

SOUTH AFRICA / JUDGMENT

Botha N.O and Others v Stoltz (29461/2020) [2021] ZAGPJHC 696 (17 November 2021) [2021] ZAGPJHC 696

COURT

South Gauteng High Court, Johannesburg

BEFORE

Nichols

CASE / FILE NUMBER

29461/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 29461/2020

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

In the matter between:

DEON MARIUS BOTHA

N.O.

First Applicant

JOACHIM HENDRIK BOTHA

N.O.

Second Applicant

CAROLINE MMAKGOKOLO

LEDWABA N.O.

Third Applicant

(in their capacities as

final liquidators of the insolvent

Estate of Big Creek

Trading 65 CC)

And

LUKAS
STOLTZ
Respondent

JUDGMENT

Nichols AJ

Introduction

- [1] This is an application for an interim interdict against the respondent in order to interdict the respondent from using and/or permit the use of a certain 2013 model John Deere 9560R tractor (the tractor) and for the tractor to be retained at a secured premises pending the outcome of an action under case number 12496/2020 (the action) instituted by the applicants (plaintiffs in the action) against the respondent (defendant in the action) in this court.
- [2] The applicants instituted these proceedings in their capacities as liquidators of Big Creek Trading 65 CC (in liquidation) (Big Creek). The respondent, Lukas Stolz, a farmer who purchased the tractor from Big Creek, opposes both this application and the action. He has in turn filed a counterclaim in the action seeking a declaration that

the sale of the tractor is valid.

Issues

for determination

- [3] The central issue for determination is whether the applicants have established the requirements for an interim interdict.

The applicable law and factual background

- [4] The relevant facts contended for by the applicants are the following:
- (a) Pioneer Hi-Bred RSA (Pty) Ltd (Pioneer), a creditor of Big Creek, instituted a liquidation application out of the Polokwane High Court on 4 October 2018. It sought an order to liquidate Big Creek. On 14 August 2019, Big Creek was placed in final liquidation and liquidators were appointed. In terms of s 348 of the Companies Act, 61 of 1973 (the Companies Act), the deemed date of commencement of the liquidation of Big Creek is 4 October 2018.
- (b) The respondent purchased the tractor from Big Creek on 25 October 2018 for an approximate amount of R2,300,000.00, inclusive of value added tax. Delivery of the tractor to the respondent constituted a disposition of property made by Big Creek to the respondent, which was made after the commencement of the winding up, as contemplated in s 341(2) of the Companies Act.

- (c) The disposition of the tractor is void in terms of the provisions of s 341(2) of the Companies Act, as read with s 348 and the respondent is liable to redeliver the tractor to the applicants, in their capacities as the duly appointed liquidators of Big Creek.
- (d) The action was instituted on or about 1 June 2020. The relief sought in the action is:
 - (i) That the disposition in terms whereof Big Creek delivered to the respondent one 2013 John Deere tractor with engine number RG6135G002507 and chassis number 1RW9560RPCP004950 be declared void in terms of s 341(2) of the Companies Act, 1973; and;
 - (ii) That the respondent be ordered to deliver the 2013 John Deere tractor with engine number RG6135G002507 and chassis number 1RW9560RPCP004950 to the applicants, in their capacities as duly appointed liquidators of Big Creek.
- [5] The relevant facts contended for by the respondent are the following:
 - (a) As a farmer, he purchased the tractor from Big Creek when he needed a replacement for his previous tractor. The tractor is a massive piece of equipment comparable to the size of earthmoving equipment. It cannot simply be driven on a public road and it cannot be moved easily.
 - (b) He came across an advertisement for the tractor in a magazine which specialises in farming equipment. He contacted the sales consultant reflected in the magazine, who in turn put him in contact with a director of Big Creek. On 24 October 2018 he went to Big Creek's premises to view and inspect the tractor with a view to purchasing it.
 - (c) When he was at the premises of Big Creek, there was no indication that it may have been in financial distress. It appeared to be a viable, successful and extensive farming operation situated on extensive land with many farm implements, equipment and tractors. The premises also had its own silos and there were helicopters and aircraft on the premises.
 - (d) He and his son were advised that the tractor was being sold because it was too big for its current use and Big Creek intended to buy smaller tractors. He negotiated the price which was paid on 25 October 2018 and he took delivery of the tractor on 26 October 2018. The total amount paid was R2,645,000,00 inclusive of value added tax.
 - (e) Nothing circumspect or untoward occurred in respect of the sale and in his view and experience, this transaction was no different to what all farmers do over the entire market in South Africa in respect of buying and selling farming implements and equipment in the ordinary course of their business as farmers.

Requirements for an Interim Interdict

- [6] The requirements for an interim interdict are well established and can be briefly summarised as follows: a prima facie right even though open to some doubt; a well-grounded apprehension of irreparable harm if the interim relief is not granted; that the balance of convenience favours the granting of an interim interdict; and the lack of another satisfactory or adequate remedy in the circumstances.[1]
- [7] In view of the discretionary nature of an interim interdict, particularly when one is sought pending an action, these requirements are not judged in isolation but in an interrelated manner.[2] The applicant is required to set out all the facts in support of the relief sought in the founding affidavit.

Prima facie right

- [8] The applicants are required to establish that the prima facie right contended for, is a right to which irreparable harm will ensue if not protected by an interdict. A prima facie right that is threatened by an impending or imminent irreparable harm.[3]
- [9] In support of this requirement, the applicants aver that, in their capacities as liquidators, they have a prima facie right to delivery of the tractor because its disposition was void ab initio and ownership did not pass to the respondent. They also aver that the tractor is subject to a special and general notarial bond over the movable assets of Big Creek in favour of the Land and Agricultural Development Bank of South Africa (Landbank). This, they argue, entitles them to retake possession of the tractor to protect the rights of the creditors and to realise same to the benefit of the general body of creditors.

- [10] S 341(2) of the Companies Act provides that:

‘Every disposition of its property (including rights of action) by any company being wound- up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders’ (my underlining for emphasis).

- [11] In *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (In Liquidation)*,[4] a matter which concerned the proper interpretation of s 341 (2), Sutherland J held:

‘Therefore it can be understood that the purpose of section 341(2) is to address the anomaly resulting from the retrospectivity of the concursus, which ensnares what were valid and binding transactions, willy nilly, and subjects them to a judicial discretion whether or not to restore that status.’[5]

The court also determined that s 341(2) does not empower a court to validate an unlawful, invalid or otherwise unauthorised transaction. The disposition needs to be initially lawful and valid in order for the court to intervene in terms of s341 (2).[6]

- [12] In both this application and the action, the respondent has challenged the applicants’ right of ownership to the tractor and asserted his own. He has challenged the deemed date of commencement of the liquidation of Big Creek as being 4 October 2018 and whether or not such date should be determined by reference to Pioneer’s application. He, for example,

points out the applicants' mistaken averments that the Pioneer application was instituted in the Polokwane High Court when it is apparent from the papers that the Pioneer application was instituted in the Thabazimbi Magistrates Court.

Irreparable Harm

- [13] The reasonable apprehension of irreparable harm and imminent harm eventuating is considered a crucial requirement for an interim interdict.[7] In describing the meaning of 'irreparable', Mogoeng CJ writing for the majority in *Tshwane City v Afriforum and Another*[8] held that 'Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm.'[9]
- [14] The facts averred by the applicants in the founding affidavit to substantiate this requirement are vague and speculative. The applicants assert that the respondent is not entitled to possession. Further that the tractor may at any time be damaged, destroyed, stolen, and/or be rendered inoperable as the tractor is utilised by the respondent in circumstances where he is not authorised to do so. That the use of the tractor is also accelerating the depreciation of the value of the tractor to the detriment of the creditors of Big Creek.
- [15] The respondent avers that no facts have been adduced to support the applicants' conclusions. He then sets out in detail the facts in support of his assertions that the current status quo should be maintained pending the finalisation of the action. He avers that:
- (a) The tractor is an integral, necessary and vital component to his business as a farmer and he therefore has every reason to ensure that it is properly looked after. Without this tractor, the livelihoods of his farming staff and the running of the farm are imperilled because the business on the farm and the farm will be rendered useless and inoperative. This will in turn have a knock on effect and pose a danger to food security in the general interest of the population.
 - (b) Due to its pure size and girth it would be difficult for anyone to steal the tractor without being seen and the tractor is slow. In addition, the tractor cannot simply be driven on a public road and moved easily.
 - (c) The tractor is only used each year for approximately 220 hours. Thereafter, it is cleaned and packed away for planting in the following season. It is stored in a huge barn on the farm near the farmhouse which is protected by security and which falls within a secure electrified fence from top to bottom. He has also arranged insurance cover for the tractor for R2,000,000.00.
 - (d) During the period that it is unused, the tractor is started, the oil drained from time to time, and the tractor is maintained in order to ensure that it remains operative and rust free. It was established, at the respondent's instance, that the sheriff would be unable to store the tractor at his premises, in terms of the order sought. It is too large and the costs to transport and store it would be prohibitive. The sheriff would actually have to hire premises for this

purpose at an additional monthly cost, which would be debited to and claimed from the general body of creditors.

- (e) The tractor is in a better position in his custody, control and possession comparative to that of the Sheriff or anyone else. It will be looked after and cared for. If the tractor is removed and left unused, it will be subjected to more harm than if it were in his possession. The respondent's view on this aspect was also confirmed by a consultant within the sector that the tractor would be rendered inoperable if it is stored without care and not put to use.
- (f) The value of the tractor will not decrease pending the outcome of the action. The value of the tractor is dependent on the number of hours it works. Based on his years of experience as a farmer and his constant vigil of farming equipment sales magazines, he expressed the view that a comparative tractor with over 7,000 hours is less valuable than one with under 7,000 hours, but marginally so. That margin he contended would not be more than R200,000.00. When he purchased the tractor the number of hours it had worked was reflected as 4,600. Since he only uses it for approximately 220 hours a year and overall it is nowhere near 7,000 hours, the depreciation is minimal. The respondent's view in this regard was confirmed by a sales consultant within this sector.

Balance of Convenience

- [16] The applicants are required to show that the balance of convenience favours the grant of the relief sought. This must be determined by weighing the likely harm that the applicant will suffer if the interim interdict is not granted against the prejudice that the respondent will suffer if the relief is granted.[10]
- [17] The severe prejudice contended for by the applicants, in the event that an interim interdict is not granted in their favour, is that the tractor is not protected and can at any time be damaged, destroyed, stolen, alienated and/or rendered inoperable should it remain in the respondents possession. The applicants' dispute that any prejudice will be suffered by the respondent as the tractor will be held in secure premises pending the final determination of the action. This, they argue, will prevent the depreciation of the market value of the tractor due to use and will guard against damage to the tractor or poor maintenance of the tractor which may diminish its value.
- [18] The respondent disputes the alleged grounds for prejudice in respect of damage, destruction, theft, alienation or the rendering of the tractor inoperable on the basis of the tractor being in his possession. He contends that the tractor is protected and is actually in the best place it can be in the circumstances. He takes issue that the costs or logistics for the moving of the tractor or its storage have not been properly considered by the applicants.
- [19] The respondent further contends that his seven employees, who rely upon their jobs for their and their families livelihoods, will be severely prejudiced. If the tractor is removed, the respondent avers that he may as well close up the farm and sell off the land as there would be no basis to continue farming and he does not have the means or capacity to purchase

another tractor similar to the tractor. He requires the tractor to harvest and he requires the harvest to run the farm and generate income for himself, his family and the parties who are employed on the farm.

Absence of alternative satisfactory remedy

[20] Whether or not an alternative remedy, such as damages, is suitable, is often an exercise of the court's discretion.[11] The applicants contend that there is no other remedy that would adequately protect and vindicate their rights pertaining to the

tractor other than a court order to retake possession of the tractor. As the owner of the tractor, the applicants assert their entitlement to claim delivery and argue that they are not obliged to consider any alternative remedy.

[21] The respondent disputes the ownership of the tractor by the applicants. This is in accordance with the counterclaim filed in the action and based on the facts which the respondent contends support his counterclaim and opposition to this application. The relevant facts have been outlined above. Based on these facts, he further contends that the applicants would be able to claim damages in the event of any alleged destruction or damage to the tractor and consequently the applicants do have a satisfactory alternative remedy.

Evaluation

[22] In the matter of National Gambling Board v Premier, Kwazulu Natal and Others[12], the following was stated:

'An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the

rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim

interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute.'[13]

[23] These papers abound with disputes that have been genuinely raised. The specific disputes that have been raised by the respondent in opposition should have come as no surprise to the applicants and should have in fact been anticipated. They are entirely consistent with the plea and counterclaim delivered by the respondent in the action months before this application was instituted.

[24] Notwithstanding, the applicants set out a tenuous factual basis upon which to draw the conclusion that the deemed date of the commencement of the liquidation is 4 October 2018. This is not to say that I have reached the conclusion that the deemed date of the commencement of the liquidation is not 4 October 2018. Rather that the applicants should

have fully, and in the founding affidavit, explained and set out the manner in which the liquidation application progressed from the Thabazimbi Magistrate's Court to culminate in the final liquidation on 14 August 2019 in the Polokwane High Court.

- [25] This is one of the issues which the court will have to decide in the main action, where it is apparent that the respondent has attempted to set out fully the reasons in support of his counterclaim. And the respondent's counterclaim is essentially a claim of ownership of the tractor, a direct and bona fide challenge of the applicants averred right to ownership of the tractor. However, as the liquidators, I am of the view that the applicants do have a prima facie right in this application, although this right is open to some doubt in consequence of the opposition and challenge by the respondent.
- [26] The applicants have not, however, in my respectful view, established the requirements of irreparable harm and balance of convenience. Sufficient and adequate facts have not been adduced from which the conclusion may be readily reached that the applicants will suffer irreparable harm if the interdict is not granted. The respondent's contention that he and others will be severely prejudiced if an interim interdict is granted is supported by detailed factual averments, supporting documentation and confirmatory affidavits.
- [27] It is not enough for the applicants to rely on the vindicatory nature of their claim in the action as the fulfilment for the requirements relating to irreparable harm, balance of convenience and alternative remedies. The presumption regarding irreparable harm in vindicatory matters is rebuttable and the respondent has specifically challenged the issue of ownership.
- [28] I accept the respondent's averments that due to the physical nature of the tractor, it is not easily susceptible to theft; that he considers the tractor to be an integral part of his farming operation and as such he has every reason to ensure that the tractor is looked after, stored safely and maintained properly, especially during the extended period that it is not in use. The prejudice contended for by the respondent extends beyond him to his employees, their families and his farm's ability to continue to contribute to national food security in the general interests of the population.
- [29] The applicants instituted this application more than a year after their appointment in August 2019 and a few months after the institution of the action in June 2020. The respondent has had possession and use of the tractor since 26 October 2018. The applicants have not disclosed any specific concerns regarding the manner in which the respondent has exercised his possession and use of the tractor such as to justify an inference of imminent or irreparable harm which in turn justifies the grant of the interim interdict.

Conclusion

and order

[30] My discretion whether or not to grant an interim interdict must be exercised judiciously according to the law and upon facts. On a conspectus of the evidence and having considered the matter on the basis of the clear undisputed facts which have largely been adduced by the respondent, I am not satisfied that the applicants have made out a case for the relief sought. I am of the view that it is the respondent who will be prejudiced if the status quo is not preserved and the balance of convenience supports the maintenance of the status quo. In relation to costs, there is no reason for me to deviate from the usual order that would follow when an application is dismissed.

[31] In the circumstances, I make the following order:

- (a) The application is dismissed;
- (b) The applicants shall pay the respondent's cost on a party and party basis.

T NICHOLS

ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines

and by release to SAFLII. The date and time for hand-down is deemed to be 15H00 on 17 November 2021.

HEARD ON:

13 May 2021

JUDGMENT

DATE:

17 November 2021

FOR THE APPLICANTS:

Advocate FH Terblanche SC;

Advocate WM Dreyer

INSTRUCTED BY:

Strydom & Bredenkamp Inc Attorneys

FOR THE RESPONDENT:

Advocate LC Leysath

INSTRUCTED BY:

Brits Attorneys

[1] Setlogelo v Setlogelo 1914 AD 221 at p.227; Webster v Mitchell 1948

(1) SA 1186 (W) at 1189.

[2] Olympic Passenger Service (Pty.) Ltd. v Ramlagan, 1957 (2) SA 382 (D) at p. 383D - G.

[3] National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) para 50

[4] 2015

(6) SA 21 (GJ).

[5] Engen Petroleum Ltd at para 17.

[6] Engen Petroleum Ltd at para 15 and 16.; Eravin Construction CC v Bekker NO(20736/2014) [2016] ZASCA 30 (23 March 2016) para 21;

[7] Tshwane City v Afriforum and Another 2016

(6) SA 279 (CC) para 50.

[8] 2016

(6) SA 279 (CC) para 50.

[9] Afriforum para 59.

[10] Afriforum at para 62; Olympic Passenger Service (Pty) Ltd v Ramlagan 1957

(2) SA 382 (N) at 383F.

[11] Wynne & Godlonton v Mitchell, Wynne & Cornish v Mitchell 1973 (1) SA 283 (E) at 294 and 296.

[12]

[2001] ZACC 8; 2002

(2) SA 715 (CC)

[13] National Gambling Board at para 49.

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