

SOUTH AFRICA / JUDGMENT

Fortein N.O. and Another v Roux and Another (1059/2023) [2023] ZAFSHC 311 (7 August 2023)

[2023] ZAFSHC 311

COURT

Free State High Court, Bloemfontein

BEFORE

Loubser

CASE / FILE NUMBER

1059/2023

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**IN THE HIGH COURT
OF SOUTH AFRICA,
FREE STATE
DIVISION, BLOEMFONTEIN**

Case number: 1059/2023
REPORTABLE: YES/NO
OF
INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO YES/NO
MAGISTRATES: In

the matter between: KAREN
FORTEIN N.O.
First
Applicant
HASSEN
KAJIE N.O.
Second
Applicant
(In
their capacity as liquidators of CRE Stropers CC – in
liquidation)
And
JACOBUS
CORNELIUS CONRAAD ROUX
First
Respondent

MASTER
OF THE HIGH COURT, BLOEMFONTEIN
Second
Respondent

CORAM: LOUBSER, J
HEARD

ON: 20 JULY 2023

JUDGEMENT

BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 07 AUGUST

2023. The date and time for hand-down is deemed to be 07 AUGUST 2023 at 16:00

- [1] The two applicants in this application are the joint liquidators of a close corporation by the name of CRE Stropers CC, which close corporation was placed in final liquidation by this court on 13 August 2020. In the notice of motion, they claim payment of an amount of R107 000.00 plus interest from the first respondent, alleging that the first respondent received that amount on the instructions of CRE Stropers (in liquidation), and that such payment to the first respondent therefore represented a void disposition of property or a right of action by the close corporation. They also seek an order declaring the payment to the first respondent to be void, and that it be set aside.
- [2] The application is opposed by the first respondent on grounds that will be referred to later herein. Suffice it to mention at this stage that the issues to be decided in the application, are firstly whether there was indeed a disposition of property by the close corporation in liquidation, and secondly, if there was such a disposition, whether the disposition was void in terms of applicable legislation and should be paid back to the liquidators.
- [3] The facts of the matter, as alleged by the applicants, appear from the founding affidavit and relevant documentation annexed hereto. They say the following: One of the creditors of CRE Stropers launched an application for the liquidation of the insolvent estate on 15 January 2020. The application was not opposed, and CRE Stropers was provisionally placed in liquidation on 27 February 2020. A final order of liquidation followed on 13 August 2020. The applicants were already appointed by the second respondent as the liquidators on 6 July 2020.
- [4] During their investigations into the affairs of the insolvent estate, they found that on 25 September 2020, CRE Stropers issued an invoice for services rendered to J.J.B. Bester van Niekerk Boerdery (Pty) Ltd in the amount of R374 808.00. The sole member of CRE Stropers, however, gave instructions to J.J.B. Bester van Niekerk Boerdery to pay R107 000.00 of that invoice amount to the first respondent, which it did on the same day, namely 25 September

2020. The insolvent estate owed the amount of R107 000.00 to the first respondent. The applicants contend that by paying the first respondent, one creditor of the insolvent estate was preferred to the detriment of the general body of creditors. For this reason, the payment should be declared

void and the money should be paid back, the applicants say.

- [5] In his answering affidavit the first respondent relies on the provisions of section 341(2) of the Companies Act[1], which 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”. At the time that the R107 000.00 was paid to the first respondent, that amount did not constitute ‘property’ of the insolvent close corporation and the payment was not made from the insolvent’s bank account, the first respondent contends. In particular, at the time the payment was made to first respondent, J.J.B. Bester van Niekerk Boerdery had already paid the invoice rendered to it by the insolvent close corporation in full. The insolvent close corporation therefore had no right of recourse against J.J.B. Bester van Niekerk Boerdery, the first respondent says. In any event, the insolvent close corporation could have no more than a personal right against J.J.B. Bester van Niekerk Boerdery, and such right was not ceded to the first respondent and therefore does not constitute a disposition of a right of action within the meaning of section 341(2). Also, should the court find that the insolvent close corporation had an extant contractual claim against J.J.B. Bester van Niekerk Boerdery as at 25 September 2020, its right of recourse lies against that company and not against the first respondent, he says.

- [6] The first respondent therefore contends that, in the premises, the applicants’ reliance on section 341(2) is bad in law, and that the relief sought by the applicants cannot be sustained.
- [7] In their replying affidavit, the applicants solely rely on an affidavit with annexures by Jenetha van Niekerk, the only director of J.J.B. Bester van Niekerk Boerdery (Pty) Ltd, to show that part of the funds that were due to CRE Stropers, were in fact paid out to the first respondent. However, the further contents of this affidavit and annexures has placed the case for the applicants on a somewhat different footing. According to the affidavit of Mrs. Van Niekerk, the money was not paid out to the first respondent on the instructions of the only member of CRE Stropers, as alleged by the applicants, but in fact on the insistence of the first respondent himself.
- [8] Me Van Niekerk says in her affidavit that CRE Stropers had done harvesting work for J.J.B. Bester van Niekerk Boerdery, and that it received an invoice from CRE Stropers on 25 September 2020 for the work done. The invoice shows that the R107 000.00 that went to the first respondent, has already been deducted from the total amount of the invoice. A notice of online payment to the first respondent shows that, as far back as 3 March 2020, the amount of R107 553.75 of the funds earmarked for CRE Stropers, was paid over to the first respondent. The date of this payment came after the date of provisional liquidation of CRE Stropers, namely 27 February 2020. The applicants have amended their notice of motion to

reflect the amount claimed as R107 553.75, and not R107 000.00.

- [9] According to Mrs. Van Niekerk, this amount was paid over to the first respondent because he came to speak with her, requesting her to deduct from the amount due and payable to CRE Stropers the amount owed to him by CRE Stropers, and to pay it out to him. This version of Mrs. Van Niekerk is corroborated by the record of proceedings in an enquiry into the affairs of the insolvent estate of CRE Stropers. The only member of CRE Stropers, Mr. Riaan Corbett, testified in that enquiry that the first respondent had requested payment from Mrs. Van Niekerk, probably because he realised that CRE Stropers was insolvent

and probably because he was afraid that he would not receive his money.

- [10] According to Mrs. Van Niekerk, CRE Stropers only provided J.J.B. Bester van Niekerk Boerdery with its invoice for the work done on 25 September 2020. As mentioned earlier, the payment to the first respondent is deducted in this invoice from the total payment due.
- [11] Although it is clear that CRE Stropers knew at the date of the invoice that the first respondent had already been paid, there is no evidence on the papers that CRE Stropers had any complicity or involvement in the request of the first respondent that resulted in the payment to him on 3 March 2020. Consequently, this court cannot find that there was a disposition by CRE Stropers itself which should be declared void. For the disposition to be void, section 341(2) expressly requires a disposition by any company being wound-up and unable to pay its debts. (My underlining). The provisions of the Companies Act relating to winding-up apply *mutatis mutandis* to close corporations.[2]
- [12] The question remains whether the first respondent is liable to pay back the R107 553.75 to the applicants in their capacity as joint liquidators of CRE Stropers. It is clear from the papers annexed to the affidavit of Mrs. Van Niekerk that the balance of the invoice of CRE Stropers, after deduction of the payment to the first respondent, was paid to CRE Stropers on 25 September 2020. Now, in the first place, CRE Stropers could never issue an invoice for payment on that date, because at that time it was already in final liquidation and in the hands of the liquidators for a period of more than a month. Only the liquidators were in a position to claim the invoice amount for distribution among the *concursum creditorum*.
- [13] Nor could the first respondent lay claim to the amount owed to him by CRE Stropers after its provisional liquidation on 27 February 2020. By doing so, he only brought about a benefit to himself to the detriment of other creditors in the *concursum creditorum*. In my view, there can be no doubt that nothing should be allowed to be done by a creditor to prejudice the rights of other creditors. The applicants' claim against the first respondent for payment of the amount concerned, must therefore succeed.
- [14] The following order is made:
1. The first respondent is ordered to pay the following to the first and second applicants in their capacities as the joint liquidators of CRE Stropers CC (In liquidation):

1.1. The amount of R107 553.75

1.2. Interest on the amount of R107 553.75 tempore morae from 25 September 2020 to date of payment.

1.3. Costs of suit.

P. J. LOUBSER, J

For the applicants: Adv. J. Ferreira Instructed by: Noordmans Attorneys Bloemfontein For the first respondent: Adv. R. van der Merwe Instructed by: Blair Attorneys Bloemfontein

/roosthuizen

[1] Act 61 of 1973

[2] Section 66 of the Close Corporations Act no 69 of 1984

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Prepared on 11 October 2026 · Esheria