

SOUTH AFRICA / JUDGMENT

Akbur and Another v Button NO and Others (AR529/2016) [2017] ZAKZPHC 68 (15 June 2017)

[2017] ZAKZPHC 68

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Koen, Poyo Dlwati, Bezuidenhout

CASE / FILE NUMBER

AR529/2016

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR529/2016

ASHRAF AKBUR FIRST APPELLANT

GSC TRADING CC SECOND APPELLANT

and

NEIL DAVID BUTTON N.O FIRST RESPONDENT

KURT ROBERT KNOOP N.O. SECOND RESPONDENT

SURENDRA NAIDOO N.O. THIRD RESPONDENT

EBRAHIM ABOOBAKER FOURTH RESPONDENT

MOOLLA N.O. FOURTH RESPONDENT

DEON SCHAUP N.O. FIFTH RESPONDENT

THE MASTER OF THE HIGH SIXTH RESPONDENT

COURT OF SOUTH AFRICA

(KWAZULU-NATAL DIVISION)

Coram: Koen J, et Poyo Dlwati J, et Bezuidenhout J

Heard: 19 May 2017

Delivered: 15 June 2017

O R D E R

The following order is granted:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and substituted with the following:

‘The application is dismissed with costs’.

J U D G M E N T

THE COURT:

[1] In *National Director of Public Prosecutions v Zuma*[1] it was said that:

‘Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine

probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers..’

[2] The application giving rise to the present appeal is no exception.

[3] In the application, the applicants, (the first to fourth respondents in the appeal) successfully claimed the following relief, in the exact terms prayed in the notice of motion, against the first and second respondents (the appellants in the appeal). The parties will hereinafter be referred to as in the court a quo.

‘1. Declaring that the following amounts paid by the Corporation from its Nedbank Kingsmead Branch bank account number: [...] to the following persons in the following amounts, namely:

- 1.1 R41 000.00 (Ashraf sal July) on 26 July 2013;
- 1.2 R11 000.00 (Ash expenses) on 12 August 2013;
- 1.3 R 1 900 000.00 (n/l trust on 16 August 2013;
- 1.4 R200 000.00 (inv. return) on 2 September 2013;

1.5 R50 000.00 (inv. return) on 10 September 2013;

1.6 R41 000.00 (Ash salary) on 30 September 2013; and

1.7 R250 000.00 (inv return) on 7 October 2013.

TOTAL: R2 493 000.00

constitute voidable preferences of the property of the Corporation, as debtor to, in favour of and for the benefit of the first respondent and/or the second respondent as the Corporation's creditors, in preference to the Corporation's other creditors, within a period of 6(six) months preceding the winding-up of the Corporation at a time when its liabilities exceeded the value of its assets, were not made in the ordinary course of the business of the Corporation and were intended to prefer one or more of the respondents' creditors above another, under and pursuant to the provisions of Section 29 of the Insolvency Act No. 24 of 1936, as read with Section 32, 31, 30(1)(2) and 26(1)(b) of the Insolvency Act.

3. Directing the first respondent, alternatively, the second respondent, or further alternatively, the first and second respondent, jointly and severally, the one paying the other to be absolved, to forthwith repay the amounts for in 1.1 to 1.7 of paragraph 1 above, together with interest thereon at the rate of 9% per annum a tempore morae, to date of payment;
4. Directing that the first and second respondents pay the costs of this application on a party and party scale, jointly and severally the one paying the other to be absolved.'
- [4] The Corporation referred to is Golden Rewards 698 CC Trading as Global Steel Corporation to which the applicants were appointed as joint liquidators. The first respondent is Mr Ashraf Akbur in his personal capacity and the second respondent is GSC Trading CC, a close corporation of which the first respondent was at all times the sole member.
- [5] Although the learned Judge in the court a quo also alluded to 'collusive dealings'[2] and 'undue preference',[3] the judgment concluded that the dispositions complained of constituted voidable preferences. The appeal lies against that

conclusion.

- [6] In order to succeed with a claim on that basis the provisions of s 29 of the Insolvency Act[4] had to be complied with. Section 29 provides:

'(1) Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.'

- [7] The applicants were accordingly required to prove:
- (a) the dispositions of property by the corporation to the first alternatively the second respondent;
 - (b) that such dispositions were not made more than six months before the liquidation of the corporation;
 - (c) that the dispositions had the effect objectively of preferring one of the corporation's creditors above another; and
 - (d) that immediately after the making of each disposition the liabilities of the corporation exceeded the value of its assets.[5]

The disposition would then qualify as a voidable preference, unless the Respondent in whose favour the disposition was made, and who would have the onus to do so proves that:

- (a) the dispositions were made in the ordinary course of business; and
- (b) that it was not intended thereby to prefer one creditor above another.[6]

- [8] The further trite principle of our law that an applicant for relief in motion proceedings must make out his case in the founding

affidavit and not in reply, also goes without saying.[7]

- [9] The drafter of the applicants' founding affidavit proceeded in a most unusual and unorthodox way. The deponent to the founding affidavit, an attorney, but not one of the co-liquidators, confirmed that he is 'intricately involved in the administration of the estate of the corporation' on behalf of the applicants and that he had represented the applicants 'in attending the on- going commission of enquiry being conducted in the corporation pursuant to the provisions of s 417 and 418 of the Companies Act No. 61 of 1973 (as amended), as read with Act No. 71 of 2008 ('the Act'), which has been conducted by attorney Monty Stanley Hacker before the duly appointed commissioner', the third respondent in the application. He confirmed from his own knowledge that the application for the winding up of the corporation was served and filed on 9 October 2013 and a final order was granted on 9 December 2013 and hence that the liquidation of the corporation commenced on 9 October

2013. He then turned to the loan account of the first respondent and the bank account of the corporation within the six month period preceding the commencement of the winding up and presented a precis of some of the evidence adduced at the aforesaid commission of enquiry by the first respondent, a Durban attorney, Mr Peter Andrew, two other members of the corporation, namely Mr Moosa Aslam and Mr Oscar Naidoo, as well as the accounting officer of the corporation, Mr Shyan Vather.

[10] I do not intend repeating any of the contents of the founding affidavit in this judgment. It forms part of and is a matter of record. Suffice it to say that the deponent deals with what the first respondent testified, not by actual repeat of the verbatim evidence led or the ipsissima verba of the witnesses, but rather what they testified in summarised form.

[11] In terms of s 417(7) of the Companies Act, 1973:

‘(7) Any examination or enquiry under this section or section 418 and any application therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise.’

[12] There is no reference whatsoever in the founding affidavit that the master or the court has directed otherwise. The effect of the requirement that the examination or enquiry under s 418 shall be private and confidential is explained in Meskin Henochsberg on the Companies Act Vol 1 at 894(8) in a commentary on s 417 as follows:

‘Unless the Court or, as the case may be, the Master, were otherwise to direct (which direction, it is submitted, can be made at any time, ie even during the examination or enquiry, at the instance of a person who is able to show a sufficient interest), s 417(7) operates to deny all persons access to the application and any documents accompanying it and to the examination or enquiry itself, the record of it and to any books or papers produced at it.’

[13] Prima facie therefore, the record of the enquiry and documents or papers produced at the enquiry remained confidential and could not be used in the application. We say prima facie, as this particular issue was not raised and therefore was not dealt with in the court a quo, and was further not sufficiently ventilated before us[8] having been raised on very short notice to counsel. However, even if we were wrong in our prima facie view, and assuming for the moment in favour of the applicants that the evidence and documents produced at the enquiry were not confidential

and could be used, we have very serious reservations whether the deponent to the founding affidavit’s summary and impression of what witnesses might have said at the enquiry could properly be presented as admissible evidence to found relief claimed. If any evidence adduced at such an enquiry could legitimately be used, then at a minimum we would expect that the actual transcript of the evidence of such witnesses reflecting the ipsissima verba of the witnesses would have to be annexed to the founding papers.

[14] In addition, the summarised version of the evidence of these witnesses who testified at the enquiry was tendered as proof of the contents thereof, and would thus constitute hearsay evidence unless confirmed by the actual witnesses. No confirmatory affidavits were annexed to the founding papers in respect of any of these witnesses. To the extent that the evidence of the first respondent at the enquiry, but not in summarized form, could lawfully have been adduced but for the provisions of s 417(7) on the basis of containing some extracurial admissions, it would not constitute inadmissible hearsay against the first respondent. But the actual transcribed evidence of the first respondent did not form part of the founding

affidavit. The evidence of Messrs Andrew, Aslam, Naidoo and Vather would however constitute inadmissible hearsay evidence. The applicants did not apply for the admission of that evidence in terms of s 3(1)(c) of the Law of Evidence Amendment Act.[9]

- [15] In paragraph 10.4 of the judgment the learned Judge remarks that Messrs Moosa Asmal and Oscar Naidoo ‘have deposed to supporting affidavits in replication to this application.’ Mr Andrews also deposed to an affidavit which was filed with the replying affidavit. Those verifying affidavits however came too late. An applicant for relief in motion proceedings must make out his or her case in the founding papers and not in reply. Furthermore, the reference to Mr Moosa Asmal having deposed to a supporting affidavit in replication appears erroneous. There is no supporting affidavit filed anywhere in the application papers in respect of Mr Asmal. All that is filed in respect of Mr Asmal, and then only in reply, is annexure ‘JDM 10’ to the replying affidavit, which purports to be a transcript of apparently a portion of the evidence of Mr Asmal before the s 418 enquiry. It is in any event unconfirmed, not certified as correct, and therefore cannot be relied upon.
- [16] If the aforesaid inadmissible evidence in the founding affidavit is ignored, (it should more correctly have been struck out on the application of the respondents) then one is left with very little which can safely be attributed to the deponent’s own personal knowledge or that is admissible.
- [17] Reading the founding affidavit fairly generously it can be accepted as common cause that the dispositions detailed in paragraph 1 of the notice of motion and the court order were made, as they appear from the corporation’s bank accounts, being documents which might have been obtained at the enquiry, but which the deponent to the founding affidavit also might have acquired during his administration of the estate. These detail the various dispositions with reference to date, amounts and also the description reflected next to the amounts in paragraph 1 of the Notice of Motion.
- [18] That these dispositions occurred within the six month period, would also follow from an acceptance of the bank statements of the corporation referred to in the preceding paragraph.
- [19] As regards whether the dispositions had the effect of preferring one creditor above another, the deponent from personal knowledge refers to ‘the largest proved unsecured creditor in the insolvent estate of the corporation’ being Aveng Trident Steel (Pty) Limited ‘a proved creditor in the sum of R10 561 834.66’ who was not paid. The dispositions made therefore, certainly and objectively, would have had the effect of preferring any creditor to whom payment was made in preference to Aveng Trident Steel (Pty) Limited.
- [20] As to whom the dispositions were made and whether the liabilities of the corporation exceeded its assets immediately after each disposition was made, is not established, mired in various factual disputes, and is sought to be addressed by applicants at the level of probabilities, to which motion proceedings don’t lend themselves. Very briefly, the requirement that the liabilities of the corporation exceeded the assets after each disposition

was made, has been sought to be established generally with reference to financial statements of the corporation. These financial statements annexed to the founding affidavit are however unsigned and were therefore never approved by the members of the Corporation as being correct. The respondents deny that the liabilities of the Corporation exceeded its assets in each instance. This denial is not a bare denial or one which can simply be disregarded as not giving rise to a genuine dispute of fact, as the respondents in this regard referred to an invoice discounting facility which the corporation enjoyed with Nedbank at the time and which, to the first respondent's knowledge, continued until or about May 2013. They submit that Nedbank certainly would not have continued to advance such invoice discounting facility to the Corporation if it was trading under insolvent circumstances. Doubt is sought to be cast on this answer in reply, but a dispute of fact remains between what is alleged in the founding affidavit and what is bona fide contended in support of the denial of insolvency in the answering affidavit.

- [21] The applicants did also not, in our view, establish on a common cause basis in whose favour the dispositions were made. The contention advanced by the applicants, based mainly on inadmissible evidence contained in the founding affidavit, is that the dispositions were made to the first respondent. The first respondent in the answering affidavit however contends, with reference to some

documentation, that the facts giving rise to the initial indebtedness in respect of which some of the dispositions are claimed to be repayments in discharge of such liability, was a liability incurred by the Corporation towards the second respondent. There might be some indicators detracting from that contention, again based largely on inadmissible evidence contained in the founding affidavit, but a material dispute of fact remains. Specifically in respect of the alleged disposition of R1 900 000 paid into the trust account of Natalie Lange attorneys, the respondent's attorney confirms under oath that she was present when the first respondent telephonically requested Mr Andrews of that firm to credit the amount to the second respondent. This in conflict with Mr Andrews' alleged evidence at the enquiry and the contents of his affidavit filed in reply, but it gives rise to a material dispute of fact, which cannot, with respect, be discounted on the basis of simply adopting a 'robust approach'. At the very least, it involves a dispute of fact between the versions of two officers of this court.

- [22] That factual dispute also affects the issue whether the alleged dispositions were indeed made to the first or second respondent. The learned judge in the court a quo found the two respondents liable jointly and severally. There is no legal basis advanced in the founding affidavit for a joint and several liability on the part of both the first and second respondents. [10] Either the voidable preference was in favour of the first respondent or alternatively the second respondent.

[23] The applicants never requested for the matter to be referred for the hearing of oral evidence on any of the disputed facts, or to trial. Any factual dispute must therefore be decided on the version of the first and second respondents. On that basis the Applicants failed to discharge the onus on all the issues in respect of which they bore the onus. The application accordingly could not succeed.

[24] This application could never have been determined on the papers. Indeed, if regard could legitimately be had to what was allegedly stated by witnesses at the enquiry, the applicants should have clearly contemplated a material dispute of fact arising and should not have proceeded by way of motion proceedings. However even assuming in their favour that motion proceedings were still available to them, when faced with the respondents' answer, raising numerous disputes of fact, the matter should have been referred to oral evidence. They elected not to do so.

[25] Mr Wallis urged this court to refer the matter to trial in the event that we find that there are material disputes of fact. However, as Harms DP (as he then was) stated in *Law Society, Northern Provinces v Mogami and Others*,^[11]

‘An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail’.

[26] There are no exceptional factors that have been presented to us so as to consider that relief.

[27] In the circumstances, the appeal must succeed with costs.

[28] The following order is granted:

‘The application is dismissed with costs. ‘

KOEN J

POYO DLWATI J

BEZUIDENHOUT J

Appearances

For the Appellant: Mr M S Khan SC

Instructed by: A.Sing & Associates, Durban

c/o Siva Chetty & Co, Pietermaritzburg

For the Respondent: Mr P J Wallis

Instructed by: Fairbridges Werthem Becker, Gauteng

c/o Berkowitz Cohen Wartski, Durban

c/o Stowel & Co, Pietermaritzburg

[1] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009

(2) SA 277 (SCA) para 26

[2] Para 11.2 of the judgment pg 364 of the papers. The judgment of the court a quo is reported on Saflii as Button N.O and others v Akbur and others [2015] ZAKZDHC 84.

[3] Para 12 of the judgment of the court a quo.

[4] Act 24 of 1936.

[5] See Cooper and Another NNO v Merchant Trade Finance Ltd 2000

(3) SA 1009 (SCA) para 15.

[6] Cooper v Merchant Trade Finance supra para 15.

[7] See Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976 (2) SA 701 (D) at 704F-G and also National Council of Societies for the Prevention of Cruelty to Animals v Openshaw [2008] ZASCA 78; 2008

(5) SA 339 (SCA) para 29.

[8] We accordingly do not express a final view thereon.

[9] Act 45 of 1988. See also Van Zyl NNO and another v Kaye NO and others 2014

(4) SA 452 (WCC) para 44. It however seems unlikely that this hearsay evidence would have been allowed, even if applied for, as the witnesses were available to give this evidence.

[10] This much was conceded, correctly in my view, by Mr Wallis who appeared for the applicants.

[11] 2010 (1) SA 186 (SCA) para 23.

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