



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

CASE NO. 2280/2020

In the matter between

**VINCEMUS INVESTMENTS(PTY) LTD T/A
KEMPSON FINANCE
(REG: 1969/004762/07)**

APPLICANT

versus

**WILLEM ANDRIES MARITZ NEL
[Identity Number: 810531 5121 086]**

RESPONDENT

JUDGMENT

CORAM:

NAIDOO J

HEARD ON:

10 MARCH 2022

DELIVERED ON:

4 AUGUST 2022

[1] The applicant in this matter sought an order for the sequestration of the respondent's estate, with ancillary relief in respect of costs. In the alternative, the applicant sought orders for the payment of various sums of money, with attendant ancillary orders in respect of interest and costs. Although the Notice of Motion sought a final order of sequestration, counsel for the applicant indicated, during oral address in court, that the applicant seeks a provisional order of sequestration, with the claim for the money judgment to be postponed to the return day of the provisional order of sequestration. The application was vigorously opposed by the respondent. Adv L Meintjes represented the applicant and Adv PJJ Zietsman SC represented the respondent.

[2] The terms of the relief sought by the applicant are as follows:

1. "That the estate of the Respondent be sequestrated and placed in the hands of the Master of this Honourable Court;
2. That the costs of this application be costs in the sequestration of the Respondent's insolvent estate;
3. That further and/or alternative relief be granted to the Applicant;
4. in the alternative to 1, 2 and 3 *supra*:-
 - 4.1 That judgment be granted in favour of the Applicant against the respondent for:-
 - 4.1.1 Payment of the sum of R3 123 836,15;
 - 4.1.2 Payment of interest on the amount of R3 123 836,15 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;

- 4.1.3 Payment of the sum of R2 132 850,77;
- 4.1.4 Payment of interest on the amount of R2 132 850,77 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.5 Payment of the sum of R6 830 566,58;
- 4.1.6 Payment of interest on the amount of R6 830 566.58 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.7 Payment of the sum of R6 830 566,58;
- 4.1.8 Payment of interest on the amount of R6 830 566.58 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.9 Payment of the sum of R5 319 184,76;
- 4.1.10 Payment of interest on the amount of R5 319 184,76 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.11 Payment of the sum of R6 655 572,01;
- 4.1.12 Payment of interest on the amount of R6 655 572,01 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.13 Payment of the sum of R6 722 999,44;
- 4.1.14 Payment of interest on the amount of R6 722 999,44 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.15 Payment of the sum of R6 655 570,48;
- 4.1.16 Payment of interest on the amount of R6 655 570,48 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive”.

- [3] The indebtedness in this matter arises from certain credit agreements entered into between the applicant and the Prinsloo Familie Trust (the Trust). During the period August 2016 to November 2016, the applicant and the Trust concluded eight Instalment Sale Agreements (ISA), in terms of which the applicant sold and delivered to the Trust various farming vehicles, machinery and equipment. The applicant was represented by a duly authorized official and the Trust was represented by Louis Hendrik Prinsloo, one of the initial trustees of the Trust, in respect of four of the agreements. He subsequently passed away in February 2018. I will refer to him as the deceased. The Trust was thereafter represented by his son and co-trustee, Leon Prinsloo, in concluding the remaining four ISA.
- [4] The Trust was part of the Prinsloo Group, which consisted of several companies, one such entity being 3 Skaar Boerdery (Pty) Ltd (3 Skaar). The applicant obtained a written deed of suretyship from 3 Skaar, in favour of the applicant, for the debts and obligations owing by the Trust to the applicant. The suretyship was signed on behalf of 3 Skaar by Leon Prinsloo, in his capacity as director of 3 Skaar. The applicant also obtained personal deeds of suretyship from the deceased, his wife, Nelly Prinsloo, Leon Prinsloo and the respondent for the debts and obligations of the Trust, owing to the applicant.
- [5] I pause to mention that the respondent is the son-in-law of the deceased, Louis Hendrik Prinsloo, and ran the operations of the

Trust, at the time, in his capacity and Chief Executive Manager/General Manager of the Trust. He is also a trustee of the Maritz Nel Family Trust which is a shareholder of 3 Skaar. The respondent was also one of the directors of 3 Skaar. The respondent appears to have been the chief protagonist in driving the litigation on behalf of the Trust, having been the person who gave instructions to the Trust's legal representatives, ostensibly in accordance with a resolution taken by the Trust in September 2013, authorizing him to act on behalf of the Trust, to take decisions and sign all documents that may be necessary.

- [6] The relationship between the applicant and the Trust appears to have become very acrimonious and litigation in this matter has been bitter and protracted, with various applications and interlocutory applications being brought by both parties in the course of this matter. The parties, for instance, went beyond the usual three affidavits that are filed in an Opposed Motion matter. The respondent filed a Rejoinder Affidavit and the applicant filed a Surrejoinder Affidavit to deal with additional allegations and evidence raised in the Answering, Replying and Rejoinder Affidavits. The applicant filed a comprehensive chronology, giving a detailed background of this matter and the history of the relationship and transactions between the parties in the various affidavits that it filed. I will mention such aspects thereof only where necessary. The Trust as well as 3 Skaar were at different times finally liquidated, prompting the applicant to pursue the respondent, in terms of the suretyship that he signed, for

payment of the Trust's debts owing to the applicant. The latter demanded, from the respondent, payment of the monies due to it but received no response. The current application for the sequestration of the respondent, was launched on 3 July 2020.

- [7] The respondent raised, in his Answering Affidavit, the primary defence that he signed the Deed of Suretyship in the mistaken belief that he was signing as surety for 3 Skaar, of which he was a director. The reason for this, he asserts, was that the initial negotiations in respect of the ISA were between 3 Skaar and the applicant, but that the deceased then decided that the ISA should be in the name of the Trust. As a result of this he was released from the suretyship by the applicant, represented at the time by its Divisional Manager, David Leslie Stephen (Mr Stephen), who signed the release letter (and who subsequently passed away in March 2020). In denying this, the applicant asserts that there was no dispute by the respondent, until the filing of the Answering Affidavit, that he had signed the suretyship agreement in the full knowledge that he was doing so for the debts of the Trust. The applicant in Reply set out in detail, support for this contention, which I will deal with later.
- [8] In support of his version that the negotiations in respect of the ISA were initially between 3 Skaar and the applicant, the respondent also alleged that a facility letter was initially sent to 3 Skaar confirming the purchase of certain farming equipment, but that subsequently, on the same day, another facility letter was sent to the Trust, confirming the

ISA in the name of the Trust. The applicant vigorously denied that a facility letter was ever issued to 3 Skaar, and set out a detailed exposition of the steps taken by its employees to ascertain and establish that such a letter was not sent by any of its employees to the respondent.

- [9] As a result of the version tendered by the respondent that he was released from the suretyship because he signed it erroneously, the applicant engaged a professional forensic document examiner (Mr Snyman) to examine the signature on the release letter allegedly signed by the late Mr Stephen, and ascertain if he was indeed the signatory of that letter. Mr Snyman examined the known and undisputed signature of Mr Stephen on twelve documents, eleven of which were unrelated to the present matter and which were signed in the course of Mr Stephen's employment with the applicant. The facility letter addressed to the Trust on which Mr Stephen's undisputed signature appears was the twelfth document that Mr Snyman examined. I mention that all of these documents, including the facility letter were copy documents as the originals were not available.
- [10] Mr Stephen undertook a comprehensive examination of the signature on each of the known documents and compared that with the disputed document (release letter). He compiled a comprehensive report, explaining the method he used in the examination, his observations in respect of the known signature and the one on the

disputed document, and his resultant conclusion. His opinion was that the signature on the release letter was copied and transferred from the facility letter of 23 June 2016, addressed to the Trust and signed by Mr Stephen.

[11] The respondent also engaged an expert (Mr Bester) to examine the signatures I mentioned above. He had recourse to the same documents as Mr Snyman. In essence he agreed with the method employed by Mr Snyman, and he found that the signature on the disputed document was identical to the one on the facility letter dated 23 June 2016, but he could not say which of the two is a forgery. I pause to mention that it is common cause that the signature on the facility letter to the Trust, dated 23 June 2016 is that of Mr Stephen. Mr Bester further criticized Mr Snyman for not considering the limitation caused by the absence of an original wet ink signed document, and for opining conclusively that the signature on disputed document is a copy and transfer forgery.

[12] The facility letter allegedly addressed to 3 Skaar was also subsequently subjected to forensic examination. The relevant information on this document was similarly found to be a copy and transfer from the facility letter addressed to the Trust. In addition, there was an investigation into the covering email to which the facility letter to 3 Skaar was attached. According to the applicant, there is no record of the email having been sent from the applicant to the

respondent. However, for the purposes of the present application, I am of the view that it is not necessary for this court to deal in any great detail with the issue of the release letter, the forensic examinations related thereto and the resultant reports. What is necessary is for this court to establish if the respondent signed the deed of suretyship binding himself to repay the debts of the Trust, in the full knowledge that he was doing so for the Trust, or whether he did so in the mistaken belief that he was signing on behalf of 3 Skaar.

- [13] The applicant sets out, in its Replying Affidavit, the chronology of how the Trust signed the application forms for finance. It is very clear from the surrounding email correspondence between the applicant and the respondent that the application form was intended to be completed by the Trust, as it was indeed done. It is worrisome that the respondent's denial of the chronology challenges such aspects as the date at the top of the finance application document (being 10/14/2020) asserting that the documents were not sent to him in 2020. It is clear from the content of the application form filled in by Leon Prinsloo and the respondent, that this was done in 2016. The applicant's explanation of the date and the email address, which is also challenged by the respondent, is that the copy attached to its papers was taken from an email to its counsel on 14 October 2020. Hence it is counsel's email address that appears on the document. The respondent's challenge in these respects is opportunistic, hollow and disingenuous. Part of the application form required the personal details of both Leon Prinsloo and the respondent to be furnished, which both duly complied with.

- [14] It is noteworthy that it was the respondent who conducted all the communications with the applicant's employees in respect of the application forms and other information required by the applicant. This lends credence to the applicant's version there were never any negotiations for finance with 3 Skaar and that the respondent approached the applicant for credit facilities to finance the purchase of farming equipment and agricultural products (for the Trust). He then offered as security a deed of suretyship by 3 Skaar, as the farm trading side of the Trust's business was transferred to 3 Skaar. Therefore 3 Skaar was the trading entity while the Trust was the property-owning entity. The applicant asserts, and I accept, that it was agreed between the parties that the trustees and the respondent would provide personal suretyships for the debts of the Trust. This is evidenced by the fact that the personal details of Leon Prinsloo and the respondent were furnished as part of the finance application.
- [15] The deed of suretyship was subsequently prepared by the applicant and sent to the respondent for signature by the deceased, Nelly Prinsloo, Leon Prinsloo and the respondent. The deed of suretyship very clearly and specifically indicates that the suretyship related to the debts of the Trust. The applicant's employee, Ms Venske, clearly marked and indicated where each party was to sign. Nelly Prinsloo and Leon Prinsloo were not shareholders of 3 Skaar at the time and logic would dictate that it makes no sense to require personal suretyships from them for the debts of 3 Skaar. It is also informative that it was Leon Prinsloo who signed the suretyship on behalf of 3 Skaar as he (and the respondent) were directors of 3 Skaar at the time.

- [16] It also makes perfect sense that the applicant would require further details concerning 3 Skaar in order to assess if it was worth obtaining a suretyship from that entity. It was as a result of this query that the respondent furnished the history of 3 Skaar, indicating that as a new entity it would not qualify for asset finance. Logically the application and resultant finance agreements would have to be in the name of the Trust. Once again, the respondent turns the communication relating to 3 Skaar in this context, into support for his contention that the negotiations for finance were initially with 3 Skaar. This is disingenuous as the correspondence evidences otherwise. It is he who advised the applicant that the application must be in the name of the Trust as the assets will be held by the Trust and leased to 3 Skaar as the trading entity. The respondent in the Rejoinder Affidavit, proffers the unconvincing explanation that the deceased decided that the transaction was to be concluded in the name of the Trust, hence his advice to the applicant to this effect. He knew, therefore that the relevant agreements had to be in the name of the Trust, and that there was no resolution or intention for him to sign on behalf of 3 Skaar, as it was Leon Prinsloo who was authorized to do so. His version regarding the signing of the suretyship is therefore far-fetched and, in my view, far from the truth.
- [17] A consideration of the extensive history of the applicant's relationship with the Trust, indicates that the applicant has had enormous difficulties in recovering the debts due to it, as a result of the

recalcitrant and devious conduct of the trustees and the respondent. The applicant was led up the proverbial garden path on numerous occasions. Cessions and guarantees were signed in favour of the applicant, only to find that the assets which were the subject matter of such cessions and guarantees were already ceded to or encumbered in favour of another entity. In one instance the proceeds of a harvest were ceded and paid to applicant. It was later discovered that the Trust had passed a Continuing Covering Mortgage Bond over certain assets, including the same harvest, in favour of Standard Bank of South Africa. The latter obtained a court order perfecting the bond. The applicant was obliged to reverse the credits for those amounts and transfer the money to a suspense account. Those amounts are now the subject of litigation between the applicant and Standard Bank.

- [18] The papers are replete with numerous other instances of such conduct by the Trust and its functionaries, especially the respondent. After the Trust was liquidated, a meeting of creditors was held, at which Leon Prinsloo and the respondent testified. Both admitted that they have no means to pay the debts of the Trust for which they signed as sureties. It was pertinently put to the respondent that he signed as surety in favour of the applicant and he was asked whether he had the financial means to pay the shortfall (due to the applicant). He said he did not at that stage have the means to do so, and confirmed that he was sure that his liabilities exceeded his assets. Interestingly, his legal representative objected to the respondent being questioned about his personal affairs as that was

an enquiry about the insolvent estate of the Trust and not about someone who stood surety for the Trust's debt to one of its creditors.

[19] Another example of the knowledge and acceptance that the suretyship signed by the respondent was, in fact, for the debts of the Trust can be found in a letter dated 5 June 2018 by the Trust's legal representatives to the applicant's legal representative, which followed a meeting between the applicant and the Trust in an attempt to settle the matter. The applicant, at the meeting, requested further security from the Trust and in the letter from the Trust's legal representatives, Kramer Weihmann & Joubert, the latter asserts that the applicant already has sufficient security. The letter sets out what that "sufficient" security is and in para (c) states that if their client (the Trust) is not in a position to timeously pay the instalment due on 1 November 2018, the applicant will still retain ownership of the of the tractors (mentioned earlier in the letter), together with the personal suretyship agreements signed by Mr Prinsloo, Mr Nel, Mrs Prinsloo, the deceased Mr Prinsloo and 3 Skaar Boerdery. (my emphasis). It is clear that such information could only have been relayed to the legal representative appearing at the insolvency enquiry and the one at the settlement negotiations, by the respondent. This in my view, is indicative of the respondent's knowledge and acceptance that the deed of suretyship he signed was for the debts of the Trust.

[20] On a conspectus of all the evidence presented in the very voluminous papers of some 2 280 pages ,excluding extensive Heads of Argument

and “authority bundles” by the respective legal representatives in this matter, I am satisfied that the respondent not only negotiated the finance credit facilities on behalf of the Trust and completed the necessary agreements in respect thereof, but he was eminently aware that the deed of suretyship, to which he and the trustees of the Trust appended their signatures, was for the debts of the Trust and not 3 Skaar Boerdery.

- [21] It is also my view that the introduction of the so-called release letter and the facility letter allegedly addressed to 3 Skaar, do not create the kind of factual dispute which precludes me from granting a provisional order of sequestration. The respondent will have his opportunity to present further evidence on the return day, if he so wishes, to say why the order should not be made final. This would include referring the issue of the questioned documents to oral evidence in order to finally determine the veracity of such documents. The applicant has set out in its founding papers the acts of insolvency and the advantage to creditors upon which it relies for the relief it seeks, and I am satisfied that in that respect, the applicant has made out a case for such relief. The respondent has not indicated in the papers that he is in a financial position to pay the amounts claimed from him, should the court not uphold his defence, nor has he denied the applicant’s assertions that he is factually insolvent. In fact Mr Zietsman’s submission was that if the court is not with the respondent in respect of the release letter, then the respondent “has problems”. This fortifies my view that an order for provisional sequestration would be just and equitable in this case

[22] The manner in which the respondent has conducted himself calls for closer scrutiny, which can well be achieved by a trustee appointed to administer the insolvent estate, in terms of the powers conferred upon him/her by statute. Mr Meintjes correctly submitted that a provisional order of sequestration should be granted. He also sought costs against the respondent, in spite of seeking, in the Notice of Motion, an order that the costs of this application be costs in the sequestration of the respondent's estate. My view is that the latter is an equitable order.

[23] In the circumstances the following order is made:

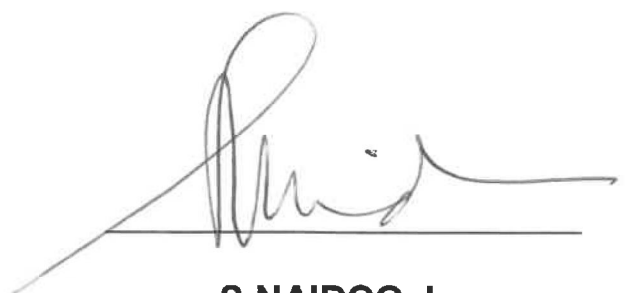
23.1 The estate of Willem Andries Maritz Nel, identity number 810531 5121 086, is placed under provisional sequestration in the hands of the Master of the Free State High Court, Bloemfontein;

23.2 A *Rule Nisi* is hereby issued calling upon the respondent and any other interested party to show cause, if any, to this court on the 8th day of September 2022 at 9h30, why the provisional order of sequestration should not be confirmed and made final;

23.3 A copy of this order must be served on the respondent.

23.4 A copy of this order must be served on:

- 23.4.1 any registered trade union which the Sheriff can, as far as is reasonably possible, ascertain, represents the employees of the respondent;
- 23.4.2 the respondent's employees, if any, by affixing a copy of this order to any notice board to which the employees have access inside the respondent's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, and failing which, to the front door of the premises from which the respondent conducted business;
- 23.4.3 the South African Revenue Service;
- 23.5 The costs of this application are to be costs in the sequestration of the respondent's estate.



S NAIDOO J

On behalf of the Applicant: Adv L Meintjes
Instructed by: Noordmans Attorneys
4 Seventh Street
Arboretum
Bloemfontein
(Ref:A Noordman/JDP/KEM1/0001)

On behalf of the Respondent: Adv PJJ Zietsman SC
Instructed by: Kramer Weihmann Inc
24 Barnes Street
Westdene
Bloemfontein
(Ref: D Muller)