

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Mnisi (31005/2019)

[2020] ZAGPPHC 594 (14 October 2020)

[2020] ZAGPPHC 594**COURT**

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla

CASE / FILE NUMBER

31005/2019

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Policy**IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION, PRETORIA****(1)****REPORTABLE:**

No

(2)

OF

INTEREST TO OTHER

No

JUDGES:

(3)

REVISED:

Yes

CASE

NO: 31005/2019

NEDBANK

LIMITED

Applicant

(REG

NO: 1951/000009/06)

and

BUTI

ANDRIES MNISI (ID:

[....])

Respondent

JUDGMENT

SARDIWALLA J

[1] The applicant seeks a final sequestration of the estate of Mr Buti Andries Mnisi ("the respondent"). The respondent is

indebted to the applicant in the amount of R 3,689,486.49 together with interest in which judgment was obtained on 10 May 2018 under case number 14382/2018. The respondent is also indebted to the applicant for further amounts of R 245,813.71 and R187,985.33 in respect of two loan agreements in which a separate action has also been instituted against the respondent under case number 16750/2019. The bank instituted action against the respondent for sequestration by way of a notice of motion.

[2] The applicant initially sought the provisional sequestration of the estates of the respondent. The application was opposed by the

respondent and the provisional sequestration order was granted by Janse Van Nieuwenhuizen with a return date of 28 April 2020.

[3] Subsequently, on 28 April 2020 the matter was before me and was stood down until 4 May 2020. On 4 May 2020 the respondent appeared in person and the matter was / argued. However, the rule nisi was extended until 1 June 2020 granting the respondent an opportunity to file a replying affidavit setting out the reasons why a final order of sequestration should not be granted.

[4] On 21 May 2020 the respondent delivered a replying affidavit wherein the respondent admitted to the judgment debt owed. However, the replying affidavit failed to demonstrate sufficient immovable and movable assets to satisfy the debt.

[5] On 1 June 2020 the respondent's counsel submitted that the respondent owns certain assets that could be liquidated to satisfy the outstanding debt. The rule nisi was extended for the respondent to file a further affidavit setting out the alleged assets.

[6] On 11 June 2020 the respondent delivered a supplementary affidavit whereupon, he attached a property report which referred to one immovable property identified as Erf 1503 Franskraalstrand, Western Cape purchased at R 349 000.00. The said report provides a comparable sales price of R 1 279 500.00 to other listed properties in the area. In his affidavit the respondent avers that all parties must attend the valuation of all the properties in order for the respondent to obtain fair value.

[7] On 24 June 2020 the matter proceeded on the unopposed roll. There was no dispute that the applicant had established a case for the provisional sequestration of the respondent. The applicant is of the view that the discretion of the court should be exercised in its favour for a final order of sequestration for the following reasons:

- (i) that the respondent is incapable of making any averment or providing proof that he is capable of making payment of the judgment debt;
 - (ii) that the respondent committed an act of insolvency in terms of section B(b) of the Insolvency Act;
 - (iii) the sheriff's return of nulla bona is prima facie evidence that the respondent committed an act of insolvency;
 - (iv) that there is only one realizable asset being the immovable property which has been offered to the applicant;
 - (v) that the respondent is utilizing its income to pay other creditors and in doing so is preferring one creditor above another; and
 - (v) that the applicant is therefore entitled to proceed by way of sequestration.
- [8] The respondent in his supplementary affidavit avers that he is unemployed and has a chronic illness. He also indicated that he has no businesses that are generating any income. He further alleges that he has proved that he has sufficient assets to be sold to pay the applicant.
- [9] The issue to be determined is whether the court should exercise its discretion in favour of the applicant by granting the application for sequestration.

LEGAL PRINCIPLES

[10] Section 12(1) of the Insolvency Act 24 of 1936 ("the Act") provides as follows:

"12 Final sequestration or dismissal of petition for sequestration. -

- (1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that -
 - (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine, and
 - (b) the debtor has committed an act of insolvency or is insolvent; and
 - (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may sequester the estate of the debtor."

[11] If on the return day the court is satisfied that the applicant has established a liquidation claim against the debtor and that the debtor has committed an act of insolvency or is in fact insolvent and further that there is reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated, the court may sequester the estate of the debtor. The degree of the onus of proof in an application for a final order of sequestration is higher than that of a provisional sequestration where a mere prima facie case needs to be established. The court needs to be satisfied, on a balance of probabilities that the

abovementioned three facta probanda exist.

[12] If it can be established that the facta probanda exist the court has no option but to grant the order. This was held in *Firststrand Bank v Evans* 2011 (4) SA 597 where Wallis J at p 607 D - E said:

"Once the applicant for provisional sequestration has established on a prima facie basis the requisites for such an order, the court has a discretion whether to grant the order. There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within a class of cases generally described as involving a power combined with a duty. In other words, where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour."

[12] There is no evidence from the papers or before this court that there are more creditors or that there will be any disadvantage to all creditors, if any, in the recovery of any debt owing to them.

[13] Counsel for the applicant also brought to the court's attention that despite the respondent averments, he has failed to produce his financial statements proving his solvency. Further that there exists a valid judgment debt against the respondent. The respondent has not made attempts to reduce his indebtedness towards the judgment debt and there is no factual evidence before this Court to show that he is capable of making payment of the judgment debt.

[14] The respondent has not made out a case why the court's discretion should be exercised in its favour. I am satisfied that the applicant has established on a balance of probabilities the three facta probanda that need to be established to grant the order.

As such the following order is granted:

- (i) The estate of the respondent is placed under final sequestration;
- (ii) The cost of the application be cost in the insolvent estate.

SARDIWALLA J

Judge of the High Court

For the Applicant:

Adv C Richards instructed by

Weawind & Weavind

For the Defendant: Unknown

Date of Hearing:

24 June 2020

Date of Judgement: (Reasons) 14 October 2020

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Prepared on 11 October 2026 · Esheria