

SOUTH AFRICA / JUDGMENT

Fortein NO v Sumeil (Pty) Ltd and Others (576/2020) [2020] ZAFSHC 59 (12 March 2020) [2020] ZAFSHC 59

COURT

Free State High Court, Bloemfontein

BEFORE

P.J. Loubser

CASE / FILE NUMBER

576/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

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

Case

number: 576/2020

In

the matter between:

KAREN
FORTEIN
N.O.
Applicant
(In
her capacity as the liquidator of
Coogal
Finance (Pty) Ltd. (in liquidation)
and
SUMEIL (PTY) LTD
First Respondent
WILLEM ANDRIES MARITZ
NEL
Second Respondent
ICEBERG TRADING 713
CC
Third Respondent
EUGENE PRINSLOO
Fourth Respondent
HEARD

ON: 27 FEBRUARY 2020

JUDGMENT

BY: LOUBSER, J

DELIVERED ON: 12 MARCH 2020

- [1] This matter came before me as an urgent application, which was fiercely opposed, on Thursday, 27 February 2020. A number of other urgent and opposed applications also came before me on that day and the following day, with the result that I was unable to pay due consideration to the merits of each of them during those two days. I therefore had to reserve judgment in some of them, including the present application.
- [2] The Applicant makes application for an order in terms of which leave is granted to execute the judgment and order of Daniso, J dated 11 February 2020 under the above case number pending the outcome of an application for leave to appeal and any further appeal against the judgment and order. It is further prayed by the Applicant that any further appeals, applications and petitions by any party relating to the judgment of Daniso, J shall not suspend the operation of the judgment and order. In the alternative, the Applicant seeks an order directing the Respondents to hand over the goods in question to her, or to the Sheriff, for preservation and storage pending the outcome of the application for leave to appeal or subsequent appeals.
- [3] It is common cause between the parties that a company by the name of Coogal Finance was placed in final liquidation by this Court on 11 April 2019. The application papers for the winding-up of the company were filed with this Court on 4 February 2019. In the founding affidavit to the present application, the Applicant alleges her investigations have led her to believe that the Respondents are attempting to conceal the goods of the company in liquidation. The goods concerned are four trucks to the total value of some R 2.8 million. The Applicant's investigations followed upon her appointment as the liquidator of the company in liquidation.
- [4] It is further common cause that the Applicant then approached this Court on an ex parte and urgent basis on 11 February 2020 for an order preserving the goods and for an order directing the handing over of the goods to the Applicant. On the same day, Daniso, J made the following final order:
- "1. That the application be disposed with as a matter of urgency.*
2. The Respondents be interdicted from disposing or otherwise encumbering the movable goods specified in Annexure A to the Notice

of Motion.

3. The Respondents forthwith hand over the movable goods as per Annexure A to the Notice of Motion to the applicant in terms of Section 69(3) of the Insolvency Act 24 of 1936.
 4. For the issue of a warrant to search for and take possession of the movable goods specified in Annexure A to the Notice of Motion.
 5. The Respondents forthwith provide the applicant with the exact whereabouts of the goods and continue to do so until the applicant is in possession of the movable goods.
 6. In the event of the Respondents failing or refusing to forthwith comply with the order granted by this court, that the South African Police Service alternatively the sheriff of the court wherein the movable goods may be found, with assistance of the SAPS if required, be ordered to attach the goods and return same to the applicant.
 7. The Respondents, jointly and severally, pay the costs on the scale as between attorney and client.”
- [5] Following this Order of Court, and without wasting any time, the Respondents then proceeded to file a notice of application to appeal against this Order only six days later, namely on 17 February 2020. The effect hereof was that the Order in question immediately became suspended for all practical purposes in terms of Section 18(1) of the Superior Courts Act 10 of 2013, with the result that the Respondents were no longer obliged to comply with the terms of the Order. This in turn spurred the Applicant into action again by approaching the Court in the present application for orders to the effect that the Order would remain operative pending the outcome of the application for leave to appeal and any further appeals against that Order.
- [6] In terms of Section 18(3) of the Act an applicant for such relief must prove on a balance of probabilities the existence of exceptional circumstances and irreparable harm which call for the Court Order to remain operative. According to the Applicant, the exceptional circumstances are to be found in the fact that she is duty-bound by the legislative prescripts to ascertain the assets of the company in liquidation and to immediately take possession and control of such assets to the benefit of the general body of creditors. She mentions in her Founding Affidavit that, taking into account the anticipated asset value of the insolvent estate, as well as the claims against

the estate, the dividend available for distribution would be nil Rand without the trucks. Should the trucks be made available and returned to her, the dividend will increase to an estimate of 30c in the Rand.

- [7] On the other hand, the Applicant states that the Respondents are unlawfully, mala fide and intentionally preventing her from taking control of the trucks. She also referred to what the investigations have disclosed, namely that the four trucks were transferred by the company in liquidation to the First Respondent on 18 February 2019 after the First Respondent had settled the outstanding amount of the instalment sale agreements that the company in liquidation had with ABSA Bank. During an enquiry subsequently held before a magistrate,

the Second Respondent intimated that the First Respondent was indeed in possession of the trucks, but in the process of selling them again. On 7 February 2020 the Applicant learned that the First Respondent had sold or transferred the trucks to the Third Respondent.

[8] With this background in mind, the Applicant discloses further information in her Founding Affidavit that can only be described as disturbing. The investigations disclosed that the Second Respondent, Mr. Nel, was the sole director of the company in liquidation. At the same time he is also a director and the controlling mind of the First Respondent company. The Third Respondent close corporation is owned and operated by the brother-in-law of the Second Respondent, namely Mr. Eugene Prinsloo, who features in this application as the Fourth Respondent. On the basis of these findings, the Applicant states that it is abundantly clear that the Respondents are colluding in an attempt to frustrate her in the performance of her statutory duties in an attempt to defraud and prejudice the creditors of the company liquidation.

[9] In the answering papers, the Respondents (by word of Mr. Nel) referred to the record of the enquiry referred to above and pointed

out that the proceedings were postponed to 26 February 2020 so that the Magistrate could decide on an application made at the enquiry for a search warrant for the trucks in terms of Section 69 of the Insolvency Act. Meanwhile, the Applicant has chosen to “snatch” a final interdicted on an ex parte basis in the High Court per Daniso, J on 11 February 2020. According to the Respondents, this was an abuse of the court processes because the enquiry before the magistrate was still proceeding and they were not afforded an opportunity to be heard in the application before Daniso, J.

[10] The Respondents further pointed out that the trucks were only transferred to the second hand car dealer stock of the Third

Respondent to place the annual licensing of the trucks on hold until such time as the trucks are removed from that stock register or registered in a new owner's name. This was done to avoid the paying of some R 80 000 license fees for the trucks. Mr. Nel also pointed out that he has arranged for the trucks to be stored at a truck stop next to the N3 highway in Johannesburg in anticipation of the further court proceedings of 26 February 2020. They are still there, he states. He also submits that Daniso, J could never have made the order in terms of Section 69 of the Insolvency Act because that Section is only applicable in proceedings before a magistrate. The High Court therefore lacked the jurisdiction to issue a warrant for the search and the taking of the trucks, the Respondents submit.

[11] The Respondents conclude by saying that the Applicant may not take control of the estate of the insolvent company by conducting herself unlawfully and by flagrantly disregarding the rights of the Respondents and by abusing the process of this Court. In such

circumstances, they say that the Applicant should not expect this Court to come to her assistance in this application.

- [12] At the hearing of the application, Mr. Zietsman appearing for the Respondents, submitted that the Respondents have showed a more than reasonable prospect of success in their appeal. This is so because the Respondents were not afforded the right to be heard when the final interdict was “snatched”, and because the Court could not have made any order in terms of Section 69 of the Insolvency Act.
- [13] As will appear hereunder, there is at least some merit in the case presented by the Respondents when it is considered in isolation. I am of the view, however, that the broader picture of all the circumstances that unfolded in the papers before me has to be considered. To begin with, in terms of Section 69(1) of the Insolvency Act, a trustee shall as soon as possible after his appointment take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee. Section 348 of the Companies Act 61 of 1973 further provides that a winding up of the company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding up. The deemed date of liquidation in the present case is therefore 4 February 2019.
- [14] Furthermore, Section 341(2) of the Act states that every disposition of its property by a company made after the commencement of the winding-up, shall be void unless the Court otherwise orders. The transfer of the trucks by the company in liquidation to the First Respondent on 18 February 2019 is therefore a void transaction, as is the further transfer of the trucks to the Third Respondent. The result of all these statutory provisions is therefore that none of the Respondents have any entitlement to retain the possession of the trucks. They must be handed over to the Applicant. This cannot be stated in any simpler way.
- [15] It is true that Daniso, J could not rely on Section 69 when she made the orders. In terms of Section 362 of the Companies Act 61 of 1973, however, she was fully entitled to do so. The reference to a wrong statutory provision would not, in my view, render the order that she had made, and irregular order that will be set aside on appeal for that reason. There is also good reason to be found for the Applicant having approached the Court on an ex parte basis. The history of the trucks changing hands and the fact that they were not yet handed over to the Applicant some ten months after the final order of liquidation and some 12 months after the date of deemed liquidation, leaves one with a strong suspicion that any notice to the Respondents would have defeated the purpose of the application. In my view, the “snatching” of the order would in such circumstances also not point to a reasonable prospect of success on appeal.
- [16] As for the fact that the Respondents have now filed a notice of application for leave to appeal, it needs to be underlined that the Respondents could have set down the matter for reconsideration of the order in terms of Rule 6(12)(c) of the Rules of the High Court. Instead of following that course, they chose to file the present notice, thereby suspending the order of Daniso, J. In view of the fact that the trucks have to be handed over immediately to the Applicant in any event, one can only consider their choice with suspicion.

[17] In my view, all the circumstances contribute to exceptional circumstances for the order now sought by the Applicant. There could also be irreparable harm for the creditors of the company in liquidation if the order sought is not granted, for the trucks may perhaps disappear or suffer damages if they are not secured immediately. There cannot be any irreparable harm to the Respondents

if the order is granted, because none of them are entitled to own or possess the trucks in any event.

[18] I have no hesitation in granting the following orders:

1. This matter is disposed with as a matter of urgency.
2. Pending the outcome of the application for leave to appeal and any further appeals that may follow, the Applicant is granted leave to execute the judgment and order of Daniso, J dated 11 February 2020 under case no. 576/2020.
3. The First and Second Respondents to pay the costs of the application jointly and severally, the one paying the other to be absolved.

P.J. LOUBSER, J

For the Applicant: Adv. F.F. Jacobs

Instructed by: Jaco Roos Attorneys

Pretoria

C/o Noordmans Inc.

Bloemfontein

For the Respondents: Adv. P.J.J. Zietsman

Instructed by: Kramer Weihman & Joubert Attorneys

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2020/59.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/fortein-no-v-sumeil-pty-ltd-and-others-unknown-topic-afshc-2020>

Prepared on 10 October 2026 · Esheria