 84(4)*(a)*(i) and (ii) of the Banks Act. This requires extensive investigation to, amongst others, determine the true amount of money unlawfully obtained, and the identities of all persons from whom

such money was so unlawfully obtained. It is in terms of s 84(1A)*(c)* that if the report by the repayment administrator concludes that the person subject to the directive is insolvent, the Authority may apply for a sequestration order in terms of the Insolvency Act. The purpose of the appointment of the repayment administrator under s 84(1), is simply to control and manage all the repayment of the money of a person who complies with the direction of the notice. Section 84(1A)*(c),* in our view, is distinguishable from s 83(3)*(b).* The difference follows hereunder.

[52] It is crucial to indicate that the deeming provision is found in s 83(3)*(b)* and not 84(1A)*(c)* of the Banks Act. For a better understanding of the import of these two sections and their differences, they are respectively quoted hereunder:

'83. Repayment of money unlawfully obtained.

. . .

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

(a) shall be guilty of an offence; and

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

'84. Management and control of repayment of money unlawfully obtained.

. . .

(1A)(c) If the report referred to in paragraph *(a)* concludes that the person subject to the directive is insolvent, the *Authority may*, notwithstanding anything contrary contained in any law relating to liquidation or insolvency *apply to a competent court* for the winding-up in terms the Companies Act or the sequestration in terms of the Insolvency Act, 1936 (Act No. 24 of 1936), as the case may be, of the person subject to the directive, and the Authority shall have the right to oppose any such application made by any other person.' (Emphasis added.)

[53] In *Smit v Minister of Justice*[29] the following was said:

'It is an established principle of our law that "the same words in the same statute bear the same meaning". This principle applies with greater force where the words appear in the same sentence. Where the same word is repeated in different parts of a statute, the presumption is that it bears the same meaning throughout the statute, unless there is a clear indication that it is used in a different sense.' [Footnotes omitted].

[54] Applying the above-mentioned authority including the trite principles of interpretation as espoused in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[30] it is clear that s 83(3)(*b*) refers to the failure to adhere to the notice of the repayment of the money which is deemed to be an act of insolvency. However, it does not end there. It also states that, if there is such a failure, 'the [Registrar] shall. . .*be competent to apply*'. This clause in our view means that the deeming provision in this section only gives the Registrar/Authority the *locus standi* to apply for the sequestration or liquidation of a person. This is so because the Registrar/Authority is not a creditor to the respondent – that is why the word 'shall be competent to apply' was used. (Emphasis added.)

[55] We further highlight the contrasts between these provisions. The heading to s 83 refers to the repayment of the money and the heading to s 84 refers to the management and control of the repayment of the said money. Of significance is that s 84 specifically refers to the 'report' that needs to be compiled by the repayment administrator as envisaged in s 84(1A)*(a)* as to whether the person is technically or legally insolvent. It is clear that the phrase 'be competent to apply' was deliberately omitted by the legislature in s 84(1A)*(c)*. Although the word 'competent' is used, it is used in a different context. It specifically provides that, the Registrar 'may' apply to a *competent court*. This simply means that the Authority may approach a court clothed with the jurisdiction to bring an application once it has established a *prima facie* case. A *prima facie case* is established

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[29] *Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29; 2021 (3) BCLR 219 (CC); 2021 (1) SACR 482 (CC) para 63.
[30] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

in terms of the report compiled by the repayment administrator. This is what is normally referred to as a cause of action which is different from standing or *locus standi* (Emphasis added.)

[56] Therefore, as correctly found by the high court, if the deeming provision in s 83(3)*(b)* was meant to be sufficient by the legislator for the purposes of declaring an estate of such a person insolvent in terms of the Banks Act, there would have been no need for determination of solvency or otherwise of the person concerned. Section 84(1A)*(c)* would have been superfluous. Hence, the section provides under what circumstances the Authority may apply for the sequestration or liquidation of a person concerned in s 84(1A)*(c).* It provides that the Authority may do so only if the report establishes that the respondents are insolvent. It is on those bases, that with respect, we do not agree with the interpretation of the majority judgment, as the requirements to declare a person insolvent were not met.

[57] Contextually, the reasonable interpretation that needs to be attributed to this, is that the issuing of a s 83(1) directive and its non-compliance is not a stand-alone ground for the Authority to sequestrate or liquidate the concerned persons. The Banks Act envisages that, only after a thorough investigation by the appointed payment administrator and finalisation of the report, which establishes the true amount owing, it is only then that the Authority may apply for the sequestration of a person. The report and finding by the repayment administrator are, in fact, a prerequisite for the utilisation of the deeming provision in s 83 to bring an application for a sequestration. Section 84(4) requires the repayment administrator to, amongst others, conduct such further investigation, establish the true amount and the identities of all persons from whom such money was unlawfully obtained. Its provisions are peremptory as it uses the word ‘shall’ in the provision.

[58] The second reason why the deeming provision cannot be a stand-alone ground to sufficiently establish the solvency of the Dlaminis is that deeming provisions are normally regarded as a conclusion of the law. An analogy can be drawn with the deeming

provisions found in s 69(1) of the Close Corporations Act 69 of 1984. In *Ter Beek v United Resources CC and Another*,[31] the following was said:

'. . . the [deeming] provisions of s 69(1) of Act 69 of 1984 [a case dealing with the liquidation of a close corporation] are merely supplementary (i.e. extending what the subject-matter includes) and *prima facie* (i.e. rebuttable). Accordingly, [the] first respondent [was] not precluded from assailing the "conclusion of law" which results from a failure to appropriately respond to a statutory demand in terms of s 69(1)*(c)* of Act 69 of 1984.'[32]

The same can be said about the failure to respond to the direction under s 83(1) of the Banks Act.

[59] This brings us to the question, whether the Authority established on a *prima facie* basis, that the Dlaminis were technically or legally insolvent. In considering the Insolvency Act, we need to take into account the following trite principles: (a) in the case of a natural person, s 9(3) provides that an act of insolvency or actual insolvency is required; (b) the claim must be liquidated, and not be less than R100; (c) there should be an advantage to creditors; (d) commercial insolvency exists when a company is unable to pay its debt – it needs to be distinguished from actual insolvency; and (e) the test for insolvency in our law is whether the liabilities of a debtor fairly valued exceed his liabilities. An inability to pay one's debts is not necessarily an indicator of insolvency, it only casts something in the nature of an evidentiary burden on the debtor to rebut it.

[60] In addition, we highlight that the difference between actual and commercial insolvency is that actual insolvency is where a debtor's liabilities exceed his assets, whereas commercial insolvency is where a debtor is unable to pay his debts (for example, due to a temporary cash-flow problem), but his assets do indeed exceed his liabilities. The fact that someone is unable to pay his debts or that his assets exceed his liability may mean that he is factually insolvent, but that does not mean that he is insolvent for legal purposes. An applicant must establish a *prima facie* case in order to obtain a provisional sequestration order by satisfying the following requirements: the claim,

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[31] *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (C).
[32] Ibid at 331E-G.

insolvency or act of insolvency, and advantage to creditors. Since sequestration proceedings have an impact on the status of a person, the creditor has to establish a *prima facie* case by setting out the claim with sufficient particularity.

[61] The sum total of the above considerations is that a repayment administrator, Mr Kruger, was appointed in terms of s 84(1) to:
(a) manage and control the repayment of money in compliance with the directions;
(b) report to the Authority whether the person subject to the direction is insolvent; and, if so
(c) comment on whether such person is technically or legally insolvent (s 84(1A)*(a)*); and
(d) conduct further investigation into the affairs of the person subjected to the direction in order to establish the true amount of money unlawfully obtained by that person (s 84(4)*(a)(*i); the identities of all persons from whom such money was so unlawfully obtained, where such money is kept, and any other fact which needs to be established in order to facilitate the repayment of such money in terms of the relevant direction (s 84(4)(ii)-(iv)).

[62] In applying the provisions of the Insolvency Act, though it had been established that the Dlaminis conducted the 'business of a bank', it is common cause that the claim did not arise from a liquidated sum of money. The amount claimed against the Dlaminis is required to be quantified by the repayment administrator. The 'Draft Solvency Report' shows that he failed to do that. Nowhere does the Authority or the repayment administrator contend that he had established the true amount owed by them. This was necessary as the Authority is not a creditor *per se*. Furthermore, the amount claimed is disputed by the Dlaminis.

[63] Contrary to the provisions of ss 8*(b)* and *(g)* of the Insolvency Act, the repayment administrator has to establish if a person subject to the s 81 directive is solvent and if not, establish whether he/she is technically or legally insolvent. The purpose of the exercise is for the recovery of the funds deposited by the innocent victims of the unlawful enterprise conducted by the operators of the scheme. Consequently, in this case an investigation

has to be conducted to establish the true amount of money unlawfully obtained by the Dlaminis. This is done to facilitate the repayment of such funds to the victims of the unlawful enterprise. As a result, the repayment administrator bears the onus to prove that he established the true amount owed, the identity of the creditors and that it would be to the advantage of the victims of the unlawful enterprise.

[64] The finding by the majority in this judgment that the Dlaminis were *prima facie* insolvent is with respect misplaced. In dealing with the question of whether their insolvency was *prima facie* established by the repayment administrator, the majority concluded that they did not have sufficient capital to repay the quantifiable liabilities. The conclusion was based on the opinion found in the report of the payment administrator that the Dlaminis were deemed to have a cash flow problem or were legally insolvent. This was the wrong conclusion from the onset, as it was premised on the principles relevant to commercial insolvency as it will become clearer hereunder. The payment administrator had to establish if the Dlaminis were insolvent or not. We find that, in coming to the conclusion that they were insolvent, the repayment administrator made several misdirections.

[65] First, the repayment administrator misconstrued the principles applicable to the sequestration of a natural person with those applicable to a juristic person. The high court correctly pointed out what is required to be proved in the sequestration of a natural person by referring to ~~the~~ Meskin Insolvency Law,[33] where the learned author states that:

'Otherwise than in the case of winding-up of a company, proof of only "commercial insolvency", ie., inability to pay debts, the payment of which currently is due or overdue, is not sufficient, *per se*, for the purpose of obtaining a sequestration order. But evidence of "commercial insolvency" may enable the Court to conclude that the debtor's liabilities in fact exceed the value of his assets.'

[66] Secondly, the evidence showed that the repayment administrator relied on a Windeed report to ascertain the value of the Dlaminis' property. The said valuation fell short of the fundamental requirements of a valuation. There was no proper valuation of

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[33] Op cit fn 18 above.

the property by a qualified valuator. The Windeed report, furnished by the repayment administrator had a lot of shortcomings. It made no provision for the market value of the property and lacked a proper analysis of the condition of the property. We point out that in *Ex Parte Ogunlaja and Others*,[34] the court emphasised that the evidence of a valuation is expert evidence and must comply with strict requirements to be acceptable. It expressed its views as follows:

'A valuator's services are required in matters of this nature in order to provide independent expert advice to the court of the probable price that an immovable or movable asset forming part of an insolvent estate will realise when offered for sale during the liquidation process undertaken by the trustee who is appointed by the Master once the surrender has been accepted.'

[67] Similarly, in *Nel v Lubbe*,[35] the court, in commenting on the nature of the valuation report held that:

'Normally the opinion of a witness is not receivable in evidence. But the opinion of an expert witness is admissible whenever, by virtue of the special skill and knowledge he possesses in his particular sphere of activity, he is better qualified to draw inferences from the proved facts than the Judge himself. A Court will look to the guidance of an expert when it is satisfied that it is incapable of forming an opinion without it. But the Court is not a rubber stamp for acceptance of the expert's opinion. Testimony must be placed before the Court of the facts relied upon by the expert for his opinion as well as the reasons upon which it is based. The Court will not blindly accept the assertion of the expert without full explanation. If it does so its function will have been usurped.

. . .

Not a single reason is set out in the valuation as to why the sum of R290 000 is the value. In fact, the document is a bald assertion of value. The procedure adopted, in my opinion, is hopelessly inadequate. The proper approach is for the expert to furnish in evidence the detailed facts upon which the opinion is based and the reasons for forming the opinion expressed. Upon hearing the evidence, the Court will come to its own conclusion, no doubt guided by the evidence.'

[68] Thirdly, one cannot simply ignore the glaring discrepancy between the valuation report provided by the Dlaminis and the Windeed report provided by the repayment

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[34] *Ex Parte Ogunlaja and Others* [2011] JOL 27029 (GNP) para 14.
[35] *Nel v Lubbe* 1999 (3) SA 109 (W) at 111D-112B.

administrator. The valuation report furnished by the Dlaminis reflects that there is equity in the property, irrespective of the fact that there is an outstanding amount of the bond. The repayment administrator failed to counter the aforementioned facts which appeared in their expert valuation report. They also put up proof of the valuation of their movable assets, a retirement annuity of about R 1 million and a pension fund worth almost R 1 million, which interestingly did not form part of the repayment administrator's determination of their solvency. In our view, the repayment administrator failed to provide evidence challenging the evidence presented by them, that they are not insolvent. The Windeed valuation report provided by the repayment administrator failed to meet the jurisdictional requirements of a valid valuation. Consequently, the repayment administrator failed to prove that the Dlaminis' liabilities exceeded their assets and were therefore insolvent.

[69] As previously stated, two distinct processes are envisaged by the provisions of s 83 read with s 84 of the Banks Act. In this case, the repayment administrator was directed to proceed in terms of s 84. The s 84 report requires the repayment administrator to establish the true amount of money unlawfully obtained by the person contemplated in s 83(1), as well as the identities of the person who deposited funds into their accounts. The process followed by the repayment administrator in the investigation and drawing of the report fails to satisfy the requirements of s 84 because the draft report did not specify the identities of the persons who deposited the funds into the Dlaminis' account. The amount in s 84 is qualified by the word 'true' amount. However, the draft report compiled by the repayment administrator, categorically states that he did not warrant the information relating to assets and liabilities to an exhaustive and accurate assessment of the Dlaminis' financial position. A sequestration order has a great impact on the status of a person, hence the requirements in s 84 that the repayment administrator has to conduct an investigation into the affairs of a person subject to a directive. If no exhaustive and accurate assessment is done, there is even a greater risk of sequestrating persons who are not insolvent.

[70] The purpose of the s 84 directive is not punitive but aims to restore the status *quo*. It requires that the people who suffered loss be reimbursed. It does not require the automatic sequestration of a guilty party merely on the basis that he conducted an unlawful enterprise. The investigation and determination, as required in terms of s 84, appears not to have been properly done by the repayment administrator. The high court carefully highlighted all the discrepancies relating to the report. We point out some of the flaws in the report. In paragraph 5.4.1 of the report, the repayment administrator refers to deposits in the sum of R2 700 or multiples thereof. However, the only confirmed investor deposit totals the amount of R151 000.00 and not multiples of R2 700. This is contrary to the requirements of s 84 which requires the repayment administrator to establish the true amount paid to the Dlaminis. This also violates the principle espoused above that the amount claimed should be set out with sufficient particularity.

[71] It is also significant to point out that the second process was not complied with, as no investors were traced by the repayment administrator. This is confirmed by the fact that no affidavits were obtained from the investors. He only refers to a probable investor deposit of R381 700 and a possible investor deposit of R2 413 350. This does not establish who are the investors as required in s 84, as it is speculative. The jurisdictional requirements of s 84 have not been complied with. A higher level of investigation and accuracy is envisaged by the section. Advantage to creditors, and in the context of this case and the purpose of the Banks Act, the repayment to creditors, is key to establishing a *prima facie* proof of declaring an estate of a natural person to be sequestrated, if indeed he is insolvent. This requirement, on its own, demonstrates that the repayment administrator failed to make out a *prima facie* case for the sequestration of the Dlaminis.

[72] We agree with the conclusion reached by the high court that the assertion by the Authority that ‘the debate about the *quantum* of indebtedness is irrelevant as a creditor has only to demonstrate an indebtedness of at least R100’ misses the point. The high court was correct to conclude that a creditor in terms of the Insolvency law has to demonstrate an indebtedness of at least R100 in order to establish *locus standi,* it does not establish a *prima facie* case. In our view, the *quantum* is therefore relevant, because

the repayment administrator has to demonstrate that the Dlaminis are insolvent. Section 84 expressly requires the determination of solvency or insolvency of the person under the direction. In the event that the repayment administrator finds that the person is insolvent, they are required to establish the nature thereof, the true amount owed and the actual value of assets.

[73] The view of the majority judgment is that the failure by the Dlaminis to make payment of the amount directed by the administrator without first reviewing that directive, brought into operation the deeming provision in s 83(3)(*b*). In our view, the only decision that was subject to review, as correctly found by the high court, is the decision of the Registrar that they had unlawfully carried on the business of a bank and they had to repay the funds so obtained, which they did not challenge. Section 9[36] is specific in that respect as it provides as follows:

'9. Appeal against decisions of Registrar

(1) Any person aggrieved by a decision taken by the Registrar under a provision of this Act may within the prescribed period and in the manner and upon payment of the prescribed fees apply for a review established by subsection (2).

. . .

(2A) In any review under subsection (1), the board of review is, subject to the provisions of subsection 8, confined to establishing whether or not in the taking of the relevant decision, the Registrar exercised his or her discretion properly and in good faith.'

In fact, the person under the direction is empowered by s 84(1A) to oppose the application for a sequestration or liquidation. The section does not refer to any review as stated in the majority judgment.

[74] The Dlaminis correctly challenged the finding on insolvency, based on the *quantum* of the debt as well as the value of their assets. The repayment order by the Registrar, in terms of s 83(1), is subject to the provisions of s 84. We conclude, as already indicated above, that the deeming provision does not preclude a person subject to a directive to challenge the finding of insolvency. In this case, reliance was placed on the report made

[36] Op cit fn 13.

by the repayment administrator that they were insolvent, which is disputed by the Dlaminis. A report which is incomplete and inaccurate goes against the spirit of the purpose of s 84, read with s 83(1), being to facilitate the repayment of creditors of the funds that were illegally obtained from the investors.

[75] The s 84 exercise brings into play all the requirements for the sequestration of a person. The Authority failed to show that it would be to the advantage of creditors if the Dlaminis were sequestrated. The report has also not identified a single creditor.

[76] It is important that we should distinguish between the role of the repayment administrator and that of the trustee of the insolvent estate. A repayment administrator has to investigate, bring her or his own mind to bear on the information before him or her to justify the solvency of the parties, report on their findings, quantify the amount owed, and identify the victims of the unlawful enterprise. If the repayment administrator has not found that the parties are insolvent, that is not the end of the matter. The Authority can demand payment from the Dlaminis and/or attach their assets for sale in execution to facilitate payment to the victims of the unlawful enterprise. The repayment administrator cannot rely on the appointment of the trustee to carry out further investigations, as this is a pre-requisite in terms of s 84.

[77] The aforementioned findings are supported by the Treasury notes appearing in the draft of 'The Banks Amendment Bill, 2006: Summary of Amendments to Bank Act, 1990, July 2006,[37] on sections 81-84-Control of certain Activities of Unregistered person.' It states as follows:

'30.1 One of the main problems and frustrations in enforcing sections 81 to 84 of the Act is the fact that once inspectors have been appointed to investigate a person operating an illegal scheme, it invariably happens that such a person is liquidated or sequestrated. Such a liquidation or sequestration negates the work done by the inspectors and the higher fees charged by the

[37] The draft Banks Amendment Bill, 2006: Summary of Amendments to Bank Act, 1990, July 2006. The Draft Bill was promulgated as the Banks Amended Bill Act 12 of 2007 which came into operation on 1 January 2008. However, the amendment bill only amended s 84 by the insertion of s 84 (1A).

appointed liquidator/trustee of the insolvent estate are to the detriment of depositors in such a scheme.

. . .

30.4 *It is also proposed that a duly appointed fund manager should report to the Registrar on the solvency of the person operating the illegal scheme. When the person is found not to be insolvent, the manager may repay depositors as provided for in section 84 of the Act. When a person is found to be insolvent, the Registrar may apply for the liquidation of the person and will be able to recommend the liquidator to be appointed as well as agree to the liquidator's fee structure in this regard.*' (Emphasis added.)

[78] The aforementioned views expressed in the Treasury documents resonate with our view that it was not the intention of the drafters of the Banks Act to automatically liquidate or sequestrate those found to have operated an unlawful enterprise. It also shows the importance of establishing the solvency or insolvency of a respondent and identifying the creditors of the unlawful enterprise. Most importantly, the exercise is not to benefit liquidators, but the actual creditors of the estate.

[79] The repayment administrator is also obliged to afford the person subject to a direction a reasonable period of time to advance a repayment plan that would benefit the creditors. A mere ten-day period afforded to the Dlaminis for the payment of such a large amount of money cannot be said to be reasonable. It was not in the interest of creditors. It merely sets up a person under the directive for the deeming provision to come into operation.

[80] Lastly, on the question whether the high court exercised its discretion judicially, our view is that the inclination of the high court to exercise its discretion against the granting of a sequestration order cannot be faulted in the context of the facts of this case. The high court, contrary to what the majority judgment concluded, gave about five reasons for this finding. Nothing suggests that the discretion was not judicially exercised. The delay, considered from the time when the repayment administrator was authorised to investigate, which ran into a number of years, is one of the factors that influenced it to

exercise its discretion in the dismissal of the application and not as a stand-alone ground as the majority judgment claims.

[81] In the circumstances, we would have dismissed the appeal with costs.

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JUDGE OF APPEAL

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AM KGOELE

JUDGE OF APPEAL

Appearances

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