

SOUTH AFRICA / JUDGMENT

Steloy Castings (Pty)Ltd and Others v B&K Castings (Pty)Ltd. (49326/2015) [2016] ZAGPPHC 673 (20 July 2016) [2016] ZAGPPHC 673

COURT

North Gauteng High Court, Pretoria

BEFORE

Madima

CASE / FILE NUMBER

49326/2015

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REPUBLIC OF SOUTH
AFRICA
HIGH
COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO:49326/2015

DATE: 20 JULY 2016
In
the matter between
STELOY
CASTINGS (PTY) LTD First
Applicant
GERT
LOUWRENS STEYN DE WET N.O
Second Applicant
FRANZ
SERITHI N.O
Third Applicant
and
B&K
CASTINGS (PTY) LTD
Respondent

JUDGMENT**MADIMA, AJ**

- [1] The first applicant seeks an order declaring that the acquisition by the respondent of its assets is void against the creditors of Bernades & Kin Foundry CC (in liquidation) ("Bemades & Kin"). Further that the respondent not be deemed to be a separate legal entity or in any manner distinguishable from Bernades & Kin, as well as ancillary relief.
- [2] On 18 May 2016 I made the following order:
1. It is declared that the acquisition by the respondent of its assets is void as against the creditors of Bernades & Kin Foundry CC (reg no: 2007/254461/23) (in liquidation) and/or B&K Foundry CC (reg no: 2008/061083/23) (in liquidation} and that the respondent shall not be deemed to be a separate legal entity or in any manner distinguishable from the said close corporation (in liquidation).
 2. The second and third applicants are ordered to liquidate and distribute the estates of Bemades & Kin Foundry CC, B&K Foundry CC and the respondent as one economic entity.
 3. The second and third applicants, in their capacity as liquidators are authorised to take control and administer all assets, books and documents of the respondent and to distribute and alienate the assets as if it were the assets of Bemades & Kin Foundry CC and B&K Foundry CC.
 4. It is declared that the respondent is liable towards the creditors of Bemades & Kin Foundry CC (reg no: 2007/254461/23) (in liquidation) and/or B&K Foundry CC (reg no: 2008/061083/23) (in liquidation).
 5. A copy of this order is to be served upon all known creditors of the respondent, who shall be permitted to submit and prove their claims in the joint administration of the said liquidated entities as one economic unit.
 6. The costs of this application, including the reserved costs of 28 August 2015 and the costs under the interim application under case number 49327/2015, including the costs of two counsel (where so employed), to be paid on an attorney and client scale, shall, together with the costs of the administration of the aforesaid estates (in liquidation}, be costs In the liquidation.
- [3] Below are the reasons for the order of 18 May 2016.
- [4] There are two issues in dispute. The first relates to the locus standi of the applicants. The second is whether the transaction whereby the respondent purchased the business assets from Bemades &

Kin Foundry CC (in liquidation) was fraudulent and therefore void on the basis of the actio Paulina and/or the relevant provisions of the Insolvency Act.

The parties

[5] The first applicant is Steloy Castings (Pty) Ltd ("Steloy Castings"), a creditor of B&K Foundry CC ("B&K

Foundry"), Bernades & Kin Foundry CC ("Bernades & Kin") and Joachim de Oliveira Bernades ("Bernades").

The trio owe the first applicant the sum of R11.8 million. This debt arises pursuant to an order granted by this court on 15 August 2014.

[6] The second applicant is Gert Louwrens Steyn de Wet N.O, a male liquidator, cited herein in his capacity as joint liquidator of Bernades & Kin Foundry CC and B&K Foundry CC (the close corporations in liquidation).

[7] The third applicant is Franz Serithi N.O, a male liquidator, cited herein in his capacity as joint liquidator of the close corporations

(in liquidations).

[8] The respondent is B&K Castings (Pty) Ltd. Johannes Hendrick Bezuidenhout ("Bezuidenhout" . a businessman of Montana Park, Gauteng Province, is its sole director.

Background

[9] Steloy Castings has been in the foundry business for thirty years. It manufactures and supplies castings for various industries. It also supplies static and centrifugally cast high-alloy components locally and internationally. Its procedures, works instructions and recipes are embodied in manuals which constitutes and embody trade secrets and/or confidential information and/or confidential knowledge and which are susceptible for copyright protection. Joaquim de Oliveira Bernades ("Bernades") was its customer liaison manager from October 2006 till November 2007.

[10] Upon leaving the employ of Steloy Castings in December 2007, Bernades founded Bernades & Kin Foundry CC ("Bernades & Kin"). In March 2008 he founded B&K Foundry CC ("B&K Foundry"). Bernades is the sole member of both close corporations.

[11] Steloy Castings claims that as at the time of his resignation from its employ, and/or at the time of founding his close corporations,

Bernades, personally or acting with other persons inter alia (a) wrongfully misappropriated its trade secrets and/or confidential

information and/or confidential knowledge, (b) took or removed its duplicate original file which contained melting instructions, (c) copied and reproduced the whole or substantial parts of one or more of its manuals or caused such copies to be made and handed over to him, (d) provided and/or exchanged and/or distributed the original and/or copies or reproductions of its manuals or parts thereof to another, and or (e) infringed its copyright in the manuals by copying and/or reproducing, alternatively by making adaptations of its manuals or substantial parts thereof.

[12] Upon obtaining the first applicant's manuals and trade secrets Bernades & Kin Foundry commenced its foundry business in unlawful competition with the first applicant in supplying castings in all grades of stainless steel, steel, low alloy steel and cast irons for heat, corrosion, wear and abrasion resistance, also to existing clients of first applicant.

[13] On 28 February 2012 Steloy Castings obtained an anton piller court order against Bernardes and B&k Foundry. The order was executed on 1 March 2012. During the execution of the anton piller documents were found which provided evidence of infringement of Steloy Castings' manuals and/or infringement or misappropriation of its confidential information.

[14] On 27 March 2012 the Anton Piller order was confirmed. The court also granted an interim interdict in applicants' favour. Costs were reserved for determination in the action.

[15] On 1 June 2012 the applicant issued summons against Bernardes and B&K Foundry based on the infringement of the copyright of its manuals, unfair competition and breach of employment contract. In their plea the defendant alleged that B&K Foundry was dormant. The first applicant amended its particulars of claim to join Bernardes & Kin Foundry in the action. Before the action could be heard, Bernardes resolved to place the close corporations into voluntary liquidation in terms of section 349 of the Companies Act. His estate had also been accepted as insolvent and placed under sequestration in the hands of the Master on 7 August 2014.

[16] On 15 August 2014, in the absence of any appearance or opposition on behalf of the close corporation (in liquidation), or Bernardes

himself, the first applicant obtained judgment in the following terms:

IT IS ORDERED IN FAVOUR OF THE FIRST PLAINTIFF AGAINST FIRST DEFENDANT, SECOND DEFENDANT (In liquidation) AND THE FOURTH DEFENDANT (in liquidation), JOINTLY AND SEVERALLY THAT,

1. First, Second and Fourth Defendants be interdicted and restrained from infringing the Plaintiffs' copyright in the First Plaintiffs manuals by reproducing or adapting it or from distributing manuals. The said manuals are the following:

1.1. Policy and Procedures;

1.2. Administration and Registration;

1.3. Pattern Making;

- 1.4. Moulding;
- 1.5. Melting;
- 1.6. Furnace and Spectrometer;
- 1.7. Fettling and Welding; and
- 1.8. Inspection

(First Plaintiffs manuals)

- 2. An order that First, Second and Fourth Defendants deliver up to the Plaintiffs all copies, reproductions and adaptations of the First Plaintiffs manual (or part thereof) in their possession or under their control or kept under attachment by the Sheriff pursuant to the execution of the Anton Piller order;
- 3. An order that the First, Second and Fourth Defendants be interdicted and restrained from using instruction, specifications, recipes, methods, processes, values, parameters and settings contained in the First Plaintiff's manual in respect of which Plaintiffs own proprietary and confidential interest, in particular those aspects set out in paragraph 88 of the founding affidavit to the Anton Piller Application, for the purpose of manufacturing castings;
- 4. An order compelling First, Second and Fourth defendants to:
 - 4.1. Return to first Plaintiff all documents and materials pertaining to the company , its employees, clients, business processes, suppliers or any information regarding the company, in whatever material medium such company information exist;
 - 4.2. Delete and remove any company information from the First Plaintiff from any computer onto which they may have loaded company information and to destroy any copies, back-ups and documents reflecting of any of the company's information after they have ensured that copy of the company information have been transferred on a computer system of the company or is available to the company in electronic or, where not applicable, in writing form.
- 5. An order that the First Second and Fourth Defendants be interdicted and restrained from using for their own benefit (or indulging to the other of his own benefit), the secret of the company or any other information which they may have received or obtained in relation to the affairs of the First Plaintiff or its customers or the working of any processes or invention or to any marketing technique which is carried on or used by the company.

6. An order that the First , Second, Fourth Defendants be interdicted and restrained from competing unlawfully with First Plaintiff by:
 - 6.1. Using the First Plaintiffs proprietary and confidential information to manufacture and supply castings;
 - 6.2. Representing to their customers and potential customers that the Second Defendant and/or Fourth Defendant has developed its own quality management system in respect of the manufacture of castings;
 - 6.3. Soliciting business from First Plaintiffs clients and by manufacturing castings for them in accordance with their unique requirements by making use of the Plaintiffs proprietary trade secrets and/or confidential information and/or confidential knowledge which were misappropriate from the Plaintiffs;
 - 6.4. Soliciting business from the First plaintiffs customers in an effort to divert the business of such clients away from the First Plaintiff and to generate income for the First and/or Fourth Defendants by making use of the Plaintiff's proprietary and confidential information and manual in the manufacturing of castings for such clients.
 7. Payment of damage in the amount of R10,836,638.00;
 8. Payment of additional damages in the amount of R1 000.000.00.
 9. Costs of suit on an attorney and client scale, including all the costs incurred in the Anton Piller proceedings under case number 11001/12, which costs shall include the costs of the supervising attorneys and which are also to be paid on an attorney and client scale'.
- [17] Steloy Castings noted its claim with the liquidators of B&K Foundry and Bernardes & Kin Foundry. It also investigated the affairs of the close corporations in order to establish whether any part of its claim for damages would be met. During the investigations it learnt that Bemardes & Kin Foundry had sold the assets of its business on 22 November 2013 to a new entity called B&K Castings (Pty)Ltd ("B&K Castings) for the sum of R1 050 000.00.[18] As it turned out, Steloy discovered that the respondent never paid for its purchase. It acquired the assets on a fraudulent basis in order to continue with the business unhindered by the constraints of liquidation and with the purpose of evading Bernardes & Kin Foundry's creditors. Steloy Castings' attorney could not find a sale agreement in the files of the liquidators, and the liquidators confirmed that no sale agreement was ever provided to them. To compound matters, Bezuidenhout ignored the request for access to the records of the company. Importantly neither Bezuidenhout nor the respondent ever put up the capital for acquiring the business/assets of Bemardes & Kin Foundry.

- [19] By the time the liquidators received their final appointment on 6 May 2014, the assets of Bernardes & Kin Foundry had already been transferred to the respondent. The respondent proceeded to utilise the assets of Bernardes & Kin Foundry, to operate the exact same business from the same premises and employing the same personnel. Bernardes continued as the manager of the "new" business, his wife, son and daughter-in-law were also appointed in the "new" business.
- [20] Shortly before and even after the liquidation of the two close corporations, Bernardes also extracted the from Bernardes & Kin Foundry's bank account the following amounts:
1. R250 000.00 (transfer to Linda Bemardes) on 12 October 2013.
- R250 000.00 (transfer to Linda Bemardes) on 14 October 2013. R250 000.00 (transfer to Linda Bemardes) on 16 October 2013. R300 000.00 (Bemardes) on 29 October 2013. R200 000.00 (Bemardes) on 29 October 2013.
6. R375 000.00 (transfer to Linda Bernardes) on 30 October 2013.
 7. R450 000.00 (Bemardes) on 12 February 2014.
 8. R450 000.00 (Bemardes) on 13 October 2014.
 9. R200 000.00 (Bernardes) on 14 February 2014.
 10. R500 000.00 (Bernardes) on 1 March 2014.
 11. R600 000.00 (Bernardes) on 14 October 2014.
- [21] The above withdrawals and transfer of funds appear to accord with the submissions of the applicant that the respondent had been set up as a vehicle to embezzle the business/assets of Bernardes & Kin Foundry and to secure the financial survival and prosperity of Bemardes and his family. There is little doubt that all, including the liquidators were duped by Bernardes.
- [22] The paper trail shows that Bemardes & Kin Foundry paid itself for the business/assets which it then transferred to the respondent. The respondent stepped into the shoes of the insolvent close corporation, Bernardes & Kin Foundry.
- [23] The bank accounts of Bernardes & Kin provide proof that Bernardes & Kin itself put up the capital for the purported sale by it of its business/assets to the respondent and therefore has paid itself. The flow of funds were structured thus:
1. An amount of R1 million was transferred on 15 March 2014 from Bernardes & Kin's beleggingsrekening account to its current account.

An amount of R1 050 000.00 was transferred on 15 March 2014 from Bernardes & Kin's current account to Venditor, the agent who facilitated the transaction. Venditor then paid over the sum of R1 050 000.00 to the liquidators as the sum purportedly received by them as agent for rendering effective a purported sale of business/assets between Bernardes & Kin and B&K Castings.

[24] This then makes it clear that the latter was set up for a purpose other than noble. This makes the transfer of the business/assets of Bernardes & Kin to the respondent suspect as it is tainted with deception and/or constitutes an alienation in fraudem creditorum for which the actio Paulina is a remedy.

[25] The transaction would appear to be voidable as it violates the provisions of section 34 of the Insolvency Act, and/or is an

impeachable transaction and/or improper alienation of property, which can be set aside under either sections 26, 29, 30 or 31 of the Insolvency Act.

[26] Steloy Castings submitted that the respondent was the alter ego of Bernardes & Kin Foundry. For the liquidators to get to the bottom of the transaction between the two, they would need to liquidate the respondent and Bernardes & Kin Foundry as one economic unit.

The case of the respondent.

[27] The respondent raises the point that the Steloy Castings does not have locus standi in these proceedings and that it has failed to properly indemnify the liquidators.

[28] In response to the respondent's preliminary point, the first applicant pointed out that section 32 of the Insolvency Act provides that:

32. Proceedings to set aside improper dispositions

(1)

(a) Proceedings to recover the value of property or a right in terms of section 25 (4), to set aside any disposition of property under section 26, 29, 30 or 31, or for the recovery of compensation or a penalty under section 31, may be taken by the trustee.

(b) if the trustee fails to take any such proceedings they may be taken by any creditor in the name of the trustee upon his indemnifying the trustees against all costs thereof.

(2) in any such proceedings the insolvent may be compelled to give evidence on a subpoena issued on the application of any party to the proceedings or he may be called by the court to give evidence. When giving such evidence he may not refuse to answer any question on the ground that the answer may tend to incriminate him or on the ground that he is to be tried on a criminal charge and may be prejudiced at such a trial by his answer.

- (3) When the court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher.
- [29] Again there is little debate that the first applicant properly indemnified the liquidators as is evident from the letter by its attorney and the affidavit deposed by him before the interim attachment order was sought and granted by Bertelsmann J on 10 July
2015. The respondent consented to the order without raising the point. The locus standi point in limine has no merit.
- [30] On the merits the respondent states that it has purchased the assets of Bernardes & Kin and used its current bank account. It admits that it also failed to advertise the sale. It would have been irregular to conduct the business of the respondent in the existing bank accounts of Bernardes & Kin...but no malfeasance was intended and it was always intended to do an adjustment account. The respondent says that "although it might seem on face value that Bemardes & l(jn Foundry paid for the assetsRespondent earned the income utilized to purchase the assets separately from the funds that was the property of Bemardes & Kin Foundry." Bernardes was not able to explain how the purchase of the assets by the respondent had been funded.
- [31] As already stated above, it is clear that Bezuidenhout or his company did not put up the funds for acquiring the assets of Bernardes & Kin. There is no proof that that the liquidators consented to the sale and transfer of assets, if so, that they were authorised by the creditors to do so, or that the sale was valid.
- [32] It is false that the respondent has paid for the asserts purchased from Bernardes & Kin. The assertions by the respondent that operating from the bank accounts of Bernardes & Kin was innocent is not supported by the evidence.
- [33] At common law the actio Paulina is available to set aside an alienation in fraudem creditorium. The requirements thereof are per Hockey NO v Rixom 1938, SR 107, Kerby 78 (Ply) Ltd v van den Heever & Others NNO 2000 (4) SA 804 (WJ the following: (a) that the alienation should be of such a nature that the debtor's assets are diminished thereby (b) that the person who receives from the debtor does not receive his own property (c) that there should be the intention to defraud and (d) that the fraud should have its effect. All of the above requisites for the actio Paulina and those of the Insolvency Act have been satisfied.
- [34] Further in Kerby supra the court held that a person who has been party to a transaction in fraud of creditors is required to deliver to the creditors all the benefits that have accrued from the fraud under the actio Paulina.

[35] The instant application is a textbook example of when and why the corporate veil ought to be pierced in order to establish if the company made fraudulent use of its legal personality, especially if there was an element of fraud in the establishment or use of the company. Cape Pacific Ltd v Lubner Controlling Inv (Pty) Ltd [1995] ZASCA 53; 1995

(4) SA 790 (A) at 802-804

[36] In summary therefore the following are factors that support the first applicant's case against the respondent:

1. Respondent has been established on 22 November 2013, some days before the voluntary liquidation of B&K Foundry CC on 4 December 2013.
2. Respondent had been established for the sole purpose of evading Bernardes & Kin creditors...this fact is admitted by Bernardes;
3. Bernardes & Kin fraudulently disposed of the corporation's main operating assets and business to the respondent, who equally fraudulently, obtained possession thereof and continued with the business and assets of Bernardes & Kin as if it was its own.
4. The business was continued at the same premises and with the same clients and personnel.
5. All existing clients were informed that the new business will start operating from 1 March 2014.
6. Bernardes was employed as the manager of the new business.
7. Bernardes' wife and son were also employed in the new business.
8. Bezuidenhout, the sole member and director who visits the foundry once a month draws no salary or share dividends from the respondent.

[37] I therefore find little to support the respondent's defence in this application and I accordingly hold that the first applicant must succeed.

TS MADIMA

ACTING JUDGE OF THE HIGH COURT

On behalf of the Appellant:

Instructed by: Geldenhuys Malatji Pretoria

On behalf of the First Respondent: Adv J.P Van der Westhuysen

Instructed by: P.J Klenyhans Incorporated

Pretoria

012 332-1450

Dates of Hearing: 18 May 2016

Date of order: 18 May 2016

Date of Judgment: 6 July 2016

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