

SOUTH AFRICA / JUDGMENT

Strutfast (Pty) Limited v Uys and Another (5675/2016) [2017] ZAGPJHC 183; 2017 (6) SA 491 (GJ) (5 July 2017)

[2017] ZAGPJHC 183

COURT

South Gauteng High Court, Johannesburg

BEFORE

GB Rome

CASE / FILE NUMBER

5675/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

CASE

NO: 567512016

Reportable: Yes
Of
interest to other judges: Yes

Revised: Yes
5
July 2017
In
the matter between
STRUTFAST
(PTY)
LIMITED Applicant
and
SARAH
MAGDALENA
UYS First
Respondent
CORRIE
VAN DER
MERWE Second

Respondent

JUDGMENT

ROME AJ:

Introduction

[1]. This is an application for the sequestration of two individuals, the first and second respondents respectively. The respondents are married, but not in community of property. The applicant's founding affidavit does not contain any averments from which it can be discerned that the sequestration of two individuals is sought in the same application because there is an identity of interests between the respondents or their estates.

[2]. The application thus runs contrary to the established practice in the Gauteng Courts. It has for many years undoubtedly been a rule of practice here that save where parties are married in community of property or in the otherwise very unusual circumstance of a complete identity of interests, one should not seek the sequestration of multiple respondents in a single application.

[3]. Apart from the weight of the authorities discussed further below, one underlying reason for limiting a sequestration application to the estate of one respondent only is that sequestration brings with it the status of diminished legal capacity (*capitis diminutio*). The relief sought in a sequestration application is directed at diminishing the legal status and capacity of a particular individual

debtor. Because of this, similar to an application for the appointment of a curator bonis for a patient, it should pertain to that debtor's circumstances only.

[4]. The authority for the practice against joining multiple respondents in a joint application for their individual sequestration is *Ferela (Pty) Ltd v Craigie* 1980 (3) SA 167 N(J), a decision of a judge (Coetzee J) of this division. Coetzee J's judgment in turn drew upon case law in which a similar rule against joining multiple respondents had been developed and applied in the context of winding-up applications. *Ferela* has however recently been departed from in another judgment of this division on the basis that it was wrongly decided.

[5]. It is therefore necessary to consider the judgment in *Ferela* before deciding whether it ought to be consigned to the scrap heap of outmoded insolvency law and practice on the basis that it is clearly wrong. In *Ferela* the petitioning applicant launched proceedings against three respondents, seeking the sequestration of each of them. The first of the two respondents were alleged to be partners in the third respondent, which was cited as a partnership. No case was made out as to why the partnership fell within the purview of an application for its sequestration and thus no case had been made out for the sequestration of the cited partnership.

[6]. The question in *Ferela* accordingly was whether the first and second respondents (the erstwhile two partners) could be jointly sequestrated in the same application. In that case the applicant, citing several pre-1948 judgments, argued that it was competent to sequester two separate estates in the same application. These earlier decisions, however, as appears from Coetzee J's judgment, contain scant reasons for the principle they were purported to have established. Coetzee J noted (correctly, with respect) that the issue was whether the first and second respondents in that case had been correctly joined per rule 10 and whether their joinder was appropriate. The issue of joinder was then considered in the context of the requirements for compulsory sequestration set out in sections 9(1) and 10(c) of the Insolvency Act 24 of 1936.

[7]. By reference to the specific statutory requirements, Coetzee J determined that it could rarely be the case that the sequestration of more than one respondent would pertain to the determination of substantially the same questions of fact. The following extract from the *Ferela* judgment is apposite:

"When one comes to the acts of insolvency, however, it is apparent from the facts that I have given that these are based on completely different facts not related in any sense whatsoever. There were two different warrants of execution. One had nothing to do with the

other, save that possibly the headings or the case numbers were the same. But in the case of one some fixed property was attached; in the case of the other no attachment could be made. The facts, which have to be investigated to decide whether each of these persons committed an act of insolvency or not, do not overlap in any sense whatsoever. But even more important is the fact that, as far as the third requirement is concerned, one has to do with two sets of creditors, two different sets of assets, two different sets of circumstances which will each have to be investigated. In order to decide whether in that particular case there is the likelihood of an advantage to creditors in respect of that particular debtor. It could therefore quite easily be that two completely different cases, both as regard the act of insolvency or actual insolvency and the advantage to creditors are concerned, may have to be heard and determined by the Court.

This is not simply a case where either money or property is claimed from a respondent and where the provisions of Rule 10 would very easily be applicable *mutatis mutandis*. This is a procedure which really achieves a *concursum creditorum*. That is the purpose of sequestration proceedings. It is to my mind inadvisable that two separate estates should be dealt with in this way, each leading to its own and utterly separate *concursum creditorum*." (At 171F-H, emphasis added)

[8]. Coetzee J found support for his reasoning in *Breetveldt and Others v Van Zyl and Others* 1972 (1) SA 304 (T), a cognate case concerning an application for the winding-up of several corporate debtors. There, Margo J had reasoned that barring a complete identity of interest or the consent of each of the respondents, several companies should not be joined in one application for their liquidation. Margo J stated as follows:

"In the present case, each company has its own separate share capital, separate shareholders and separate creditors and the fusing of the interests of all four companies in one proceeding is confusing and prejudicial to persons interested in only one such company. In the compulsory winding-up of a company, the petition is an important document. Its purpose, inter alia, is to place before the Court, for the information of the company, the creditors and shareholders, a statement of the material facts upon which a winding-up order is claimed, and it also serves to provide information to the Master, the Sheriff, the liquidator and other interested parties. If, for example, creditors in one or other of the companies in this case, should wish to intervene on the return day, or to suggest a compromise under sec. 103 of the Companies Act, there is no valid reason why they should have to become involved in the affairs of three other companies." (At 314)

[9]. Some four decades later Boruchowitz J remarked that Breetveldt has "stood the test of time". (See *Brick and Another v Front Runner Racks 2000 (Pty) Ltd* (2011] ZAGPJHC 34 (4 May 2011) at para 7.)

[10]. It is important to note that while it is convenient to treat Breetveldt and Ferela as alike judgments, there was a further important consideration, which informed the decision in Ferela. As the above emphasised portion of Coetzee J's judgment indicates, where one is dealing with the requirement of advantage to creditors, one has to do with two sets of creditors, two different sets of assets, two different sets of circumstances, which have to be investigated separately in order to decide whether in a particular case there is the likelihood of an advantage to creditors in respect of that particular debtor. This reasoning is with respect sound. Intertwining allegations about assets belonging to a plurality of respondents have the potential to generate confusion about which assets (as between several respondents) are to form the basis of the advantage (in the form of a dividend) to the particular creditors of one respondent.

[11]. Accordingly and in my view, the judgment in Ferela has likewise and for good reason withstood the passage of the years. If anything, noting up the judgment indicates that its authoritative

force has grown, not diminished, over the years.

[12]. The only reported judgment in which any misgivings were expressed about the practice established in Ferela is to be found in *Business Partners Ltd v Vecto Trading 87 (Pty) Ltd and Others* 2004 (5) SA 296 (SE). In that case Kroon J, after a comprehensive analysis of inter alia Breetveldt and Ferela stated as follows {at para 34):

"I am persuaded, because of the different requirements that require to be satisfied, there is in principle serious objection to a single application for the liquidation of a company and a sequestration of an individual.

Accordingly, subject to what follows, I align myself with the approach followed in Breetveldt, Ferela and Caltex Oil [Caltex Oil SA (pty) Ltd v Govender's Field Distributors (Pty) Ltd 1990 (6) SA 552 (M)]. I, however, have some difficulty with the stance that a complete identity of interests is a *sine qua non* for the valid joinder of more than one debtor in liquidator and/or sequestration proceedings.

One cannot readily conceive of a situation where there would in fact be a complete identity of interests between debtors. Perhaps a preferable test would be that mooted by counsel for the applicant, viz a sufficiently substantial coincidence of interests such as would practically or at least substantially place the case outside the objections to joinder that were stated in the three cases referred to above and properly bring the case within the ambit of rule 10."

[13]. As appears from the above passage, prior to making any qualification as to the correctness of the Breetveldt and Ferela judgments, Kroon J expressly endorsed the approach in those cases.

[14]. To the extent that Kroon J then suggested a different approach, such difference was one expressed as to kind, namely that the strictness of the rule be reduced from a complete identity of interest to a somewhat more flexible substantial coincidence of interest. Even then the suggested qualification was stated in the tentative form of a "perhaps".

[15]. In Business Partners the application was for a winding up under the Companies Act, not for the sequestration of individuals under sections 9 and 10 of the Insolvency Act. The above qualification as it pertained to sequestration proceedings was thus clearly obiter. In any event, the judgment in Business Partners does not address a central aspect of the reasoning in Ferela, namely that the rule of practice applies a *fortiori* to sequestration proceedings because of the statutory imperative to prove a likely advantage to the creditors of a particular debtor.

The practice firmly established in Ferela thus remained undisturbed by the judgment in Business Practice.

[16]. However as foreshadowed above, the continued application of the practice established in Ferela was recently rendered uncertain. Such uncertainty arises out of a decision of this division, namely Maree and Another v Bobroff and Another

[2017] ZAGPJHC 116 (7 March 2017). Thus, the question now arises whether the practice established through Ferela et al remain good law.

[17]. Bobroff concerned the application for the sequestration of two attorneys, a father and son who were partners in the same law firm. From the judgment it does not appear that the practice itself had been sequestrated or liquidated. Indeed, the practice (or the business of the practice) appears to have been sold to a third party. The facts in Bobroff fell squarely within the ambit of the Ferela precedent. Unsurprisingly the respondents in that case contended that their joinder was improper and that a single application for the sequestration of each of them was ill conceived. As appears from judgment, the respondents' reliance on judicial precedent proved to be of no assistance to them. Theron AJ dismissed the objection of a fatal misjoinder on the basis that Ferela was (in his view) clearly wrong. For the reasons set out below, it is respectfully not

clear to me on what basis Theron AJ could have reached so definitive a conclusion.

[18]. In Bobroff the only basis for why Ferela was found to be wrongly decided appears to be a reliance on the qualification to the general rule as suggested by Kroon J in *Business Partners*.^[1] However, Kroon J's remarks on the general rule (which he specifically endorsed) do not in my view properly serve to ground a conclusion that the judgment in Ferela constituted a clear judicial error.

[19]. In considering under what circumstances a Court may overrule its own previous decisions (Ferela and Bobroff are decisions of this Court), guidance is to be found from the Constitutional Court and its judgment in *Gcaba v Minister for Safety and Security and Others* 2010

(1) SA 238 (CC).

[20]. The author of a highly illuminating article on precedent and the Constitutional Court, has summarised the issues raised in *Gcaba* thus:

20.1. *Gcaba* raised substantial questions about the relationship between administrative law and labour law under the Constitution.

20.2. The decision attempted to bring clarity to the confusion created in the lower Courts by the Constitutional Court's conflicting decision in two differing judgments handed down in 2002 and 2008 (respectively in the cases of *Fredericks* and *Others v MEC for Education and Training*

[2001] ZACC 6; 2002 (2) SA 693 (CC) and *Chirwa v Transnet Limited and Others*

[2007] ZACC 23; 2008 (4) SA 367 (CC).

20.3. Briefly, in *Fredericks* the Constitutional Court held that section 157(1) of the Labour Relations Act 66 of 1995 does not exclude the jurisdiction of the High Court to review a decision by the CCMA.

20.4. By contrast, in *Chirwa* the same Court had held in the context of a claim of unfair dismissal by a public sector employee, that the High Court lacked jurisdiction to entertain the claim.

20.5. According to the majority judgment in *Chirwa*, all disputes that were in essence labour disputes, fell within the exclusive jurisdiction of the Labour Court, to the exclusion of the jurisdiction of the High Court.

20.6. Tensions thus arose between the two judgments with some lower Courts interpreting *Chirwa* as overruling *Fredericks* and others viewing the two as consistent. (See J Brickhill, "Precedent and the Constitutional Court"

(2010) 3 Constitutional Court Review, at p79).

[21]. In *Gcaba*, the applicant, a public-sector employee, sought to review in the High Court a decision of the Minister for Safety and Security not to appoint him to an upgraded post. The Minister objected to the High Court's jurisdiction. The High Court upheld the

defence and in so doing concluded that Chirwa overruled Fredericks. In Gcaba the Constitutional Court (per Van Der Westhuizen J) unanimously upheld the High Court's judgment. In so doing the Court dealt extensively with the question of legal precedent:

"[P]recedents must be respected in order to ensure legal certainty and equality before the law. This ... is essential for the rule of law. Law cannot 'rule' unless it is reasonably predictable. A highest court of appeal

- and this Court in particular -has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned. It is the upper guardian of the letter, spirit and values of the Constitution. The Constitution is the supreme law and has had a major impact on the entire South African legal order - as it was intended to do. But it is young; so is the legislation following from it. As a jurisprudence develops, understanding may increase and interpretations may change. At the same time, though, a single source of consistent, authoritative and binding decisions is essential for the development of a stable constitutional jurisprudence and for the effective protection of fundamental rights. This Court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so. One exceptional instance where this principle may be invoked is when this Court's earlier decisions have given rise to controversy or uncertainty, leading to conflicting decisions in the lower courts." (at para 62)

[22]. In a later decision, Brand AJ[2] for a unanimous Constitutional Court gave further constitutional imprimatur to the continued principled application of stare decisis:

"The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos." (See *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 28)

[23]. There is clearly potential for conflict between so ringing an endorsement of the stare decisis doctrine and the injunction in section 39(2) of the Constitution that every Court must interpret and develop our law in the light of the Bill of Rights. Any such tension between important, yet potentially conflicting, fundamental jurisprudential principles does not however arise in the present matter. The applicant, having chosen to join two respondents in one application, advanced no basis as to why the established practice might be constitutionally suspect and in argument contented itself with a reliance on the qualification expressed in *Business Partners*.

[24]. Moreover, having regard to the importance of safeguarding the status of full legal capacity and the caution thus required before limiting, depriving or diminishing a person's legal status or capacity, the established rule of practice in my view chimes with important Constitutional values. It prevents, for example, large financial institutions seeking for reasons of their own commercial convenience to join numerous debtors as multiple respondents in an application for their

sequestration, with the inevitable blurring between the estates, creditors and the specific circumstances of each debtor that such an application would entail.

[25]. Ferela falls into that category of judicial precedents where Courts ought not lightly and without compelling reasons depart from their own previous judgments. In their discussion of judicial precedent, Hahlo and Kahn[3] note as follows:

"The feeling of compulsion to follow suit extends as far as an unreasoned judgment and even when there are contrary decisions of other divisions which the court, were the matter *res nova*, would find highly persuasive, and the reasoning of which it prefers"[4].

[26]. Apart from the fact that the Constitution would in all appropriate circumstances manifestly enable the circumvention of absurd or clearly unfair precedent, deference to judicial precedence has in any event never obliged our Courts to descend to into casuistry and allow the law to become mired in "That codeless myriad of precedent II That wilderness of single instances." [5]

[27]. The *stare decisis* doctrine is therefore encapsulated by the notion that a Court may only disregard its own established precedent in circumstances where the precedent was crystallised in a judgment that is not merely wrong, but "clearly" wrong. Various expressions have been used to describe the same precept. For example, similar phrases such as "quite satisfied", "settled conviction", "unconvinced", and "satisfied it was plainly wrong", "convinced that it was wrong" appear in the following cases: *R v Jansen* 1937 CPD 294 at 297, *Duminji v Prinsloo* 1960 OPD 83 at 84, *S v Tarajka Estates* 1963 (4) SA 467 (T) at 470, and *National Chemsearch (SA) CPtv) Ltd v Borrowman* 1979 (3) SA 1092 T at 11018.

[28]. My review of the judgments where Courts have departed from their previous decisions on the basis that such decisions were clearly wrong, did not reveal any readily accessible formulation to determine when a previous judgment is not only "wrong" but also "clearly or palpably so". The closest authority appears to be the full Court judgment in *National Chemsearch (SA) (Pty) Ltd v Borrowman*[6]

In that case Botha J {as he then was) stated

"In the field of precedents and *stare decisis* it is used to be said that a decision otherwise binding could be departed from if a later Court considered it to have been 'clearly wrong': nowadays the more

usual way of expressing the requirement is that the later Court must be 'convinced that it was wrong'. The words used in formulating the principle are not important; what matters is the degree of conviction, but the test to be applied is incapable of exact definition."

[29]. As to what degree of error renders a decision clearly, plainly or palpably wrong, there thus appears to be no widely accepted and clearly formulated curial test. I find some support for this conclusion in a perhaps perceptive comment by an author of a US Law Journal article that in "a// but the rarest cases, [w]hether a precedent is seen as clearly wrong is often a function of the judge's self-confidence more than of any objective fact." [7]

[30]. Despite not having located a source for a clearly articulated or precise test (or perhaps because in the words of Botha J the test "is incapable of definition") as to when a decision is not only wrong but clearly wrong, it nonetheless seems axiomatic and it is also clear that the stare decisis doctrine requires something more than a mere conclusion that a previous judgment was incorrectly decided. Whatever the precise test, a clearly or patently wrong judgment would pertain to a type of case where the error is so profound that it amounts to a judicial blunder or results in a manifest and unsustainable absurdity or injustice.

[31]. Applying the above principles to the present case, I am in respectful disagreement with the conclusion reached in Bobroff to the effect that Ferela was clearly wrong. An analysis of Bobroff indicates that the conclusion reached therein was based solely on the qualification expressed in Business Partners. Even if the suggested qualification in Business Partners is in principle to be preferred over the stricter test enunciated in Ferela, the rationale advanced for the qualification, namely that it is almost impossible to conceive of a situation where there would be a complete identity of interest, does not indicate a palpable error in Ferela. I am accordingly in respectful disagreement with the conclusion of Theron AJ that the judgment of Ferela is clearly wrong.

[32]. Further and because sequestration concerns an application for the diminution in the status of a particular debtor and because of the necessity to consider whether such application would be in the interests of the creditors of that debtor, Ferela is in my view not wrong, even less so is it clearly or palpably wrong. I am thus constrained to conclude that the decision in Bobroff to disregard the earlier judgment in Ferela was itself an error of such a nature that Bobroff must on this point be held to be clearly wrong.

[33]. Turning to the present application, there was no rationale for having launched sequestration proceedings against both respondents in one application. Whilst the same judgment debt based on a settlement agreement, that was made an order of Court, was obtained against each of the respondents, there was no identity of interests as between them, particularly so when consideration is given to the requirement of advantage to creditors.

[34]. The applicant did not identify nor distinguish between the creditors of each respondent and merely contented itself with an anodyne allegation that it has very little knowledge of the affairs of the respondents. Even if this is so the applicant was still required to distinguish between the affairs of each of the respondents. The applicant instead lumped the creditors of each respondent into one composite body of creditors and stated that their sequestration would be to the advantage of the respondents' (plural) general body of creditors. The applicant's founding affidavit contained no averments from which it could be discerned that there is an identical group of joint creditors for each of the respondents. While the founding affidavit did set out that the second respondent is vested with ownership of two bonded immovable properties, there was no allegation about whether the relevant mortgagees are creditors of the first respondent, the second respondent, or of both. The failure to distinguish or even attempt to delineate between the creditors and assets of each of the respondents for the purposes of identifying a potential dividend to the creditors in each separate estate, rendered the application fatally defective.

[35]. In these circumstances even were the test to be the less stringent formulation of a similarity or coincidence of interests such as to justify joinder, I would be unable to conclude that the joinder in this matter was justified. The applicant's blurring of the distinction between the affairs of the first and second respondents demonstrates why the joinder of respondents in an application for their sequestrations is an ill-advised practice.

[36]. In the result I make the following order:

The application is dismissed with costs.

GB ROME

ACTING JUDGE OF THE HIGH COURT

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DATE OF HEARING

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DATE OF JUDGMENT

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[1] Cf Bobroff at para 11 where the following terse statement appears "I find the qualification of Kroon J persuasive and that the judgment of Ferela is clearly wrong. The qualification of Business Partners is to be preferred."

[2] Brand AJ was in that matter sitting as an Acting judge of the Constitutional Court and not as a permanent Judge of the Supreme

Court of Appeal

[3] H R Hahlo and E Khan "The South African Legal System and its Background" at 254

[4] See, *Stiller and Dyzenhaus v O'Brien* NO 1947 (2) SA 1094 (W)

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- [5] Lord Tennyson, *Aylmers Field* at lines 438-439 cited in *Hahlo and Kahn*, *supra* at 215
- [6] *Supra*, Cited with approval in *Living Hand Pty Ltd v Ditz* 2013(2) SA 368 (GSJ), at para 71
- [7] Randy J. Kozel *Stare Decisis as Judicial Doctrine* 67 WASH. & LEE L REV. 411 (2010) at 420
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