

SOUTH AFRICA / JUDGMENT

Corporate Money Managers (Pty) Ltd and Others v Kruger (77058/09) [2013] ZAGPPHC 42 (12 February 2013)

[2013] ZAGPPHC 42

COURT

North Gauteng High Court, Pretoria

BEFORE

P M Mabuse

CASE / FILE NUMBER

77058/09

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IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 77058/09

DATE:12/02/2013

CORPORATE MONEY MANAGERS (PTY) LTD FIRST APPLICANT

PIETER HENDRIK STRYDOM N.O.SECOND APPLICANT

JOHN RODERICK GRAHAM POLSON N.O.THIRD APPLICANT

GRAHAM LOUIS STRYDOM N.O.FOURTH APPLICANT

and

EUGENE KRUGERRESPONDENT

REGENT BOND DISCOUNTING (PTY) LTD.....INTERVENING APPLICANT

JUDGMENT

MABUSE J:

1. These are the reasons that follow on the order that I made on 18 November 2012. On the said date I made the following order:

“The estate of the respondent is hereby finally sequestrated” and because of time constraints promised that I would furnish

reasons

later.

By notice of motion issued by the Registrar of this Court on 15 December 2011, the applicants sought the above order against the estate of respondent, an adult businessman of Lakeview Crescent, Kleinfontein Office Park, who at that time resided at 356 Startling Street, Eldoraigne, Pretoria.

2. The first respondent is a company duly registered in terms of the Companies Act NO.61 of 1973 with its registered place of business at 1 Phillip Road, Meyersdal, in the province of Gauteng. The first applicant, together with other companies collectively known as “the CMM Group”, was placed under curatorship in terms of the provisions of s.5 of the Financial Institutions (Protection of Funds Act 28 of 2001). In this application the first applicant was represented by the second, third and fourth applicants in their collective capacities as the trustees of CMM and the CMM Group. The second applicant, who has deposed to the founding affidavit in his capacity as a duly appointed co-trustee of CMM, is an adult male attorney and a director in Strydom & Bredenkamp Incorporated, a firm of attorneys, where he practices at Brooklyn, Pretoria. The said applicant is a co-trustee of CMM and so is the fourth applicant.
3. The applicants sought the sequestration of the respondent’s estate on the following grounds, firstly, that the respondent was insolvent and unable to pay his debts; secondly, that the respondent’s liabilities exceeded his assets; thirdly, that the respondent was part of the scheme to which the first applicant had advanced large sums of money which sums of money were fraudulently

misappropriated and not used for the purposes for which they were advanced; and fourthly and lastly, the respondent had contravened the provisions of s. 8(g) of the Insolvency Act 24 of 1936 (“the Insolvency Act”) in as much as he was unable to satisfy the judgment of the South Gauteng High Court in case no. 2008/37052 granted on 27 May 2009 in terms of which the respondent, Classic Crown Properties 84 CC and one Nayager Ratha Krishnan, were ordered to pay jointly and severally a total sum of R21,011,736.37 or thereabout, interest at 1.333% per day on the total sum of R 15,597,973.31 and interest at 0.05% per day on the sum of R1, 135,000.00, commencing on 21 October 2008 until date of full payment, cost of the matter on an attorney and client scale.

4. The abovementioned judgment was granted in favour of Regent Bond Discounting (Pty) Ltd, (“Regent”), the intervening party in this application. On 3 August 2009 by a deed of cession dated 3 August 2009, Regent transferred all its rights, title and interests in all its claims against the debtors, including Classic Crown Property 84 CC, to the trustees of the said CMM. It is apposite at this stage to indicate that the application for intervention depended on this court finding that the said cession was invalid. What I do not understand however, is that, having ceded its rights against its debtors in favour of the trustees of CMM, and having thus divested itself of its rights, title and interest and having ceased to be a creditor of the

debtors why would Regent still join in the application for the sequestration of the respondent's estate. For these reasons, for the intervening party was not even party in the original application because, according to Pieter Hendrik Strydom ("Strydom") who deposed the founding affidavit,: "Regent Bond Discounting (Edms) Beperk ("Regent") het al sy eise teen al sy debiteure insluitend die respondent aan CMM gesideer. Ek heg hierby aan, gemerk aanhangsel H83, en cn afskrif van die sessie waama verwys word. "

5. Strydom has, in the founding affidavit, set out the following circumstances that led to Regent being the creditor of, among others,

the respondent. Regent was a company that conducted business as financiers by advancing financial loans, primarily bridging finances

and short term loans in respect of which it would obtain security as cover for the refund of such loans. During the year 2007 a close co-operation known as Classic Crown Properties 84 CC ("Classic Crown"), at that time duly represented by a certain Ratha Krishnan Nayager ("Nayager") and the respondent, approached Regent and applied for a short-term loan. At the time Classic Crown, it would seem, was involved in the development of a new residential township in Benoni, which, when complete, would have become known as Norten Home Estates ("the development"). This development would have taken place on the property known as Portion 401 (a Portion of Portion 30) of the Farm Vlakfontein Nr. 30 ("the property"), which property was registered in the names of Classic Crown. The primary purpose of the said short-term loan was to provide Classic Crown with bridging finances to enable it to finance or to comply with the pre-proclamation requirements of the property and to finance the installation, on the property, of public amenities so that the development could grow.

6. Following the said application for loans, Regent made five short-term loans ("loans") to Classic Crown over the period

commencing in December 2007 and ending with March 2008. Regent made the following loans to Classic Crown and the balances of such loans were, as at 20 to 21 October 2008, as follows:

6.1 R2,026,080.00 with costs and interests reckoned on the sum of R 1,417,500.00 at 1.333% per day, commencing on 20 October 2008 to date of payment;

6.2 R16,674,968.69 together with costs and interests reckoned on the capital amount of R12,261,006.39 at 0.1333% per day commencing on 21 October 2008 to date of payment;

6.3 R1,053,675.18 together with costs and interest calculated on the capital amount of R789,466.92 at the rate of 0.1333% per day reckoned from 21 October 2008 to date of payment.

6.4 R1,257,012.50 together with costs and interest computed on the capital sum of R1, 135,000.00 at the rate of 0.05% per day commencing on 21 October 2008 to date of payment.

7. Regent paid all the above loans to Classic Crown and in lieu of security for the refund of the said loans the respondent and the said Nayager stood as sureties for the proper repayment of the loans made by Regent to Classic Crown. Regent obtained additional security for the refund of the loans by Classic Crown in the form of registration of the mortgage bond no. B051300/08 on the property.
8. Classic Crown, the respondent and Nayager, all defaulted with the refund of the loans with the result that Regent was forced to launch an

application to the South Gauteng High Court on 30 October 2008 under Case No. 37052/2008 for the refund of the loans, payment of interest and costs. In his answering affidavit, the respondent admitted that he had been served with a copy of the relevant application. He contended, however, that he intended opposing the application and that he had instructed his then legal representatives to file the necessary papers in order to oppose the application by Regent. He stated furthermore that he had wanted to oppose the application

because, firstly, he believed that Classic Crown had a defence against the claim and, secondly, Classic Crown had a counter claim in excess of Regent's claim against them for breach of contract. I have dealt with these aspects in case no. 18192/2010 which was a case in which the respondent and Nayager had sought to rescind the above judgment obtained against them in the South Gauteng High Court and do not therefore deem it necessary to deal with them again in this judgment save to state that on 27 May 2009, and not on 17 May 2009 as stated by Strydom in paragraph 16.3 of his founding affidavit, Regent applied for, and was granted, judgment as set out in paragraph 3 above.

9. Following the said judgment, Regent caused to be issued a writ of execution against the movable assets of the respondent. The sheriff was unable to serve the said writ of execution against the movable assets of the respondent by reason of his inability to gain entry into the respondent's property. According to the sheriff's return of service, the relevant property where he had been sent to serve a copy of execution was walled and the gates were forever locked. All his attempts at pressing the gate bell of the property to attract attention of the occupants of the said house in particular the respondent bore no fruits. He left a note for the respondent at the given address so that the respondent could contact him but still it served no purpose as the respondent did not come back to him. Consequently he returned the writ of execution together with his report to Regent's attorneys. A deeds search to establish whether or not the respondent was possessed of any immovable property which could be attached and sold in execution in order to satisfy the judgment proved that the respondent did not have any immovable property. The respondent has admitted that for the reasons as set out in his report, the sheriff was unable to have a copy of the writ of execution served on him. He also admitted that he had no immovable property. It is accordingly for these two reasons that the applicants contend that the respondent does not have sufficient assets to satisfy the judgment debt and had thus contravened the provisions of
- s. 8(g) of the Insolvency Act.

11. Despite his vehement denials, I am satisfied that the applicants have shown that the respondent did not have sufficient disposable assets from which the judgment debt could be satisfied. Accordingly they were correct in their contention that the respondent is insolvent.
12. It was contended by the applicants that during an enquiry conducted by the provisional liquidators of Classic Crown in terms of the provisions of s. 152 of the Act, during which the respondent testified, the respondent's evidence indicated quite

convincingly not only that the loans advanced by Regent had been misappropriated but quite clearly so that he himself was factually

insolvent and unable to pay his debts. Although the respondent had denied that the loans were misappropriated, he had not denied that had he admitted that he was factually insolvent and unable to settle his debts. The respondent was unable to account for the loans.

13. I was satisfied that the applicants had made out a good case and that it was in the interest of the creditors that the respondent's

estate be sequestrated, hence the order that I made on 18 October 2012.

P. M. Mabuse

JUDGE OF THE HIGH COURT

Appearances:

Applicant's Attorneys: Roesthoff & Kruse

Applicant's Counsel: Adv. MA Badenhorst (SC)

Adv. J Herschensohn

Respondent's Attorneys: David C Feldman

Respondent's Counsel: Adv. M. Smit

Intervening Party's Attorneys: Crouse Inc.

Intervening Party's Counsel: Adv. J Crouse

Date Heard: 18 October 2012

Date of Judgment: 18 Pthfv.cuj 2013

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