



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: 5473/2023

In the matter between:

PHUMA FINANCE (PTY) LTD

Applicant

and

WILLEM ANDRIES MARITZ NEL

Respondent

JUDGMENT BY: REINDERS, J

HEARD ON: 29 FEBRUARY 2024

DELIVERED ON: 27 JUNE 2024

This judgment was handed down in open court and distributed to the parties via electronic mail communication.

- [1] The applicant is a registered credit provider who applies for the sequestration of the estate of the respondent and in the alternative judgment for various amounts. The respondent opposes the application.
- [2] From the voluminous papers it appears that indebtedness of the respondent arose by virtue of goods sold and delivered by the applicant to an entity known

as 3 Skaar Boerdery (Pty) Ltd [in liquidation] (3 Skaar Boerdery) in terms of Instalment Sale Agreements. The respondent bound himself as a surety and co-principal debtor for the indebtedness of 3 Skaar Boerdery to the applicant. The aforementioned entity has already been liquidated on 27 June 2019.

- [3] The applicant avers that the respondent is factually insolvent as envisaged in section 9(1) of the Insolvency Act¹ (the Insolvency Act) and has committed acts of insolvency in terms of sections 8(c), 8(d), 8(e) and 8(g) of the Act, more in particular that he has given notice in writing to his creditor that he is unable to pay his debts.
- [4] The respondent filed an opposing affidavit wherein he preferred not to deal with the merits and the allegations against him, but rather to raise a single defence. The respondent states that, whatever claim or claims the applicant might have had, has prescribed in terms of the Prescription Act² (the Prescription Act) in that two Liquidation and Distribution accounts were respectively confirmed by the Master of the High Court on 2 June 2020 and 15 August 2020. The affidavit pleads that the court should dismiss the application for sequestration on the aforementioned basis. However, in the event that the court finds that the claim has not prescribed respondent requests a postponement of the application to deal with the allegations by the applicant. At the same time respondent in such an event tenders the costs occasioned by the postponement.
- [5] In its replying affidavit the applicant disputes that the claims have prescribed and alludes to various payments (referred to in its founding papers) which constituted express and/or tacit acknowledgements of liability. As a result, so it is submitted, prescription commenced to start afresh as contemplated by sections 14(1) and (2) of the Prescription Act. Applicant in addition refers to the allegations made in the founding papers to the effect that the Final Liquidation and Distribution account in the insolvent estate of 3 Skaar Boerdery has not been confirmed in terms of section 408 of the Companies Act³ and the affidavits of the joint liquidators from which it appears that debtors still have to be

¹ 24 of 1936.

² 68 of 1969.

³ 61 of 1973.

collected and game has to be sold. In fact, it avers that the mentioned account has not been prepared by the liquidators let alone confirmed. The impediment in section 13(1)(g) of the Prescription Act, so the applicant submits, has for that reason also not ceased to exist.

- [6] I am satisfied that the respondent has failed to convince me that the claim against him has prescribed. There is no evidence that the Final Liquidation and Distribution account in the estate of 3 Skaar Boerdery has been confirmed. On the contrary, the only first-hand evidence before me is that of the applicant stating that it has neither been prepared by the joint liquidators nor confirmed. In addition thereto, various payments were made to the applicant by 3 Skaar Boerdery in terms of the First Liquidation and Distribution account. In my view therefore the claim has not prescribed.
- [7] A court may grant an application for the sequestration of a debtor's estate if it is satisfied that the applicant has established a claim which entitles it under section 9(1) of the Insolvency Act to apply for sequestration of the estate concerned, that the debtor committed an act of insolvency or is insolvent, and there is reason to believe that it will be to the advantage of the creditors of the debtor if the estate is sequestrated. The onus for satisfying the court on these matters is throughout on the sequestrating creditor and the debtor has no onus to disprove any element of the claim. Section 10 of the Insolvency Act provides that if the court is of the opinion that *prima facie* the applicant has established against the debtor a claim which is of the kind mentioned under section 9(1) and 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 of the estate that the estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.⁴

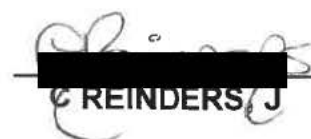
⁴ Poole v Saffy N.O. (2566/2021) [2024] ZAGPPHC 94 (5 February 2024) at para [15].

[8] None of the factual allegations in support of the applicant's petition for sequestration (except for the issue of factual insolvency) is disputed or at least seriously disputed by the respondent. It follows that in my view the applicant has made out a prima facie case as required by section 10 of the Insolvency Act. I am satisfied in light of the evidence before me that, prima facie, there is reason to believe that it will be to the advantage of creditors of the estate if it is provisionally sequestrated. The respondent only has himself to blame for his election not to plead over on the merits. Should the provisional order be granted he will have ample time to file an opposing affidavit on the merits, should he so prefer. I have therefore come to the conclusion that the application must succeed and I shall issue the usual order in applications of this nature in this Division. The applicant in addition sought an order in terms of section 20(1)(a) of the Insolvency Act for the money judgment as claimed by the applicant (in terms of the alternative relief sought) to be stayed. I intend doing so as will be reflected in the order granted herein below.

[9] Accordingly I make the following order:

1. The estate of the respondent is hereby placed under provisional sequestration in the hands of the Master of the High Court.
2. A provisional order is hereby issued calling upon the respondent to show cause if any, to this Court on Thursday 8 August 2024 at 09:30 why a final order of sequestration should not be granted against respondent's estate.
3. This order, together with a copy of the notice of motion and annexures thereto must be served on the respondent personally.

4. A copy of this order must be served on:
 - 4.1 any registered trade union that as far as the Sheriff can reasonably ascertain, represents any of the employees of the respondent.
 - 4.2 the respondent's employees, if any, by affixing a copy of the order and application to any notice board to which the employees have access inside the respondent's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the respondent conducted any business at the time of the presentation of the application papers, and
 - 4.3 the South African Revenue Services.
5. The Sheriff must ascertain whether the employees of the respondent are represented by a Trade Union and whether there is a notice board on the premises to which the employees have access.
6. The costs of this application for sequestration of the respondent's estate shall be costs in the administration of the insolvent estate of the respondent.
7. The relief sought by the applicant in prayers 4, 4.1 (including sub-prayers thereof), 4.2 and 4.3 of its Notice of Motion dated 13 October 2023, is stayed as contemplated in section 20(1)(a) of the Insolvency Act 24 of 1936.


C REINDERS/J

On behalf of the Applicant:

Instructed by:

Adv. L Meintjies

Noordmans Inc

BLOEMFONTEIN

On behalf of the 1st Defendant:

Instructed by:

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