



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

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

SIGNATURE

DATE: 26 August 2024

Case No. 2024-066493

In the matter between:

TUHF LIMITED

Applicant

and

MARK MORRIS FARBER

Respondent

JUDGMENT

WILSON J:

- 1 The applicant, TUHF, finances the purchase, renovation and letting of residential property in the inner city of Johannesburg. The respondent, Mr. Farber, took finance from TUHF to acquire and run several properties in the inner city. In each case, TUHF's finance was secured by a mortgage on the property itself, cession of the rental income derived from the property and a suretyship from Mr. Farber himself.

- 2 TUHF and Mr. Farber are presently engaged in fairly extensive litigation arising from those finance agreements. There are a number of cases in which TUHF has sought to realise its security, and has obtained judgment against Mr. Farber or the companies he controls for the amounts outstanding under the various agreements. In each of those matters, Mr. Farber has sought to challenge the judgments on appeal. In two of the matters, however, judgments against Mr. Farber in his personal capacity have become final, in the sense that Mr. Farber has exhausted his avenues of appeal against them.
- 3 In the first of these matters, *TUHF Limited v Esselen Street Hillbrow CC* (44393/2020) [2022] ZAGPJHC 566 (12 August 2022), TUHF obtained judgment against Mr. Farber in the sum of R9 198 953.70, which Mr. Farber was ordered to pay jointly and severally with five of his property-holding companies. In the second matter, *TUHF v 68 Wolmarans Street Johannesburg* (A5073/2022) [2023] ZAGPJHC 1390 (29 November 2023), a Full Court of this division directed Mr. Farber, jointly and severally with two of his property-holding companies, to pay R4 897 004.22.
- 4 It is common cause that neither of these judgments has been satisfied. On 14 February 2024, two days after the *Esselen Street* judgment had become final, TUHF despatched the Sheriff to Mr. Farber's home with instructions to execute against Mr. Farber's assets. The Sheriff's return records that Mr. Farber was able neither to satisfy the judgment nor to point out movable or immovable assets which could be attached to satisfy the full amount due under it.
- 5 During the three months following the Sheriff's visit, Mr. Farber removed a number of assets from his office. It also came to TUHF's attention that Mr.

Farber had donated to his wife his controlling interest in various other property-owning entities over which TUHF held no security. Based substantially on this conduct, TUHF formed the view that Mr. Farber had begun to dispose of his assets in order to protect them from any steps TUHF or his other creditors may take to recover the sums Mr. Farber owes.

6 On 18 June 2024, TUHF instituted these proceedings, in which it seeks a provisional order of sequestration against Mr. Farber. The proceedings have been brought on what TUHF calls a “semi-urgent” basis, and were enrolled before me in my urgent court on 20 August 2024. TUHF claims that it is entitled to an order provisionally sequestering Mr. Farber because it has an unsatisfied claim against him of more than R100; because Mr. Farber has committed at least three acts of insolvency, one of which was his failure to produce the assets necessary to satisfy the writ of execution served on him on 14 February 2024; and because it would be to the advantage of Mr. Farber’s creditors that his estate be sequestered.

7 These are the well-known requirements of the Insolvency Act 24 of 1936. TUHF is entitled to a provisional order of sequestration if they are *prima facie* satisfied, and if there is no other reason for me to exercise my discretion against making a provisional order for Mr. Farber’s sequestration. The principal basis on which I could exercise my discretion against granting such an order would be that Mr. Farber has established that he is factually solvent, in the sense that his assets exceed his liabilities.

8 The Insolvency Act’s requirements are established *prima facie* if they are met on the facts TUHF sets out, evaluated together with any facts Mr. Farber

alleges that TUHF does not or cannot deny, and provided also that TUHF's version is not inherently improbable overall (see *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189).

- 9 Before turning to evaluate the papers in light of this test, it is necessary for me to deal briefly with the question of urgency.

Urgency

- 10 TUHF claims to have brought the application on a "semi-urgent" basis. Mr. Marais, who appeared for Mr. Farber, was quick to point out that there is no such thing as a "semi-urgent" roll in this court. A matter either qualifies for consideration on an urgent basis or it does not. That is true enough, but there is no magic in the term "semi-urgent". There are obviously degrees of urgency. An urgent matter is simply a matter that needs to be considered more quickly than it would be if it joined the queue for hearing on the ordinary opposed roll. The question is whether, in the circumstances of the case, that sort of preference ought to be given.

- 11 In this case, it seems to me that TUHF has clearly demonstrated that it should. On TUHF's papers, all the requirements for an order of sequestration are met, and Mr. Farber is plainly factually insolvent. What is more, he is disposing of his assets at a rate that would prevent TUHF from satisfying its proven claims if he is allowed to go on doing so for the thirty or so weeks that TUHF would have to wait for a hearing in the ordinary course. The mere fact that, as Mr. Marais submitted, Mr. Farber has not managed to frustrate TUHF's claims in the two months since this application was launched does not mean that he would not be successful in doing so if TUHF had to wait the better part of a

further eight months before being able to obtain even a provisional order of sequestration.

- 12 Accordingly, on TUHF's version – which is all I am required to consider for the purposes of urgency – the application plainly ought to enjoy the preference that TUHF asks that I give it.

TUHF's monetary claims

- 13 It is common cause that TUHF has monetary claims against Mr. Farber in excess of R14.2 million. These claims are incapable of dispute, because they are embodied in final court orders. It follows that the first requirement for an order of sequestration – a claim in excess of R100 for the purposes of section 9 (1) of the Insolvency Act – has been met.

Act of insolvency

- 14 Section 8 (b) of the Insolvency Act provides that Mr. Farber commits an act of insolvency 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”.
- 15 There can be no serious dispute that this is exactly what happened when the Sheriff visited Mr. Farber's home on 14 February 2024. Mr. Farber denies in his answering affidavit that the Sheriff ever asked him to point out assets capable of satisfying the judgment, but I reject that version. Mr. Farber's

affidavit fails to deal in full – or indeed in any detail whatsoever – with what happened when the Sheriff came knocking.

16 In the absence of a sufficiently detailed version from Mr. Farber, the denial that the requirements of section 8 (b) of the Insolvency Act have been met is insufficient. What is required is a clear factual foundation for impeaching the content of the Sheriff's return (see *Sussman and co Ltd v Schwarzer* 1960 (3) SA 94 (O) at 96G-H). Mr. Farber has not laid that foundation.

17 Having found that the act of insolvency defined in section 8 (b) of the Act has been established, at least *prima facie*, it is not necessary for me to consider whether the further acts of insolvency TUHF alleged have been made out.

Advantage to creditors

18 There is a wealth of evidence on the papers that Mr. Farber's financial affairs are, to put it mildly, opaque. He operates through a number of property-holding companies, which are arranged, on the face of it, to allow him to treat the rental stream from each of the relevant properties as his personal income. The papers suggest that the income from each of Mr. Farber's properties is fed into an entity called Hillbrow Consolidated Investments (HCI). This is achieved by HCI charging each of the property-owning companies grossly inflated fees for managing each of the properties. It appears that HCI also takes loans from individual property-holding companies at the same time as lending money to Mr. Farber himself as and when the need arises. In 2020, HCI's books disclosed loans of around R20 million to Mr. Farber. HCI also pays personal expenses on Mr. Farber's behalf.

- 19 There is no sense in the papers of where the properties and their holding companies end and Mr. Farber begins. HCI's accounting officer, a Mr. Snoyman, freely admits on the papers that he cannot give a clear account of how Mr. Farber's companies relate to each other, and which of them owes what to whom. He bemoans that the situation is such that it is impossible to provide a clean audit for the web of companies in which Mr. Farber maintains an interest – including, if not especially, HCI.
- 20 Were Mr. Farber able to pay his debts, perhaps that would not matter, at least in the short term. But Mr. Farber has substantial liabilities to TUHF, which are only likely to increase in future. His companies also owe significant sums to the City of Johannesburg. Mr. Farber doubtless has other creditors who are perhaps less aware of the way in which he conducts his financial affairs.
- 21 In all these circumstances it seems to me, at least *prima facie*, to be to Mr. Farber's creditors' advantage that those affairs be interrogated with the aim of establishing exactly what is available to satisfy Mr. Farber's proven and substantial indebtedness. Provided that there is some prospect that such an investigation will uncover assets that can be liquidated to pay his debts, Mr. Farber's provisional sequestration will advantage his creditors in at least this sense (see, in this respect, *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559, which was approved in *Commissioner, SARS v Hawker Air Services* 2006 (4) SA 292 (SCA) at paragraph 29). Given the substantial amounts of money involved – including the loans HCI appears to have made to Mr. Farber over the years – there must, I think, be some prospect of an investigation identifying assets that can be used to pay Mr. Farber's debts.

Is there any reason not to make a provisional order?

22 It follows from all this that TUHF has satisfied the requirements for a provisional sequestration order. Nonetheless, clear evidence that Mr. Farber is factually solvent would have convinced me to refuse such an order. Indeed, Mr Farber contends that he is factually solvent, in the sense that his assets exceed his liabilities. The evidence on which he advances this contention is, however, slender.

23 That evidence takes the form of a one-page chart that purports to show that the equity in Mr. Farber's properties exceeds his liabilities by some margin. Quite apart from the fact that the chart has been produced by Mr. Farber himself, and it is not clear to me how the figures on the chart relate to any objective or reliable evidence, the chart itself overlooks substantial amounts owing to the City of Johannesburg on each of Mr. Farber's properties. TUHF makes the point that the amounts the City currently claims are owed to it on each of the properties eliminate the equity Mr. Farber claims the properties hold.

24 Mr. Marais was not able to gainsay this. He instead submitted that I cannot be sure what is really owed on each of the properties, as the City's claims against them are the subject of ongoing disputes. This is a far cry from the clear evidence I would need to exercise my discretion to refuse TUHF's request for a provisional order.

25 Ultimately, though, I am most convinced by the simple proposition that, were he in fact solvent, Mr. Farber would have paid his debts to TUHF by now. There is no prospect – at least none identified on the papers – of Mr. Farber

being able to contest the R14.2 million worth of claims on which TUHF relies. In these circumstances, I might have looked sympathetically on a clearly pleaded plan to liquidate Mr. Farber's assets so as to satisfy TUHF's proven claims. But that was nowhere in sight on the papers.

- 26 “[T]he best proof of solvency is that a man should pay his debts” (*De Waardt v Andrew & Tienhaus Ltd* 1907 TS 727 at 733). In this case, Mr. Farber does not even begin to suggest how he intends to do so, and the information about his financial situation available to me on the papers is far from reassuring. There is accordingly no basis on which to refuse a provisional sequestration order.

Order

- 27 For all these reasons –

27.1 The applicant's non-compliance with the rules as to service and prescribed time periods is condoned, and this matter is treated as one of urgency under Rule 6 (12).

27.2 The respondent's estate is provisionally sequestrated.

27.3 The respondent and any other interested party are called upon to advance reasons why the respondent ought not to be finally sequestrated at 10h00 on Monday 25 November 2024, or as soon thereafter as counsel may be heard.

27.4 A copy of this order is to be served upon

27.4.1 the respondent personally;

27.4.2 the respondent's employees, if any, and their trade unions,
if any. The Sheriff is directed to make enquiries to establish
the existence of such employees or trade unions.

27.4.3 the Master of the High Court; and

27.4.4 the Commissioner of the South African Revenue Service.

27.5 The costs of this application will be costs in the sequestration.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 26 August 2024.

HEARD ON: 21 August 2024

DECIDED ON: 26 August 2024

For the Applicants: A Botha SC
(Heads of argument drawn by A Botha SC and
E Eksteen)
Instructed by HBG Schindlers Attorneys

For the Respondent: H Marais SC
SS Cohen
(Heads of argument drawn by SS Cohen)
Instructed by Dempster McKinnon Inc