

SOUTH AFRICA / JUDGMENT

Osborne v Cockin and Others; Osborne v Cockin N.O. and Others (5618/2015, 6053/2015) [2016] ZAECHGHC 19 (12 April 2016) [2016] ZAECHGHC 19

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering

CASE / FILE NUMBER

5618/2015, 6053/2015

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

Source record

NOT

REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Case no: 5618/2015

Date

heard: 31 March 2016

Date

delivered: 12 April 2016

In

the matter between

DAVID

MILES OSBORNE

Applicant

vs

COCKIN

PARTNERS

First Respondent

MARIOTH

JANET COCKIN

N.O.

Second Respondent

MARIOTH

JANET COCKIN

N.O.

Third Respondent

MARK

WILLIAM

COCKIN

Fourth Respondent

THE

MASTER OF THE HIGH
COURT:

GRAHAMSTOWN

Fifth Respondent

JOHANNES

CHRISTOFFEL DE

WET

Sixth Respondent

PHILLIPUS

VAN

RENSBURG

Seventh Respondent

ALAN

HEGER

Eight Respondent

SHAUN

STEWART

Ninth

Respondent

JOHN

DAY

Tenth Respondent

WERNER

DE JAGER

N.O.

Eleventh Respondent

MICHAEL

TIMKOE

N.O.

Twelfth Respondent

ANDREW

OLIVER SMITH

N.O.

Thirteenth Respondent

MARK

WILLIAM COCKIN

N.O.

Fourteenth Respondent

MARIOTH

JANET COCKIN

N.O.

Fifteenth Respondent

MARIOTH

JANET COCKIN
N.O.
Sixteenth Respondent
MARK
WILLIAM COCKIN
N.O.
Seventeenth Respondent
Case
no: 6053/2015
And
in the matter
between
DAVID
MILES
OSBORNE
Applicant
and
MARK
WILLIAM COCKIN N.O. (in his
Capacity
as a trustee of the Cockin Trust)
(Trust
NO: IT
304/2007)
First Respondent
WERNER
DE JAGER N.O. (in his capacity
As
a trustee of the insolvent deceased
Estate
of Shaun Russell
Cockin)
Second Respondent
MARIO TH
JANET COCKIN N.O. (in her
capacity
as a trustee of the Cockin Trust)
(Trust
no: IT No:
304/2007)
Third Respondent
ANDREW
OLIVER SMITH N.O. (in his
(Trust
No: IT No:
304/2007)
Fourth Respondent
FOR
THE COMPULSORY SEQUESTRATION OF THE COCKIN TRUST: IT
304/2007

JUDGMENT

PICKERING J:

[1] There are before me two applications. In case no 5618/2015 applicant seeks confirmation of a Rule Nisi in terms whereof an interim interdict relating to certain cattle was granted, together with an Anton Piller Order relating to documentation and the furnishing of information in respect of the cattle.

[2] In case no 6053/2015 applicant seeks an order for the provisional sequestration of a Trust known as the Cockin Trust, IT/304/2007.

Because the issues in both applications are to a certain extent interlinked they were argued together, with Mr. Smuts S.C. appearing

for the applicant in both applications and Mr. Paterson S.C. appearing for the various respondents in each case.

[3] Applicant describes himself as a director of companies and a businessman. He avers that during 2013 he and a certain Shaun

Cockin who was trading as Cockin Partners, entered into an oral agreement in terms of which, inter alia, applicant's cattle

would graze on farms owned or controlled by Shaun Cockin; their progeny would be divided equally between them on a date to be agreed;

Shaun Cockin would account to applicant on a monthly basis for the cattle and their progeny; and applicant would retain ownership of the cattle.

[4] For purposes of convenience I will refer to Shaun Cockin hereunder as "Shaun" as this is the manner in which he was referred to throughout the various affidavits filed in the two applications.

[5] Pursuant to the above agreement applicant delivered a large number of cattle to Shaun. An audit done on 28 February 2014 of all the cattle under Shaun's control confirmed that 611 cattle belonging to applicant were in Shaun's possession. In addition thereto applicant and Shaun entered into a written "Agreement of Joint Venture" during March 2014 in terms whereof applicant made available 281 cattle for the joint cattle farming operation and Cockin Partners

made available the land for grazing, with all offspring to be divided equally between the parties to the agreement. It was also agreed that applicant retained ownership of the cattle. It is not in dispute that in consequence of the agreements, both oral and written, Shaun came to be in possession of 1831 cattle belonging to applicant which were distributed by him amongst various farms for purposes of grazing.

- [6] On 31 August 2015 Shaun furnished to applicant a “DM Osborne and Cockin Partners Joint Venture and Report” in which the aforesaid number of cattle in Cockin Partners’ possession was confirmed and in which it was also reported that there were “no losses”.
- [7] During mid September 2015, however, applicant’s manager visited the various farms on which applicant’s cattle were allegedly grazing and discovered that there was in fact a significant shortfall in the number of applicant’s cattle under Shaun’s control. In consequence of this applicant approached Shaun on 12 September 2015 with the request that he explain the discrepancies by not later than 14 September 2015.
- [8] Tragically, on 13 September 2015, Shaun committed suicide.
- [9] Thereafter, during the week of 14 September 2015, an inspection was conducted and applicant ascertained that most of his cattle were missing and could not be accounted for.
- [10] A meeting was then arranged in Cathcart on 17 September with a number of Shaun’s creditors at which an attorney, Mr. Werner De Jager, was present. On 22 September 2015 De Jager furnished a provisional report in which he stated that his instructions were that the value of the livestock claimed against Shaun’s estate “may be as high as R25 million.” He stated further that over and above the livestock claims “the other liabilities mentioned amount to approximately R10 million.” He concluded that it was therefore clear that Shaun’s estate was “hopelessly insolvent.”
- [11] Indeed, on 8 October 2015, an application for the provisional sequestration of Shaun’s deceased estate was brought by a creditor, Colorado Farming CC. According to the deponent to the founding affidavit in that matter the deceased’s estate was indebted to Colorado in the sum of R1 365 500,00 arising out of the misappropriation by Shaun of 173 head of its cattle, Colorado having entered into a similar commercial arrangement in respect of the grazing of its cattle with Shaun, as that entered into between applicant and Shaun.
- [12] On 13 October 2015 a provisional order of sequestration in respect of Shaun’s deceased estate was granted by this Court and Mr. De Jager together with Mr. Timkoe were on 20 October 2015 appointed by the Master of this Court as joint provisional trustees of Shaun’s insolvent deceased estate.
- [13] In the meantime, applicant arranged for such cattle as were still on Shaun’s farms to be removed and returned to him. As at 30 October 2015, however, 200 head of cattle covered by the oral grazing agreement and 1025 covered by the Joint Venture agreement were missing. The value of applicant’s missing stock was approximately R11 million. As was stated by applicant it was clear that Shaun had been involved in conducting a massive “Ponzi” scheme.

[14] Applicant, assisted by the South African Police Stock Theft Unit, attempted to track down his missing cattle. He managed to trace a limited number of the cattle which, so it transpired, had been sold by Shaun to other farmers despite applicant having retained his ownership thereof. Applicant was advised by the Police, however, that all endeavours in terms of the Criminal Procedure Act to trace the remainder of the cattle had been exhausted and that applicant should pursue other legal means to obtain redress.

[15] Applicant accordingly launched the aforementioned Anton Piller application in an attempt to seek evidence regarding the whereabouts

of his missing cattle. Applicant averred that Shaun's widow, Marioth Cockin (to whom I shall hereinafter refer to as

"Marioth") and his son, Mark William Cockin ("Mark") were, at the time of Shaun's death, in partnership together with him, trading as Cockin Partners. He averred that Cockin Partners was essentially a family concern in which Shaun, Marioth and Mark were not only father, son, mother and wife but also intimate business partners acting in furtherance of a family enterprise. He averred further that the Cockin Trust was the alter ego of Shaun and that Shaun had utilised the Trust with the intention of diverting thereto assets which belonged to persons defrauded by Cockin Partners.

[16] In his Anton Piller application applicant cited a number of respondents, including Cockin Partners as first respondent; Marioth

in her various capacities, namely, as second respondent in her capacity as executrix of Shaun's deceased estate; as third

respondent in her personal capacity and "possibly a partner of Cockin Partners"; as fifteenth respondent in her capacity as a Trustee of the Cockin Trust and as sixteenth respondent in her capacity as a Trustee of a Trust known as the Downs Trust. Also cited was Mark in his personal capacity and "possibly a partner of Cockin Partners" and as the "duly authorised managing Trustee of the Cockin Trust and the Downs Trust." He was also cited as fourteenth respondent in his capacity as "Managing Trustee of the Cockin Trust."

[17] On 2 November 2015 the application came before me in chambers and I granted an interim interdict, inter alia, interdicting and restraining the various respondents from dealing with applicant's cattle and placing various obligations upon them to disclose information and documents relating to the cattle and, generally, to perform such acts as would assist in tracing the whereabouts of applicant's cattle.

[18] In argument before me on the extended return day the issue largely resolved itself into a question of costs.

[19] Both counsel were agreed for present purposes that the matter fell to be determined on the basis of the following dictum of Strathern AJ in *Friedshelf v Kalianji* 2015 (4) SA 163 (GJ) at paragraph 67:

“In my view the test at the opposed return day or reconsideration of an Anton Piller order is whether, after considering the competing

allegations and submissions on the affidavits, the applicants still make out a strong prima facie case. In this regard the Court would not be bound to determine the matter on the basis of facts alleged by the respondent which cannot be rejected on paper, as argued in this matter by the respondent’s counsel.”

[20] The application has been opposed only by Marioth in her capacity as second respondent and Mark in his capacity as fourth respondent.

In their respective answering affidavits both of them deny that they were ever partners with Shaun in the business conducted by him as Cockin Partners. Mark denies further that he was the “Managing Trustee” of the Cockin Trust. I should mention that it became common cause that Mark was never a partner. Both aver that they had no involvement whatsoever in Shaun’s business and that they had only limited knowledge of his business dealings with applicant and Shaun’s other creditors. They stated that they had no knowledge at all of Shaun’s fraudulent dealings with applicant’s cattle.

[21] Marioth stated further as follows:

“It is apparent from applicant’s founding affidavit and annexures that there is not a single piece of evidence or document which establishes that I was involved in or a party to the business conducted by Shaun with applicant and his other creditors and the allegations are baseless, reckless and unlawful.”

[22] This averment, so said applicant in his reply based on certain documentation obtained in consequence of the aforementioned order, was dishonest and untruthful. The document referred to, Annexure DM23, emanating from First National Bank, is a so-called

“Facility Agreement” dated 19 November 2014 in terms of which FNB offered a credit facility to “Shaun Russell Cockin and Marioth Janet Cockin trading together in co-partnership under the name of Cockin and Partners.” The offer was duly accepted “for and on behalf of Shaun Russell Cockin and Marioth Janet Cockin trading together in partnership under the name or style Cockin and Partners” and was signed at the end thereof by both Shaun and Marioth above the designation of each as “Partner”.

[23] Not surprisingly, Mr. Paterson had considerable difficulty in dealing with this issue. He submitted that the facility agreement was only disclosed in reply and that Marioth had therefore been deprived of the opportunity of providing an explanation therefor. He submitted that in all probability she was merely assisting Shaun as his wife. In my view, however, this submission cannot be sustained. If indeed there was an innocent explanation for Annexure DM23 one would have expected an application to file a further affidavit setting out such explanation, and such application would in the circumstances obviously have readily been granted. That no such application was forthcoming speaks volumes. The only inference to be drawn in the circumstances is that no innocent explanation exists and that applicant’s averment, to the effect that Marioth’s allegations to the contrary in her affidavit were false, is correct.

[24] This document is, in my view, damning not only of Marioth's denial that she was ever involved in any business conducted by Shaun but also of the denial by Mark that Marioth was a partner. In all the circumstances Mark must have been aware of the fact that Marioth was indeed a partner and his denial of this fact is not credible.

[25] In my view, the fact that Marioth and Mark falsely denied her membership of the partnership clearly constitutes an attempt to distance themselves and the Cockin Trust of which they are trustees as far as possible from Shaun's fraudulent conduct. In view of the false evidence concerning Marioth's role in the Cockin Partnership no reliance can be placed on their evidence

insofar as it seeks to rebut applicant's averments that the businesses were closely interlinked. In my view, as was submitted by Mr. Smuts, this fact is sufficient in itself to justify the application for the Anton Piller order.

[26] Applicant's averment that Cockin Partners was essentially a family concern and that the business affairs of the "Cockin Group" were closely interlinked also gains considerable support from a document obtained in consequence of the order, namely, DM24, prepared by an accountant, Mr. Rossouw, who provided services to Shaun, Cockin Partners, the Cockin Trust and the Downs Trust in July 2013, for the "Cockin Group" headed "Cockin Family: Farming Enterprises Review." In this document Rossouw states that "the entire family enterprise is farmed through four different entities." As appears from his report these entities are the Cockin Trust, which is described as being a business Trust and the entity that physically conducts the farming enterprise on The Downs and Olive Grove farms in Cathcart; the Downs Trust which is a property trust that owns the Downs farm; Cockin Partners which, according to Rossouw "is operated as a sole proprietor in Shaun Cockin's name" and which leases ground and livestock in partnership with various role players and conducts farming operations with profit shares being paid to the partners in line of the various agreements. The fourth entity at the time was Shaun's father, Vernon Cockin.

[27] With regard to Cockin Partners Mr. Rossouw states as follows:

"In theory this business operates completely separate to the Cockin Trust – however, in practice due to cash flow shortages, this business loans and repays cash from and to the Cockin Trust on a regular basis. This business also runs livestock on the Downs and Olive Grove farms from time to time."

[28] Rossouw states further in a letter addressed to Shaun and Mark on 25 November 2013 as follows:

"A Trust is a separate legal entity over which no one person has or should be perceived to have control of. Any decisions affecting

a trust must be made in accordance with the trust deed as decided upon, minuted and resolved by the board of trustees. This is of paramount importance i.e. the paper trail for all transactions in the Trust must be there.

The one very concerning point which pops up time and time again when I look at the transactions which have passed through your Trust bank account in the 2013 financial year is the number of times that cash is transferred between the trust bank account and the other bank accounts such as Cockin Partners, M.W. Cockin etc. This cannot happen if you want to maintain the persona of a Trust. In theory each of these transactions would need to be approved by the trustees (which has not happened).”

[29] In my view, after a consideration of the competing allegations and submissions contained in the various affidavits including that of applicant’s farm manager Mr. Vigne to the effect that at an inspection during February 2015 he observed 30 of applicant’s

heifers on Mark’s farm, The Downs, the applicant has made out a strong prima facie case justifying the launching of the interdict and the Anton Piller application. He is accordingly entitled to an order confirming

the rule nisi together with the costs of the application.

[30] I turn to consider the application for the provisional sequestration of the Cockin Trust under Case no 6053/2015. Cited as first and third respondents in this application are Mark and Marioth Cockin in their capacities as trustees of the Cockin Trust. The independent trustee of the Cockin Trust, Mr. Andrew Smith, is cited in his capacity as such as fourth respondent. The

mentioned Mr. Werner De Jager is cited as second respondent in his capacity as a trustee of Shaun’s insolvent deceased estate.

[31] Section 10 of the Insolvency Act 24 of 1936 provides as follows:

“If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie –

- (a) The petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
- (b) The debtor has committed an act of insolvency or is insolvent; and
- (c) There is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.”

[32] In *Firststrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) Wallis J, as he then was, stated as follows at paragraph 27:

“Once the applicant for a provisional order of sequestration has established on a prima facie basis the requisites for such an order the court has a discretion whether to grant the order. There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking it seems to me that the discretion falls within that class of cases generally described as involving a power combined with a duty. In other words where the conditions prescribed for the grant of a provisional order of sequestration are satisfied then,

in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour."

- [33] As was stated in *Provincial Building Society of South Africa v Du Bois* 1966
- (3) SA 76 (W), referred to with approval in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (AD), in an opposed application for a provisional order of sequestration the necessary prima facie case is established only when the applicant can show that on a consideration of all the affidavits filed a case for sequestration has been established on a balance of probabilities.
- [34] Much argument was addressed to me by both counsel with regard to whether applicant had discharged the onus upon him. In the view that I take of the matter it is not necessary to deal with much of the argument that was presented because, in my opinion, the matter can be determined on a relatively narrow basis.
- [35] As appears from what I have set out above with regard to the Anton Piller application it not disputed that Shaun unlawfully sold applicant's cattle, valued at approximately R11 million.
- [36] As also appears, especially from the report of Rossouw, there was a considerable degree of intermingling of the various "Cockin group" operations. In my view, having regard to certain evidence relating to a joint attempt by Shaun and Mark to sell the entire Cockin Family Farming Enterprise to applicant and to the affidavits of Messrs. Ranger and Knott, Mark clearly had full knowledge of Shaun's business operations.
- [37] Furthermore, it is clear that Marioth was in fact a partner with Shaun in the Cockin Partners business, that she dishonestly attempted to distance herself from such involvement, and that Mark made common cause therewith.
- [38] It is against this background that evidence relating to certain lucerne sales which came to the fore in consequence of the Anton Piller order becomes of great relevance. It is not disputed that certain sums of money transferred by Shaun to the Cockin Trust were recorded as "lucerne sales."
- [39] In his affidavit in support of the respondents' opposition to the application the aforementioned Rossouw stated, with regard to the annual financial statements of the Cockin Trust, that he was satisfied that at the time they were signed that they were a "fair and correct presentation" of the financial records and information presented to him by Shaun and Mark. He then stated that subsequent to Shaun's death, however, "information has come to light that this information supplied to me was not always complete and correct resulting in an understatement of Shaun's liabilities due to his fraudulent activities. I have also been made aware of an overstatement of the value of livestock reflected on the 2015 financial statements of the Cockin Trust due to incorrect livestock quantities being supplied to me by first respondent and an overstatement of lucerne sales in the Cockin Trust due to misallocations due to incorrect narrations on the bank statements provided to me."

[40] Rossouw then proceeds to state further as follows:

“An amount of R1 895 000 has subsequently been identified by the first respondent (Mark) as having been misallocated to lucerne sales in the 2015 year and as such will need to be corrected by crediting the loan account with this amount. As a result the correct lucerne sales that were debited against the loan account reflects at a nett value of R678 640 in the 2015 year... A further similar adjustment to the lucerne sales in the current financial year has been identified by the first respondent equal to an amount of R998 000 which has been credited to the loan account...”

[41] No explanation has been forthcoming from any of the respondents as to how the misallocation of nearly R3 million in respect of lucerne sales could have been made and it is difficult to understand in the absence of any rational explanation on what innocent basis such a misallocation could have come about. This was not a mere “overstatement” of the lucerne sales as Rossouw would have it. Two very large amounts were deliberately allocated to lucerne sales in two different financial years. It is common cause that Shaun did not grow nor sell lucerne. His only source of income was from his cattle speculating business and, at the time that such misallocation was made, he was “hopelessly insolvent”. Rossouw simply reallocated this amount to Shaun’s loan account but there is no explanation at all as to why he did so. As was submitted by Mr. Smuts, in the absence of any such explanation the reasonable inference arises that this was a false representation of the source of money which flowed from the deceased to the Trust. In my view therefore, applicant has established, prima facie, that such money must be the proceeds of the unlawful sale of cattle not belonging to Shaun.

[42] In this regard applicant states pertinently that the Cockin Trust is indebted to him in respect of his livestock that was fraudulently sold by Shaun and the proceeds of such sales having been deposited in the Cockin Trust accounts. In the circumstances I am of the opinion that applicant has established, prima facie, that he is a creditor of the trust. Furthermore, there is no suggestion that the Cockin Trust is able to pay such money to applicant in order to compensate him for such unlawful sale. I agree with the submission by Mr. Smuts that in the light of the misallocation of the sum of R2 893 000 to false lucerne sales in the financial statements of the Trust, when the only source from which the insolvent deceased could have transferred this money was the unlawful sale of cattle, the Trust prima facie, cannot pay its debts and is insolvent.

[43] It will, in the circumstances, be in the best interest of creditors if the estate of the Trust is sequestrated and its affairs fully investigated.

[44] In my opinion therefore applicant has prima facie satisfied the requirements of section 10 of the Act.

[45] The following orders will issue:

- a. The Rule Nisi is confirmed.

- b. The second and fourth respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

Case no: 6053/2015

1. The estate of the Respondent Trust is placed under provisional sequestration in the hands of the Master of this Honourable Court;
2. The said Mark William Cockin, Marioth Janet Cockin and Andrew Oliver Smith, nomine officio in their capacities as the Trustees of the Cockin Trust and Werner de Jager nomine officio in his capacity as trustee of the insolvent deceased estate of Shaun Russell Cockin, be and are hereby called upon to show cause, if any, to this Court at Grahamstown on 17 May 2016 at 10h00 or as soon thereafter as the matter may be heard, why:
 - 2.1 a final Order of Sequestration of the respondent estate should not be granted;
 - 2.2 that the rule nisi be served upon Mark William Cockin, Marioth Janet Cockin, Andrew Oliver Smith and Werner de Jager personally;
 - 2.3 That a copy of this Order be published once in the Daily Dispatch newspaper; and
 - 2.4 That a copy of this Order be served:
 - 2.4.1 On the employees of the respondent by affixing a copy thereof on a notice board to which the employees of the respondent have access inside the respondent's premises, alternatively by affixing a copy of the order at the front gate of the respondent's premises; and
 - 2.4.2 On the South African Revenue Services in East London.
3. The Costs of this application shall be costs in the sequestration.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. Smuts S.C.

Instructed by: Wheeldon Rushmere & Cole, Mr. Brody

Appearing on behalf of Respondents: Adv. Paterson S.C.

Instructed by: Joubert Galpin Searle Inc, Mr. Huxtable

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/ZAECGHC/2016/19.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/osborne-v-cockin-and-others-unknown-topic-aecghc-2016--6a3ea50e3b1caa9129807167>

Prepared on 13 October 2026 · Esheria