

SOUTH AFRICA / JUDGMENT

Olivier NO and Others v Stewart NO and Others (2020/37190) [2023] ZAGPJHC 1408 (5 December 2023) [2023] ZAGPJHC 1408

COURT

South Gauteng High Court, Johannesburg

BEFORE

Meiring

CASE / FILE NUMBER

2020/37190

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No. 2020/37190

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

05/12/23

In

the matter between:

GERT
CORNELIS OLIVIER N.O.
First
plaintiff
ZACHRYDA
GERTRUIDA RABIE OLIVIER N.O.
Second
plaintiff
CORNELIS
WILHELMUS OLIVIER N.O.
Third
plaintiff
FREDERIK
PETRUS SENEKAL OLIVIER N.O.
Fourth
plaintiff
and
MICHAEL
LAWRENCE STEWART N.O.
First
defendant
LUCAS
MASUTHU N.O.
Second
defendant
THE
MASTER OF THE HIGH COURT GAUTENG DIVISION
Third
defendant
THE
MARINA MARTINIQUE HOME OWNERS ASSOCIATION
Fourth
defendant
This judgment was handed down
electronically by circulation to the parties' representatives
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2023.

JUDGMENT

MEIRING, AJ

The question for determination in this action

[1] This is an action brought under section 45(3) of the Insolvency Act, 1936, which provides:

“If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law, but subject to the provisions of section seventy-five.”

- [2] The plaintiffs, the trustees of the Olyfboom Trust, lodged a claim against the insolvent estate of the entity Richoil Investments 8 (Pty) Ltd for moneys that they say the Trust had loaned and advanced to Richoil.
- [3] In due course, the Master disallowed that claim.
- [4] Under section 45(3) of the Insolvency Act, excerpted above, the claimant, the plaintiffs in this action, seek in this action at law to establish that disallowed claim.
- [5] To succeed, they are to demonstrate, on a balance of probabilities, that the total amount of R600,000.00 that they say was advanced to Richoil – comprised of a deposit of R60,000.00 made in 2004 and a further loan payment of R540,000.00 made in 2007 – emanated from the Olyfboom Trust.
- [6] This Court is enjoined to determine whether the plaintiffs have, on a balance of probabilities, made out a case to establish the claim.

The facts

- [7] This action concerns the relations among several inter-related entities. One might call them a group of family entities. Various farming, business and investment interests of the Olivier family came to be aggregated within the structures of the group.
- [8] At the time in question, at the apex of the group was the Olyfboom Trust. It held all the shares in three private companies, namely Sirkelvier Boerdery (Pty) Ltd, Richoil, and Chartpro Properties 9 (Pty) Ltd. Sirkelvier occupied itself with farming activities. Chartpro and Richoil were set up to embark upon property development.
- [9] The paterfamilias and the driving force and ultimate decision-maker in all the affairs of the group was Mr Gert Olivier. At all material times, his wife Mrs Zachryda Olivier was installed as the sole director of the three companies. She signed resolutions and minutes, yet she played no part in the actual running of the companies. In Mr Olivier’s words, she shouldered the task of the entities’

administration.

- [10] Up until 2020, the Olyfboom Trust had three trustees. They were Mrs Olivier, Mr Cornelis Olivier, the elder of the two sons of the Oliviers, and Mr Christo Oosthuizen, the longstanding auditor of the group and latterly also a friend of the Oliviers. In 2020, Mr Oosthuizen was removed. Messrs Gert Olivier and Frederik Olivier, the younger of the Olivier sons were added, to make up the full complement of four trustees that are before this Court in this action.
- [11] The erven that feature in this dispute are situated within the Marina Martinique Estate in Aston Bay, which is a suburb of Jeffreys Bay, in the Eastern Cape Province. They fall under the sway of the Marina Martinique Homeowners' Association, which is the fourth defendant in this action.
- [12] A dispute over arrear water, electricity and sewerage charges and outstanding levies arose between the Marina Martinique Homeowners' Association and Richoil.
- [13] On 7 February 2014, the Marina Martinique Homeowners' Association applied to this Court for the winding up of Richoil. On 4 March 2014, the final winding up of Richoil was ordered.
- [14] In the wake of the winding up, several things happened that are pertinent to this action.
- [15] At the second general meeting of creditors, on 27 November 2015, a claim that the Olyfboom Trust had brought against Richoil was accepted and admitted. As mentioned above, that claim was for money that the Olyfboom Trust said it had loaned and advanced to Richoil. (The claim, framed in a letter of Mr Oosthuizen of 25 November 2015, was, however, for the incorrect amount of R555,073.00. That amount, it appears, concerns erf 9[...] and not erf 1 [...], which is at issue in this action.)
- [16] Thereupon, the Marina Martinique Homeowners' Association applied to the Master of the High Court, in the Gauteng Division, to authorise an enquiry under section 418 read with section 417 of the Companies Act, 1973, to investigate the trade, dealings and affairs of Richoil. One of the spurs for its seeking the enquiry was the claim of the Olyfboom Trust mentioned above that had been accepted and admitted.
- [17] On various dates in 2016, the enquiry proceeded. Three witnesses testified, namely Messrs Gert Olivier and Christo Oosthuizen, and Mrs Olivier.
- [18] Disquieted, the Marina Martinique Homeowners' Association applied for the review and setting aside of the acceptance of the Olyfboom Trust's claim. On 21 November 2018, this Court directed the Master to consider and decide whether, in the light of the evidence presented at the section 417 enquiry and/or in the light of other evidence, the claim of the Olyfboom Trust should be set aside and expunged from Richoil's insolvent estate.
- [19] On 6 May 2019, the Master indeed expunged the claim, directing the Olyfboom Trust to approach the High Court, should it wish to do so, under section 45(3) of the Insolvency Act, which permits a claimant to establish a claim thus disallowed "by an action at law".

[20] This is that action.

[21] The trustees of the Olyfboom Trust, the plaintiffs in this action, seek three heads of substantive relief (a fourth having being abandoned at the start of the trial).

21.1 First, they seek a declaratory order that Richoil, presented by its joint liquidators, is indebted to the Olyfboom Trust in the amount of R600,000.00.

21.2 Second, they seek the admission of that claim for R600,000.00 in the liquidation and distribution account of Richoil, with interest running from 27 November 2015 (namely the date of the second general meeting of creditors, when the Olyfboom Trust's claim was accepted and admitted).

21.3 Third, they seek an order directing the joint liquidators of Richoil to pay the amount of R600,000.00 to the plaintiffs under the final liquidation and distribution account approved by the Master.

[22] The first, second and fourth defendants defend the action. Jointly, they are referred as the defendants.

The nub of the plaintiffs' case

[23] The plaintiffs' case is that, in 2004, a loan agreement was concluded between the Olyfboom Trust and Richoil. This was so that Richoil might enter into an agreement with C-Max Investments 276 (Pty) Ltd to buy erf 1[...] in the Marina Martinique Estate.

[24] At that time, an amount of R60,000 was advanced to Richoil, as a deposit for the acquisition. It was advanced by Sirkelvier to the Olyfboom Trust and, in turn, by it to Richoil.

[25] Only three years later, in 2007, the remainder of the total loan amount, namely R560,000.00, was advanced to Richoil. This time, the money was advanced by Chartpro to the Olyfboom Trust and, in turn, by it to Richoil.

[26] Accordingly, the plaintiffs aver that the total amount of the loan is R600,000.00.

[27] The plaintiffs contend that the mortgage bond registered over erf 1[...] on 4 October 2010 in favour of the Olyfboom Trust served to secure that historic loan made up of the amounts advanced in 2004 and 2007, respectively. They deny the defendants' version that it was in respect of a new loan that the Olyfboom Trust advanced to Richoil in 2010.

[28] While, in the particulars of claim, the entire loan of R600,000.00 is said to have been advanced only in 2007, the evidence led was to the above effect. No formal amendment was made. Yet, the defendants did not object. The action proceeded on the basis that the loan in question was indeed agreed in 2004, when the deposit was paid. However, the dispute persists over the identity of the lender.

The nub of the defendants' case

- [29] The defendants, the joint liquidators in the insolvent estate of Richoil and the Marina Martinique Homeowners' Association, defend the action.
- [30] Their case is that the moneys advanced to Richoil, comprising the R60,000.00 lent and advanced in 2004 and the further amount of R540,000.00 lent and advanced in 2007, did not emanate from the Olyfboom Trust.
- [31] They say that those amounts were advanced by Sirkelvier and Chartpro, respectively.
- [32] The mortgage bond registered over erf 1[...] in 2010, the defendants say, had nothing to do with that earlier loan amount, but secured a new loan advanced by the Olyfboom Trust to Richoil in 2010.

The faultline between the two cases

- [33] Accordingly, as stated in the opening section of this judgment, if the plaintiffs can, on a balance of probabilities, demonstrate that the amounts advanced to Richoil in 2004 and 2007 – upon which the claim rests that they seek to establish in this action – emanated from the Olyfboom Trust, they will succeed in establishing their claim.
- [34] If they fail to do so, this action under section 45(3) of the Insolvency Act stands to be dismissed.
- [35] That is the narrow question that falls to be determined.

The evidence

- [36] At trial, three witnesses testified. For the plaintiffs, Mr Gert Olivier testified. So, too, did Mr Herman Swanepoel, an expert in matters of accounting. A sole witness testified for the defendants, namely Mr Jan Dekker, also an accounting expert.

Mr Gert Olivier

- [37] Mr Olivier testified on a number of matters. He explained the genesis of the group of entities, the name of the original company Sirkelvier being a play on the surname Olivier, the word “sirkel” referring to the circle made by the letter O, and the word “vier” denoting the four members of the Olivier family.
- [38] In due course, the ambitions of the family grew beyond farming, and the other two companies, Chartpro and Richoil were set up. They all pivoted around the family trust, the Olyfboom Trust, which held all the shares in them.
- [39] Mrs Olivier became the sole director of all the companies. Yet, Mr Olivier was emphatic that he was the central decision-maker among the four Oliviers in all the affairs of the group.

- [40] Mr Oosthuizen was the longterm auditor of the group. In time, the relationship among the Oliviers and Mr Oosthuizen developed into one of friendship. Indeed, until he was removed in 2020, Mr Oosthuizen was also one of the three trustees of the Olyfboom Trust. (Only from 2020, have there been four.)
- [41] As the group of family entities emerged, initially its only source of income was the money generated by the farming operations in Sirkelvier. When it started up, Chartpro, which came to develop an apartment block Aruba Breeze in Jeffreys Bay, was also reliant upon money from Sirkelvier. Only later, as the property developed in Chartpro came to be sold, was money also generated there.
- [42] Mr Olivier was emphatic that, in the group, the money always flowed through the Olyfboom Trust. Sirkelvier would lend money to the Olyfboom Trust, only for it to lend it on to Richoil. This entailed the creation of loan accounts inter se.
- [43] Indeed, at the time in question, Richoil had not yet generated any money. It acquired two erven in the Martina Martinique Estate, namely erven 9[...] and 1[...]. In respect of the latter of those, which is at the heart of this dispute, Mr Olivier testified that the only way it could be acquired was by using money generated elsewhere and loaning and advancing it to Richoil.
- [44] As to the two receipts that were discovered, the one for R60,000.00 in 2004 and the other for R540,000.00 in 2007, Mr Olivier testified that they document the loan in question that forms of the basis of the claim sought to be vindicated in this action. He testified that, on his instruction, the amount of R60,000.00 (the receipt is dated 20 October 2004) was paid directly to Jim Boyens Attorneys, the conveyancing attorneys dealing with the sale of erf 1[...], by an agent of Sirkelvier that owed money to it for potatoes that it had produced under licence. (It is not clear why this receipt bears the legend “Erf 76” at its foot.)
- [45] He gave a similar instruction when the payment of R540,000.00 fell due in 2007. Of the R540,000.00, which was generated in Chartpro by the sale of the first of the apartments in Aruba Breeze, he said: “But it is proceeds that is going to be paid back to Sirkelvier, and Sirkelvier will advance it to the trust again, but that goes now off from the loan to Sirkelvier Boerdery. It was only a way of saving some money, bank costs.”
- [46] As to the timing of the registration of the mortgage bond, in 2010, Mr Olivier testified that it was only, once the Oliviers had decided that they would not continue with the development in Richoil, that they chose to “secure the bond into Olyfboom Trust”.
- [47] Faced by a central feature of this case, namely the financial documents of the Olyfboom Trust and Richoil that, on their face, contradict the case advanced by the plaintiffs, Mr Olivier testified that, as the person responsible for the keeping of the accounts of the entities in the group, Mr Oosthuizen had made errors.

[48] This had, Mr Oliver testified, become a matter of such moment to the Oliviers that the relationship soured and that litigation ensued between them and the auditing firm that employed Mr Oosthuizen. The details of that litigation were unclear. It had become settled.

[49] Indeed, Mr Olivier blamed the very expungement of the claim in question here upon Mr Oosthuizen, too, who had given “wrong financial information”.

Mr Herman Swanepoel

[50] Mr Swanepoel produced an expert report, a copy of which was attached to the particulars of claim. Thereafter, he took part in the expert process, namely the exchange of expert reports and the composition, with Mr Dekker, of a joint expert report. The later version of Mr Swanepoel's expert report, thus exchanged with the defendants, did not differ materially from the earlier iteration.

[51] By the time the experts compiled their joint expert minute, after a meeting held in Lichtenburg on 31 May 2023, the issues had narrowed to the question of from where the funding of the R600,000.00 loan emanated, comprised of the payment of R60,000.00 in 2004 and R540,000.00 in 2007. The suggestion that that report contains a concession on the part of the defendants as to from where the R60,000.00 emanated was not well-founded. Upon a conspectus of the pleadings and the joint expert minute, that remained in dispute.

[52] In line with the contents of his expert report, Mr Swanepoel testified that he had inspected the annual financial statements of the Olyfboom Trust and Richoil for the year ended 28 February 2010, which were the earliest approved statements for both entities. (In his report, he did not consider the 2012 annual financial statements of the Olyfboom Trust, which, it is common cause, were also approved.)

[53] Mr Swanepoel also had recourse to inter alia resolutions that “were available and formed part of the bond registration” as well as correspondence concerning “the loan and the registration of the bond”. In his report, Mr Swanepoel said that he had had “discussions” with Mrs Oliver, “as trustee of the trust”. In his testimony, Mr Swanepoel indicated that this had, in fact, been a single telephone call of about five minutes' duration.

[54] Mr Swanepoel was of the view that the group of family companies at issue here was a group of companies, as defined in section 1 of the Companies Act, 2008, and that it “is not uncommon for groups of companies to transfer funds, or even make payments on behalf of others and account for it in loan accounts”.

[55] As to the recordal of the loan at issue in this action – namely the one made up of the deposit of R60,000.00 advanced in 2004 and the remainder of R540,000.00 advanced in 2007 – Mr Swanepoel testified that it was recorded only in Richoil's annual financial statements for the year ended February 2010, while it ought to have been recorded in the annual financial statements of the year ended February 2005 already. He added that this would, however, not have affected Richoil's asset value, since the purchase price and the liability are equal in value. On occasion, Mr Swanepoel returned to this point.

- [56] Mr Swanepoel testified about the receipts among the discovered documents, both from Jim Boyens Attorneys, the conveyancing attorneys for erf 1[...], the one, in 2004, for R60,000.00 and the other, in 2007, for R540,000.00. Those were transfers, he said, that were made directly between the attorneys.
- [57] Mr Swanepoel relied upon the discussion he had with Mrs Olivier, the sole director of Richoil and at the time one of three trustees of the Olyfboom Trust, to interpret the flow of money represented by these two receipts.
- [58] The smaller receipt, Mr Swanepoel testified, for the amount of R60,000.00 represented the 10% deposit that was due under the sale agreement. The other receipt was for the remainder of the purchase price of erf 1[...], paid in 2007.
- [59] In his expert statement, he said this of the smaller receipt (and his viva voce testimony was to similar effect):

“According to our discussion with Mrs Olivier, it was indicated that the funds was transferred by one of Sirkelvier Boerdery (Pty) Ltd customers as compensation for goods purchased. On request by the director (Mrs Olivier) the funds was paid directly to the attorneys, instead of paying it into the account of Sirkelvier Boerdery Ltd and then transferring it on behalf of the Olyfboom Trust to the attorneys.”

- [60] As Mr Swanepoel testified in court, that discussion as well as the “statement” referred to below, was an oral statement made during the five-minute telephone call with Mrs Olivier, at one point while Mr Olivier was bringing documents to Mr Swanepoel for him to prepare the initial version of his expert report, upon which the plaintiffs say the particulars of claim rely.

- [61] As to the larger invoice, Mr Swanepoel said this:

“According to the statement of Mrs Olivier even though the funds was transferred directly between the attorneys, the funds was used to repay the loan Chartpro ... had from Olyfboom Trust. Then Olyfboom Trust made the funds available to Richoil ... as a loan to pay the balance of the purchase price.”

- [62] Mr Swanepoel proceeded to refer to two further pockets of documents, first an e-mail exchange between Mr Oosthuizen and the office of Messrs Slabbert & Rossouw Attorneys, the attorneys entrusted with the task of registering the mortgage bond, and a resolution of the board of directors of Richoil dated 4 August 2010, as well as an extract from the minutes of the board of directors of the same date.
- [63] In the e-mail exchange, on 20 July 2010, one Yvonne from the office of Slabbert & Rossouw Attorneys enquired from Mr Oosthuizen: “Bevestig asseblief hierdie verband oor Erf 1[...] Astonbaai word gegee deur Chartpro Properties 9 (Pty) Ltd (en nie Olyfboom Trust nie).” On 26 July 2010, she followed up in similar terms: “Bevestig asseblief dringend of Chartpro Properties (en nie Olyfboom Trust nie) bogemelde verband gee.”

[64] Later on 26 July 2010, Mr Oosthuizen responded: “Verwys na jou skrywe dateer 20 en 26 Julie 2010 t.o.v. Richoil 8 en verbande. Die verbandgewer t.o.v altwee eiendomme is Olyfboom Trust.”

[65] The extract of the minute reads inter alia as follows:

“2.2 The Company has applied for and will enter into a mortgage loan agreement with OLYFBOOM TRUST ... (‘the Lender’) for a principal debt amount of R600 000,00 ... on the terms and conditions as stipulated by the Lender subject to a further condition that a covering mortgage bond (‘the Bond’) securing the Capital amount of R720 000,00 ... be registered in favour of the Lender over the following property:-

ERF 1[...] ASTON BAY

...

2.5 Any amount received from the Lender will be paid into the Company’s banking account.”

[66] The resolution of Richoil reads as follows:

“RESOLVED:

1.1 be registered in favour of the Lender over the following property:-

ERF 1[...] ASTON BAY”

[67] The conclusion that Mr Swanepoel reached was that the funds indeed emanated from the Olyfboom Trust.

Mr Jan Dekker

[68] Mr Dekker was the expert witness for the defendants. He had recourse to broadly the same documents as Mr Swanepoel. At any rate, during the expert engagement, they came to have everything their counterparty had. In the compilation of his report, Mr Dekker also had regard to the annual financial statements of the Olyfboom Trust for the year ended February 2012, which had also been approved.

[69] Mr Dekker testified that, despite it having occurred some years earlier already, the purchase of erf 1[...] was first recorded in the annual financial statements of Richoil for the year ended February 2010.

[70] He added that the purchase was funded from a new loan with an outstanding balance of R600,000.00, which was first recorded then, in the year ended February 2010. The lender of that amount is recorded as Chartpro. The loan is reflected as “unsecured, interest bearing and repayable on demand”.

[71] In sum, therefore, Mr Dekker concluded this on the strength of the 2010 annual financial statements of Richoil:

71.1 They reflect a loan from the Olyfboom Trust to Richoil of R555,073.00, which concerns erf 9[...].

71.2 They also reflect a loan of R600,000.00 for the purchase of erf 1[...], payable not to the Olyfboom Trust but to Chartpro (despite the deposit of R60,000.00 having come from Sirkelvier).

[72] This position is mirrored in the annual financial statements of the Olyfboom Trust for the year ended February 2010, which reflects only the loan to Richoil of R555,073.00, which relates to erf 9[...]. It does not reflect a loan amount of R600,000.00 owed to it by Richoil.

[73] Mr Dekker proceeded to say that, on 4 August 2010, the board of Richoil resolved to apply for a mortgage loan agreement with the Olyfboom Trust, after which the mortgage bond was registered on 14 September 2010. He emphasised the forward-looking nature of the language used in the resolution.

[74] Indeed, consistent with this, the 2012 annual financial statements of the Olyfboom Trust reflect a loan to Richoil of R1,155,073.31.

[75] That loan, Mr Dekker testified, was made up of an unsecured loan relating to erf 9[...] in the amount of R555,073.31, which was in place already before the acquisition of erf 1[...], and the mortgage loan given by the Olyfboom Trust after 4 August 2010 in the amount of R600,000.00.

[76] He went on to say that, if the version advanced in the particulars of claim was correct, the outstanding loan payable by Richoil to the Trust on 28 February 2010 would have been R1,155,073.00, consisting of the R555,073.00 loan concerning erf 9[...] and the R600,000.00 loaned to acquire erf 1[...].

[77] Yet, after 28 February 2010, namely on 4 August 2010, Richoil entered into a mortgage loan agreement with the Olyfboom Trust, in the amount of R600,000.00.

[78] In the light of all the documents available to him, Mr Dekker concluded that, if the version in the particulars of claim were true, on 4 August 2010, the outstanding loan payable to Trust would be R1,755,073.00, made up of the erf 9[...] loan, the erf 1[...] loan (as pleaded) and the new loan, borne out by the Richoil documents of 4 August 2010.

[79] The 2012 annual financial statements of the Olyfboom Trust (and the comparative balance on 28 February 2011) disclosed the loan recoverable from Richoil as R1,155,073.31. That is, Mr Dekker said, the erf 9[...] loan amount and the 2010 mortgage loan to Richoil. This is consistent, he said, with the 2010 annual financial statements of Richoil, which reflect the erf 9[...] loan as being in the amount of R555,073.00 payable to the Olyfboom Trust and a loan of R600,000.00 payable to Chartpro.

[80] Mr Dekker concluded that, upon a conspectus of all the documents available to him, it could not be said that the R600,000.00 in question emanated from the Olyfboom Trust..

An appraisal of the evidence led

- [81] There are several byways in the facts of this matter that might lure the decision-maker from the straight and narrow course.
- [82] Yet, properly considered, the main body of facts permit of only one outcome.
- [83] In the first instance, the approved annual financial statements of both the Olyfboom Trust and Richoil for the year ended February 2010 (those of the previous years were not approved) are in important respects a mirror image of one another. The Richoil statements for that year indicate that the total loan in question, of R600,000.00, was owed Chartpro. The statements of the Olyfboom Trust indicate that Richoil owed it an amount only of R555,073.00, which is the amount that was owed for erf 9[...].
- [84] The annual financial statements of the Olyfboom Trust for the year ended February 2012, which were also approved, are consistent with those of the year ended February 2010. They reflect a loan owing to the Olyfboom Trust of R1,155,073.00. Had the version pleaded in the particulars of claim been true, it is inescapable that the total loan amount owed to the Olyfboom Trust then would have been R1,755,073.00. That would have been made up of the erf 9[...] loan, the erf 1[...] loan, and the mortgage loan that Richoil had resolved to apply for on 4 August 2010.
- [85] That body of documentary evidence is compelling. It is directly consistent with the defendants' case. It is diametrically at odds with the plaintiffs' case.
- [86] This is plainly what impelled the plaintiffs to seek to distance themselves from the approved financial statements of Richoil and the Olyfboom Trust.
- [87] Yet, while Mr Olivier was at pains to emphasize that the funds would always flow "through" the Olyfboom Trust, in order, in his words, that capital might be built up in it, in his own testimony and on his own version, money did not actually flow from one entity to another. Rather, loan accounts were created inter se. They existed in the ether or – more accurately – in the financial records of the entities.
- [88] It is for precisely that reason that the Companies Act sets in place stringent rules to ensure that the books of account of all companies – even small private companies that are perceived by its owners as having sway only in a family realm – are accurate.
- [89] The plaintiffs were, therefore, constrained to make out a case that logically depends upon the narrative recorded in the financial statements of the group, yet, at the same time, they sought to impugn those very building blocks of their case.
- [90] What is more, the plaintiffs' attempt so to distance themselves from the financial statements of the group does not bear scrutiny. Mr Olivier's testimony in this regard was vague and inscrutable. It was not clear exactly when and in what circumstances Mr Oosthuizen committed the infractions ascribed to him: he was accused both of having botched the claim submitted to the second meeting of creditors, in the incorrect amount of R555,073.00, and erroneously to have recorded a loan owed to Chartpro in the Richoil annual financial

statements of 2010, while it ought to have been recorded as being owed to the Olyfboom Trust. The account advanced by Mr Olivier in this regard raises more questions than it answers. What is more, nothing was said of the steps that Mr Olivier,

the ultimate decision-maker in the group, had taken to clear up the dismal state of the group's books in the wake of Mr Oosthuizen's exit.

[91] Mr Oosthuizen was not called to testify. No particularity was provided of the litigation that was brought against him and/or the firm that had employed him. There was no way of knowing precisely what had been ascribed to him in that litigation. In these circumstances, the question also lingers as to why he was allowed to remain a trustee of the Olyfboom Trust until as late as 2020.

[92] The plaintiffs' case was built upon the expert report of Mr Swanepoel. Yet, in at least two important respects his report was shown to be lacking. In the first place, it appears that, in the face of the documentary evidence set out above that tends in the opposite direction, Mr Swanepoel simply accepted the say-so of Mrs Olivier – conveyed on a five-minute telephone call – from where the money in question emanated. This is surely not very helpful at all – the more so where Mrs Olivier

was a director in name only and could not, on Mr Olivier's evidence, have provided Mr Swanepoel with any meaningful information

on the questions he posed to her.

[93] What is more, Mr Swanepoel conceded that it was only in Court that it struck him that the resolution and the extract of the minutes of the board of directors of Richoil, both of 4 August 2010, were, as a matter of language forward-looking. They were cast in the present tense, as far as the loan agreement goes, and in the future tense, as far as the mortgage bond goes. Properly considered, they are inconsistent with the plaintiffs' version that the mortgage bond was designed to secure the historic loan for erf 1[...], which had been finalized several years before. Had the resolution and the extract from the minutes truly dealt with that

loan, it would surely have recorded it as a historic debt.

[94] To boot, Mr Olivier's explanation of the timing of the mortgage bond vis-à-vis the loan concluded in 2004 already hard to fathom. He testified that it was only once the decision had been made not to continue with the Richoil development that he chose to secure the loan. Surely such security would have been as apposite while the development was ongoing.

Conclusion and the order granted

[95] In sum, the body of evidence, both documentary and testimonial, carefully considered, demonstrates that, on a balance of probabilities, the plaintiffs have failed to demonstrate that the funds for the R600,000.00 advanced under the 2004 loan agreement emanated from the Olyfboom Trust.

[96] Accordingly, the following order is made:

1. The action is dismissed, with costs, including the costs of counsel.

JJ MEIRING

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing: 4–8 September 2023

Date of Judgment: 5 December 2023

APPEARANCES

For the Plaintiff: Adv J Prinsloo

Instructed by: SB Attorneys

For the Defendants: Adv JG Richards

Instructed by: Rushmere Noach Inc

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2023/1408.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/olivier-no-and-others-v-stewart-unknown-topic-agpjhc-2023>

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