

SOUTH AFRICA / JUDGMENT

Rossgro Feed (Pty) Ltd v Van der Westhuizen (766/2021) [2023]

ZALMPPHC 89 (28 September 2023)

[2023] ZALMPPHC 89

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

766/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 766/2021

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

In

the matter between:

ROSSGRO

FEED (PTY) LTD

PLAINTIFF

And

JACQUES

VAN DER WESTHUIZEN

DEFENDANT

JUDGEMENT

KGANYAGO J

- [1] The plaintiff is a company that specialises in the manufacturing of poultry feed. The defendant was the director of Procrops 202 (Pty) Ltd which was conducting the business of a layer poultry farm. Procrops has been finally winded-up. Procrops used to buy feed for the lay hens from the plaintiff's company. According to the plaintiff, Procrops was placing orders using the name of a third party called Serfontein Layer Chickens which was by agreement between the two companies. Serfontein closed its account with the plaintiff but Procrops continued placing orders in the names of Serfontein despite the account being closed. When it was discovered that Serfontein did not give Procrops permission to place the orders using its closed account, Procrops tried to apply for its own credit facilities, but because of its bad credit ratings, the credit facility was not approved.
- [2] As at 2nd November 2020 Procrops was having an outstanding balance in the amount of R391 711.04. On 2nd November 2020 Procrops represented by the defendant signed an acknowledgement of debt with regard to the outstanding amount. The first payment was supposed to be made on 30th November 2020. However, Procrops did not make a single payment in terms of the acknowledgement of debt. On 6th January 2021 the defendant signed a resolution to put Procrops under business rescue. Procrops was finally winded-up. The plaintiff has instituted an action against the defendant seeking the relief based on the provisions of section 424 of the Companies Act[1], (old Act). The plaintiff seeks an order that the defendant be held personally liable for the amount of R391 711.04 together with interest and costs.
- [3] The defendant had defended the plaintiff's action. The defendant has pleaded a special plea of compromise. In terms of the special plea, the defendant had pleaded that Procrops was placed under business rescue, and that the defendant had lodged a claim with the business rescue practitioner. On 17th May 2021 the plaintiff voted in favour of the issued business rescue plan and agreed to specific further amendments to the plan. Procrops has subsequently been finally wound-up on 22nd March 2022, and that subsequently the compromise will extend to the appointed liquidators. The defendant has further pleaded that the plaintiff had entered into the agreement with Procrops and not with him. Further that the defendant had reached a compromise and as such it has the effect of *res iudica*.
- [4] On merits the defendant denied that he was aware of the fact that Procrops did not have any account with the plaintiff. The defendant pleaded that the defendant had approached the plaintiff and the plaintiff had provided feed to the defendant. That the plaintiff was under the express and/or implied impression that the feed was provided to Procrops on credit. That Procrops did apply for credit through one of its directors who did order animal feed directly from the plaintiff and the plaintiff delivered such feed to Procrops even prior to informing Procrops that its credit application has failed. That the plaintiff has delivered

the feed to Procprops prior to the credit application being rejected, and that Procprops was never informed while deliveries were made that the credit application was rejected.

- [5] The defendant disputed the amount claimed by the plaintiff and pleaded that the claim that was proved by the plaintiff with the business rescue practitioner amounted to R356 521.60, and that it was the amount which the plaintiff had specifically stated that it was due to it. The defendant denied that he had acted in contradiction of what was expected from him in line with sections 75, 76 or 77 of the Companies Act[2] (new Act) as amended. The defendant admitted that he had signed the acknowledgment of debt on behalf of Procprops, but never to effect payment. That the plaintiff's claim does not lie against the defendant but against Procprops.
- [6] The plaintiff's first witness to testify was Jan Stephanus Erlank. He testified that currently he is on retirement. He used to be the financial manager of the plaintiff. He was managing the overall finances of the plaintiff. The plaintiff specializes in poultry feed. Serfontein was the plaintiff's client and had an account which it was using to buy feed. As at the 12th November 2019 the records of the plaintiff shows that the last time Serfontein had placed an order with the plaintiff was during

March/April 2019, and its account has been fully paid.

- [7] There was an arrangement which he (witness) was not aware of between Serfontein and Procprops. In terms of the arrangement, Procprops will buy from the plaintiff and the plaintiff will invoice Serfontein. The items that have been bought through that arrangement will be delivered to Procprops. Around the 12th November 2019 the defendant phoned the plaintiff and placed an order for feed through the Serfontein account. The invoice was payable within 30 days of the date of purchase. On 30th November 2019 the plaintiff invoiced Serfontein as usual. On 4th December 2019 Serfontein replied notifying the plaintiff that the invoices sent were not theirs but for Procprops. Serfontein attached an email wherein they have notified Procprops that with effect from 1st November 2019 it will have to buy from the plaintiff on its own names.
- [8] On receipt of the information from Serfontein, the plaintiff notified one Gregory from Procprops to apply for their own credit facility. The credit facility application of Procprops was turned down by the plaintiff as on the credit bureau Procprops was listed on code G and H, meaning that they had a bad credit record. By then various feed have already been delivered to Procprops by the plaintiff. At the end of December 2019 the plaintiff talked to the defendant about the non-payment of the account of Procprops, and the defendant told the plaintiff that he was experiencing financial problems at the stage, but that he will pay as soon as he got payment for the oranges. As at 4th December 2019 the amount owed by Procprops to the plaintiff amounted to R794 937.94.

- [9] From February 2020 up to September 2020 Procprops was making sporadic payment in reduction of its account. On 2nd November 2020 the defendant in his personal capacity and representative capacity of Procprops signed an acknowledgement of debt acknowledging that they were indebted to the plaintiff in the sum of R391 711.04. However, Procprops did not make a single payment in terms of the acknowledgement of debt. On 6th January 2021 Procprops was placed under business rescue, and thereafter it was finally wound-up.
- [10] The witness was cross-examined and he conceded that as per the order made by Gregory on behalf of Procprops per email dated 19th November 2019, there was nowhere in that email that Serfontein was mentioned. Further that the order was directly from Procprops to the plaintiff. The witness stated that Gregory always ordered using Serfontein's account, and often Gregory will phone and ask as when they will get the order even though he had used Serfontein's account. It was also put to the witness that the same happened on 27th November 2019 and 1st December 2019 which shows that Gregory was ordering directly from the plaintiff and not involving Serfontein. The witness conceded to that and stated that when Gregory phones, he was using Serfontein's account and that previous orders shows that Gregory was buying using Serfontein's account. The witness stated that he did not know the relationship between Serfontein and Procprops, and why in the past Serfontein was delivering feed to Procprops.
- [11] The plaintiff's second witness to testify was Michelle Scutter. She testified that she is employed at Tshwane Trust and Liquidations. Procprops has been placed under liquidation and that the first and second meeting of creditors has taken place. At that meeting they have submitted the claims of Procprops. A section 417 and 418 of the Companies Act enquiry has also been arranged where the affairs of the company in liquidation will be looked into. The enquiry is been conducted by attorney Grundlingh who is the attorney for the defendant.
- [12] The secured creditor is ABSA bank and that it will be paid out of the proceeds from the sale of the immovable property. For the concurrent creditors it is highly unlikely that they will be paid from the proceeds of the sale of the movable properties. Even ABSA will not be paid in full. They have received a claim from the business rescue practitioner for his services rendered. The attorneys' fees for the liquidator will also be part of the free residue account.
- [13] The witness was cross-examined and he conceded that previously the immovable property was sold on auction, but that ABSA rejected the offer. That currently the immovable property has been sold for a purchase price lower than that which was initially rejected by ABSA. That concluded the plaintiff's evidence and it closed its case. The defendant in turn closed its case without leading any evidence.
- [14] Counsel for the plaintiff in his closing address has submitted that the defendant's special plea of compromise is irrelevant as the agreed business rescue plan was never implemented. There is no legal basis that what was agreed in the lapsed business rescue plan will extend to the appointed liquidators. The defendant presented no evidence whatsoever in support of the allegations of its special plea. On the undisputed evidence

tendered by the plaintiff there will be no dividend payable to any concurrent creditor, including the plaintiff. That the defendant had expressly admitted in its plea to the plaintiff's particulars of claim that he was the director of Proccrops, he was responsible for the carrying on business of Proccrops, and that during the period 12th November 2019 to 4th December 2019 Proccrops took delivery of animal feed in the total value of R794 937.94. As a result of these admissions, it was not necessary for the plaintiff to tender any evidence in this regard.

- [15] Counsel for the plaintiff further submitted that at the time Proccrops took delivery of the feed from the plaintiff during the period 12th November 2019 to 4th December 2019, Proccrops was already in financial distress. That Proccrops with the assistance of the defendant placed its orders with the plaintiff in the name of Serfontein, because the defendant knew that there was no other way to obtain feed, and that amount to dishonesty. Therefore, the defendant carried the business of Proccrops recklessly, with gross negligence, with the intention to defraud in a manner that it constitutes gross abuse of the juristic personality of Proccrops. The defendant has also failed to discover the financial records of Proccrops, and that a finding should be made that no such records ever existed.
- [16] Counsel for the defendant has submitted that Mr Erlank's evidence to substantiate allegations that Proccrops ordered chicken feed on the account of Serfontein Layer Chickens from November 2019 amounts to hearsay evidence. That Erlank had relied on the telephone conversation of two third parties, and he was not part of that conversation. The plaintiff has failed to present documentary proof to substantiate the hearsay evidence. There is no direct evidence regarding the alleged purchase of feed from Proccrops on a Serfontein Layer Chicken's account that was tendered or were there any exceptions tendered to the hearsay rule. There was no evidence tendered whether hearsay or otherwise that Proccrops was entitled to take delivery of animal feed on the basis that the payment of the animal feed will be for the account of Serfontein Layer Chickens.
- [17] Counsel for the defendant further submitted that Erlank has conceded during cross-examination that the orders placed by Proccrops did not contain the words "Serfontein Layer Chickens". That the evidence of Michelle Schutte mainly relates to liquidation proceedings which had no bearing on the plaintiff's claim, nor did her evidence relate to the purchase of the feed by Proccrops from the plaintiff, nor the financial status of Proccrops when the orders by Proccrops was placed. The plaintiff has therefore failed to make out a case against the defendant.
- [18] The plaintiff's claim is based on section 424(1) of the Old Act which read as follows:
- "Liability of directors and others for fraudulent conduct of business"*
- (1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any

creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct”.

- [19] The purpose of section 424(1) of the Old Act is to prevent the business of a company from being carried on in a reckless or fraudulent manner. In *Tsung v Industrial Development Corporation of SA*[3] Lewis JA said:

“It is clear, then, that if the IDC can show (and of course it bears the burden of proof) on the probabilities that the Tsungs acted recklessly or fraudulently in conducting the business of Textiles, and that Textiles was unable to pay its debts, they would be liable to it under s 424. Henochsberg on the Companies Act states that the carrying on of the business of a company recklessly means ‘carrying it on by conduct which evinces a lack of any genuine concern for its prosperity’. A fortiori if one deliberately depletes the company’s assets, or misuses its corporate form for one’s own purposes, then that conduct will fall within the ambit of s 424. Henochsberg states also:

‘Ordinarily, if a company while carrying on its business incurs debts at a time when to the knowledge of its directors there is no reasonable prospect of the creditors’ ever receiving payment, there is a carrying on of its business with the intend to defraud those creditors”.

- [20] The first issue to be determined is whether the plaintiff’s claim has been compromised by the plaintiff voting in favour of the business rescue plan and also agreeing to specific further amendments to the business rescue plan. It is common cause that the proposed business rescue plan was not successfully implemented, and that resulted in Proccrops been finally wound-up. After Proccrops was finally wound-up, the business practitioner was replaced by the liquidator who assumed his responsibility in terms of the Insolvency Act. The covering letter of the business rescue practitioner confirming the voting meeting of the 17th May 2021 state that “until such time that the creditors have been paid in full, the creditors rights against sureties remain strictly reserved”. None of the creditors were paid in terms of the failed business rescue plan, and their rights have therefore not been affected. The failed business rescue plan is not binding of the liquidator since a new process in terms of the Insolvency Act has commenced. Therefore, the defendant’s point in limine of compromise has no merit.

- [21] On merits the plaintiff has called two witnesses, Mr Erlank and Ms Schutte. Mr Erlank was the only witness who testified about the dealings of the plaintiff, defendant and Proccrops, whilst Ms Schutte testified about the liquidation of Proccrops. Mr Erlank has testified that Serfontein had an arrangement with Proccrops that Proccrops will buy feed from the plaintiff using Serfontein’s account, but he was not aware of that arrangement. Mr Erlank did not have personal knowledge of that arrangement, and other witnesses with direct knowledge of that arrangement were not called by the plaintiff to corroborate Mr Erlank’s version.

- [22] As per the credit application by Procprops, EJW Pieterse one of the directors of Procprops is the one who completed the credit application on 17th December 2019 on behalf of Procprops to buy feed from the plaintiff. This is the application that was turned down by the plaintiff due to the negative listing of Procprops by the credit bureau. This confirms the version of Mr Erlank that Procprops did not have credit facility with the plaintiff. There are trails of emails which have been discovered by the parties which shows that prior to the 19th December 2019, Procprops was placing orders with the plaintiff and even giving dates as when the delivery of the orders should be made. The trails of emails further shows that the November 2019 statement of account was sent to Serfontein by the plaintiff. However, Serfontein responded to inform the plaintiff that the order was not made by Serfontein. Ms Snyder from the plaintiff on receipt of the email from Serfontein, sent an email to Gregory asking him as when they were going to pay the account that is in Serfontein's name. In that email Ms Snyder informed Gregory that they still need them as their client and that they must come and open their own account. In deed on 17th December 2019 Procprops attempted to open an account with the plaintiff and that was turned down.
- [23] There is no evidence presented by the defendant that before the credit application was submitted by Mr Pieterse, Procprops had set the record straight by denying knowledge of the November 2019 statement which was in the names of Serfontein, or questioning why the account was in the name of Serfontein whilst they were the ones who have placed the order. The basis of applying for the credit facility was for Procprops to have its own credit facility. The defendant in his plea has pleaded that the defendant had approached the plaintiff and the plaintiff had provided feed to the defendant, and further that the plaintiff was under the express and/or implied impression that the feed was provided to Procprops on credit. This version was not repeated under oath as the defendant closed its case without leading any evidence. The plaintiff was therefore denied an opportunity to test the credibility of this version under oath.
- [24] It is trite that if a witness is available, but did not enter the witness box to clarify certain issues, that will raise an inference that his/her testimony would not have supported his case. In the case at hand there is evidence that Procprops represented by defendant and/or by other directors was placing orders through Serfontein's account without the knowledge of Serfontein, and Serfontein had disputed those invoices. There is evidence that prior to the 17th December 2019 even though Procprops did not have credit facilities with the plaintiff, was able to place orders which were delivered to Procprops by the plaintiff. On this issue the defendant had pleaded that he had an express and/or implied agreement with the plaintiff. All these issues needed the defendant to have taken a witness stand and clarify the court so that his version can be tested by the plaintiff under cross-examination, but deliberately elected not to do so. This court is left with no option but to draw a reasonable inference that his evidence would not have supported his case. (See *Webrandchek v LK Jacobs and Another*[4]).

[25] What must now be determined is whether the plaintiff had succeeded with its claim that the plaintiff be held personally liable for the debt owed to it by Procprops. Mitchell has testified that there is no possibility that the concurrent creditors will receive any dividend from the insolvent estate of Procprops, and further that the secured creditor which is ABSA will also not be paid in full. The affidavit for applying for a business rescue of Procprops was deposited by the defendant on 6th January 2021. In paragraph 5.1.4 of the affidavit the defendant had stated the following:

“The company’s open account with its supplier of chicken feed was closed as a performance guarantee issued by the company’s bankers was not acceptable to the supplier. Feed since November 2019 is supplied on COD basis with resultant pressure on cash flow”.

[26] When the defendant placed orders during the period 12th November 2019 to 4th December 2019 on behalf of Procprops it was aware that its credit facilities with suppliers have been closed and it had a poor credit record. It was aware that it had no credit facility with plaintiff and was required by other suppliers to place orders on COD, but it did not do the same with the plaintiff. The defendant was therefore not honest with the plaintiff when it placed orders whilst knowing that it was not creditworthy. In my view, the intention of the defendant was to defraud the plaintiff.

[27] The defendant signed the acknowledgment in his capacity as director of Procprops and also in his personal capacity acknowledging that he is truly and lawfully indebted to the plaintiff in the total sum of R391 711.04 being in respect of monies due and payable for goods sold and delivered and/or for goods sold and delivered that have been credited to the debtor and the surety. There was also an agreed plan of how the debt was supposed to be paid. However, that payment plan was not fulfilled by either party. There is no evidence that the acknowledgment of debt was signed under duress. The defendant when he signs the acknowledgement of debt in his personal capacity, his liability was depended upon the obligations of Procprops. Should Procprops fail to pay the debt it owed to the plaintiff, the defendant was to assume those obligations.

[28] Procprops has been finally wound-up and there is no prospect that concurrent creditors which includes the plaintiff will be paid. I have already found that when the defendant placed orders with plaintiff, he was not honest. On the basis of his dishonesty and the acknowledgment of debt he is declared personally liable for the debt owed by Procprops to the plaintiff.

[29] In the result I make the following order:

29.1 The defendant’s point in limine of compromise is dismissed.

29.2 The defendant is declared personally liable for the debt owed by Procprops 202 (Pty) Ltd to the plaintiff.

29.3 The defendant is ordered to pay the plaintiff the amount of R391 711.04.

The defendant is ordered to pay interest on the aforesaid amount at the rate of 7% per annum a tempore morae;

29.5 Defendant to pay plaintiff's costs on party and party scale.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

APPEARANCES: Counsel for the plaintiff : Adv Els AJP : Adv Basson AA Instructed by : Barnard & Patel Inc Counsel for the defendant : Adv Harms CLH : Grundlingh GL Instructed by : Grundlingh & Associates Date heard : 27th July 2023 Electronically circulated on : 28th September 2023

[1] 61 of 1973

[2] 71 of 2008

[3] 2013

(3) SA 468 (SCA) at para 31

[4] 1948

(4) SA 671 (A) at 681-682

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