

SOUTH AFRICA / JUDGMENT

Nutrigo SA (Pty) Ltd v Van Niekerk and Another (615/2024)

[2024] ZAFSHC 117 (22 April 2024)

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COURT

Free State High Court, Bloemfontein

BEFORE

JP Daffue

CASE / FILE NUMBER

615/2024

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

case no: 615/2024

In the matter between: NUTRIGO SA (PTY) LTD Applicant and ANDRE JOHAN VAN NIEKERK 1st Respondent (Identity number: 6[...] Date of birth: 2[...] April 1963 Married to the 2nd Respondent, Alinda van Niekerk Identity number: 6[...] Date of birth: 1[...] November 1963) ALINDA VAN NIEKERK 2nd Respondent (Identity number: 6[...] Date of birth: 1[...] November 1963 Married to the 1st Respondent, Identity number: 6[...] Date of birth: 2[...] April 1963)

CORAM:

JP DAFFUE J

HEARD ON:

11 APRIL 2024

REASONS

DELIVERED ON: 22 APRIL 2024

On 11 April 2024, I dismissed the application for provisional sequestration in the unopposed motion court. I mentioned that my reasons would follow in due course. These are the reasons:

- [1] The application papers are in a complete mess. What was supposed to be a relatively simple sequestration application emerged to be a catastrophe. Two founding affidavits, seeking contrary relief, were filed. Numerous documents were duplicated and the bundle of documents consists of 121 pages.
- [2] The index, notice of set down and notice of motion refer to the applicant as Nutrico SA (Pty) Ltd and the first and second respondents as Andre Johan van Niekerk and Alinda van Niekerk respectively, married in community of property with each other.
- [3] In the notice of motion, the applicant sought a provisional sequestration order against the joint estate of the first and second respondents.

[4]

In the founding affidavit deposed to by Mr Martin Botha in his capacity as managing director of Nutrico SA (Pty) Ltd, the applicant sought, contrary to what was expected, the sequestration of the Andre Johan van Niekerk Family Trust[1]. It is not necessary to refer to each and every allegation, but the deponent referred to the Andre van Niekerk Family Trust, or the trust, about 25 times in this affidavit. Clearly, the applicant intended to use this affidavit in order to sequester the Andre Van Niekerk Family Trust. But that is not what it sought.

[5]

In paragraph 9.8 of the aforesaid founding affidavit it is alleged that a 'separate application for sequestration has been brought against the joint estate of the respondent and his spouse'.

[6]

This founding affidavit is dated 24 May 2022, the same day as the resolution taken by the applicant's company to launch application proceedings to liquidate (sic) the Andre van Niekerk Family Trust and to sequester Mr and Mrs Van Niekerk.

- [7] It is accepted that the applicant intended to bring two separate applications against the trust and Mr and Mrs Van Niekerk for the sequestration of the two separate estates. This would be the normal practice, but surely, it is not desirable to sequester several debtors simultaneously in one sequestration

application.[2]

- [8] The aforesaid affidavit of Mr Botha referred to confirmatory affidavits of Mr DH Murray, an attorney of Bloemfontein, and Mrs Wilma van der Westhuizen, an employee of Erasmus Incorporated Attorneys. None of these two affidavits were attached to this affidavit.
- [9] The nulla bona return of service of the sheriff relied upon is in respect of the Andre van Niekerk Family Trust[3]. Furthermore, the applicant also relied on an alleged act of insolvency under s 8(9) of the Insolvency Act 24 of 1936 in order to sequester the trust who according to the applicant is also insolvent. Severally documents pertaining to Sandvet Pecans are attached to this affidavit which appear to be totally irrelevant.
- [10] After struggling through the first 59 pages, I all of sudden came across another affidavit deposed to by the same Mr Martin Botha, supposedly in order to support an application for the sequestration of Mr and Mrs Van Niekerk.[4] This affidavit is to a certain extent a carbon copy of the first affidavit. In this case the applicant tried to make out a case for the sequestration of Mr and Mrs Van Niekerk. The affidavit is also dated 24 May 2022, nearly two years ago. Attached thereto is an affidavit of Mrs Van der Westhuizen. I also found an affidavit by the attorney, Mr Erasmus, which is not even referred to in the second founding affidavit[5]. Again, the affidavit of Mr Murray relied upon, is missing. In my view, no reliance could be placed on an affidavit which is nearly two years old without explaining what has occurred since then to the date of the issuing of the application.
- [11] It is surprising to note the following from Mr Erasmus' affidavit. He alleged in paragraph 3 that the 'basis for the liquidation application is the non-fulfillment (sic) of a credit agreement, a true copy of which is attached hereto as Annexure LME 1.' I underlined the wording. This is totally confusing. First of all, the applicant does not even rely on the affidavit of Mr Erasmus, not to speak of annexure LME 1. Annexure LME 1 is an 'application for credit account facility' by the Andre Van Niekerk Family Trust and although it is largely illegible, there appears to be no reference whatsoever therein to either Mr or Mrs Van Niekerk in their personal capacities. Insofar as the applicant apparently relied on annexure LME 1 to prove the residential address of Mr and Mrs Van Niekerk, the attorney has got it totally wrong. The customer's address contained paragraph 4 under the heading 'Legal Proceedings'[6] is a reference to the Andre van Niekerk Family Trust and most definitely not the domicilium address and/or residential address of Mr Van Niekerk or Mrs Van Niekerk.
- [12] The sheriffs return of service, alleging that he served the application on Mr and Mrs Van Niekerk on 8 March 2024, is hopelessly wrong. Neither Mr Van Niekerk, nor Mrs Van Niekerk has ever chosen their domicilium address according to any documents before me as S[...] N[...], Willemrus Silo, Bultfontein as alleged. It is also highly improbable that the sheriff could not ascertain from neighbours, bearing in mind the small town of Bultfontein, whether Mr and/or Mrs Van Niekerk reside at the alleged domicilium address as mentioned in the return of service. The reliance on the so-called domicilium address of the first and second respondents is frowned upon, bearing in mind the allegation in paragraph 2 of the second affidavit that Mr and Mrs Van Niekerk reside at S[...] N[...], Willemrus Silo, Bultfontein.

- [13] The sheriff also noted in his return of service that the appearance date of the application was 23 May 2024. Firstly, where he got that date from is uncertain and secondly, there is no indication that this has been explained to either Mr Van Niekerk, or Mrs Van Niekerk. The only reference to a possible date of hearing of the application is the reference to 11 April 2024, being the last paragraph of the notice of motion[7].
- [14] The applicant's attorney elected to make use of form 2(a), the usual long form used in application procedure when no reliance is placed on urgency as in this case.[8] Contrary to sub-rule 6(5)(b)(iii) the applicant provided a dies induciae of 5 days, whilst the sub-rule makes it clear that the normal dies induciae is 10 days. I accept, however, that an applicant may rely on a shorter period than 10 days in the case of urgency and when a rule nisi is sought as in this case.
- [15] For all these reasons, I was not prepared to grant a provisional order to sequestrate the joint estate of Mr and Mrs Van Niekerk. In the circumstances I was also not prepared to grant leave to amend the papers. The applicant is fully entitled to launch a fresh application for sequestration.

JP DAFFUE J

On behalf of the Applicant: Horn & Van Rensburg Attorneys BLOEMFONTEIN On behalf of Respondents: No appearance

- [1] Bundle, pp 13 - 30.
- [2] See Mars: The Law of Insolvency in South Africa, 9th ed at p 102 and authorities relied upon.
- [3] Bundle, p 34: annexure D.
- [4] Bundle, p 60.
- [5] Bundle, pp 110 - 112.
- [6] Bundle, p 120.
- [7] Bundle, p 7.
- [8] See Erasmus Superior Court Practice, vol 2 at DI- 62A.

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Prepared on 12 October 2026 · Esheria