

SOUTH AFRICA / JUDGMENT

Ameropa Commodities (Pty) Limited v Benchimol N.O and Others (D2873/2019) [2020] ZAKZDHC 14 (5 June 2020)

[2020] ZAKZDHC 14

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Steyn

CASE / FILE NUMBER

D2873/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL LOCAL
DIVISION, DURBAN
CASE NO. D2873/2019

In the matter between: AMEROPA COMMODITIES (PTY)
LIMITED
Plaintiff/Respondent
and
VERNA REGINA BENCHIMOL
N.O.
First
Defendant/First Excipient
DENNIS PAUL TOZER GREEN N.O.
Second Defendant/Second Excipient
THEODORE CASPER DE WET N.O.
Third
Defendant/Third Excipient
SALVAGE & STOCKFEED PARCELS
CC
Fourth
Defendant
(In liquidation)
LOUISE GROENEWALD
N.O.
Fifth
Defendant
MELUSI GUMBO

N.O.
Sixth
Defendant
COLIN MARK POOLE

N.O.
Seventh
Defendant
This

judgment was handed down electronically by circulation to the parties' representative by email, and released to SAFLII.

The
date and time for hand down is deemed to be 09h30 on 5 June 2020.
ORDER

It is ordered: The exception is
dismissed with costs.

JUDGMENT

Steyn J:

- [1] This is an exception to the plaintiff's amended particulars of claim dated 5 July 2019, brought by the first to third defendants, on the grounds of:
- (a) Non-joinder of the Registrar of Deeds, Pietermaritzburg.
 - (b) Failure to attach the sale agreement (cause of action).
 - (c) Locus standi.
- [2] The plaintiff has instituted action against the first to third defendants for the recovery of the immovable property described as; Portion 6 of Erf 432 Bellair, Registration Division FT, Province of KwaZulu-Natal, in extent 5040 square metres, with street address at 120 Stella Road, Hillary, Queensburgh (the property), that was fraudulently alienated by the fourth defendant prior to its liquidation. Plaintiff is seeking an order declaring the transfer of the property on 30 April 2015 from the fourth defendant to the VRB Trust No. IT020493/2014 as having being done in fraud of the creditors and falls to be set aside.
- [3] The property was alienated to the VRB Trust (the trust) of which the first, second and third defendants are the trustees. The fourth defendant (Salvage) has since been liquidated and does not defend the action. The action is defended by the trust, which has excepted to the amended particulars of claim. The plaintiff's action is based on the common law remedy actio Pauliana. The plaintiff, in its capacity as a concurrent creditor of Salvage, seeks the return of the property from the excipients to Salvage so that it can be dealt with as an asset in the estate of Salvage. For ease of reference, I shall refer to the respondent (Ameropa) as the "plaintiff" and the trust as "the defendants" or "the excipients".

Actio Pauliana

[4] The requirements for the actio Pauliana were set out in *Fenhalls v Ebrahim & others*:^[1]

“The common law on the subject of rescinding alienations made in *fraudem creditorum* is derived from the civil law. One of the actions by which this relief might be sought was the actio Pauliana, which is recognised in the Roman-Dutch authorities. Pothier on the Pandects, 42.8.2 says: “In order that a transaction may be rescinded under this edict the following factors must be present:

1. That it should be of such a nature that the debtor's assets are diminished thereby (secs. 6 and 7).
2. That the person who receives from the debtor does not receive his own property (secs. 8 to 12),
3. That there should be the intention to defraud (sec. 13 and following),
4. That the fraud should have its effect (sec. 22).”

(My emphasis).

[5] The scholars Van der Merwe and Olivier in *Die onregmatige daad in die Suid-Afrikaanse reg*^[2] summarised the actio Pauliana and concluded that the remedy is not restricted in its use by the curator bonorum only, but it is available to all creditors.

[6] In *Wiener v Estate Mckenzie*,^[3] the court analysed the authorities in support of the common law remedy, as follows:

‘. . .In *Fraudem Creditorum*. --- Under the Roman-Dutch law whenever a debtor entered into a transaction in fraud of and to the actual detriment of his creditors,

it could be set aside by an action at law, and the property disposed of recovered. See Voet (48.8); Grotius' Introduction (2.5.4); Van der Keessel (Thes. 200); Van Leeuwen's Roman-Dutch Law (Kotze's Translation, Vol. I., p. 195). In *Thurnurn v Stewart* (3 L.R., P.C. 478), the Privy Council expressed the view that the Cape Insolvency Act had not repealed the Common Law of Holland. A similar conclusion was arrived at in *Smith's Trustee v Smith* (Foord. 19). See also *Desai's Trustee v Hack* 1910 TPD 499, at p. 509; *Scharff's Trustee v Scharff* 1915 TPD 463, at p. 476).

The common-law remedy was introduced into the Roman-Dutch law from the Roman law. Hunter (Roman law, 4th edition, p. 1412) describes the remedies for fraudulent alienation *inter alia* as follows: “Actio Pauliana. This action may be brought by creditors, but not by the debtor himself or his heirs, against a person cognisant of the fraud, although he has ceased to possess the property (D. 42.8.25. 1); and also against anyone who has in his possession any property of the debtor without valuable consideration, even if innocent of fraud (D. 42.8.25.2); actio Pauliana in factum: If a person has lost possession of anything fraudulently conveyed to him, or has been fraudulently acquitted of a debt, the remedy is in factum.”

- [7] In *Commissioner of Customs and Excise v Bank of Lisbon International Ltd & another*, [4] the full bench held:

‘There is therefore authority for the view that an *actio in factum* lies for the recovery of property from a person who has acquired the property gratuitously or without valuable consideration from someone who has alienated the property in *fraudem creditorum* even though the person who acquired the property was innocent of the fraud.’

(My emphasis).

The court went on to describe the *actio Pauliana* as:

‘. . . a personal action of general application which even an individual creditor could invoke to recover from third persons, property which the debtor had alienated in *fraudem creditorum* and where the third party had received the property with knowledge of the fraud or had not given value for the property.’ [5]

- [8] In *Kommissaris van Binnelandse Inkomste en ‘n ander v Willers en andere*, [6] the Supreme Court of Appeal (the SCA) confirmed the dictum of this division in *Bank of Lisbon* above in so far as the court held that a recovery of property in instances where it was acquired gratuitously could be recovered through the *actio Pauliana*. The SCA also referred to the fact that the *actio Pauliana* may be used to recover assets even after liquidation. [7]
- [9] In *Nissan South Africa (Pty) Ltd v Marnitz NO & others (Stand 186 Aeroport (Pty) Ltd Intervening)*, [8] the SCA approved the approach by Thirion J in *Bank of Lisbon* and rejected the criticism of the authors Malan and Pretorius in *Malan on Bills of Exchange Cheques and Promissory Notes* 4th ed, that interdicts can only be granted on the basis of the *Mareva*-type injunctions. [9]

Non-joinder

- [10] The principles with regard to joinder of a party to proceedings have been well established over the years in many decisions. The test remains whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party non-joined. [10]
- [11] The excipients aver that as the plaintiff seeks a declaration to set aside a transfer of an immovable property as recorded by the Deed of Transfer, it had to join the Registrar of Deeds, since it is the Registrar who oversees and records transactions in relation to immovable property. It has been submitted that the Registrar is tasked to deal with the registration of property and has a direct and substantial interest in the subject matter before court and ought to have been joined. It has been argued that the plaintiff ought to have sought a cancellation of the transfer in terms of s 6 of the Deeds Registries Act 47 of 1937. [11]
- [12] In *Gordon v Department of Health, KwaZulu-Natal*, [12] the SCA dealt with joinder as follows:

‘The Du Preez and Traub decisions had nothing to do with non-joinder, a fact acknowledged by the LAC. They were concerned primarily with the audi alteram principle in circumstances where a public body had failed to afford certain individuals a hearing in matters in which their interests and rights were at stake. The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the Amalgamated Engineering Union case (supra) it was found that “the question of joinder should . . . not depend on the nature of the subject-matter . . . but . . . on the manner in which, and the extent to which, the court’s order may affect the interests of third parties”. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or “judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests” of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.’^[13]

(Footnotes omitted). (My emphasis).

^[13] The salient allegations in the amended particulars of claim in support of the actio Pauliana are inter alia the following:

‘12.

On or about 30 April 2015 the fourth defendant caused to be transferred to the VRB Trust (hereinafter referred to as “the Trust”) the immovable property described as “Portion 6 of Erf 432 Bellair, Registration Division FT, Province of KwaZulu-Natal, in extent 5040 square metres”, which has its street address at 120 Stella Road, Hillary, Queensburgh (hereafter referred to as “the property”). A copy of the Deed of Transfer is annexed hereto marked “H”.

13.

Although the purchase price in the Deed of Transfer is reflected as R10 000 000.00 in fact no money changed hands and the transfer of the property was affected without payment being made or available consideration given by the Trust to the fourth defendant.

14.

When the property was transferred to the Trust, the fourth defendant was insolvent and was indebted to the plaintiff in the sum of R16 695 887.65, in respect of wheat sold and delivered by the plaintiff to the fourth defendant on a running account. A copy of the comprehensive statement of account of all wheat sold and delivered by the plaintiff to the fourth defendant is annexed hereto marked "I".

. . .

16.

The alienation of the property to the Trust diminished the fourth defendant's estate. As a result of the fraud the plaintiff is unable to recover its claim from the fourth defendant.

17.

The property did not belong to the Trust and the Trust had no lawful right to receive it. The trustees of the Trust accepted the transfer of the property with knowledge that the Trust had not paid the purchase price of R10 000 000.00 to the fourth defendant.

18.

The fourth defendant's intention in transferring the property to the Trust was:

- (a) to represent to its creditors (which include the plaintiff) that the property did not belong to it anymore;
- (b) to represent to its creditors that the Trust had purchased the property from the fourth defendant;
- (c) to represent to its creditors that the Trust had given valuable consideration for the property;
- (d) to prevent its creditors from executing against the property;
- (e) to prevent its liquidators, in the event of its insolvency, from realising the property and distributing to its creditors.

19.

At all times material hereto, and in particular at the time when the property was transferred from the fourth defendant to the Trust, the fourth defendant knew:

- (a) that its aforesaid representations to the plaintiff and its other creditors were false;
- (b) that it was insolvent;
- (c) that it was indebted to the plaintiff;
- (d) that the Trust was not entitled to the property;
- (e) that the Trust was not paying for the property or giving any valuable consideration for it;

- (f) that the result of the transfer would be that the plaintiff and other creditors would be unable to levy execution against the property, so as to satisfy the debts due by the fourth defendant to them;
- (g) that the result of the transfer would be that the liquidators of the respondent would be unable to realise the property for the benefit of creditors, in the event of its liquidation.’[14]

[14] The plaintiff in opposition to the exception submitted that the relief sought is an order declaring that the disposal of the property was in fraud of the creditors. It has been submitted that the order sought does not in itself have the effect of setting the transfer aside. Further steps have to be taken by the parties in order to set the transfer aside. It is also contended that the Registrar of Deeds has no legal interest in the matter nor will the Registrar be affected prejudicially by the order sought. In addition, the plaintiff did send a letter to the Registrar, with copies of the papers, informing the Registrar about the matter and whether he wished to intervene. No intervention was asked for.

[15] In my view, it is necessary to emphasise the need for joinder. Horwitz AJP in *Henri Viljoen (Pty) Ltd v Awerbuch Brothers*[15] stated:

‘The decision in the *Amalgamated Engineering Union* case is binding on this Court. It is necessary, however, to bear in mind the distinction between joinder as of right and leave to intervene and to enquire a little more closely into the test enunciated in that case of “a direct and substantial interest” and when a third party's interest will be “prejudicially affected by the judgment”.

The first point can be briefly dealt with. Joinder is necessary in the cases referred to in *Morgan's* decision, *supra*. It may also be necessary in other cases, but the right to claim the joinder of a third party “is very limited” (*Sheshe's* case at p. 666). It is certain, however, that where leave to intervene cannot be granted then, a fortiori, a claim that a third party must necessarily be joined cannot be maintained.’[16]

[16] The plaintiff is not challenging the transfer process, what is being challenged, is the underlying causa for the transfer of the property, i.e. the alienation of the property. Applying the test for material non-joinder, I find that the Registrar of Deeds does not have to be joined as a party to these proceedings, since he has no direct and substantial interest in this matter and will not be prejudicially affected by the order sought.

Cause of action

[17] The submissions advanced on behalf of the excipients on this ground, fuse the two grounds of cause of action and locus standi in iudicio into one. I shall deal however with each of the grounds separately because they are distinct, in my view.

- [18] The defendants take exception to the plaintiff's amended particulars of claim in that the plaintiff has failed to plead the terms of the sale agreement that resulted in the transfer of the property from Salvage to the trust. In addition, it has been argued that the plaintiff failed to attach the agreement of purchase and sale, which forms the underlying causa that resulted in the transfer of the immovable property. In light of the aforesaid, it has been argued that the plaintiff has failed to establish a cause of action against the excipients.
- [19] In opposition to the exception raised, the plaintiff submitted that the sale agreement need not form part of the particulars, since the alienation of the property is the cause of action. Since the plaintiff relies on the actio Pauliana, it submitted that all it had to do was to plead the essential requirements of the actio Pauliana, which it claims it did.[17]
- [20] In my view, the excipients are mistaken in placing reliance on the sale agreement as the cause of action. It is clear from an analysis of the amended particulars of claim that all of the requirements of the actio Pauliana are met and that it matter not whether the property was obtained by way of sale, a donation or barter or in any other way.[18]
- [21] The defendants do not challenge the plaintiff's reliance on the actio Pauliana or that the common law remedy is insufficient to defeat the rights of the trust over the property. The amended particulars of claim referred to earlier in this judgment show that each of the requirements are complied with. The exception on this ground is bad in law and cannot be upheld, since the plaintiff has established the cause of action.

Locus standi

- [22] The excipients submit that the action ought to have been instituted by the liquidators of Salvage and not the plaintiff. In my view, the plaintiff's locus standi is directly connected to the stated cause of action, which is the actio Pauliana. On this ground the excipients relied on *Wolpe v Gale*[19] in argument. In my view, the dictum at 262C-E merely endorsed the principle that the Insolvency Act 24 of 1936 (the Insolvency Act) does not deprive creditors of any rights which they may have under the common law.
- [23] The plaintiff is not seeking an order that the property be returned to it, in reality it is seeking an order to return the property to Salvage, the insolvent company. The plaintiff remains to be a creditor that will in all likelihood share in the proceeds of realisation of the property by the liquidators, after the property has been restored to Salvage.
- [24] Had the defendants considered the actio Pauliana and that it grants a creditor in an insolvent estate a remedy under the common law to recover asset(s) that ought to have been in an insolvent estate, they would never have raised an exception on the ground that the plaintiff does not have locus standi. The actio Pauliana is still available to creditors even after the liquidation of the debtor. The Insolvency Act does not deprive a concurrent creditor of his/her rights in terms of the common law, as long as the enforcement of such right is not inconsistent with any of the provisions of the Act. The plaintiff as a creditor has locus standi under the actio Pauliana.[20]

[25] It follows, for the reasons above that the exception taken by the excipients on the grounds listed above is without merit and fails.

Order

[26] Accordingly, it is ordered:

The exception is dismissed with costs.

Steyn J

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Date of hearing

: 27 May

2020

Judgment Delivered Electronically : 5 June 2020

- [1] Fenhalls v Ebrahim & others 1956 (4) SA 723 (D) at 727D-G.
- [2] N J van der Merwe and P J J Olivier Die onregmatige daad in die Suid-Afrikaanse reg 6 ed (1989) at 259-261.
- [3] Wiener v Estate Mckenzie 1923 CPD 562 at 579.
- [4] Commissioner of Customs and Excise v Bank of Lisbon International Ltd & another 1994 (1) SA 205 (N) at 210C-D.
- [5] Ibid at 213F-G.
- [6] Kommissaris van Binnelandse Inkomste en 'n ander v Willers en andere 1999 (3) SA 19 (SCA).
- [7] Ibid para 23. Also see para 17 where the SCA refers to the actio Pauliana as follows: 'Die partye is dit eens dat enige regshandeling waardeur 'n skuldenaar in fraudem creditorum van sy goed vervreem, vernietig kan word onder die moderne vorm van die actio Pauliana. In die lig van uitsprake soos dié in Fenhalls v Ebrahim and Others 1956
- (4) 723 (D) op 727D - G en Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another 1994 (1) SA 205 (N) op 209D - J het mnr Delpont aanvaar dat 'n suksesvolle eis om vernietiging bewys verg, onder andere, dat die regshandeling 'n vermindering van die skuldenaar se bates tot gevolg gehad het en verrig is met die doel om te bedrieg in die sin van 'n bedoeling om skuldeisers, of 'n besondere skulderiser, te benadeel.'
- [7] Ibid para 23. Also see para 17 where the SCA refers to the actio Pauliana as follows:
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- [8] Nissan South Africa (Pty) Ltd v Marnitz NO & others (Stand 186 Aeroport (Pty) Ltd Intervening) 2005 (1) SA 441 (SCA) at para15.

[9] Ibid para 19. Also see Commissioner, South Africa Revenue Service, and another v Absa Bank Ltd & another 2003 (2) SA 96 (W) at 129B-7 where Van der Nest AJ preferred the views of Malan and Pretorius. In my view, the SCA dealt with the criticism authoritatively in Nissan's case.

[10] Absa Bank Ltd v Naude NO and Others 2016 (6) SA 540 (SCA).

[11] Section 6 reads: '(1) Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court. (2) Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in subsection (1), the deed under which the land or such real right in land was held immediately prior to the

registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.'

[11] Section 6 reads:

'(1) Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court.

(2) Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in subsection (1), the deed under which the land or such real right in land was held immediately prior to the

registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.'

[12] Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA).

[13] Ibid para 9.

[14] See pleadings at 10-12.

[15] Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O).

[16] Ibid at 166H-167A.

[17] See L T C Harms Amler's Precedents of Pleadings 9 ed (2018) at 21- 22. Also see 27 Lawsa 2 ed para 246 at 321.

[18] See Bank of Lisbon above at 210D.

[19] Wolpe v Gale 1980

(3) SA 259 (W).

[20] It is acknowledged that liquidators have remedies in terms of the Close Corporations Act 69 of 1984, the Companies Act 61 of 1973 and the Insolvency Act. None of these statutes deprives a creditor of his/her common law rights.

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