

SOUTH AFRICA / JUDGMENT

Schnell NO and Others v FMI Trading (Pty) Ltd (60068/19) [2022] ZAGPPHC 387 (2 June 2022) [2022] ZAGPPHC 387

COURT

North Gauteng High Court, Pretoria

BEFORE

Pillay

CASE / FILE NUMBER

60068/19

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
Case No: 60068/19

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.

In the matter between: WERNER
SCHNELL
NO
First Applicant
JACOBUS
LUCAS MARTHINUS VAN DER WALT NO
Second Applicant
JACOB
DE KLERK
NO
Third Applicant
JAN
LOUIS VENTER
Fourth Applicant
and

FMI
TRADING (PTY)
LTD
Respondent

JUDGMENT

PILLAY AJ

1. This is an application for the winding up of the respondent on the grounds that it is factually insolvent alternatively that it is just and equitable for it to be wound up. A provisional winding up order is sought in the notice of motion.
2. The first, second and third applicants are the trustees of the Werner Schnell Trust (“the Schnell Trust”). The fourth applicant avers that he is a creditor of the respondent. He is also the father of the first applicant. The trustees of the Schnell Trust in their capacities as such hold 50% of the shares in the respondent. The other 50% of the shareholding in the respondent is held by the Melgisedek Trust.

Respondent’s directors from time to time

3. Mr Ignatius Michal de Jager (also known as “Natie”) (“De Jager”), one of two directors of the respondent, has an interest in the Melgisedek Trust.[1] He was employed as the respondent’s operations manager during 2012 and was appointed as a director on 25 November 2014. He was the sole director from 13 August 2015 until 9 January 2017 being the date on which Ms Barton was appointed a director. The following individuals were also directors of the respondent:

3.1. Mr Jacobus Stefanus Cornelius Johannes Jacobs (“Jacobs”) from 6 September 2010 until 12 August 2015. Mr Jacobs served as financial director;

3.2. Mr Richard Gerald Bahre (“Bahre”) from 6 September 2010 to 1 March 2012; and

3.3. Mr Jan Louis Venter (also known as “Jantjie”), the fourth applicant, from 25 November 2014 until 12 August 2015.

Shareholders from time to time

4. The fourth applicant was an existing shareholder when a shareholders’ agreement was entered into on 9 January 2015. Following the conclusion of the shareholders’ agreement, the shareholders of the respondent were:

4.1. The Declaune Trust;

4.2. The Bahre Family Trust;

4.3. The Brewer Venter Trust; and

4.4. The Melgisedek Trust.

These Trusts are collectively referred to as “the four Trusts”.

5. There were subsequent changes in the shareholding and with effect from 12 January 2016, the shareholding in the respondent was as follows:

5.1. Werner Schnell Trust (50%); and

5.2. Melgiesedek Trust (50%).

Issues

6. There are three issues which arise in this application. The first, whether the fourth applicant is a creditor of the respondent. The second, whether the respondent is factually insolvent. The third, in the event that the respondent is not factually insolvent, whether it is just and equitable to wind-up the respondent.
7. The last issue does not arise if I find that the respondent is factually insolvent.

Solvency

8. The applicants’ case for winding-up on the grounds of factual insolvency is based on the financial statements for the financial years ending, 2016, 2017, 2018 and 2019 which were requested by the applicants’ attorneys from respondents’ auditors on or about 29 May 2019 and received by them in the result. The applicants aver that they had not seen the financial statements before they were provided in response to their attorney’s request.
9. The respondent’s 2016[2] financial statements reveal a factually insolvent company. Its total assets are reflected as R 10 680 287.00 and

liabilities as R 26 870 755.00.[3] This resulted in the independent auditors issuing a qualified audit report in which they recorded that the respondent’s liabilities

exceeded its fairly valued assets and that the respondent’s existence depended on consistent financial assistance by financiers

and the resumption of a profitable business. The largest debt on these financial statements is a loan of R22 050 000.00

which is described as “Loan from shareholder”. Note 9 to the 2016 financial statements deals with loans from shareholders. The lender of the R22 050 000.00 is identified as “JL Venter”, who is the fourth applicant. It is noted in note 9 that the loan is interest free with no fixed repayment terms and has been sub-ordinated in favour of the respondent’s other creditors and liabilities. Note 9 also reflects a historical loan of R1.8m from “RB Bahre Family Trust” which was owing at 28 February 2015 and repaid during the financial year ending 2016.

10. The respondent's 2017 Financial Statements were signed by De Jager on 4 May 2017. The respondent's independent auditors again issued a qualified audit report. They recorded therein that the respondent's liabilities exceeded its fairly valued assets and that the respondent's existence depended on consistent financial assistance by financiers and the resumption of a profitable business. Despite these statements, the balance sheet reflects the value of the respondent's assets as R12 611 888 and its liabilities as R4 170 952. Note 9 to the notes to the financial statements reflects "JL Venter" as the shareholder who advanced a loan of R1 038 500.00 to the respondent. It is noted under note 9 that the loan is an interest free unsecured loan, with no fixed repayment terms and that it has been sub-ordinated in favour of the respondent's other creditors and liabilities. The drastic reduction in the liabilities from R26 860 755.00 at 28 February 2016 to R4 170 952 to at 28 February 2017 is the result of the R 22 050 000.00 loan from the fourth applicant having been reduced to nil. However, the loan was not repaid to the fourth applicant during the 2017 financial year. To the contrary, the fourth applicant advanced an amount of R1 938 500.00 to the respondent during the 2017 financial year[4]. It appears from note 7 to the financial statements that the respondent converted the R22 050 000.00 debt to equity. The financial statements record the respondent having issued 19 236 570 ordinary shares. Paragraph 3 of the director's report for the year ended 2017 records that shares to the value of R19 235 970 were issued during the year to shareholders. The statement of cash flows reflects a cash flow from financing activities of R 19 235 970.00 in the form of share capital. There is however no indication to whom the shares were issued. Furthermore, this does not explain how the difference between R22 050 000.00 being the amount advanced and R19 235 970.00 being the cash flow, namely R2 814 030.00, came to be extinguished.
 11. The first to third applicants aver that no shares were issued to them and even if shares had been issued to them that would not discharge the debt owed to the fourth applicant. The latter contention is of course correct. The fourth applicant did not enter into any agreement for the issue of shares to him or for the conversion of the R22 050 000.00 loan to equity. His case
- is that no shares were issued to him. And that the R22 050 000.00 loan has not been repaid to him.
12. The applicants aver that the 2017 financial statements were an intentional misrepresentation of the respondent's financial position aimed at prejudicing the fourth applicant and to create the impression that the respondent was solvent when it was not. It is worth repeating that the independent auditors in their report had unambiguously stated that the respondent was insolvent.
 13. According to the 2018 financial statements[5] the value of the respondent's assets is R15 051 794.00 and its liabilities are R2 853 201.00. This amount includes a debt of R528 500.00 being the balance owing of the loan of R1 938 500.00 advanced by the fourth applicant during the 2017 financial year. The directors reported that shares to the value of R22 050 000.00 had been issued to shareholders during the financial year ending 2017. This is however inconsistent with the 2017 financial statements (and director's report) which record that

shares to the value of R19 235 970 were issued to shareholders.

14. The 2019 Financial Statements were signed by De Jager and Barton on 26 July 2019. The value of the respondent's assets is reflected as R17 441 818.00 and its liabilities as R3 027 993.00. While the respondent's authorised share capital is 1 000 ordinary shares, according to these financial statements the respondent had issued 22 050 000 ordinary shares and the share capital is reflected as R22 050 000.00.
15. The applicants submit that the 2019 financial statements perpetuate the misrepresentation of the respondent's solvency by reducing its liabilities by R22 050 000.00 through removing the fourth applicant's loan to the respondent from the respondent's balance sheet.
16. It is evident that the question whether the respondent is factually insolvent or not, depends on whether the respondent's

liabilities are R22 050 000.00[6] more than what has been reflected in the 2017, 2018 and 2019 financial statements.

17. The respondent disputes that it is factually insolvent. Its case is that (i) the Brewer Venter Trust had lent the R22 050 000.00 to the respondent and not the fourth applicant; (ii) the loan was a shareholder's loan to the respondent; (iii) on 26 January 2016 the then shareholders of the respondent, namely the four Trusts each agreed to sell their shares to the respondent for a purchase consideration of R100.00 and agreed that the loan due by the respondent to shareholders (and vice versa) would be written off, and was written off. Therefore, it argues that the loan of R22 050 000.00 has become irrelevant and has no impact on the respondent's solvency.
18. However the difficulty which arises for the respondent was that the financial statements do not fit this narrative. The respondent attempts to explain this away in the answering affidavit which is deposed to by De Jager. It contended that the 9 January 2015 shareholders' agreement entered into between the four Trusts ("the shareholders' agreement") and the 11 January 2016 sale of shares agreement entered into between them were not correctly recorded in the 2016 financial statements. De Jager states that these agreements were not correctly recorded because the financial records which he inherited were in a poor state and because of a "bona fide omission" on the part of De Jager and Barton.
19. The respondent wishes to escape the 2016 to 2019 financial statements and has attached to the answering affidavit restated draft financial statements for the financial years ending 2016, 2017, 2018 and 2019. De Jager explains that after the application was served and during consultations with the respondent's legal and financial advisors it "became apparent that certain critical and essential adjustments were required to the financial accounts of the Respondent to present a lucid picture of what had transpired historically". Consequently, the respondent's auditors were instructed to redraft the 2016, 2017, 2018 and 2019 financial statements taking into

account the terms of the shareholders' agreement and the sale of shares agreement.

20. The respondent attempts to show three things thereby:

20.1. The Brewer Venter Trust was the shareholder and not the fourth applicant;

20.2. The Brewer Venter Trust advanced the R22 050 000.00 loan and not the fourth applicant, and the loan was therefore of shareholder's loan which in terms of the sale of shares agreement fell to be written off;

20.3. Being a shareholder's loan the loan was written off in terms of the sale of shares agreement entered into on 11 January 2016 between the four Trusts.

21. The respondent does not dispute that an amount of R22 050 000.00 was lent and advanced to it. It disputes only the identity of the lender. In the answering affidavit De Jager admits that during 2012/2013 and 2014 an amount of R22 050 000.00 was lent and advanced to the respondent but avers that the lender was the Brewer Venter Trust and not the fourth applicant.[7] He additionally avers that between September 2013 and September 2015 the respondent repaid an amount of R8 500 000.00 to the Brewer Venter Trust. In this regard he refers to annexure DE2 to the answering affidavit. The applicants have two responses to these payments. Firstly they admit that the respondent paid interest in an amount of R900 000.00 but aver that the payment did not reduce the capital amount of R22 050 000.00 advanced to the respondent. Secondly, that the R900 000.00 was paid by the respondent to Can't Let Go and in this regard, they rely on the bank statements of Can't Let Go which reflect five

(5) payments from the respondent totaling R900 000.00. These payments are reflected on DE2 and are included in the R8 500 000.00 alleged by the Respondent to have been paid to the Brewer Venter Trust. The bank statements of Can't Let Go reflecting payments totaling R900 000.00 from the respondent give lie to the respondent's averment that the amounts reflected on DE2 were repaid to the Brewer Venter Trust.

22. An indebtedness at the end of 2015 financial year in the amount of R16 750 000 is recorded in note 9 to the 2016 restated draft financial statements and is reflected as a loan debt due to the Brewer Venter Trust. The difference between R22 050 000.00 lent and advanced and the R16 750 000 reflected as owed by the respondent on 28 February 2015 namely R5 300 000.00 is not explained by the respondent.

23. The applicants persist in their averment that the R22 050 000.00 loan was advanced by the fourth applicant and not the Brewer Venter Trust and therefore the sale of shares agreement did not wipe out the loan.

24. While De Jager, denies that fourth applicant lent and advanced the R22 050 000.00 to the respondent, on De Jager's own version he was neither directly nor indirectly involved in the respondent's finances until the resignation of the financial director Jacobs on 12 August 2015. De Jager avers that the monies were lent and advanced to the respondent during

2012/2013 and 2014.[8] The last amount was advanced on 30 July 2015 according to annexure DE2 to the answering affidavit. When the last advance was made Jacobs was still a director. He only resigned on 12 August 2015. De Jager was appointed as director on 13 August 2015. By then not only had the loan and its terms been negotiated, the entire loan of R22 050 000.00 had been advanced to the respondent.

25. In response to the respondent's assertion that the monies were lent and advanced by the Brewer Venter Trust and not the fourth applicant, in the replying affidavit a detailed explanation is given on how the fourth applicant came to lend the money to the respondent, where he obtained the money from and why on the probabilities the Brewer Venter Trust was not the lender.
26. The applicants' case is the following:
27. Bahre, the erstwhile managing director of the respondent, who held the position of director from 6 September 2010 to 1 March 2012 informed the fourth applicant that the respondent required money to expand its operations. The respondent represented by Bahre and the fourth applicant negotiated a loan agreement in terms of which the fourth applicant lent and advanced monies to the respondent. However, the fourth applicant did not have sufficient money to provide the full loan amount to the respondent and consequently during October 2013 he entered into a written loan agreement with a company called Can't Let Go (Pty) Ltd ("Can't Let Go" or "the lender") in terms of which the lender lent to the fourth applicant an amount of R10m to be advanced in two equal instalments. The loan attracted interest at the rate of 2% per month. The capital amount and the interest instalments as well as legal costs had to be repaid by the fourth applicant by 31 July
2016. The fourth applicant was liable to pay to the lender an administration fee equivalent to 3% on each advance made by the lender.
28. As security for the loan the fourth applicant was required to cede to the lender in securitatem debiti his right, title and interest in 50 ordinary shares held by him in a property owning company as well as any and all claims which he had against the property owning company and other shareholders of that company. The fourth applicant also had to cede to the lender in securitatem debiti the right, title and interest in a close corporation. Furthermore the trustees of the Brewer Trust had to encumber the assets of the Brewer Venter Trust as security for the repayment of the loan by the fourth applicant to the lender. In addition, the respondent's shareholders (at the time) were required to cede in securitatem debiti their rights, title and interest in the shares held by them in the respondent.
29. The fourth applicant avers that because of the high interest that the loan by Can't Let Go to the fourth applicant attracted (2% per month i.e., 24% per annum) Bahre on behalf of the respondent agreed to pay this interest to Can't Let Go. This version is plausible considering that the loan of R22 050 000.00 did not attract any interest. It would be imprudent of a lender who himself takes a loan to enable him to advance an interest free loan to another person, to assume the burden of paying interest to his lender. He will be out of pocket even if he is able

to recover the full capital sum advanced by him to his debtor. It is therefore neither improbable nor surprising that the fourth applicant required the respondent to take on the burden of paying the interest on the

loan from Can't Let Go.

30. The applicants have attached several of the respondent's bank statements (annexures RA2(a) to (f)) which reflect payments totaling R1.4m[9] from "Jantjie", which is the fourth applicant's nickname, into the respondent's bank account.
31. It is common cause that the following amounts totaling R10m,[10] which was the amount that Can't Let Go Lent to the fourth applicant, were paid by Can't Let Go directly to the respondent:
 - 31.1. R2.5m on 24 October 2013 (RA3);[11]
 - 31.2. R2.5m on 28 October 2013 (DE2) and (RA6);
 - 31.3. R4.5m on 22 April 2014 (RA7) and (RA8);
 - 31.4. R4.5m on 23 April 2014 (RA9) and (RA10);
 - 31.5. R1m on 24 April 2014 (RA11) and (RA12).
32. The applicants explain that due to time constraints they were not able to locate proof of all the payments made by the fourth applicant to the respondent. Considering that there is no dispute that R22 050 000.00 was lent to the respondent, the failure to attach proof of the other payments is of no consequence.
33. The applicants concede that the respondent paid some of the interest due on the loan from Can't Let Go directly to Can't Let Go. According to them the respondent paid R900 000.00[12] to Can't Let Go. However, these were not made in reduction of the capital sum advanced by the fourth applicant but to settle the interest accruing on the loan from Can't Let Go to the fourth applicant as agreed between Bahre and the fourth applicant. The respondent however reflects these payments as repayments on the loan on annexure DE2 to the answering affidavit.
34. When the respondent stopped paying the interest, Can't Let Go called up the loan and the fourth applicant had to cede his shares in the property holding company to Can't let Go in settlement of the debt owed by him to the latter.
35. The applicants have attached the financial statements of the Brewer Venter Trust for the 2014 and 2015 financial years which show that:
 - 35.1. the Brewer Venter Trust could not have lent the money to the respondent because it did not have access to R22 050 000.00 to lend to the respondent; and

35.2. The Brewer Venter Trust did not borrow money from Can't Let Go. The Brewer Venter Trust's total liabilities for the 2014 and 2015 financial years according to its financial statements was under R2m.

36. On De Jager's own version he was not involved in the respondent's financial affairs before Jacobs' resignation on 12 August 2015, which occurred not only after the loan agreement between the fourth applicant and the respondent had been negotiated, but after the last amount of R200 000.00 on the respondent's version was advanced on 30 July 2015. By the time Jacobs resigned as director and De Jager was appointed as director the full amount of the loan had been advanced. In the circumstances, De Jager cannot gainsay the applicants' version that in terms of the agreement between the respondent represented by Bahre and the fourth applicant, the fourth applicant was the lender and not the Brewer Venter Trust. Nor can he gainsay that the payments that were made by the respondent were in respect of interest on the loan from Can't Let Go to the fourth applicant. I am satisfied that the applicants have proven with reference to supporting documents that the fourth applicant lent and advanced R22 050 000.00[13] to the respondent. This being so the shareholders' agreement and the sale of shares agreement are irrelevant and how they are reflected in the respondent's financial statements are of no moment.

37. It is common cause that the respondent has not repaid to the fourth applicant the R22 050 000.00 lent to the respondent nor for that matter the R16 750 000 referred to as a loan from the Brewer Venter Trust in the respondent's restated draft financial statements for the financial year ending 2016.[14] Annexure DE2, in addition to reflecting payments totaling R900 000.00 which the applicants contend were payments towards the interest

accruing on the Can't Let Go loan to the fourth applicant, reflects payments totaling R7.6m by the respondent. Accepting,

without deciding, that R7.6m was paid by the respondent, the payments could not have been made to the fourth applicant (it has never been the respondent's case that it made any payments to the fourth applicant). At best for the respondent, the R7.6m was paid to the Brewer Venter Trust, who was not the lender. I am therefore unable to find that any portion of the capital amount advanced by the fourth applicant has been repaid to him.

38. The respondent's restated draft financial statements for financial year ending 2019[15] reflect the total value of its assets as R17 441 818.00 and total liabilities as R3 027 993.00. This is consistent with the respondent's key financial figures and ratios confirmed by the respondent's auditors in a letter dated 18 November 2019 addressed to the

respondent's directors.

39. If the loan of R22 050 000.00 is added to the liabilities, the respondent is hopelessly insolvent. I do not know how or why the

restated draft 2016 financial statements reflect R16 750 000 as the amount owed by the respondent at the end of the 2015 financial

year.[16] However, even if I were to accept the respondent's version that the loan was reduced to R16 750 000 by the end of the 2015 financial year the respondent remains factually insolvent; its liabilities would total R19 777 993 and exceed its assets by R2 336 175.00.

40. In the circumstances I am satisfied that the fourth applicant lent and advanced to the respondent an amount of R22 050 000.00 which amount has not been repaid and at best for the respondent an amount of R16 750 000.00 of R22 050 000.00 has not been paid. The respondent raises in the answering affidavit that any debt owed to the fourth applicant has in any event prescribed. According to the fourth applicant the loan had no specific date for repayment terms and was payable on demand. The fourth applicant demanded payment in his affidavit deposed to on 6 August 2019 which is attached to the first to third applicants' founding affidavit.[17] The fourth applicant's claim has accordingly not prescribed.
41. Having found that the respondent is factually insolvent, I find that a case for the winding up of the respondent has been made out. The applicants seek a provisional order which I grant. The order is returnable on the first available date on the unopposed motion court roll.
42. The applicants are requested to immediately arrange with the Registrar a return date for a provisional winding up order and then to prepare a draft order, which caters for service on interested parties, including on the respondent at its registered office and for the publication of the provisional order once in the Government Gazette and in a daily newspaper circulating throughout

the Gauteng province, for signature by me.

Acting Judge: Gauteng Division, Pretoria

(electronic signature appended)

31 May 2022

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 2 June 2022

Appearances:

For the applicants:

Adv SD Wagener SC

For the respondent: Adv DB du Preez SC

Adv FC Lamprecht

- [1] In the opposing affidavit Mr de Jager refers to the Melgisedek Trust as his family trust.
- [2] The copy attached to the founding affidavit is unsigned. The respondent confirms that the annual financial statements were signed and that an unsigned copy was inadvertently provided to the applicants.
- [3] Non-current liabilities of R24 221 260.00 and current liabilities of R2 649 495 (CaseLines 004-72). The founding affidavit reflects the total liabilities as R24 870 755 (CaseLines 004-13 para 39.2).
- [4] It is common cause that this amount was advanced by the fourth applicant and has been fully repaid to him.
- [5] The copy attached to the founding affidavit is unsigned. The respondent confirms that the annual financial statement was signed and that an unsigned copy was inadvertently provided to the applicants.
- [6] Or at best for the respondent R16 750 000.00 more. See paragraph 22 and 40 below.
- [7] The Brewer Venter Trust's financial statements for the financial year ending 2015 reflect JL Venter as a trustee. On the fourth applicant's own version the trust is a family trust.
- [8] R1 400 000.00 during 2012, R11 050 000.00 during 2013; R10 000 000.00 during 2014 and R200 000.00 on 30 July 2015 (CaseLines 005-8, paras 3.8 to 3.9 and CaseLines 005-59, DE2). This totals R22 650 000.00 and is R600 000.00 more than the respondent admits was lent and the fourth applicant claims was owed.
- [9] On 15 March 2012, R100 000.00. On 10 May 2012, R500 000.00. On 17 September 2012, R200 000.00. On 10 October 2012, R200 000.00.
- On 30 October 2012, R200 000.00. On 30 November 2012, R200 000.00: CaseLines 006-11, para 20.5.1 and 20.5.2. These payments are also reflected on annexure DE2 to the answering affidavit (CaseLines 005-59).
- [10] CaseLines 006-11 to 006-12, para 20.5.3 to 20.5. These payments are reflected on the respondent's bank statements attached by the applicants to their papers. The applicants also attached the bank statements of Can't Let Go (save for the one reflecting the payment of R2.5 on 28 October 2013) which show the corresponding payment to the respondent. These payments also appear on "DE2" to the answering affidavit.
- [11] This same bank statement forms Annexure RA5.
- [12] On 8 October 2013, R100 000.00. On 3 December 2013, R200 000.00. On 29 January 2014, R200 000.00. On 3 March 2014, R200 000.00.
- On 31 March 2014, R200 000.00. (CaseLines 006-13 to 006-14, para 20.5.9.)

[13] In fact annexure DE2 reflects that not R22 050 000.00, but R22 650 000.00 was lent and advanced to the respondent.

[14] Cf. Para 22 above.

[15] CaseLines 005-155, Annexure DE8.4 to the answering affidavit.

[16] Cf. Para 22 above.

[17] CaseLines 004-142, para 5.6.

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