

SOUTH AFRICA / JUDGMENT

Mota-Engil South Africa (Pty) Ltd v Barnard (04725/13) [2013] ZAGPJHC 153 (30 April 2013) [2013] ZAGPJHC 153

COURT

South Gauteng High Court, Johannesburg

BEFORE

DTvR Du Plessis

CASE / FILE NUMBER

04725/13

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IN THE REPUBLIC
OF SOUTH AFRICA
SOUTH GAUTENG HIGH
COURT, JOHANNESBURG
CASE NO. 04725/13

In the matter between: MOTA-ENGIL
 SOUTH AFRICA (PTY) LTD
 Applicant
 and
 BARNARD,
 JACQUELINE
 Respondent

JUDGMENT

D T v R DU PLESSIS AJ:

1. The respondent was employed by the applicant as a financial and human resources manager from 18 July 2011 until the termination of her employment on 3 September 2012. The applicant alleges that the respondent is indebted to it in the sums of R3 566 772,52 and R38 159,01 respectively.

2. The first claim is for money that the respondent has allegedly misappropriated out of the funds of the applicant and the second was for taxed bills of costs arising out of orders granted against the respondent by this court. The applicant attempted to execute on the bills of costs and received a nulla bona return from the Sheriff.
3. On the basis of the nulla bona return, the applicant launched this application for the sequestration of the respondent's estate. The allegation is also made that the respondent is factually insolvent.
4. After the application was launched, the sum of R38 159,01 in respect of the taxed costs was paid to the applicant. Based thereon, the respondent denies that the applicant can still rely on the act of insolvency as the indebtedness in respect whereof it was committed, had been extinguished. The respondent also denies being factually insolvent and her indebtedness to the applicant in the sum of R3 566 772,52.
5. It is not in dispute that the applicant has complied with all the formal requirements of the Insolvency Act, 24 of 1936 (as amended). The only issues to be determined are whether the applicant is a creditor of the respondent for purposes of a sequestration application and whether the applicant has shown either an act of insolvency or factual insolvency on the part of the respondent.
6. The first issue will depend on whether the respondent has disputed the applicant's claim on bona fide and reasonable grounds. The only claim that will be relevant in this regard, is the claim for R3 566 772,52 based on an alleged misappropriation of funds. The reason for this is that the applicant's claim for the taxed costs has been paid

after the launch of the application.

7. In its founding affidavit the applicant makes the following allegations:

"26. After conducting a thorough forensic and financial audit of the Applicant's affairs while managed by the Respondent, I ascertained that, inter alia:-

26.1. the Respondent had stolen and misappropriated several amounts totalling R599 341,23, which were paid and/or transferred in to (sic) her personal banking account;

26.2. had fraudulently and unlawfully transferred out of the Applicant's bank account an amount of R2 967 431,29, to a bank account in the name of Kwiksand Building and Transport Merchants, which Solly controls.

27. The unlawful transactions detailed in the preceding paragraph were not picked up by me and the Applicant until the aforementioned audit was undertaken. The Respondent had used other beneficiary references on the stated transfers so as to cover up the misappropriation of the Applicant's funds."

8. The reference to "Solly" is to the respondent's common-law husband.

9. In her answering affidavit, the respondent deals with these allegations as follows:

“Whilst I admit that the Applicant paid the amounts referred to in paragraph 26.1 and 26.2, I deny that I stole and/or misappropriated such amounts and state that such amounts were paid to me and into the bank account of Quicksand Building and Transport merchants by agreement with the said De Sousa, who personally authorised and caused such monies to be released by the Applicant’s bankers and so paid and transferred, the causa being a bonus payment due to me, which was specifically agreed to and approved by the said De Sousa.”

10. The admission of the amounts by the respondent has the result that the applicant’s claim, if sustained, is liquidated.

11. The applicant attached a copy of a forensic report, together with a confirmatory affidavit by the forensic auditor, to its replying affidavit. In response thereto the respondent filed a supplementary affidavit in which she inter alia dealt with the contents of the report. In the supplementary affidavit, the respondent elaborated on the bonus as follows:

“The said De Sousa advised me that bonuses would be paid to me as she and I were involved in facilitating the procurement processes which had been awarded to certain of the Applicant’s suppliers and she would see that I was included in such bonus payments. The said De Sousa advised me that such bonus payments were in accordance with substantial bonus payments which she was also entitled to receive payment of from the Applicant.”

12. The respondent is required, in good faith, to adduce facts which, if proved at trial, would constitute good defences to each of the claims against her. For its part, all that the applicants needs to establish is a single claim in excess of R100,00[1] which the respondent is unable to contest on reasonable and bona fide grounds.[2]

13. The respondent’s allegations should be seen in context to determine whether they are bona fide and reasonable. The context is the following:

13.1. The respondent entered into a transaction on behalf of the applicant for the purchase of steel products to the value of R8,1 million. This transaction was, on the admission of the respondent, without authorisation;[3]

13.2. The respondent purchased three vehicles in the applicant’s name and with the applicant’s money. After the applicant became aware of this fact, it attempted to obtain possession of the vehicles from the respondent. The applicant had to launch various applications to achieve this and it was the costs awarded in these applications that formed the basis of the applicant’s claim for costs referred to above;

13.3. Although the respondent alleges that she had the written authority of De Souza to purchase the vehicles for her to the value of R800 000,00, there is a factual dispute as to whether the document on which she relies was signed by De Souza. The applicant relies on the report of a handwriting expert to show that De Souza’s signature thereon is forged. It is, however, not necessary for me to make a finding on this issue. What is important is that the respondent

provides no logical reason why she would have been authorised to purchase three vehicles for her own use, in the applicant's name and with the applicant's money;

13.4. The respondent was employed for a period of approximately nine months before she was suspended. Her monthly salary was R27 000,00 per month. She fails to provide cogent reasons why the applicant would agree to pay her a bonus of over R3 million at the time that she alleges it did so;

13.5. There is no explanation of the terms of the alleged bonus agreement or when and where it was concluded. There is also no explanation as to why the bonus payments were made in so many tranches and in the particular amounts that they were made in. There is further no explanation as to why the completely wrong beneficiaries were placed on the applicant's bank statements as having received the amounts;

13.6. The reference to "a bonus payment" in the answering affidavit has become a reference to "bonuses" and "bonus payments" in the supplementary affidavit;

13.7. The respondent has failed to attend a disciplinary enquiry into her conduct, as one would have expected her to do if she had authorisation to enter into the transactions and transfer the money as she alleges;

13.8. There is serious doubt over the respondent's qualifications, which are from a Belford University. The documents annexed to the replying affidavit seem to indicate that one merely has to apply and pay a fee to be awarded a degree. In some instances the degree was awarded on the same day as the application and in others even before the application. All the applications for the different degrees seem to have been made on 12 March 2012, but they were awarded from 2008 to 2012, obviously to lend a degree of legitimacy thereto.

14. On a conspectus of the evidence the respondent's version is so inherently improbable that it should be rejected.[4] There was no reason for the applicant to have given her a bonus (or bonuses) within the first year of her employment. The purchase of three vehicles for her, which vehicles were registered in the name of the applicant and paid for by the applicant, also makes no commercial or other sense whatsoever. The fact that she has, on her own version, transacted on behalf of the applicant without any authority in regard to the purchase of steel products, shows her *modus operandi*. The assertion that she had the necessary authority in respect of the other transactions does not bear scrutiny.
15. The applicant has demonstrated that the respondent has acted without authority and to the detriment of the applicant. There is no *bona fide* and reasonable explanation for her transfer of the total sum of R3 566 772,52 to her own account and that of Solly.
16. In the case of a provisional sequestration, such as that before me, the test is that the applicant needs to establish a *prima facie* case. I am satisfied that the applicant has shown that it is a creditor of the respondent in the sum of at least R100,00. It therefore has *locus standi* in the application.

17. In argument before me the respondent's counsel, Mr. Iouliauou, only relied on the disputed indebtedness and the submission that sequestration proceedings are not appropriate to determine such indebtedness.[5] I have dealt therewith and made a finding thereon, but will still deal with the remaining requirements for a sequestration.
18. The next issue is whether it has been shown that the respondent has committed an act of insolvency, alternatively whether she is factually insolvent. There is no question that, at the time that the application was launched, the respondent had committed an act of insolvency in terms of section 8 (b) of the Act. The question is whether the applicant is still entitled to rely on such insolvency where the indebtedness, on which the act is based, has been paid.
19. Mr Maselle, who appeared for the applicant, submitted that an act of insolvency is not extinguished by subsequent payment whereas Mr Iouliauou submitted that it is. In ordinary circumstances such payment would extinguish an act of insolvency as it would not make sense for a creditor to proceed with an application based on such an act where he has been paid. However, on the facts of this matter, I find that the payment has not extinguished the act of insolvency. This is so for the following reasons:
 - 19.1. In her answering affidavit, the respondent alleged that subsequent to the applicant launching the application, she had made payment of the amount of the taxed bill of costs.[6] I pause to mention that this payment was also used by the respondent to show that she was solvent, i.e. that she could pay her creditors and that her assets exceeded her liabilities. I will deal with this aspect hereunder;
 - 19.2. In the replying affidavit the applicant pointed out that this allegation was false, in that at the time that the answering affidavit was filed no amount had been paid. The sum of R36 878,00 was only paid into the account of the applicant's attorneys some days later, which was a lesser amount than what was owed[7];
 - 19.3. In her supplementary affidavit, the respondent stated that the amount had been paid by Solly, i.e. not by herself[8];
 - 19.4. Under these circumstances the respondent cannot evade the consequences of the act of insolvency. The payment of the admitted indebtedness was not made by her but by another person on her behalf. If anything, this fact strengthens the act of insolvency in that it has now been established, even on her own version, that she does not have the means to make payment. This is the inescapable inference to be drawn from this admission.
20. Even if I am not correct on the act of insolvency, the respondent has denied the allegation of factual insolvency without providing any detail or proof of her financial situation whatsoever. She had an opportunity to do so in both her answering affidavit and the supplementary affidavit, but failed to avail herself thereof. This is even more glaring in light of the applicant's criticism in that regard in its replying affidavit.

21. This omission, as seen in light of the fact that Solly paid the taxed bill of costs on her behalf, also leads to the inescapable inference that the respondent is factually insolvent. As the test at this stage is whether the applicant has established such insolvency prima facie, I find that it has discharged that onus.
22. The remaining requirements for a sequestration were not in dispute.
23. I therefore find that the applicant is entitled to an order for the provisional sequestration of the respondent's estate.
24. Accordingly I make the following order:
 1. The respondent's estate is placed under provisional sequestration;
 2. The respondent is called upon to advance reasons, if any, why the Court should not order final sequestration of the said estate on Tuesday 28 May 2013 at 10h00 or so soon thereafter as the matter may be heard;
 3. The costs of the application will be costs in the sequestration.

DTvR DU PLESSIS: AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant: Adv. B Maséle 082 454 8880

Instructed by:

On behalf of the Respondent: Adv. K Ioulianous 011 535 1800 / 082 921 5689

Dates of Hearing: 26 April 2013

Date of Judgment: 30 April 2013

- [1] S 9(1) of the Insolvency Act, 24 of 1936
- [2] Gungudoo and another v Hannover Reinsurance Group Africa (Pty) Ltd and another 2012 (6) SA 537 (SCA) at para 18
- [3] Founding affidavit, page 11, para 15 Answering affidavit, page 83, para 17.1
- [3] Founding affidavit, page 11, para 15
Answering affidavit, page 83, para 17.1
- [4] Gungudoo and another v Hannover Reinsurance Group Africa (Pty) Ltd and another, supra.
- [5] Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (AD) at 980C
- [6] Answering affidavit, page 80, para 11
- [7] Replying affidavit, page 110, paras 12.7 and 12.8

[8] Supplementary affidavit, page 2, para 3.1

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