

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited t/a First National Bank v Venter (242/2021) [2021] ZAFSHC 113 (10 May 2021) [2021] ZAFSHC 113

COURT

Free State High Court, Bloemfontein

BEFORE

Daniso

CASE / FILE NUMBER

242/2021

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 242/2021

In

the matter between:

FIRSTRAND

BANK LIMITED t/a FIRST NATIONAL BANK

Applicant

And

LEON

VENTER

Respondent (ID No: 5[...])
Born
on 25 February 1953
Married
out of community of property with
MARIETTE
VENTER
Identity
number:5[...]
Born
on 29 December
1953
HEARD

ON: 15 APRIL 2020

JUDGMENT

BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 10 May 2021.

- [1] This is an opposed application for the provisional sequestration of the respondent's estate.
- [2] On 22 October 2013 the parties concluded two written credit agreements in terms of which the applicant lent and advanced monies to the respondent. The credit agreements were secured by a notarial general covering bond over the respondent's immovable property number 532 Pentzplaas Farm situated in Bultfontein ("the farm").
- [3] The respondent failed to repay the amounts due to the applicant as a result the applicant instituted summons against the respondent and was later granted a default judgment on 19 December 2019 for the sum of R5 646 705.49 and R465 129.79 together with interest and costs.
- [4] In terms of s 10 of the Insolvency Act 24 of 1936 ("The Act") a creditor who seeks to sequester the estate of a debtor must satisfy the court *prima facie* that it has an established a claim of not less than R100 which entitles it[1] to apply for the sequestration of the debtor who has committed an act of insolvency or is in fact insolvent and there is reason to believe that it would be to the advantage of the respondent's creditors if his estate is sequestered.
- [5] The applicant relies on the unsatisfied judgment to establish that it has a liquidated claim against the respondent. The application is premised on the provisions of s 8 of the Act. The applicant submits that the respondent has committed acts of insolvency in terms of:

5.1. section 8(b) by failing to satisfy a judgment obtained against him or point out any disposable assets sufficient to satisfy the debt and that the Sheriff could also not find any disposable assets at the respondent's farm;

5.2. sections 8(c) and 8(d) by disposing of his movables; and

5.3. section 8(g) by confirming in writing his inability to pay his debts.

[6] It is the applicant's case that the respondent is presently indebted to the applicant in the amount of R7 099 478.41 being the judgment amount including accumulated interest and costs. The respondent has refused or failed to pay the judgment debt or any part thereof. Pursuant to the judgment the Sheriff unsuccessfully attempted to execute a Writ of Execution for at least three different occasions, 26 February, 10 March and 24 March 2020. It was only on the 04th June 2020 that the Sheriff was able to attach the respondent's two motor vehicles, a Land Rover and Toyota Bakkie. The Sheriff

returned to the respondent's farm on 09 December 2020 to remove the vehicles, they were nowhere to be found. Despite the Sheriff's diligent search no movable assets were discovered. The Sheriff's return was a Nulla Bona.

[7] The applicant contends that it would be to the advantage of creditors, specifically the applicant if his estate is sequestrated. The trustee will be able to unearth all the respondent's assets which could yield a benefit to the applicant and other creditors.

[8] It is common cause that during April 2015 the respondent was served with a letter in terms of section 129(1) of the National Credit Act 34 of 2005. On 17 February 2016 the respondent signed an acknowledgment of debt in terms of which he undertook to make repayments on an extended

repayment plan. Notwithstanding the acknowledgment of debt, the respondent failed to make the required payments. He thereafter

authorized the applicant to appoint auctioneers to sell his farm in order to utilize the proceeds to repay the applicant. The farm was auctioned twice. It was not sold as the bids were considerably less than the value of the farm. Summons was ultimately issued on 20 August 2019, the respondent again made attempts to settle the debt to no avail. A default judgment was granted thereafter the respondent's application to rescind the judgment was dismissed. On 04 June 2020 the Sheriff executed a Writ of Execution and attached two vehicles at the respondents' farm, a Landrover and a Toyota Bakkie with registration numbers and letters 007 JAW FS and DBC 026 FS respectively. On 09 December 2020 the Sheriff's attempt to remove the respondents' movable resulted in a Nulla Bona.

[9] The respondent's opposition is mainly a denial of the applicant's locus standi to institute these proceedings. It is the respondent's contention that the credit agreements relied upon by the applicant were ceded to an entity known as iKaya by way of a securitization scheme as a result there is no longer a debt owing to the applicant. The true creditor in the said

agreements is iKaya. Furthermore, the judgment granted against the respondent is void ab initio as it was obtained by fraud. The court would not have granted the judgment if it was aware that the applicant was not the correct creditor. Similarly, the respondent would not have engaged in settlement negotiations or admitted liability if he was aware that the applicant was no longer entitled to collect the debt. The respondent avers that the full details of the said securitization

scheme are in the knowledge of the applicant's representatives. These issues cannot be resolved on affidavits the matter must be referred for hearing on oral evidence to enable the respondent to cross-examine the applicant's representatives.

[10] As regards the alleged alienation of the respondent's vehicles, the respondent denies that he owns a Land Rover. He states that the Toyota Bakkie is still in his possession.

[11] A referral of an application to the hearing of oral evidence is not merely there for the asking. The application can only be granted in exceptional circumstances. In *Kalil v Decotex (Pty) Ltd & Another* 1988

(1) SA 943 (A) Corbett JA held at 979 B:-

"Where on the affidavits there is a prima facie case in favour of the applicant, then, in my view, a provisional order of winding-up should normally be granted, and, save in exceptional circumstances, the Court should not accede to an application by the respondent that the matter be referred to the hearing of viva voce evidence. This does no lasting injustice to the respondent for he will on the return day generally be given an opportunity, in a proper case and where he asks for an order to that effect, to present oral evidence on disputed issues..."

[12] On the facts germane to this matter, the applicant relies on the default judgment and not the credit agreements to establish that it has a liquidated claim against the respondent. The respondent's defence is ill-founded it does not raise a real dispute of fact as far as the applicant's locus standi to institute these proceedings is concerned. There are no exceptional circumstances justifying the referral to oral evidence.

[13] The judgment is extant and as a judgment creditor the applicant is entitled to seek the sequestration of the respondent's estate. I'm satisfied that prima facie the applicant has established that it has a liquidated claim against the respondent as provided for in s 9(1) of the Act.

[14] Except for a bald denial that the respondent ever owned a Land Rover and to aver that he is still in possession of the Toyota Bakkie, the respondent does not take the court into his confidence to explain why then the Sheriff's return is a Nulla Bona. It is a trite principle that a Sheriff's return of "what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated." [2] It thus follows that the onus is on the respondent to rebut such evidence and without an explanation to the contrary, I'm

inclined to accept the applicant's version that the respondent has committed the acts of insolvency as contemplated in section 8, ss (b), (c), (d) and (g). The respondent is also unable to pay his debts when they become due he is thus insolvent.

[15] As regards whether the sequestration of the respondent's estate will advantage the creditors, the applicant is merely required to show that there is reason to believe that creditors will be advantaged. In *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559 the Court held that:

"there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and enquiry under the relevant

provisions of the Act might unearth assets thereby benefiting creditors."

[16] The respondent is a farmer. In addition to the unexplained whereabouts of his farming equipment there is also no disclosure with regard to the farm's financial profitability or efficacy. I'm persuaded that sequestration of the respondent's estate will be to the advantage of the creditors as the trustee will bring about a convergence of all the assets and liabilities of the trust to ensure a fair distribution to the creditors.

[17] Taking into consideration all facts of this matter I'm satisfied that there is good reason to place the respondent's estate under provisional sequestration.

[18] I make the following order:

- (1) The application to refer the matter for oral evidence is dismissed;
- (2) A provisional sequestration order returnable at 9h30 on 10 June 2021 is granted as prayed for in the notice of motion dated 20 January 2021

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicant: Adv. P. Zietsman (SC)

Instructed by:

Symington & De Kok Attorneys

BLOEMFONTEIN

Counsel on behalf of Respondents: Adv. W. Edeling (SC)

Instructed by:

Bekker Attorneys

[1]In terms of section 9(1) of the Act “A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the Court for the sequestration of the estate of the debtor.”

[1]In terms of section 9(1) of the Act “A creditor (or his agent) who has a liquidated claim for not less than fifty

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one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the

Court for the sequestration of the estate of the debtor.”

[2] Section 43 (2) of the Superior Courts Act, 2013 (Act No: 10 of 2013).

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Prepared on 11 October 2026 · Esheria