

SOUTH AFRICA / JUDGMENT

Muller N.O and Another v Fourie and Others (70852/18) [2020] ZAGPPHC 25 (19 February 2020) [2020] ZAGPPHC 25

COURT

North Gauteng High Court, Pretoria

BEFORE

M Van Staden

CASE / FILE NUMBER

70852/18

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

Case number: 70852/18

19/2/2020

In

the matter between:

JOHANNES
ZACHARIAS HUMAN MULLER N.O
1ST APPLICANT
LARISSA ARENDS
N.O
2ND APPLICANT
and
JOHAN ANDRE
FOURIE
1ST RESPONDENT
ESAIAS
JOHANNES JANSE VAN RENSBURG
2ND RESPONDENT
SANDILE OSBORN
BEAUCHAMP N.O
3RD RESPONDENT

JUDGMENT

VAN STADEN, AJ:

INTRODUCTION

- [1] This application, like too many others, has its origins in gullible members of the public being fleeced by the unscrupulous, resulting in the predestined insolvency proceedings fallout. In such fallout, those who have received are called upon to explain their receipts.
- [2] In the current matter application is made for the sequestration of the first respondent's unrehabilitated estate. The issues in dispute involve the respondent disputing his indebtedness and denying that he is insolvent.

FOUNDING AFFIDAVIT

- [3] The applicants, in their capacity as joint provisional liquidators of Love and Let's Live (Pty) Ltd (LLL), apply for the provisional

sequestration of the unrehabilitated estate of the first respondent. The second and third respondents are the trustees of the first

respondent's unrehabilitated estate.

- [4] LLL came into existence in 2015 and purported to trade as an investment company. A'Ri'El Theron (Theron Jr) was the sole director of LLL. Prior to LLL coming into existence, Theron Jr received funds from investors for investment purposes in his personal capacity. For the entire period that LLL was in existence (approximately 20 months) it received payments earmarked for investment in the amount of approximately R285 million. Theron Jr transferred a mere R11,475 million thereof into an online trading account. This trading account yielded a loss of approximately R1 million.
- [5] LLL was run as a Ponzi scheme, where investors were promised unrealistic returns and new investments were utilised to "fund" returns to existing investors. LLL concluded a Memorandum of Understanding (MOU) with potential investors to purportedly justify its activities.
- [6] The first respondent did not have such an MOU with LLL. He concluded an agreement with Theron Jr in his personal capacity during 2012, predating the existence of LLL. The first respondent handed over an amount of R500,000 to Theron Jr, to be invested for his benefit.
- [7] After the investors had demanded payment of their money a liquidation application was presented to court against LLL on 6 December 2017. The investors were met with a response by Theron Jr that the funds were invested in Bitcoin but then "stolen by hackers". Theron Jr conceded that all the funds were gone.

- [8] LLL was finally wound up on 16 March 2018. Theron Jr, not unsurprisingly so, fled the country.
- [9] There were approximately 1,000 investors during the 20 months' period of LLL's existence. Of the 1,000, approximately 300 received some sort of repayment before Theron Jr absconded.
- [10] The first respondent's indebtedness to LLL's insolvent estate is premised on the fact that he never had any form of a contractual relationship with LLL. Despite same he received substantial amounts from LLL.
- [11] An amount of R4,8 million was paid from LLL to an attorney's trust account on behalf of the first respondent, for the acquisition of shares in a company, Brooklyn Chambers (Pty) Ltd (Brooklyn), which is the owner of the house in which the first respondent resides. Such disposition occurred in the 2 years before LLL's winding up. During this time LLL's liabilities exceeded its assets.
- [12] After 6 December 2017, the date of the issue of the liquidation application, the first respondent received amounts totalling R500,000

originating from LLL, into his bank account. Said amount of R 500,000 was generated by Theron Jr utilising LLL's funds to purchase Bitcoin, later on selling the Bitcoin, and utilising part of the proceeds to pay the first respondent.

- [13] The applicants contend that the first respondent is factually insolvent, bearing in mind their claims of R4,8 million and R500,000. They contend that it will be to the advantage of the first respondent's creditors that the first respondent's unrehabilitated estate be sequestrated. If the first respondent's stake in Brooklyn is realised, it will generate a dividend of more than 20c in the rand. The applicants contend that there is a more than reasonable prospect that further assets will be uncovered.

ANSWERING AFFIDAVIT

- [14] The first respondent opposes, essentially on the basis of disputing his indebtedness to LLL and denying that he is insolvent.
- [15] The first respondent denies that he is indebted to the applicants. He contends that LLL was merely the alter ego of Theron Jr and that he received the money from Theron Jr through this alter ego. The payments received by the first respondent were not a return on investment made with LLL, but payments received in terms of his agreement with Theron Jr.
- [16] The first respondent denies that the R500,000 received after commencement of the winding-up of LLL was received from LLL. Said amount was paid to the first respondent after he had enquired from Theron Jr during December 2017 about monies due to him. Theron Jr agreed to sell Bitcoin and pay the first respondent the amount of R 500,000.

- [17] The first respondent contends that as he has no creditors he is solvent. According to him the property owned by Brooklyn is worthless. He also contends that the R4,8 million was used for the acquisition of shares in Brooklyn by his wife.

DISCUSSION

- [18] The Insolvency Act 24 of 1936 (the Act) determines that a court may sequester the estate of a respondent provisionally when it is of the opinion that prima facie the applicants have established a claim against the respondent exceeding R100, the respondent has committed an act of insolvency or is insolvent, and there is reason to believe that it will be to the advantage of the respondent's creditors if his estate is sequestered[1].
- [19] A debtor whose estate has been sequestered may, during his insolvency, acquire a new estate under a title valid against his trustee. This new estate may be sequestered at the instance of a creditor[2].
- [20] In the matter of Wightman t/a JW Construction v Headfour (Pty) Ltd and Another[3] the Supreme Court of Appeal dealt with the issue of a factual dispute in the context of motion proceedings as follows:

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied..."

- [16] The comparison between the two approaches is striking. Whereas the appellant sets out chapter and verse the second respondent deals in generalisations. Each material averment should have been met and answered appropriately not enveloped in a fog which hides or distorts the reality."
- [21] It is clear that the first respondent has no firsthand knowledge of the inner dealings of LLL. The first respondent cannot seriously and unambiguously dispute that Theron Jr utilised LLL's funds, funds which were fleeced off unsuspecting investors. There was no real trading activity from which any other form of income could have been generated.
- [22] It is clear that the first respondent does not have the necessary knowledge to dispute that the only funds generated by Theron Jr, were those received from investors in LLL. As such I cannot state that the first respondent has seriously and unambiguously addressed the facts said to be disputed, and accordingly find that the first respondent received the funds in question from LLL, including the R 500,000 received from the sale of Bitcoin.

- [23] The first respondent clearly had no entitlement to the receipt of the amount of R4,8 million. Such disposition was made without value within the 2 years' period prior to LLL's liquidation when LLL's liabilities exceeded its assets. As such it falls to be set aside in terms of Section 26 (1) of the Act.
- [24] The amount of R500,000, as it was disposed of after winding-up of LLL, constitutes a void transaction in terms of section 341 of the 1973 Companies Act.
- [25] As such I find that prima facie the applicants have established their claims of respectively R4,8 million and R500,000 against the first respondent, whether it is on the basis of the statutory provisions referred to, or on the basis of the *condictio indebite*.
- [26] The first respondent claims that his unrehabilitated estate is solvent as he has no creditors. He relies on the absence of debts to contend that his unrehabilitated estate is not insolvent. Concomitantly it means that if I find that prima facie the applicants have established their claims against him, his unrehabilitated estate would prima facie be insolvent. Furthermore, there is some asset to show for the amount of R4,8 million, the first respondent's stake in Brooklyn. However, there is no asset to show for the amount of R500,000. This means that even if one takes into consideration the asset represented by the first respondent's stake in Brooklyn, his liabilities would still exceed his assets.
- [27] I am of the opinion that prima facie the sequestration of the first respondent's estate will be to the advantage of creditors. The sale of the share in Brooklyn will present a return in all likelihood of more than 20c in the rand. The first respondent has proved himself as a person that takes steps to ensure that assets do not reflect in his own name, as is evident from the amount of R4,8 million being used to acquire shares in Brooklyn for his spouse. I concur with the applicants that there is a more than reasonable prospect that further assets will be uncovered.
- [28] I also take cognizance of the authority of *Chenille Industries v Vorster*[4], in coming to the conclusion that prima facie the sequestration of the first respondent's unrehabilitated estate will be to the advantage of his creditors:
- "Apart from the direct financial advantage resulting from sequestration, the Court must have regard, inter alia, to the superior legal machinery which creditors acquire by sequestration, the right to control the collection, custody and disposal of all the assets through their nominee, the trustee, the right to control similarly the sale of the assets, the certainty that the insolvent cannot contract further debts and diminish the estate, and the assurance that all creditors will be accorded the treatment prescribed by law in the division of the proceeds."*
- [29] The first respondent's defence of Theron Jr using LLL as his alter ego and that the funds in question actually emanate from Theron Jr, does not serve to answer the applicants founding affidavit. It does not, firstly as the applicants have pointed out that the funds in question originate from what the investors have entrusted to LLL, not to Theron Jr. Secondly, as there is no court order that I must pierce the corporate veil and find that the funds originated

from Theron Jr. There is nothing which may lead me to find that the funds did not originate from LLL.

ORDER

1. Accordingly, I order as follows:
 - a. The estate of the first respondent is placed under provisional sequestration.
 - b. The provisional sequestration order is to be published in the Citizen newspaper and the Government Gazette.
 - c. The first respondent and any other party who wishes to avoid such an order being made final are called upon to advance reasons, if any, why the court should not grant a final order of sequestration of the said estate on 10 JUNE 2020 at 10:00 or as soon thereafter as the matter may be heard.

M VAN STADEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 12 FEBRUARY 2020

DATE OF JUDGMENT: 19 FEBRUARY 2020

ATTORNEY FOR APPLICANT: MATHYS KROG ATTORNEYS

ADVOCATE FOR APPLICANT: ADV VAN DER MERWE

ATTORNEY FOR RESPONDENTS: NJ VAN RENSBURG ATTORNEYS

ADVOCATE FOR RESPONDENTS: ADV VILJOEN

[1] Section 10(a), (b) and (c) of the Act.

[2] Ex Parte Geeringh 1980

(2) SA 788 (O) at 789.

[3]

[2008] ZASCA 6; 2008

(3) SA 371 (SCA) at paras 13 and 16.

[4] 1953

(2) SA 691 at 699 F – G.

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