



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 4709/2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
DATE: 12 MARCH 2021	
SIGNATURE:	

In the matter between

PREMIER FMCG (PTY) LTD

Applicant

And

BARBARA VAN ZYL

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] I heard this matter in the urgent court last week and issued an order for the provisional sequestration of the respondent's estate. I indicated that the reasons for the order would follow. The reasons appear *infra* and due to the fact that the matter is urgent a short summary of the facts and law will suffice.

Reasons

- [2] The applicant prayed for the provisional sequestration of the estate of the respondent on the basis that the respondent is factually insolvent.
- [3] In a separate application under case number 4712/2021, the applicant also prayed for the provisional liquidation of ABC Fire Projects (Pty) Ltd ("ABC"), a company of which the respondent is the sole director and shareholder, on the basis that it is factually insolvent.

Facts common cause

- [4] The respondent was appointed as a senior credit controller by the applicant on or about 1 April 2002. Specific customer accounts were allocated to the respondent to manage, which management included obtaining proof of payments (remittances) made by the customers, allocating each payment/remittance to that customer's account and ensuring that agreed discounts, rebates, returns or other credit transactions are accurately recorded on each customer's account.

- [5] Naturally, the credit-control duties performed by the respondent played an important role in the applicant's business operations and enabled the applicant to have an accurate record of the liabilities of each of its customers towards it.
- [6] The applicant alleges that the respondent had, as a result of her position, become acquainted with all the applicant's internal financial processes including the applicant's internal checks and balances.
- [7] One of the customer's allocated to the respondent was Farhaad Distributors (Pty) Ltd ("FD"), which customer forms the subject matter of the alleged theft perpetrated by the respondent.
- [8] According to the applicant's accounting records, the account of FD seemed up to date. Some suspicious behaviour of the respondent, however, prompted the applicant to appoint forensic investigators to investigate the accounts managed by the respondent. The results of the forensic investigation were, as will appear more fully *infra*, astounding.
- [9] In conducting the investigation, an analysis of the bank accounts of the respondent and ABC for the period 2017 to date were compiled.

[10] The analysis revealed the following:

10.1 during the period 2017 to date, FD made payments to ABC's bank account referenced either by the customer account number allocated by the applicant to it or by the name of Mr Aboo Baker, the proprietor and director of FD, in an aggregate amount of R 74 137 004, 57;

10.2 the aforesaid amount was disbursed by the respondent by *inter alia* paying an amount of R 39 899 654, 57, directly into her bank account, which amount was disbursed by the respondent.

[11] Notwithstanding the aforesaid payments, the respondent filed a statement of affairs on 1 March 2021 in terms of which her total assets amounted to only R 2 095 000, 00.

[12] The financial statements of ABC similarly reflected a dire picture. The 2019 financial statements reflected total equity and liabilities of R 301 519, 00 and a nett profit of R 19 863. Sales for the year amounted to only R 976 286, 00.

Points *in limine*

[13] Prior to considering the merits of the applicant's application it is necessary to deal with the points *in limine* raised by the respondent.

First point *in limine*

[14] The respondent alleges that the applicant's notice of motion is defective because it does not reflect a date for hearing if the matter is opposed.

- [15] The point is ill-conceived. A mere reading of the notice of motion makes short shrift of the point, to wit:

"TAKE NOTICE FURTHER that, in the event that a notice of an intention on the part of the respondent to oppose this application is received as aforesaid, the application will be made at 10h00 on Tuesday 23 February 2021 or as soon thereafter as counsel for the applicant may be heard."

- [16] The point is dismissed.

Second point *in limine*

- [17] The respondent contends that a supplementary affidavit filed by the applicant on 8 February 2021, should be disregarded because no basis or exceptional circumstances for the filing of the supplementary affidavit exists.

- [18] It is trite that an applicant who wishes to file further affidavits may only do so with the permission of the court. The supplementary affidavit contains facts that came to the knowledge of the applicant subsequent to the filing of the founding affidavit.

- [19] I am of the view that the facts contained in the supplementary affidavit do not take the matter any further. The respondent has, however, responded to the contents of the supplementary affidavit in her answering affidavit and as a result did not suffer any prejudice by the filing thereof.

- [20] In the exercise of my discretion, the supplementary affidavit is admitted into evidence.

Third point *in limine*

- [21] The respondent alleges that the applicant's claim underlying the application is one for damages and as such does not fall within the definition of a "*liquidated claim*" as envisaged in section 9 of the Insolvency Act, 24 of 1936 ("the Act").

- [22] The point pertains to the merits of the application and will be dealt with *infra*.

Fourth point *in limine*

- [23] The respondent contends that the allegations in the supplementary affidavit dispel any notion that she is a debtor of the applicant.

- [24] The point, once again, pertains to the merits of the matter and will be dealt with *infra*.

Applicant's case

- [25] The applicant reconstructed the account of FD and established that an amount of R 124 941 177, 90 is outstanding on the account. From the aforesaid facts, the applicant contends that the respondent clearly misappropriated the money paid by FD to the benefit of the applicant into ABC's account.

Respondent's case

- [26] The respondent explained that FD made payments to ABC for services rendered. In support of the aforesaid, the respondent attached four invoices to her answering affidavit issued by ABC to FD in respect of the services rendered. The total amount of the invoices is approximately R 45 000, 00.
- [27] Having regard to the amount paid by FD to ABC, the explanation is untenable, to say the least.

Legal principles and discussion

- [28] The respondent does not dispute that the applicant has complied with all the formal requirements pertaining to the application for sequestration. The issues in dispute are whether the applicant has a claim against the respondent and if so, whether the claim is liquidated.
- [29] Section 9 of the Insolvency Act, provides that a creditor with a liquidated claim of R 100, 00 that has accrued but is not yet due, may, if it alleges that a debtor is in fact insolvent, launch an application for the sequestration of the debtor's estate.
- [30] Section 10 of the Act provides for a provisional sequestration order with a return date and section 12 for the issuing of a final sequestration order on the return date.

[31] At this stage the applicant prays for a provisional sequestration order and needs to establish on a *prima facie* basis that it is entitled to a final order for sequestration.

[See: *Kalil v Decotex (Pty) Ltd & Another* 1988 (1) SA 942 A]

[32] The applicant's claim against the respondent is based on a debt arising from theft committed by the respondent. The claim is well recognised in our law as a valid claim for purposes of the sequestration of a debtor's estate. [See: *VBS Mutual Bank (in liquidation) v Madzonga* (25057/2018)[2019] ZAGPJHC 273 (23 August 2019)]. The applicant's claim is in the result a liquid claim, that has accrued but is not yet due.

[33] Insofar as the issue of *locus standi* is concerned, the respondent does not deny that she received R 39 899 654, 57 in her bank account. She does not deny that the amount was paid by her from ABC's bank account into her personal bank account.

[34] The respondent does not deny that the payments in the aggregate of R 74 million paid by FD into ABC's bank account was referenced by the customer account number allocated by the applicant to FD or by the name Aboo Baker, the director and proprietor of FD.

[35] The respondent did not provide any facts to dispel the applicant's allegation that FD, after a reconstruction of its account, owes the applicant R 129 million.

[36] In view of the aforesaid facts, the respondent contends that FD still owes the outstanding balance to the applicant. FD is, therefore, the actual debtor and not the

respondent. Accordingly, the applicant does not have a claim against the respondent and lacks the necessary *locus standi* to launch this application.

[37] The fact that the applicant might have a claim against FD, does not disentitle it to apply for the sequestration of the respondent's estate.

[38] Once the applicant has established *prima facie* that it would be entitled to a final order of sequestration of the respondent's estate, the applicant is entitled to a provisional sequestration order. In the result, the applicant has the necessary *locus standi* to apply for the provisional sequestration of the respondent.

[39] I was satisfied that it had and the order for the provisional sequestration of the respondent's estate was issued.

A handwritten signature in black ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line. To the left of the signature is a large, stylized circular mark.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 3 March 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 12 March 2021

APPEARANCES

Counsel for the Applicant:

Advocate N.G.D. Maritz SC and

Advocate P. Lourens

Instructed by:

Adams and Adams Attorneys

Counsel for the Respondent:

Advocate A.J. Swanepoel

Instructed by:

Jay Inc.