

SOUTH AFRICA / JUDGMENT

Boshoff Visser Paarl (Pty) Ltd Limited v Oudewoning Boerdery (Pty) Limited [2019] ZAECHGHC 21 (5 March 2019)

[2019] ZAECHGHC 21

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Poswa-Lerotholi

CASE / FILE NUMBER

4373/2017

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IN

THE HIGH COURT OF SOUTH AFRICA, EASTERN CAPE DIVISION, GRAHAMSTOWN
CASE

NO: 4373/2017

In

the matter between:

BOSHOFF
VISSER PAARL (PTY) LTD LIMITED
Applicant
and
OUDEWONING
BOERDERY (PTY) LIMITED
Respondent

JUDGMENT

Poswa-Lerotholi, AJ

[1] This is an application for the provisional liquidation order. The Applicant is Boshoff Visser Paarl (Pty) Ltd an accounting auditing firm, the Respondent is Oudewoning Boerdery (Pty) Limited a farming company. The Applicant alleges that the Respondent is indebted to it in the sum of R145 469.34 as at 31 October 2016. The debt is made up of; R97 135.00 capital and R48 334.34 interest. The debt arises out of accounting services rendered to the Respondent in the years 2014 to 2016. The Respondent denies the whole debt.

Applicant's

submissions

- [2] The Respondent owes the Applicant a sum of R145,469.34, recorded in the letter of demand dated 17 November
2016. The debt is due and payable. It is common cause that there is proof of service of the notice. The Applicant submitted that the only issue between the parties is the debt, which, in the opinion of the Applicant, is not an impediment to a claim for provisional liquidation as it can be resolved with the liquidator. The Applicant submitted that, it has satisfied the three requirements for provisional order of sequestration in terms of this section 345(1)(a) of the Companies Act, 1973 requirements to seeking a provisional.
- [3] The Applicant further argued that the document put up by the Respondent in support of its contention that it is able to pay its debts, is inadmissible. The said document did not meet the evidentiary requirements for proving liquidity, primarily because it was not compiled by an expert in the field. Furthermore, the Applicant pointed out that prior to the institution of the proceedings, the Respondent never disputed its indebtedness to the Applicant. To the contrary, the Respondent acknowledged the debt, promised to settle the debt and reached a payment agreement with the Applicant, paid a sum of R30 000 towards the capital debt.

Respondent's

Submissions

- [4] On behalf of the Respondent the following submissions were made. There are several role players in this matter. The Respondent, is a private company, and a juristic person. which can sue and be sued. It is part of a group of companies which make up Johanne Petrus Potgieter Pty Ltd consisting of Modesto, WelPic Packhouse and Export (Pty) Ltd, JP Trust and Welgemoed. Johannes Petrus Potgieter junior ("Potgieter, junior"), is the sole director of the Respondent and Johannes Petrus Potgieter ("Potgieter") is a former director of the Respondent, he deposed to the answering affidavit on behalf of the Respondent. The Respondent asserted that the matter revolves around the identity of the debtor. As far as the Respondent is concerned the Applicant is pursuing the wrong debtor. In any event, liquidation proceedings are not the appropriate procedure for the recovery of debt.
- [5] On the papers before court, all the e-mails and correspondence were directed to Potgieter in his personal capacity, there is no reference to the Respondent. On 25 February 2016, the Applicant attempted to recover the debt by serving summons on Potgieter in his personal capacity. Subsequently, the Applicant obtained a default judgment against, Potgieter whereafter, the Sheriff served a warrant of execution and a nulla bona return. The Applicant realised that Potgieter was not in a position to settle the debt and opportunistically began to pursue the Respondent. At the inception of these proceedings, the judgment against Potgieter was still in place. The applicant belatedly issued a Notice of Abandonment after the Respondent filed its answering affidavit. It is evident that had the Applicant been able to recover the debt from Potgieter, the Applicant would not have instituted these proceedings.

[6] Whilst pursuing the Respondent, the Applicant continues to identify Potgieter as the debtor in his personal capacity. In the replying affidavit, on more than three occasions the following averments are made-

[6.1] At paragraph 3.7 in part reads-

“Thus, it is submitted, ex facie the documents, that the Respondent carried on its business recklessly, with gross negligence and/or with the intention to defraud the Applicant and or any other creditor and should and Potgieter could be held liable in his personal capacity for his act and/or omission. “

[6.2] At paragraph 4.2 –

“The Applicant has, as indicated in its founding papers, instituted legal action against Potgieter on the basis that he was also liable for the Respondent’s debt as well as four other entities, in his personal capacity.

[6.3] At paragraph 4.6-

“It is submitted that the accounts were rendered and addressed to the Respondent at all times, however as the Respondent did not have the requisite number of directors as per the provisions of the Act, thus in the circumstances Applicant is entitled to hold Potgieter personally liable for costs the Respondent and/or the Applicant incurred.”

[7] In the circumstances, the Applicant has not proved the Respondent’s indebtedness. The Applicant has not made out a case for provisional liquidation. Consequently, the Respondent has proved a bona fide defence. \

[8] Although the Respondent acknowledged that it is within the discretion of the court to grant the order, it pleaded that an order for provisional liquidation of the Respondent, would have dire consequences. Respondent is a farming enterprise which employs 10 farmworkers would have a devastating effect on the employees most of whom are breadwinners.

[9] The Respondent also argued in limine that the debt had prescribed. The Applicant submitted that the debt upon which the Applicant bases its claim consists of nine invoices dated from 31 January 2014 to 31 August 2016.

31 January 2014

R2 223.00

24 February 2014

R17 100. 00

25 June 2014

R 2 394.00

11 August 2014

R 33 060, 00

30 September 2014

R 36 366,00

30 January 2015

R 2 394,00

30 June 2015

R 2 565, 00

29 February 2016

R 805,00

31 August 2016

R228.00

[10] The Respondent submitted that most of these claims had prescribed as the debt had exceeded the 3-year period for debts in terms of section 15(1) of the Prescription Act. The Respondent denied the Applicant's assertion that prescription had been interrupted by the acknowledgement of debt. The Applicant submitted that it was Potgieter who acknowledged the debt and not the Respondent. In any event, so argued the Respondent, a further 3-year period had elapsed since the alleged interruption. Relying on the case of *Misnum v Nobel Street*[1], the Respondent argued that the issuing and service of process does not interrupt prescription of winding up or sequestration proceedings.

[11] The Applicant denied that the claims had prescribed arguing that, in the first instance, the Respondent did not specify the date upon which prescription began to run as required in a plea of prescription. Additionally, the Applicant argued that various events had interrupted prescription:

[11.1] The meeting with Potgieter on 10 August 2015 representing the 5 entities including the Respondent;

[11.2] On 11 September 2015, Potgieter, confirmed the discussions in the meeting with the Applicant in writing, acknowledged the debt and agreed prepared a payment arrangement in writing.

[11.3] On 12 November 2015, Potgieter effected payment of the sum of R30,000 towards the debt.

[11.4] The institution of proceedings in September 2017.

- [12] I agree with the Respondent's contention that the alleged interruption does not assist the Applicant as a further three-year period has elapsed since the alleged interruption. There is no doubt, and counsel for the Applicant conceded, that the debt claimed by the Applicant has prescribed within the meaning of section 15 of the Prescription Act 68 of 1998 ("the Prescription Act"). At issue is whether the Applicant has discharged the onus of interruption of prescription as alleged by the Applicant.
- [13] Section 14 of the Prescription Act provides for the interruption of prescription it reads-
- "Interruption of prescription*
- (1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor;
 - (2) if the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the party is the due date of the debt from the date upon which the debt again becomes due."
- [14] The primary objectives of extinctive prescription are the achievement of legal certainty and finality in litigation as well as the need for expeditious and diligent enforcement of rights by the debtor. Section 14 of the Prescription Act, however protects the creditor. The uncertainty will be cured if the debtor acknowledges liability.[2]
- [15] Section 15(1) of the Prescription Act, provides for the interruption of the running of prescription if the debtor institutes and prosecutes legal proceedings for the recovery of the debt against the creditor. In order for the creditor to successfully plead the interruption of prescription the service of process must be served on the correct debtor by the correct creditor.[3]
- [16] Goldstone, AJ in *Misnun's Heibron Roller Mills Holdings (Pty) Ltd v Nobel Street (Pty) Ltd*[4] held that an application for a provisional winding - up order is not one for a debt to due by the debtor to the creditor. Such proceedings are instituted by a creditor, not for the purpose of claiming something from the debtor but for the purpose of setting the machinery of the law in motion to have the debtor wound up.
- [17] Granted, the court must enquire into the veracity of the allegations made in the application, such as the indebtedness of the alleged debtor. However, there is no claim by the creditor against the debtor to pay what is due. The order sort by the creditor relates only to the claim for provisional winding up.
- [18] It follows that an application for a winding up order is not a legal proceeding for the enforcement of a right relating to the Applicant's debt. It is not process whereby the Applicant claims payment of the debt consequently, the service of such an application does not have the effect of interrupting the running of prescription as contemplated in section 15(1) of the Prescription Act.

[19] I find that, save for the invoice dated 31 August 2016, for the sum of R228.00 all other debt which the Applicant might have had against the Respondent have become prescribed.

[20] Counsel for the Applicant conceded that if I find that the other debts have prescribed the balance of R228.00 will be too little and therefore the Applicant will not pursue the liquidation procedure.

[21] Accordingly, I issue the following order:

1. The application is dismissed;
2. The applicant is to pay the costs of the application.

S POSWA-LEROTHOLI

Acting Judge of the High Court

Appearances:

For the plaintiff

: Adv Sephton

Instructed by

: Nolte Smit Inc

GRAHAMSTOWN

For the Defendant

: Adv Watt

Instructed by

: Netteltons

Date heard

: 7 February 2019

Date delivered

: 5 March 2019

[1] 1979

(2) SA 1127

[2] Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality 1984(1) SA 571(A) at 578H-579A.

[3] Blauuwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd 2004(3) SA 160.

[4] 1979

(2) SA 1127 at 1129A- D

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Prepared on 11 October 2026 · Esheria