

SOUTH AFRICA / JUDGMENT

De Wet and Another v R G and Associates (9406/2017) [2018] ZAWCHC 39 (26 February 2018) [2018] ZAWCHC 39

COURT

Western Cape High Court, Cape Town

BEFORE

N P Boqwana

CASE / FILE NUMBER

9406/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case Number: 9406/2017

In

the matter between:

G.L.S
DE WET N.O.
First
Applicant
K.R.
VENGADESAN N.O.
Second
Applicant
and
R
G & ASSOCIATES
Respondent

Heard:

21 February 2018

Delivered:

26 February 2018

JUDGMENT**BOQWANA, J****Factual matrix**

[1] The applicants approached this Court seeking a declarator that payments totalling R240 427.85, made to the respondent, a firm of attorneys, were impeachable dispositions and that the respondent must be ordered to pay it back to the estate of Solodor 42 CC (in liquidation ("Solodor")), together with interest thereon.

[2] Solodor was placed in final liquidation on 22 May 2015. The applicants are the joint liquidators of its insolvent estate. Prior to the liquidation of the company it had two members, Ronald Lipman ("Lipman") with 20% members' interest and Pieter

Gabriel Van Staden ("Van Staden Jnr") holding 80% of members' interest.

[3] Van Staden Jnr signed a document purporting to be a Power of Attorney in terms of which he authorized his father, Johannes Erasmus Van Staden ("Van Staden Snr"), to be his agent and to act in his stead with regard to all matters pertaining to the day to day business and operations of Solodor.

[4] According to the applicants, Solodor provided crayfish to Lobster Harvest to the value of R240 427.85 during March 2015. Solodor delivered two invoices to Lobster Harvest, both dated 23 March 2015, in the amounts of R132 478.34 and R107 949.51 respectively.

Lobster Harvest paid the amounts on 23 March 2015 and on 25 March 2015 respectively totalling a sum of R240 427.85, by means of direct payments into the respondent's account. Payment confirmation history is attached to the founding affidavit, as proof of these payments.

[5] At the time of these transactions, Van Staden Snr faced 572 criminal charges of fraud, with the South African Revenue Service ('SARS')

as a complainant. Mr R G, a sole proprietor of the respondent, represented him.

[6] According to the applicants, Mr G testified during an enquiry held on 23 February 2017, at the Master of the High Court, Johannesburg,

('Master') that the respondent received payment due to Solodor, in the amount of R240 427.85, from Lobster Harvest.

The first applicant claims that he was involved in that enquiry and directed questions to Mr G.

[7] According to him, Mr G testified that Van Staden Snr had instructed that the payments be made to the respondent, for payment of the account of legal services rendered to him by the respondent.

- [8] Mr G further deposed to an affidavit on 27 August 2015, wherein he again stated that Van Staden Snr arranged for the amount due to Solodor to be paid into the respondent's Trust account.
- [9] The applicants contend that such payment did not represent a payment for services rendered to Solodor, or related to it and/or its business in any manner whatsoever.
- [10] According to them, the criminal proceedings against Van Staden Snr did not relate to the day-to-day business of Solodor in any manner

whatsoever, and the Power of Attorney provided to Van Staden Snr did not extend to dealing with the income (or other assets) of Solodor beyond matters pertaining to the day-to-day business of Solodor. Van Staden Snr was therefore not entitled to authorise payment of his personal legal bills with the income of Solodor.

- [11] Furthermore, neither Van Staden Snr nor the respondent, was a creditor of Solodor at any time. Therefore, payment to the respondent for services rendered to Van Staden Snr, with Solodor's funds, constituted invalid transactions that needed to be set aside by this Court.
- [12] The applicants contend that these payments resulted in the respondent being enriched to the detriment of Solodor's creditors and that the respondent must be ordered to repay the money to the applicants, which he has refused to do.
- [13] In answer to the applicants' allegations, the respondent first raises a point in limine alleging that a number of parties needed to be before this Court before this matter can be adjudicated. He refers to a joinder

application which I have not seen.

- [14] He further alleges that the only reason he helped his client, Van Staden Snr, to use his trust account facilities, was because he (Van Staden Snr) had no choice of where to bank, as Lipman (minority member of Solodor) had taken control of Solodor's account; Van Staden Snr was acting out of necessity, albeit on behalf of and under the instructions from the majority member of Solodor, his son Van Staden Jnr.
- [15] According to the respondent, Van Staden Snr's resources were restrained by the State and placed under the control of a curator, in terms of a Court order dated 8 December 2008, with Van Staden Snr having been left without income or means to defend himself in court proceedings and to support his dependant wife and grandchild. Mr G states that he is now being held liable for money which Van Staden Snr was, of necessity, forced to use to support himself and his family.

- [16] The respondent further alleges that this is not the first attempt the applicants have made to reclaim money from him. There had been an earlier application, brought by Lipman, to recover monies which he received on behalf of Van Staden Snr. In that application, he applied to join the applicants, but the applicants did not participate. Lipman brought another application against Van Staden Snr wherein he sought an order directing Van Staden Snr to deliver certain documentation to the creditors.
- [17] These two applications served before Yekiso J, who mentioned that there were serious disputes of fact with regard to both forms of relief sought by Lipman. Yekiso J found that the matter was not capable of being resolved solely on the basis of the papers. He remarked that '[t]hey are the kind of disputes which, I am of the view, can only be resolved by way of viva voce evidence.' In those matters, Lipman was found to have lacked locus standi and a rule nisi that had been issued in respect thereof was accordingly discharged.
- [18] The respondent contends that Lipman and the applicants had acted in concert in a conspiracy intended to extort funds from him.
- [19] He alleges that he had intended to join Lipman to this application, but had been unable to effect service on him, as all registered mails sent to Lipman's address were returned as undelivered.

Point in limine

- [20] The point in limine relating to the joinder of other parties was not raised in oral argument before me by Mr Callaghan, on behalf of the respondent. I will, therefore, not spend much time on it, save to say that no application was brought by the respondent to join any other party to these proceedings, although reference was made in the answering affidavit to an application for joinder. It is further not explained what purpose those parties (who are not mentioned other than a scant reference to an intention to join Lipman) would serve in these proceedings. I, therefore, need not take that point any further.

The disputes of fact point

- [21] Similarly, the point relating to disputes of fact raised in the answering affidavit was not argued by Mr Callaghan. As Mr Montzinger, who appeared for the applicants, argued, and as appears in the judgment by Yekiso J, the application before him was brought by Lipman, whilst the company was in liquidation. Yekiso J decided the applications purely on the issue that Lipman had no locus standi to bring the applications, correctly so. The applications were purportedly brought in terms of s 362 (1) of the Companies Act 61 of 1973 ('the 1973 Companies Act').

The matter before is brought by the liquidators in terms of ss 26 and 29 of the Insolvency Act 24 of 1936 ("the Act"), which call for certain requirements to be met before dispositions can be set aside, if the requirements are met by the applicants, on the papers before me, that is the end of the matter. The respondent did not demonstrate, nor clearly identify before this Court, what disputes of fact existed on the papers before me or even press on to apply for the matter to be

referred to oral evidence. In any event, as it shall be demonstrated below, the matter is determinable on the papers.

Does the transaction constitute an impeachable disposition?

[22] Mr Montzinger submitted that, whilst not stated categorically in the founding papers, the applicants relied on s 26 read with s 29 of the Act. He did refer to other sections, such as ss 30 and 31, submitting that those also could easily fit the circumstances of this case.

[23] Section 26 (1) provides that:

,

26. Disposition without value.-(1) 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:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.’ (Underlined for emphasis)

[24] Section 29 (1) provides that:

‘29. Voidable preferences.-(1) Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.’ (Underlined for emphasis)

[25] Section 2 of the Act defines disposition as:

‘...any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and ‘dispose’ has a corresponding meaning.’

[26] The definition is so wide as to cover the broadest range of dispositions of property conceivable. The use of ‘any’ broadens the scope of instances that may constitute disposition within the meaning of the Act. In *Reynolds and Others NNO v Mercantile Bank Ltd* 2004 (5)

SA 220 (SCA) at 224H, the court observed that '[g]iven the wide definition of 'disposition' in the Insolvency Act it is clear that the payments [of two cheques deposited by Makrides (a managing director of Duchini (Pty) Ltd, a company in liquidation) in favour of Mercantile Bank Limited] were 'dispositions'. In that case liquidators of a company called Duchini (Pty) Ltd ('Duchini'), which was placed in final liquidation, brought an action claiming payment of two amounts they alleged were dispositions without value within the meaning of s 26 (1) (b) of the Act. On the date the cheques were deposited, Duchini was not indebted to Mercantile Bank Ltd ('Mercantile Bank'). The amount of each cheque was debited to the loan account of Makrides in the books of Duchini. All of the said payments took place within two years of the winding up of Duchini. The Court there held that the two cheques deposited to Mercantile Bank had the effect of giving the bank an immediate benefit. Secondly, it was able to reduce the debt which was owed to it by Makrides. The Court held that '[i]n essence, leaving aside the mechanics employed, Duchini paid Makrides' debt to the defendant.' (at 226A)

- [27] In this case, the respondent does not dispute the fact that an amount of R240 427.85 was paid by Lobster Harvest, a creditor of Solodor, directly to his trust account, on the instruction of Van Staden Snr. In his answering affidavit, the respondent raises a number of defences as reasons why the money was paid to his trust account. In one instance he alleges that the amount was paid to the trust account out of necessity, because Van Staden Snr's resources had been restrained and that he was forced to use the amount in question to sustain himself and his family.
- [28] Having said that, Mr G, the deponent, then goes on to state that Van Staden Snr instructed him to receive the payments totalling R240 427.85 from Lobster Harvest, because at that time, in late March 2016 [sic], he was informed by Van Staden Snr, and which he verily believed, that there was a real risk that Lipman, the minority shareholder, and two other investors, would take the money, thereby preferring themselves over other creditors. This was because Lipman had sole control over Solodor's bank account.
- [29] Mr G denies that the money was paid to the respondent for the services he rendered for Van Staden Snr in criminal proceedings, contrary to an opposing affidavit which he attested to, to that effect, in paragraph 29 thereof, in a matter with Case number 11773/2016, dated 05 August 2015, wherein he stated as follows:
- "29. I concede that Lobster Harvest as a result of the dispute between Applicant and 'van Staden Snr' might have been provided by 'van Staden Snr' with the details of my Trust bank account for a sum if money[sic] was paid into such account during March 2015 which was intended to be used for disbursements in connection with 'van Staden Snr's criminal defence and part of my fees outstanding in connection with work done at the instance of 'van Staden Snr' on his behalf, which was done as an attorney acting qua attorney." (Underlined for emphasis)*

- [30] The applicants have also attached an extract of an affidavit dated 27 August 2015 allegedly deposed to by Mr G wherein, he stated that Van Staden Snr 'arranged' that 'a sum of money' of Solodor be paid into the respondent's trust account, which the respondent knew represented funds belonging to Solodor and such funds were utilised for Van Staden Snr's personal expenses and the 'rest' was paid to Van Staden Snr. The respondent did not deny this allegation, he simply noted it and stated that its source is not identified and put the applicants to the proof thereof.
- [31] In the current matter, Mr G further states that he disposed of the money the respondent received from Lobster Harvest on 23 March 2015 and 26 March 2015 respectively, by paying : (a) wages to the employees of Solodor on 2 April 2016; (b) one 'Stringer' for the repair of Solodor's vehicle; (c) Van Staden Snr's salary; (d) Advocate C Viljoen (although it is not clear what that was for) - no dates are advanced in respect of those payments; (e) Advocate C Viljoen again on 25 March 2016 and on 07 April 2016; (f) the respondent on 24 March 2016 and on 17 April 2016; and finally bank charges (no date is advanced for that payment either). Significantly, no proof is attached in respect of any of these payments.
- [32] Nevertheless, the applicants have been able to establish the following:
- (a) Solodor rendered services to Lobster Harvest;
 - (b) Lobster Harvest paid for those services on 23 March 2015 and 25 March 2015, to the total amount of R240 427.85, into the respondent's trust account;
 - (c) The respondent received money from Lobster Harvest; All this is not disputed.
 - (d) The respondent was not a creditor of Solodor;
 - (e) Solodor was placed into provisional liquidation on 8 April 2015, which was made final on 22 May 2015;
 - (f) The respondent utilised the money he received from Lobster Harvest to pay for legal services he rendered to Van Staden Snr. Mr Callaghan was at pains to submit to the Court that Van Staden Snr was an employee of Solodor, that he was owed money by Solodor and therefore it was permissible for the money to be paid to the respondent, and be utilised for legal services rendered by the respondent on behalf of Van Staden Snr. Not only is this not in the papers, it contradicts the respondent's denials that the money was used for that purpose. In any event, the respondent contradicts himself also, because on the list he gave, some of the money was paid to himself, for reasons not stated. The fact that the respondent now lists how he disposed of the amount paid is neither here nor there; it not only lacks substance but appears to be unlawful on other bases. Lastly, the Power of Attorney authorising Van Staden Snr to act in Van Staden Jnr's stead, in all matters pertaining to the day to day business and running of Solodor cannot be stretched to cover the utilisation of Solodor's money for services or matters not related to Solodor.

[33] From this, it is clear that there was a disposition of property, made by Solodor, or on its behalf with the use of a Power of Attorney by Van Staden Snr, in the form of payments to the respondent's trust account by Solodor's creditor. This disposition was made just over a week before Solodor was provisionally liquidated. The respondent benefited from this payment in that the money was used to pay for legal services he rendered to Van Staden Snr. The version that the money, or part thereof, was used to pay Solodor's employees' salaries and Solodor's other related activities, is far-fetched and untenable and must therefore be rejected on the papers. Not only does it contradict what Mr G had stated under oath in an opposing affidavit in an application

before Yekiso J, it is untenable because those payments were made in 2016, at a time when Solodor was already in liquidation. The

respondent accordingly had no authority to make payments on behalf of Solodor. When this was pointed out to Mr Callaghan, he simply suggested that these were typographical errors, the dates should have read as 2015. Apart from the fact that no affidavit was filed to explain the errors, it is inconceivable that an error would be repeated six times, when strangely, the dates on which payments were received from Lobster Harvest are correctly stated right above the itemisation of how the sum was disbursed. Furthermore, if those payments were made in 2015, one of the payments would have been made after Solodor was placed in liquidation and others shortly before that. If those disbursements were made in the manner the respondent says they were, that would, in any event, have had the effect of preferring a creditor above another as envisaged in s 29

(1) of the Act.

[34] The respondent has brought no evidence to show that immediately after the making of the dispositions to him, Solodor's assets exceeded its liabilities, as stated in s 26 (1) (b) of the Act. Neither was any evidence brought to the effect that Solodor's

liabilities exceeded its assets by less than the value disposed of, so that the disposition may only be set aside to the extent of such excess.

[35] The Power of Attorney does not assist the respondent, because the dispositions made were not for the benefit of Solodor. They

were without value and would have preferred the respondent above other creditors, had he been a creditor of Solodor (which he has not been able to show), or connected to it in the manner suggested on his behalf.

[36] For those reasons, I am satisfied that the applicants have met the requirements of s 26 (1) (b) read with section 29 of the Act.

[37] I asked Mr Callaghan whether it would have been appropriate for an attorney's trust account to be utilised to pay for salaries of employees, and other activities attributed to Solodor, such as the repair of vehicles. Mr Callaghan submitted that the respondent was obliged to act in accordance with the instructions of his client.

[38] These allegations as well as different versions proffered by the respondent under oath, unavoidably, place a duty upon this Court to direct that a copy of this judgment be sent to the Law Society, to investigate the conduct of the respondent in relation to these transactions.

[39] In the result, the following order is made:

1. It is declared that payments in the amounts of R 132 478.34 and R107 949.51 totalling R 240 427.51 made to the respondent's

trust account are impeachable dispositions by Solodor 42 CC (in liquidation) to the respondent and are accordingly set aside;

2. The respondent is ordered to pay back to the estate of Solodor 42 CC (in liquidation) the amount of R240 427.85, together with interest thereon a tempore morae at 9% per annum;
3. The respondent is ordered to pay the costs of this application.
4. It is directed that a copy of this judgment be sent to the Law Society to investigate the conduct of the respondent.

N P BOQWANA

Judge of the High Court

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