



**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: 14 January 2025

Case No. 2024-066493

TUHF LIMITED

Applicant

and

MARK MORRIS FARBER

Respondent

JUDGMENT

WILSON J:

- 1 On 26 August 2024, I provisionally sequestered the respondent, Mr. Farber. I set the return day, on which Mr. Farber would have to show cause why that order should not be made final, for 25 November 2024. My judgment was published as *TUHF Limited v Farber* [2024] ZAGPJHC 802 (26 August 2024).
- 2 On the return day, only two arguments of any substance were placed before me in opposition to a final sequestration order. The first related to the act of

insolvency alleged against Mr. Farber. The second related to the question of whether Mr. Farber's assets exceed his liabilities.

- 3 In my judgment of 26 August 2024, I found, *prima facie*, that Mr. Farber had committed an act of insolvency, in that he had failed to satisfy, or to reveal to the Sheriff disposable assets sufficient to satisfy, a judgment debt Mr. Farber owes the applicant, TUHF. Mr. Cohen, who appeared for Mr. Farber, did not challenge that *prima facie* finding. He nonetheless submitted that the finding could not be sustained on the more exacting test applicable to applications for final relief. On that basis, it was argued that TUHF had not finally established the act of insolvency defined in section 8 (b) of the Insolvency Act 24 of 1936.
- 4 Building on that proposition, it was then submitted that TUHF bears the onus to establish that Mr. Farber is factually insolvent, in the sense that his liabilities exceed his assets. That onus, it was contended, had not been discharged. Mr. Cohen argued that, on the common cause facts, Mr. Farber's assets exceed his liabilities by a clear margin. In those circumstances, Mr. Cohen contended that the final sequestration order cannot be granted, and the provisional order must be discharged.
- 5 I reject both of these arguments. Firstly, it is clear on the papers that Mr. Farber has committed the act of insolvency defined section 8 (b) of the Act. TUHF obtained a substantial judgment against him. After that judgment became final, TUHF sent the Sheriff to Mr. Farber's residence to execute the judgment. Mr. Farber neither satisfied the judgment nor pointed out disposable assets capable of satisfying it. Mr. Farber's version that the Sheriff did not ask him to

point these assets out – or indeed explain what the point of his visit was – is so far-fetched that it can safely be disregarded.

6 This means that it is Mr. Farber – not TUHF – who bears the “heavy” onus of demonstrating that he is factually solvent (see *Millward v Glaser* 1950 (3) SA 547 (W), 553H). Mr. Farber has not discharged this onus. On Mr. Farber’s own version, there is at best a possibility that Mr. Farber’s equity in various buildings his holding companies own is sufficient to meet his liabilities. But that possibility only arises if I assume in Mr. Farber’s favour that substantial sums the City of Johannesburg says are owed to it in rates and taxes on the buildings are almost entirely erroneously calculated.

7 Such an assumption would have to be made against the weight of the evidence in this case, and, indeed, against the ordinary standards of credulity. The provisional sequestration order I granted on 26 August 2024 must accordingly be made final.

8 In what follows, I set out my reasons for reaching these conclusions.

The act of insolvency

9 Section 8 (b) of the Insolvency Act states that a debtor 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”.

- 10 There is no dispute that TUHF has obtained judgment against Mr. Farber in the sum of R9 198 953.70. The judgment became final on 12 February 2024. Two days later (Mr. Farber says it was four, but nothing turns on this), 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 assets which could be attached to satisfy the full amount due under it. This is also common cause.
- 11 In his affidavit in response to the application for a provisional order, Mr. Farber issued a bare denial that the Sheriff asked him to point out assets capable of satisfying the judgment. In my 26 August 2024 judgment, I found that this bare denial constituted no bar to my finding, at least *prima facie*, that Mr. Farber had committed the act of insolvency defined in section 8 (b) of the Act.
- 12 Mr. Farber has now filed a supplementary affidavit in which he seeks to contest the contents of the Sheriff's return in more detail. Mr. Cohen relied on this additional particularity in seeking to persuade me that I should not now find, on the test applicable to findings of fact in applications for final relief, that the Sheriff made the "demand" that section 8 (b) requires. If the Sheriff made no such demand, then, so it was argued, Mr. Farber's failure to satisfy the judgment or to point out assets that could be disposed of to do so, did not amount to an act of insolvency.
- 13 While I appreciate the ingenuity of this argument, I cannot accept it. Mr. Farber nowhere explains in his answering affidavit what, other than the execution of the judgment debt, the purpose of the Sheriff's visit of 14 February could have been. It is inconceivable that he was not told, or did not ask, why the Sheriff

wished to inventory his assets. If he was asked to satisfy the judgment debt, as the Sheriff's return records he was, then that is the end of the matter. If Mr. Farber asked the Sheriff why he had come, then there is no reason at all to think the Sheriff did anything other than issue the demand recorded in his return. The only other possibility is that Mr. Farber did not ask and was not told that the purpose of the Sheriff's visit was to demand satisfaction of the judgment debt – whether in money or disposable assets.

14 That possibility is too far-fetched to accept. Mr. Farber is a seasoned businessman and an experienced litigant. The only reasonable conclusion, on a conspectus of all the facts, is that Mr. Farber knew exactly why the Sheriff had come, because the Sheriff told him so, and issued the demand recorded in his return.

15 There being no dispute that the judgment was not – and still has not been - satisfied, it seems to me indisputable that Mr. Farber has committed the act of insolvency defined in section 8 (b) of the Act.

Factual insolvency

16 That leaves the onus of proving factual solvency firmly on Mr. Farber.

17 In evaluating Mr. Farber's claim to be factually solvent, I should first point out that Mr. Farber's affidavits are devoid of any realistic proposal to satisfy the debts he owes to TUHF, whether by liquidating his assets or otherwise. Mr. Cohen adverted to no such plan in argument, and I see none on the papers. Were Mr. Farber genuinely solvent, I would have expected some indication of how he intends to pay the judgment debts piling up against him.

- 18 What Mr. Farber offers instead is a table of assets and liabilities that he says has been independently compiled. Whether or not the person who compiled the table is truly independent, the source of nearly all the information set out in the table was plainly Mr. Farber himself. It is a signal feature of this case that none of Mr. Farber's companies is able to present financial statements accompanied by an unqualified auditor's opinion. At bottom, we have only Mr. Farber's word for the accuracy of most of the figures he provides.
- 19 Even if Mr. Farber is taken at his word, he has not shown that he is solvent. The independent expert Mr. Farber retained says that Mr. Farber's assets exceed his liabilities by just under R11.2 million. But that figure could only have been reached by ignoring almost all of what the City of Johannesburg says is owed to it on the buildings Mr. Farber owns. The expert puts that liability at just over R2.3 million. However, the expert concedes that the City of Johannesburg's statements put the liability at just under R32 million.
- 20 The expert report does not provide an independent basis, separate from information prepared by or on behalf of Mr. Farber, for discounting over R29 million of the City's claims. Mr. Farber himself provides almost no reason to think that the City's calculations are off by that sum, or anything like it. Even if, as Mr. Cohen suggested, I should take notice of the frequency with which the City is shown to have billed its customers inaccurately, R29 million is too substantial a liability to ignore. So is the R21 million I would have to overlook before concluding that Mr. Farber's assets match his liabilities.
- 21 Ultimately, I was given no reason to think that the City's claims are so inaccurate as to make a difference to Mr. Farber's solvency. And since it is

Mr. Farber who bears the onus to show that he is factually solvent, he is not entitled to the benefit of any doubt about the accuracy of the City's billing.

22 Accordingly, I cannot avoid the conclusion Mr. Farber is, on a balance of probabilities, factually insolvent.

Order

23 Nothing was done in evidence or argument to displace my provisional conclusion that Mr. Farber's sequestration would advantage his creditors. Nor was I given a basis on which to exercise my discretion against finally sequestering Mr. Farber.

24 It follows that my provisional order must be confirmed. Ms. Eksteen, who appeared for TUHF, asked for counsel's costs on scale "C", but I do not think that this case rises to that level of complexity and importance. Costs on scale "B" are sufficient.

25 For these reasons –

25.1 The estate of the Respondent is placed under final sequestration.

25.2 The costs of this application, including the costs of two counsel (to be taxed on Scale "B"), are costs in the sequestration of the respondent's estate.



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 14 January 2025.

HEARD ON: 25 November 2024

DECIDED ON: 14 January 2025

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

For the Respondent SS Cohen
Instructed by Dempster McKinnon Inc