

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2734/2022

In the matter between:

ELRICH RUWAYNE SMITH N.O.

First Applicant

ETHNÉ MARY VAN WYK N.O.

(In their capacities as joint liquidators
of Trackstar Trading 140 (Pty) Ltd
(in liquidation))

Second Applicant

And

PETRONELLA SOPHIA DU PREEZ

(Identity Number: [...])
Married out of community of property)

Respondent

HEARD ON: 13 OCTOBER 2022

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 03 March 2023

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- [1] The applicants are the joint liquidators of Trackstar Trading 140 (Pty) Ltd (Trackstar). Trackstar was liquidated on 5 December 2019. At all material times hereto, the respondent's husband Mr Alexis Du Preez to whom the respondent is married out of community of property was the sole director of Trackstar. The respondent, her husband and brother in law are co-trustees of the A Du Preez Family Trust ("the Trust") a sole shareholder in Trackstar.
- [2] In this application the applicants seek an order that the estate of the respondent be placed under provisional sequestration on the grounds of insolvency.
- [3] In terms of s 10 of the Insolvency Act¹ ("The Act") a creditor who seeks to sequester the estate of a debtor must satisfy the court *prima facie*, that it has a liquidated claim of not less than R100 which entitles it² 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 the debtor's estate is sequestrated.

The Applicant's claim

- [4] The applicants' claim arises from the respondent's failure to repay an amount of R360 000.00 which the respondent received from Trackstar and her husband respectively during the period 2017 to 2019 in monthly payments of R15 000.00

¹ Act No, 24 of 1936.

² 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."

for a period of 24 months. It is the applicant's case that the respondent was not entitled to the said payments, she was not even employed by Trackstar.

- [5] The applicants state that the respondent is insolvent. At the insolvency enquiry held on 11 March 2020 and 13 October 2022,³ the respondent admitted that she received payments from Trackstar and her husband as monthly allowances. She also confirmed her inability to pay her debts including bond instalments and household expenses and that she was also not gainfully employed. On her own version, she was in arrears with her mortgage bond repayments in the amount of R786 525.55, her only source of income was from teaching mathematics on a part time basis where she received only R4 000.00 per month as a result, she was dependent on her father and her sister for financial assistance for household expenses including the monthly bond repayments, medical aid, water and electricity. Her income was so meagre she has been advised to submit nil returns to SARS.
- [6] The applicants further state that despite demand,⁴ the respondent has failed to pay the applicant's debt. There is also a judgment taken against the respondent and her co-trustees in both their personal capacities and as trustees for the Trust by Absa bank on 20 August 2020 and in the amount of R889 327. 83. The extent of the respondent's assets is unknown except that she owns a fully paid 1998 Toyota Corolla and some household furniture. The estimation value of her immovable property by Windeed is only R1 850 000.00 while her liabilities including the applicants' debt stood at R2 035 853.38.
- [7] The applicants contend that there is no alternative remedy except to seek the sequestration of the respondent's estate. A trustee will be able to unearth all the respondent's assets which can be distributed amongst the creditors and investigate her previous income that she earned as a school teacher and also her involvement with the Trust and Trackstar.

³ The record of the proceedings of Insolvency Enquiry are attached to the applicants' founding affidavit as Annexures "D1.1" to "D1.2", "D2.1" to "D2.7" and "D3.1" to "D3.10."

⁴ Annexure "B" is the copy of the registered letter of demand dated 28 October 2021.

- [8] It is undisputed that during the period 2017 to 2019 the respondent received various payments from Trackstar and her husband. The exact amount that the respondent received and the circumstances under which the payments were made to her is in dispute.
- [9] The application is opposed on the grounds that the applicants have failed to prove the debt relied upon and that the respondent is insolvent. The respondent contends that if there is any debt due by her, the applicants should have issued summons instead of sequestration proceedings. She did not receive the letter of demand as it was sent back by the post office otherwise, she would have responded to it. In any event the applicants' claim has prescribed.
- [10] According to the respondent, the only payment she received during this period was the total amount of R305 335.00 of which R125 000.00 was from Trackstar and the rest from her husband.⁵ The payments were from the income generated by Trackstar and paid to her as a beneficiary of the Trust which is the sole shareholder in Trackstar.
- [11] The respondent further states that she is not insolvent, the applicants have simply relied on outdated information namely, her testimony relayed at the insolvency enquiry which took place two years ago. Her financial situation has improved since then and at that time her inability to pay her debts was attributable to the effects of Covid-19 pandemic lockdown on business operations. Her income has now increased, she earns between R56 000.00 to R61 000.00 per month from various streams of income including providing Mathematics lessons, home schooling and extra classes while her monthly expenses amount to R49 556.00⁶ as a result, she has managed to bring her debts up to date and her home loan is no longer in arrears.
- [12] The default judgment alluded to by the applicants was not granted against her in her personal capacity but in her capacity as a trustee of the Trust. With regard to her assets, the estimated value of her vehicle is R30 000.00 and her immovable

⁵ Annexure "OA3" of the respondent's answering affidavit.

⁶ Annexures "OA1" and "OA2" are bank statements for the period May to July 2022.

property has been evaluated at the amount of R2 500 000.00 by Messrs Johan Broderyk Properties on 3 August 2022.

- [13] I am in agreement with the applicant's replication that proof of dispatch of the letter of demand by registered mail to the respondent's address constitutes sufficient proof of service irrespective of whether the respondent received it or not. It is also important to note that on her own submission, the post office had returned the mail back to the sender. The respondent conveniently avoids adding that the reason the mail was sent back to sender is because it was unclaimed. It has been held that registered mail is more is more reliable means of postage and no harm can come to either party's interests when this mode of service is utilized.⁷
- [14] There is also no merit to the respondent's unsubstantiated contention that the applicants' claim has prescribed. On the facts germane to this matter it is indisputable that during the period from 2017 to 2019 the respondent received payments in the aggregate amount of at least R305 335.00 from Trackstar and her husband respectively. Trackstar was only liquidated in the year 2019, within the three-year period of prescription of debts as contemplated in s11 of the Prescription Act.⁸
- [15] On the papers, the respondent's averment with regard to what led to the payment is implausible and gainsaid by the indisputable evidence that approximately a year before the payments were made to her in 2016, Trackstar was already in financial dire straits. There was no income generated that would have retained dividends for the Trust hence the respondent's version is not even supported by any evidence namely, the Trust's financial statements for that period and a resolution authorising the distribution of the payments to the beneficiaries. The averments are also not verified by the co-trustees' confirmatory affidavits.

⁷ *Rossouw and Another v Firstrand Bank Ltd* **2010 (6) SA 439** (SCA).

⁸ Act No, 68 of 1969.

- [16] For the above-mentioned reasons, I am not persuaded that the applicants' debt is is disputed on *bona fide* and reasonable grounds. I am satisfied that the applicants have established a liquidated claim against the respondent as provided for in s 9(1) of the Act.

Insolvency

- [17] The respondent has provided no cogent reasons for not paying the applicants' debt or at least the amount R125 000.00 which is undisputed. There is also a judgment debt obtained against the respondent as co-trustee and surety for the unpaid debts of the Trust. An inability to pay a debt and a failure to pay a debt to the extent that a judgment is taken by the creditor are both clear and persuasive indicators of insolvency. In *De Waard v Andrews & Thienhans Ltd*⁹ Innes CJ stated that:

"To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

- [18] It is trite that the inability to pay debts must be considered cumulatively with the extent of the respondents' assets and liabilities. On its own, the respondent's inability to pay her debts does not constitute actual insolvency but merely a strong suspicion that her estate might be insolvent.

- [19] In the founding affidavit, the applicants conceded that the extent of the respondent's liabilities and assets have not been established. The applicants simply placed an unsworn appraisal of an amount of R1 850 000.00 as the value of the respondent's immovable property while the respondent countered by attaching a letter from Messrs Johan Broderik Properties dated 3 August 2022 stating that:

"This serves to confirm that I the undersigned visited and inspected the abovementioned property. Market related value that can be linked to the property is:

⁹ 1907 TS 727 at 733; *Mackay v Cah* 1962 (4) SA 193 (O) at 204F-G.

R2 500 000.00 (Two Million Five Hundred Thousand Rand)

For any queries please contact me.”

[20] As correctly pointed out by the applicants, expert evaluation of the immovable property is required under these circumstances.¹⁰ Inexplicably, the applicants have not attached a covering affidavit by their valuator. The same deficiencies hold good in respect of the respondent’s evaluation nonetheless; the onus is on the applicants to establish *prima facie* that the respondents’ liabilities exceed the total of her assets. See *Mackay* at 199H and 200A-F.

[21] In the absence of credible, independent and sworn valuation of the respondent’s assets I am unable to determine that the respondent’s assets are exceeded by her liabilities and to also assess whether there is a reasonable prospect that the sequestration will benefit the creditors.

[22] Taking into consideration all facts of this matter, I am not convinced that a case has been made out for an order to place the respondent’s estate under provisional sequestration. The costs are to follow the result.

[23] In the premises, I make the following order:

(1) The application is dismissed with costs.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

Mr. E. Visser

Instructed by:

Ettiene Visser Attorneys

¹⁰ *Nel v Lubbe* **1999 (3) SA 109** (W).

BLOEMFONTEIN

Counsel on behalf of Respondent:

Adv. F.F. Jacobs

Instructed by:

Callis Attorneys

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