

SOUTH AFRICA / JUDGMENT

Maree and Another v Bobroff and Another (2016/32219) [2018] ZAGPJHC 79 (3 April 2018)

[2018] ZAGPJHC 79

COURT

South Gauteng High Court, Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

2016/32219

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IN

THE HIGH COURT OF SOUTH AFRICA

GOUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2016/32219

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED.

3

April 2018

In

the matter of:

MAREE,
CHRISTINE
MARIE First
Respondent
MOTARA,
YASMIN Second
Respondent
and
BOBROFF,
RONALD
First
Respondent
BOBROFF,

DARREN
RODNEY Second
Respondent

Summary:

Application for
confirmation of the
provisional sequestration:

Joinder of the separate estate of the individual respondents.
The
decision of the court in the provisional sequestration that joinder
in the circumstances is permissible is palpably wrong and
thus of no
precedential value or binding effect. The authorities in the Gauteng
Division and the Natal Provincial Division that
misjoinder is
inappropriate unless done by consent of the parties or there is
sufficient coincidence of interest on the facts to
find that there is
no misjoinder.

JUDGMENT

Molahlehi J

Introduction

1. The applicants in this matter successfully obtained a provisional sequestration order of the estate of the first and second respondents. The applicants now seek an order confirming the same.
2. The sequestration application is brought in terms of s 8 (a) and (b) of the Insolvency Act, 24 of 1936 (the Act). The claim in terms of s 8
 - (a) of the Act is based on the departure of the respondents from South Africa for Australia and their alleged absence with the intention to evade or delay the payment of the debts due to the applicants and several other former clients of the respondent's law firm.
3. The alleged indebtedness to the applicants is based on the outcome of the decision of this court, in *De La Guerre v Ronald Bobroff and Partners Inc*,^[1] which they unsuccessfully appealed against in the Constitutional court.^[2]
4. In terms of the judgments made in favour of the applicants, the law firm, Ronald Boproff Inc (to which the respondents were directors) respectively owed the first applicant an amount of R1 000 334 980.00 and the second applicant R1 872 757 .52. The applicants contended that the respondents are jointly and severally liable in terms of section 19
 - (3) of the Companies act 71 of 2008 read with section 23 of the Attorneys 53 of 1979.

5. Section 19 of the Companies Act reads as follows:

"If a company is a personal liability company, the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as were contracted during their respective periods of office."

Section 23 (3) of the Attorneys Act reads as follows:

"(1) A company may, notwithstanding anything to the contrary contained in this Act, conduct a practice if:

- (a) Such company is a personal liability company contemplated in the Companies Act, 2008 (Act 71 of 2008);
 - (b) only natural persons who are practitioners and who are in possession of current Fidelity Fund certificates are members or shareholders of the company or persons having any interest in the shares of the company;
 - (c) ...
- (2) Every shareholder of the company shall be a director of the company, and only a shareholder of the company shall be a director thereof.
- (3) If a shareholder of the company or a person having any interest in the shares of the company, dies or ceases to conform to any requirements of subsection (1)(b), he or she or his or her estate, as the case may be, may, as from the date on which he or she dies or ceases to conform, continue to hold the relevant shares or interest in the shares in the company for a period of six months or for such longer period as the Council of the Society having jurisdiction in the area in which the company is registered office is situate, may approve."
6. The respondents did not dispute the existence of the judgments made against the law firm but placed in issue their effectiveness and enforceability pending the outcome of the appeal against the refusal by this court to rescind the same,
7. The unsuccessful rescission application was based on the contention that the agreements which were made orders of the court were not properly concluded in that one of the directors of the firm and the erstwhile attorney of record, for the law firm did not have authority to conclude the same.

Misjoinder.

8. The respondents persisted with the misjoinder point which they had unsuccessfully raised in the provisional sequestration application.

They contended that the final sequestration application should be dismissed because of that defect.

9. The essence of the applicants' case is that the respondents are jointly and severally liable with each other for the indebtedness of the law firm to them.
10. In relation to the misjoinder point, Counsel for the applicants argued that it is permissible to join the respondents because they are jointly liable for the debt in the amount of R18 million. He further argued that the court should find that in the circumstances, it is convenient to allow the separate estates of the respondents to be jointly sequestrated. It was further argued that the joinder of the respondents was justified because of the congruency of the debts of the respondents.
11. Counsel for the respondents on the other hand argued that the decision of Theron AJ in *Marie v Bopfoff and Another*[3], (the provisional sequestration), was correct. He criticised the decisions of Coetzee J in *Ferella (Pty) Ltd v Craiggie and Another*,[4] and Rome AJ in *Strutfast (Pty) Ltd v Uys and Another*,[5] on the bases that they elevated a rule of practice to a principle of law and thus depriving the court of its discretion to consider the issue of joinder in matters of this nature.
12. In addition to emphasizing that the case was unique in that it involves two attorneys whose affairs are uniquely linked, Counsel argued that the court should exercise its powers in terms of s 173 of the Constitution and find that the respondents were properly joined. Section 173 of the Constitution provides that this court has the inherent powers to protect and regulate its process and to develop the common law taking into account the interest of justice.
13. In the supplementary heads of argument, the applicants relied on the authority of *Challen v Reddy and Another*,[6] and *Business Partners Ltd v Vecto Trading 87 (Pty) Ltd and Others*,[7] in support of their proposition that joinder in this matter was proper and should sustain. In *Challan* the full court of the then

Natal division held that joinder of more than one respondent in one insolvency application was permissible. The decision in *Business*

Partners is dealt with later in this judgment.

14. The above proposition is however slightly different to that put forward in paragraph 59 of the heads of argument of the applicant where it is stated that:

"59 A slightly more permissive [different in principle] approach was taken by the full bench in *Challen v Reddy & Another*

[1928] 49 NPD 387 and *Kroon J Business Partners Ltd v Vetco Trading 87 (Pty) Ltd and Others* 2004

- [5] SA 296. (SE) where it was found that in certain circumstances, such a joinder of respondents is permissible and even sometimes desirable, provided the effect of substantially similar."

15. The above approach was recently adopted in *Maree and Another v Bobroff and Another*,[8] where Theron AJ, in the provisional sequestration judgment in this matter found that;

"There is sufficient substantial coincidence of interest on the facts of this case to find that there is not a misjoinder."

16. The learned judge further noted that "there is some weighty authority" in support of the proposition that joining the two respondents in one application was a fatal misjoinder. He, however, based on the reservations raised obiter about the approach in *Ferela (Pty) Ltd v Craigie and Others*,^[9] by Kroon J in *Business Partners Ltd v Vecto Trading 77 (Pty) Ltd and Others*,^[10] found that *Ferela* was clearly wrong and thus it was permissible for the applicants to have joined the respondents.
17. The above approach was correctly heavily criticized in the recent decision of Rome AJ in *Strutfast (Pty) Limited v Uys and Another*.^[11] The learned judge in that matter found that there seem to have been no basis as to why the court in *Maree* (provisional sequestration matter) deviated from the well-established approach in dealing with misjoinder in cases of this nature.

Evaluation/analysis

18. I align myself, with due respect, to the criticism of *Maree* in *Strutfast*. The approach adopted in *Strutfast* that misjoinder in applications of this nature is fatal to the case of the applicants is line with the authorities in this division, including some in the then Natal Provincial Division.
19. The basic principle governing the approach to adopt when dealing with the application involving joinder of more than one respondents in an application for the sequestration is well summarized in the head note in *Ferella* as follows:

"[It is] undesirable that two individuals should ever be joined in an application for the sequestration of respondents in one application."

20. A joinder of more than one respondent in an application for sequestration is permissible where there is a complete identity of interest or where there is consent by the parties.
21. The Challen approach which as indicated earlier the applicants relied on, was followed in *Kirkwood Garage (Pty) Ltd v Lategaan and Another*,^[12] where the court held that it was competent to join more than one of the debtors in one sequestration application.
22. The two decisions were heavily criticised by Coetzee J in *Ferella*, who when dealing with the precedential value of Challen said:

"Unfortunately, there is no discussion whatsoever of the principles involved, and it is therefore not known to one on what basis the then Natal Full Bench allowed this approach to be adopted."

23. As concerning the precedential value of *Kirkwood*, the learned Judge said that the decision: "... contains no reasoning whatsoever to suggest why joinder was proper under the circumstances and with the greatest respect on principle this is not a helpful judgment."

24. In dealing with the problems posed by having to deal with more than one respondent in a similar application of insolvency, the court said:

“When one comes to the act of insolvency, however, it is apparent from the facts that I have given that this is based on completely different facts not related in any sense whatsoever. There were two different warrant of execution. One had nothing to do with the other, save that possibly the headings of the case numbers were the same. But in the case of one some fixed property was attached; in the case of the other, no attachment could be made. The facts which have to be investigated to decide whether each of these persons committed an act of insolvency do not overlap in any sense whatsoever. But even more important is the fact that, as far as the third respondent is concerned, one has to do with two sets of creditors, two different sets of assets, two different sets of circumstances which will each have to be investigated in order to decide whether, in that particular case, there is the likelihood of an advantage to the creditors in respect of the particular data. It could therefore quite easily be that two completely different cases, both as far as the act of insolvency or actual insolvency and the advantage that creditors are concerned may have to be heard and determined by the court. Of course, there is the further very important feature which exercised my mind. This is not simply a case where either money or property, is claimed from a respondent and where the provisions of rule 10 would very easily be applicable,

mutatis mutandis. This is a procedure which really achieves the conquests was credited to him. That is the purpose of sequestration

proceedings. It is to my mind, inadvisable that two separate estates should be dealt with in this way, each leading to its own and utterly separate concursus creditorum.”

25. In following and upholding the approach in *Breedtvelde and Another v Van Zyl and Others*, [13] the court in *Ferela* found that although the respondent companies which the applicant had sought to liquidate in one petition were subsidiary companies, it was inappropriate to join them in one liquidation application.

26. The important consideration for the approach that several respondents should not be joined in an application for sequestration is set out by Margo J in *Breedtvelde* as follows:

"In the present case, each company has its own separate share capital, separate shareholders and separate creditors and the fusing of the interests of all four companies in one proceeding is confusing and prejudicial to persons interested in only one such company. In the compulsory winding-up of a company, the petition is an important document. Its purpose, among other things, is to place before the Court, for the information of the company, the creditors and shareholders, a statement of the material facts upon which a winding-up order is claimed, and it also serves to provide information to the Master, the Sheriff, the liquidator and other interested parties. If, for example, creditors in one or other of the companies, in this case, should wish to intervene on the return day, or to suggest a compromise under section 103 of the Companies Act, there is no valid reason why they should have to become involved in the affairs of three other companies."

27. In *Strutfast*, after quoting the above with approval Rome AJ said:

“[10]. It is important to note that while it is convenient to treat Breetveldt and Ferela as alike judgments, there was a further important consideration, which informed the decision in Ferela. As the above-emphasised portion of Coetzee J's judgment indicates, where one is dealing with the requirement of advantage to creditors, one has to do with two sets of creditors, two different sets of assets, two different sets of circumstances, which have to be investigated separately in order to decide whether in a particular case there is the likelihood of an advantage to creditors in respect of that particular debtor. This reasoning is with respect sound. Intertwining allegations about assets belonging to a plurality of respondents have the potential to generate confusion about which assets (as between several respondents) are to form the basis of the advantage (in the form of a dividend) to the particular creditors of one respondent.”

28. In *E Brack and Another v Front Runner Racks*,^[14] Burochowitz J said:

“Breedvelt has withstood the test of time. It has been referred to with approval in this province and in Natal... It has received qualified approval in the Eastern Cape Division in Business Partners supra. There the court expressed the view that it was not a sine qua non that here has to be a complete identity of interest for a valid joinder of more than one debtor in an application for liquidation or sequestration.”

29. The learned Judge further held that:

“[8] On the basis of the stare decisis principle this Court may only depart from the approach adopted in Breedvelt if convinced that it is clearly or palpably erroneous... The above-quoted dictum in Business Partners is persuasive but insufficient to persuade me that Breedveldt, which has been consistently followed over many years is erroneous. I am thus duty-bound to follow Breedvelt.”

30. In *Business Partners* Kroon J in aligning himself with the approach in Breedveldt, Ferella and Caltex Oil (Caltex Oil SA (Pty) Ltd v Govender's Field Distributors (Pty) Ltd,^[15] held that:

“[33] I am persuaded, because of the different requirements that require being satisfied, that there is in principle serious objection to a single application for the liquidation of a company and sequestration of an individual.”

31. It is thus my view that the weight of authorities, in this division, including those in the other divisions support the principle set out by Margo J in Breedveldt. The comments made by Kroon J in *Business Partners* was with due respect obiter and has thus not changed the approach set by the various authorities referred to earlier in this judgment.

32. It follows therefore that the approach adopted in the Maree (in the provisional sequestration) was palpably wrong and accordingly neither does it provide any precedential value nor binding effect on this court.

33. In the present matter, there is a clear, misjoinder of the two respondents which is in my view fatal. There is material difference in the estates of the two respondents. They each own different immovable property which poses different answers to the issue of a benefit to the creditors.
34. Accordingly, the case of the applicants stands to fail on this ground alone. For this reason, I do not deem it necessary to examine other issues raised in this matter.

Order

35. In the premises, the applicants' application is dismissed with costs.

E Molahlehi

Judge of the High Court:

Johannesburg.

Representation:

For the Applicants: J Erasmus.

Instructed by: Norman Berger and Partners Inc

For the Respondents: Adv A Subel SC with Adv D Vetten

Instructed by: John Joseph Finlay Cameron Attorneys.

Heard: 01 March 2018

Delivered: 03 April 2018

[1]

[2013] ZAGPPHC 33).

[2] Ronal Boroff and Partners Inc v De La Guerre 2014 (3) SA 134 (CC).

[3] (2016/32219) ZAGPJHC 11 (7 March 2017).

[4]

[1980] (3) SA 167 (WLD).

[5] 2017

(6) SA 491 (GJ) (5 July 2017).

[6] (1928) CPD 387.

[7] 2004 [5] SA 296 (SE).

[8] (2016/32219)

[2017] ZAGPJHC 116 (7 March 2017).

[9]

[1980] (3) SA 167 (WLD).

[10] 2004 (5) SA 296 (SE).

[11] (5675/2016)

[2017] ZAGPJHC 183; 2017 (6) SA 491 (GJ) (5 July 2017).

[12] 1961 [2] SA 75 [SCA].

[13] 1972 (1) SA 304 (T).

[14] 2000 (Pty) Ltd

[2011] ZAGPJHC 34 (4 May 2011).

[15] 1990 [6] SA 552.

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