

SOUTH AFRICA / JUDGMENT

Benade N.O and Another v Donald and Another (079845/2023) [2023] ZAGPPHC 702 (23 August 2023)

[2023] ZAGPPHC 702**COURT**

North Gauteng High Court, Pretoria

BEFORE

Adams

CASE / FILE NUMBER

079845/2023

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Source record**REPUBLIC OF SOUTH
AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE****NO:** 079845/2023**DATE:** 23rd
August 2023
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)**REVISED:** Date: 23rd August 2023**Signature:** In

the matter between:	BENADÉ, MARIETTE N O First Applicant MATHEBULA, TIRHANI SITOS DE SITOS N O Second Applicant and DONALD, RENEÉ SUSAN First Respondent THE REGISTRAR OF DEEDS Second Respondent
Neutral Citation:	Benadé and Another v Donald and Another (079845/2023) [2023] ZAGPPHC 369 (23 August 2023)
Coram:	Adams J
Heard:	22 August 2023
Delivered:	23 August 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 09:30 on 23 August 2023.
Summary:	Urgent application – anti-dissipation interdict – proceeds of sale of house – provisional liquidators of company seeking interim order preserving proceeds of sale of director's immovable property – what is required is for the applicant to show that the debtor is getting rid of funds or is likely to do so, with the intention of defeating the claims of creditors – the effect of the interdict is to prevent a respondent from freely dealing with his own property – Applicants not meeting these requirements – application dismissed with costs. ORDER (1) The urgent application of the first and the second applicants is dismissed with costs. (2) The first and the second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first respondent's costs of the urgent application.

JUDGMENT

Adams J:

[1]. In this opposed urgent application, the first and the second applicants, who are the joint provisional liquidators of The Food Factory (Pty) Limited (in Liquidation) ("TFF"), apply for a preservation order of sorts in respect of the proceeds of the sale of a house, belonging to the first respondent, who is a shareholder and a director of TFF. Orders are also sought in terms of section 386 of the Companies Act, Act 61 of 1973, for an extension of the powers of the joint provisional liquidators. On my reading of the applicants' papers, the main object of the application is, however, the anti-dissipation order.

[2]. The case of the applicants, in a nutshell, is that during the period from April 2021 to March 2022, payments totalling R2 133 200 were made by TFF to a related company by the name of Promivax CC, of which the first respondent is also the sole member. This amount, so the liquidators contend, can and should be repaid by Promivax to TFF as being an impermissible disposition. They therefore intend instituting action against Promivax to recover that sum. Moreover, so the case on behalf of the liquidators goes, the first respondent should be held personally liable for the debts of Promivax because she inter alia recklessly allowed it to trade in insolvent circumstances. If necessary, an application will be brought for the liquidation of

Promivax with a view to put into operation the mechanisms available to them to ultimately obtain a judgment against the first respondent

to repay to TFF via Promivax the said amount.

[3]. It is with the foregoing foreshadowed legal proceedings in mind, that the applicants wish to have preserved the assets of the first respondent, in particular the proceeds from the sale of her house. In that regard, it is common cause that the house has been sold and the registration of transfer is imminent. From the foregoing, it is clear that there is a long way to that point when the first respondent would be liable to pay to the applicants the above sum or, for that matter, any amount – in my view, it will be a long haul to that point. All the same, in this urgent application, as I have already indicated, the applicants ask for an interim order preserving the net proceeds of the sale of the first respondent's property, pending the final determination of the legal actions to be instituted against her and her husband and their legal entities, which, the applicants aver, have good prospects of success.

[4]. The first respondent disagrees and contends that she has a valid and sustainable defence against any and/or all of these alleged claims against her. Her husband gives an explanation for these payments to Promivax, which they allege were all above board. In any event, so the first respondent contends, she is not dissipating her assets and if and when the applicants are successful with their foreshadowed legal action against her, she will, in all likelihood, be able to pay any judgment debt obtained against her.

[5]. The applicants, on the other hand, are of the view that, having regard to the manner in which the first respondent and her husband conducted themselves, especially in the business of TFF, she will most likely not be able to pay any judgment debt obtained against her by them. This would then mean, so the argument on behalf of the applicants goes, that, in the event of them obtaining a judgment against the first respondent, same would be a hollow one. And to counter such eventuality an anti-dissipation order is applied for presently.

[6]. The case of the applicants is based on an anti-dissipation interdict, which would require them to show that the first respondent is likely to spirit away the proceeds from the sale of her house to the detriment of the liquidated company, being TFF. In *Knox D'Arcy Ltd and Others v Jamieson and Others*[1], Grosskopf JA discussed the nature and effect of the so-called anti-dissipation interdict and found that what is required is for the applicant to show a certain state of mind of the respondent, ie that the debtor is getting rid of funds or is likely to do so, with the intention of defeating the claims of creditors. Grosskopf JA goes on to say that this interdict is sought

'by the petitioners ... to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in these assets ... It is not the usual case where its purpose is to preserve an asset which is in issue between the parties. Here the petitioners lay no claim to the assets in question.' Grosskopf JA then turns to the effect of the interdict and finds that it is to 'prevent the respondent from freely dealing with his own property to which the applicant lays no claim'.

[7]. This is the relief sought by the applicants in casu. What they essentially apply for is an interim interdict to secure the proceeds of the sale of the house, pending the finalisation of a string of anticipated litigation, which would include a claim against Promivax to reclaim the above amount of R2 133 200, an application for the liquidation of Promivax and a claim by Promivax (in liquidation) to recover that amount from the first respondent

personally. The question to be considered is whether the applicants have made out a case for such relief.

[8]. In my view, the applicants have not, in this application, established that it has a prima facie case against the first respondent. A case most certainly is not made out by TFF against the first respondent. In that regard, the applicant's case is sketchy at best and speculative in general. Moreover, as already alluded to above, there would and could be many slips between now and finally getting the judgment against the first respondent as envisaged by the applicants.

[9]. I am singularly unpersuaded that the applicants' claim against the first respondent is as open and shut as they would have the court believe. It therefore follows that the applicants are not entitled to a preservation order. The simple point is that the applicants have not, in my view, shown that they have a case, let alone a fairly strong one, for the payment by the first respondent of the amounts allegedly due to TFF. Moreover, no case is made out that the first respondent intends secreting her assets with the intention of thwarting the claim or claims of the applicants on behalf of the liquidated company.

[10]. It requires reiteration that the applicants have not, in my judgment, satisfied the other requirements relating to the granting of an anti-dissipation order. In particular, it has not been demonstrated by the applicants that the first respondent intends spiriting away the proceeds of the sale of her house so as to subvert the alleged unassailable claims by the applicants. For this reason alone, the applicants' application should fail.

[11]. There may very well be other reasons why the application should not succeed, such as the fact that the provisional liquidators, with limited powers, cannot legally invoke the provisions of section 386(3), read with 386 (4) and (5) of the Companies Act 61 of 1973, which means that they lack the necessary standing to have brought this application. It is however not necessary to make a definitive finding in that regard in light of my foregoing conclusions. Moreover, and in particular in relation to the application for the relief sought in terms of s 386 of the Companies Act, in light of my above findings, the application is not urgent and should therefore fail.

[12]. For all of these reasons, the applicants' urgent application falls to be dismissed.

Costs

[13]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[2].

[14]. I can think of no reason why I should deviate from this general rule.

[15]. Accordingly, I intend awarding costs in favour of the first respondent against the first and the second applicants.

Order

[16]. Accordingly, I make the following order: -

L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Pretoria

HEARD ON: 22nd August 2023 JUDGMENT DATE: 23rd August 2023 – judgment handed down electronically FOR THE FIRST AND THE SECOND APPLICANTS: Advocate H P Wessels

INSTRUCTED BY: Van der Merwe & Associates, Waterkloof, Pretoria FOR THE FIRST

RESPONDENT: Advocate N Alli INSTRUCTED BY: Tero Bailey Attorneys, Bryanston, Randburg

FOR THE SECOND RESPONDENT: No appearance INSTRUCTED BY: No appearance

[1] *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A); [1996] 3 All SA 669; [1996] ZASCA 58.

[2] *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

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