

SOUTH AFRICA / JUDGMENT

Cecil N.O and Others v Bertulis and Another (04024/2014) [2014] ZAGPJHC 333 (11 March 2014) [2014] ZAGPJHC 333

COURT

South Gauteng High Court, Johannesburg

BEFORE

Makume

CASE / FILE NUMBER

04024/2014

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 04024/2014

DATE: 11 MARCH 2014

In the matter between:

GAINSFORD, GAVIN CECIL N.O.....First Applicant

KAJEE, ZEENATH N.O.....Second Applicant

MONYELA, CHRISTOPHER KGASHANE N.O.....Third Applicant

FISHER, JACQUES ANDRE N.O.....Fourth Applicant

MCKENZIE, SANDRA JOAN N.O.....Fifth Applicant

MOTIMELE, MMABATHO SHIRLEY N.O.....Sixth Applicant

[In their capacities as the appointed liquidators of

FIRST STRUT (RF) LIMITED (in liquidation)]

ANDRIS DZINTARS BERTULIS.....First Respondent

CAPITEC BANK LIMITED.....Second Respondent

J U D G M E N T

MAKUME, J:

[1] In this application the applicants who are the duly appointed liquidators of a company known as First Strut (RF) (In Liquidation) (“the company”) seek an order setting aside the payment of certain premiums on policy number 01..... by the company to Momentum Life.

[2] This application served in the urgent court before Tshabalala J on the 7th day of February 2014 when a draft order was granted affording the respondent’s time to file answering affidavits. The application was postponed for hearing in the urgent court on the 11th February 2014.

[3] Of importance is clause 4 of the draft order which reads as follows:

“4. Without prejudice and without any admission the First Respondent undertakes that pending the adjudication of this application in the Motion Court week commencing 10 February 2014 the First Respondent will not cede, Pledge, Alienate, Dispose of, use or in any way encumber the monies standing to the credit of bank account number 13..... at Second Respondent and agrees also without prejudice or any admissions to his rights against the Second Respondent that the hold on the above account be maintained pending the adjudication of this application in the Motion Week of 10 February 2014 as aforesaid.”

[4] The application was argued before me on the 13th February 2014. I reserved judgment and once more by agreement between the parties prayer 4 of the order of the 7th February 2014 was extended until judgment is delivered.

BACKGROUND FACTS

[5] The facts leading to this application are to a large extent common cause and not disputed.

[6] The first respondent together with the late Jeffrey Mark Wiggil (“Wiggil”) were the directors of the company and controlled its affairs.

[7] On the 18th September 2013 the company was placed in final liquidation, shortly thereafter on the 22nd November 2013 the Master of the High Court appointed the applicants as liquidators of the company.

[8] In carrying out their duties as liquidators and investigating the financial affairs of the company the liquidators discovered that the company had paid out of its bank account held at First National Bank premiums totalling R1 740 000,00 (One Million Seven Hundred and Forty Thousand Rand Only) in respect of a policy held at Momentum Life being policy number 01..... The investigations further revealed that payments were made between the period 1st December 2011 to July 2013.

- [9] On the 6th February 2014 Mr Raquel Peter a legal administrator at Momentum Life informed the applicants that proceeds of policy number 01..... in the amount of R1 935 270,00 were paid into a bank account held in the name of the first respondent at Capitec Bank (second respondent) that payment had been made on the 5th February 2014.
- [10] The applicants on receiving this information concluded that the proceeds of the policy are impeachable and recoverable as contemplated in sections 26 to 31 of the Insolvency Act 24 of 1936 alternatively in terms of the common law. Having so concluded and acting in the best interest of creditors the applicants approached court by way of urgency in accordance with Rule 6(12)(a) at the earliest possible time being the 7th February 2014.

URGENCY

- [11] The facts deposed to on urgency speak for themselves. The applicants could not have done anything on the 20th January 2014 which is the day they became aware of the existence of the policy because at that time the proceeds of that policy had not as yet been paid out. This they got to know only on the 6th February 2014. They wasted no time and launched the application.
- [12] More than three decades ago in the now well-known case of *Luna Meubelvervaardigers v Making and Another* 1977 (4) SA 135 Coetzee J stated what a court has to bear in mind when considering urgency. He said the following:

“(i) The question is whether there must be a departure at all from the times prescribed in Rule 6(5)(b). Usually this involves a departure from the time of seven days which must elapse from the date of service of the papers until the stated day for hearing. Once that is so, this requirement may be ignored and the application may be set down for hearing on the first available motion day but regard must still be had to the necessity of filing the papers with the Registrar by the preceding Thursday so that it can come onto the following week’s motion roll by the motion court judge on duty for that week.

(ii) Only if the matter is so urgent that the application cannot wait for the next motion day from the point of view of his obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday without having filed his papers on the previous Thursday.

(iii) Only if the urgency be such that the applicant dare not wait even for the next Tuesday may he set the matter down for hearing on the next court day at the normal time of 10:00 or for the same day if the court has not as yet adjourned.”

- [13] What Coetzee J says in (iii) above is exactly what the applicants did in this matter. Having come to know of the payments of the money on the 5th or 6th of February 2014, Friday the 7th February 2014 was the first motion court day available for them to be heard. Had they waited until the following Tuesday a possibility existed that the first respondent would by then have withdrawn the money and dissipated it to the detriment of the creditors.

- [14] Accordingly I find that the applicants have satisfied the requirements for urgency.

MERITS

- [15] It is common cause that within two months of being placed under business rescue the company was placed under provisional liquidation and subsequently finally liquidated.
- [16] In paragraphs 26 and 29 of the founding affidavit the applicants say Momentum confirmed that the premiums in respect of the policy were paid from the bank account held in the name of the company (First Strut). In his answering affidavit the first respondent does not dispute this. What he says is that this was payments for his pension fund as an employee of First Strut. If this is indeed so the first respondent will raise this as a defence in the envisaged action that the applicants will be instituting. At this stage what is of importance is that the payments of the premiums were made from the bank account of a company that was experiencing financial problems and could have been trading under insolvent conditions.
- [17] It is not in dispute that the company First Strut's assets are less than its liabilities. What the trial court will have to determine is whether at the time that First Strut paid premiums to Momentum whether such payments were made under circumstances that fall to be protected in terms of sections 26 up to 31 of the Insolvency Act No 24 of 1936 ("the Act").
- [18] Section 26(1) of the Act captures the crux of what the trial court will have to concern itself with. The section reads as follows:

"Disposition without value

- (i) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –
- (a) More than two years before the sequestration of his estate and it is proved that immediately after the disposition was made the liabilities of the insolvent exceeded his assets.
- (b) Within two years of the sequestration of his estate and the person claiming under or benefited by the disposition is unable to prove that immediately after the disposition was made the assets of the insolvent exceeded his liabilities."
- [19] In Mars Law of Insolvency in South Africa 9th Edition at page 285 paragraphs 13.28 the learned writer says that:

"When proceedings are contemplated for the recovery of property alleged to have been alienated fraudulently or by way of undue preferences or gratuitously, or in contravention of section 34 by the insolvent the court may grant an interdict restraining the person in possession of the property from parting with the same pending action for its recovery. If the property sought to be recovered is in the possession of the person to whom it was originally delivered the court will interdict it being parted with even though neither mala fides, collusion, feared irreparable loss nor intention to dissipate the property is alleged. It may also even before sequestration of a debtor's estate restrain him from parting with his assets to the detriment of his creditors."

[20] The learned writer refers to the matter of *Stern v Ruskin N.O. v Appleson* 1951

(3) SA 800 (W). In that the court held that where in an application for an interdict pendente lite the claims under consideration are neither vindicatory nor quasi-vindicatory an applicant cannot obtain an interdict unless he proves in addition to a prima facie case an

actual or well-grounded apprehension of irreparable loss.

[21] In the present case the respondent has not provided any proof of an employment contract to support his contention that the proceeds of the policy with Momentum belong to him by way of it being pension benefits. There is evidence that he opened the bank account on the 28th January 2014 a mere 9 days before the policy paid out. This in the court's view is suspicious conduct by a director of a company in financial difficulties.

[22] This Court has reasonable belief that the amount once released to the first respondent will be dissipated and if it is proved in the envisaged action that the proceeds belong to the company then the creditors would have been prejudiced.

[23] The application is upheld and I make the following order:

1. The first respondent is hereby interdicted from ceding, pledging, alienating, disposing, using or in any way encumbering the monies standing to the credit of bank account number 13..... (The bank account) held in his name with the second respondent pending the final determination of an action to be instituted by the applicant within 45 days from date of this order.
2. The second respondent is interdicted from permitting the withdrawal, disposal or use in any manner whatsoever of the funds standing to the credit of the bank account.
3. The applicant is ordered to institute action against the first respondent to set aside the payment of the premiums on policy number 01..... by First Strut to Momentum Life and/or the appropriation of the proceeds thereof by the first respondent and/or for similar alternative and/or ancillary relief.
4. The costs of this application shall be costs in the action to be instituted save that if the action is not instituted within the 45 day period or within such extended period as the court on good cause may allow then the order granted in 1 and 2 above will lapse in which event the applicants shall pay the first respondent's costs of the application.

M A MAKUME

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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