

SOUTH AFRICA / JUDGMENT

Botha N.O. and Others v Carstens and Others (50323/14) [2017] ZAGPPHC 527 (10 August 2017) [2017] ZAGPPHC 527

COURT

North Gauteng High Court, Pretoria

BEFORE

N M Mavundla

CASE / FILE NUMBER

50323/14

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IN

**THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)****CASE****NUMBER: 50323/14**

DATE:

10/8/17

In

the matter between:

J

H BOTHA N.O .

FIRST

APPLICANT

DM

BOTHA

N.O.

SECOND APPLICANT

V

D RAMUEDZISI N.O.

And

DAVID

RICHARD MARTIN

CARSTENS 1ST

RESPONDENT

THE

PERSONS CAPTURING THE GAME AT OR NEAR

REMAINING

EXTENT OF PORTION 2 OF THE FARM

SWEET
HOME AND REMAINNG PORTION 8
OF
THE FARM SWEET HOME AND THE FARM VERGEET
MY
NIET 194, DISTRICT VENTERSDORP,
NORTH
WEST
PROVINCE 2ND
RESPONDENT
DAVID
RICHARD MARTIN CARSTENS SENIOR 3RD
RESPONDENT

JUDGMENT

MAVUNDLAJ;

- [1] The applicants in their capacities as provisional trustees of the insolvent estate of the first respondent, approached this Court on urgent basis seeking, inter alia, an order that the third respondent, being the father of the insolvent, should be restrained from shooting, capturing, removing or in any other way dealing with any of the game in the game camp situated on the farms "Remaining Extent of Portion 8 of the Farm Sweet Home and the Farm Vergeet My Niet" ("the farms), pending an action to be instituted for a final declaratory that the game is part of the insolvent's estate. A rule nisi in this regard was obtained and stands extended pending the judgment regarding the confirmation or discharge of thereof.
- [2] The first respondent has since been finally sequestered. He owns a substantial number of immovable and movable assets. Both the applicants, and the sequestrating creditor, contend that the first respondent is the owner of the game, consisting of various species, held at a game camp in the district of Ventersdorp.
- [3] According to the applicants the first respondent was extremely uncooperative with his creditors, and dissipated assets. Numerous applications had to be brought to preserve his assets. After the applicants took charge of the affairs of the first respondent, they alleged that they became aware, on the morning of 8 June 2014, that there are attempts made to capture and remove the game held at the game camp.
- [4] The applicants at very short notice brought an urgent application which came before Bertelsmann J. The aim of the application was to obtain an interim relief to preserve the game. That relief was granted, and towards that end a rule nisi was extended pending the delivery of this judgment confirming or discharging same.
- [5] The application was argued and judgment was reserved and this is the relevant judgment. It behoves this court to apologise profusely for the inordinate delay of this judgment, occasioned by various circumstances which need not be the subject of this matter.

[6] The applicants are the trustees in the insolvent estate of the first respondent. They are in a position of trust. Their duty, inter alia, is to identify all assets, corporeal and otherwise, moveable and or immovable, which ought to fall within the domain of the insolvent

estate, and take reasonable steps to protect same. They are duty bound to protect the potential interest of creditors and take

possession of the goods even that which has been collusively disposed of; vide *Standard Bank v Master of the High Court*[1]; *Meyer NO v Tvl Lewendehawe Koop en Andere*. [2]

[7] The applicant do not seek a final relief, they only seek confirmation of the preservation order. They have also indicated that they were going to institute a claim. I need not interrogate this aspect whether they have since done so. In the matter of *National Council of SPCA v Openshaw*[3] *Mhlanhla AJA* (as she then wsa)

held that:

"[20] An interdict is not a remedy for the past invasion of rights but is concerned with the present or future. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated. The requisites for the right to claim an interim, interdict are

- (a) a prima facie right. What is required is proof of facts that establish the existence of a right in terms of substantive law;
- (b) A well- grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) The balance of convenience favours the granting of an interim, interdict;
- (d) The applicant has no other satisfactory remedy."

In my view, the applicants have established a prima facie right, to establish whether the game falls within the insolvent estate.

[8] The test in regard to the second requirement is objective and the question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm. The following explanation of the meaning of 'reasonable

apprehension ' was quoted with approval in the *Minster of Law and Order v Nordien and another* . [4]

'a reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being confronted with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable apprehended that injury will result. However the test for apprehension is an objective one. This means that, on the basis of facts presented to him, the Judge must decide whether there is any basis for the entertainment of reasonable apprehension

by the applicant. [5]

- [9] In an affidavit of Carel Van Herden (annexure "DRM2") a farmer and registered professional wild animal catcher, registered as such with the Department of Natural Conservation, he stated that during June 2014, he acted on instructions from the third respondent to catch his game and sell it. He managed to get a buyer in the name of S J Potgieter. During June 2014 he managed to catch the game of the third respondent in the third respondent's game camp situated in the farm of the third respondent's wife Mrs Carstens. The first respondent was present but only as an observer and had no interest in the game. I do accept that on the strength of this evidence, the applicants had a reasonable apprehension that the wild game was being or about to be removed out of the estate of the insolvent. They were therefore entitled to approach the Court for the relief they sought.
- [10] It is trite that in motion proceedings, the applicant is to adduce his evidence in one piece in the form of an affidavit, including that of his witnesses (confirmatory affidavits) coupled with discovered documents which must be referred in, and attached to the affidavit; vide Judgment of Joffe J *Swissborough Diamond v Government of The RSA*[6] : "In an application the notice of motion and founding affidavit, together with its annexures, constitute pleadings and evidence which must justify the grant of the relief sought." Vide also *n DH Brothers Industries v Granite NO* .[7] The applicant stands or falls on the contents of his affidavit; vide *Bowman NO v De Souza Roldao*.[8]
- [11] In casu, an intervening party, namely JS Afslaers CC t/a Swarico Afslaers brought under the same case number herein above an application for leave to intervene in the main application and joined as the fourth respondent and for an order interdicting and restraining any of the respondents (i.e including the applicants and the respondents in this application, from removing or alienating the game in the game camp ("the game") situated on the farm REMAINING extent of Portion 2 of the Farm Sweet Home, Remaining Extent of Portion 8 of the Farm Sweet Home and of the Farm Vergeet My Niet; and staying the main application pending the outcome of an application to be brought by the intervening party for the declaratory relief that the intervening party is the owner of the game within 30 days pursuant to an order in terms hereof, inter alia. Needless to state that, that application to intervene was dismissed by this Court.
- [12] The general rule in motion pleadings is that parties are not at liberty to file further affidavits without the leave of the Court; vide *Standard Bank of SA v Sewpersadh and Another*[9]; *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another*[10]. An applicant is allowed to file a further affidavit, replying affidavit dealing with the issues raised by the respondent. In casu, after the applicants had filed their replying affidavit, the third respondent sought leave to file what it called a rejoinder affidavit, to correct what it alleged to be misstatements in his answering affidavit.

[13] The applicant, subsequent to the rejoinder affidavit, sought leave to file a supplementary affidavit in order to address new issues which emanated from the rejoinder affidavit, and various contradictions in the affidavits deposed to by the respondents and the intervening applicant, inter alia. The applicant also placed annexures, including a transcript of the evidence under oath by the senior and junior in the insolvency

inquiry involving the insolvent estate of the latter. In my view and exercise of my discretion, the supplementary affidavit was therefore justified and is accepted; vide *Vandenhende v Minister of Agriculture, Planning and Tourism*, WC.[11]

[14] It needs mentioning that Carstens senior contended that he is the owner of the game in dispute, which he bought from Swarico Auctioneers, and attached annexure "B" showing that he bought same for R339

264. 00. Senior also attached a verifying affidavit of Steinmann on behalf Swarico to buttress the aforesaid allegation. To emphasise that he is the owner of the game, Carstens senior further deposed that: "The fact that he is the owner of the game is confirmed by permit 14/0021NM, issued by the Department of Economic Development, Conservation and Tourism, North West Province, in which they confirmed and gave permission for me to sell and transport my game." However, in the joinder affidavit, Carstens senior retracted the aforesaid version contending that the game as a matter of fact belonged to Swarico because he had not fully paid for it. This patent contradiction he ascribed to his illiteracy and lack of understanding the difference between ownership and bona fide possessor, in spite of the fact that he was at all relevant time duly legally represented. It needs mentioning that Steinman in his application to intervene alleged that the game belonged to Pienika Boerdery CC. In my view, the dictates of fairness and justice warrant that this Court should have regard to what had been placed before it in a form of an affidavit, albeit in the application to intervene by the respondent, to determine his mendacity or candour.

[15] I further take note that according to the transcript in the insolvency inquiry and further annexures placed before this Court, permits to keep wild game were issued not to the third respondent but the first respondent; vide paginated pages 159 and annexure C" and "D" at paginated pages 286 and 287. Carstens junior, during the insolvency

inquiry denied ever having had any wild game nor applying for a permit to keep wild game, vide paginated page 365 lines 1 -22,

contradicting the contents of paginated page 159 showing that a permit was issued to him.; also contradicting the recommendation

for keeping of animals in fenced camp issued for the first respondent (identity number 8311265073083, issued to him by Environmental Services, paginated page 361 and his own letter confirming that he has 1 buck and 11 red hartebees-368 annexure "I"

paginated page 368; paginated page 294 15 Zebras, 50 red buck, 15 red hartebeest; etc.

[16] In my view, the applicants have established a prima facie right, to establish whether the game falls within the insolvent estate. I bear in mind that the respondents

dispute this. Having regard to their contradictory evidence in regard to whether the game belongs to the first respondent or the

third respondent or Swarico or Pienika, I find that their denials are not bona fide and their version unattainable and remains to be rejected on paper; vide *Wightman t/a JW Construction v Head/our (Pty) Ltd and Another*. [12] In my view, the contradictory versions of the respondents are calculated to create a smoke screen and frustrate the duties of the

applicants in identifying all the assets of the insolvent estate of Carstens junior. This very effort on the part of the respondents, invariably establishes a ground for apprehension that there are efforts to defray or hide the assets of the insolvent estate of the first respondent, which would be to the detriment of the creditors. In my view, the balance of convenience favours the grant of the relief sought by the applicants, namely the confirmation of the rule nisi

[16] In my view, the applicants have established a prima facie right, to establish whether the game falls within the insolvent estate. I bear in mind that the respondents dispute this. Having regard to their contradictory evidence in regard to whether the game belongs to the first respondent or the third respondent or Swarico or Pienika, I find that their denials are not bona fide but stand to be rejected, as I do; vide . In my view, the denials are calculated to create a smoke screen and frustrate the duties of the applicants in identifying all the assets of the insolvent estate of the first respondent. This very effort on

the part of the respondents, invariably establishes a ground for apprehension that they want to defray the assets of the insolvent

estate of the first respondent, which would be to the detriment of the creditors. In my view, the balance of convenience favours the grant of the relief sought by the applicants, namely the confirmation of the rule nisi.

[17] In my view, the opposition to the confirmation of the rule nisi is unmerited and should be dismissed with costs inclusive those of employing the services of senior counsel, whose services I find were warranted regard being had to the nature and complexity of the matter. The first respondent did not file an opposing order;

therefore the costs would have to be visited to the third respondent.

[18] Consequently it is ordered ;

1. That the rule nisi is confirmed;
2. That the third respondent is ordered to pay the costs of the application, inclusive the costs of the employment of senior counsel.

N .M. MAVUNDLA

JUDGE OF THE COURT

DATE OF JUDGEMENT

: 10/08/2017

APPLICANT'S ADV

: ADV. M P VAN DER MERWE SC

INSTRUCTED BY

: TIM DU TOIT & CO INCORPORATED.

1ST to 3RD RESPONDENTS' ADV : ADV SJ VAN RENSBURG

INSTRUCTED BY

: BOSMAN & BOSMAN ATTORNEYS

[1] 2010 (4) SA 405.

[2] 1982 (4) SA 746 (AA) at 749G-H.

[3] 2008 (5) SA 339 (SCA).

[4] 1987 (2) SA 894 (A) at 896G-I. See also Janit and Another v Motor Industry Fund Administrators 9Pty) Ltd and Another 1996 (4) SA 293 (A) at 304; End Conscription Campaign and Another v Minister of Defence and Another 1989 (2) SA 180 (C) at 2081- 209C

[5] Nestro and Another v Minister of Police and Others 1984 (4) SA 230 (SWA) at 244.

[6] 1999 (2) SA 279 (TPD) at 323G-325B.

[7] 2014 SA 103 (KZP) at 111 F-G.

[8] 1988 (4) SA 326 at 3 270 -G .

[9] 2005 (4) 148 .

[10] 2013 (1) SA 161

[11] 2000 (4) SA 681 WC at 688 H.

[12] 2008 (3) SA 371 {SCA) at 37SE (SCA) at 375 at par [12];

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