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SOUTH AFRICA / JUDGMENT

## Strydom N.O and Others v Bennet N.O and Others (53908/2016) [2019] ZAGPPHC 432 (18 September 2019) [2019] ZAGPPHC 432

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COURT

North Gauteng High Court, Pretoria

BEFORE

S Kuny

CASE / FILE NUMBER

53908/2016

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 53908/2016

DATE: 2019.09.18

In the matter between:

P H STRYDOM N.O.

First Applicant

MARTHINUS JACOBUS DEWAL BREYTENBACH N.O.

Second Applicant

HAROON ABDOOL SATAR MOOSA N.O.

Third Applicant

and

G S BENNET N.O.

First Respondent

ROXANNE BENNET N.O.

Second Respondent

MAGDALENA RACHEL ENGELBRECHT N.O.

Third Respondent

J U D G M E N T IN APPLICATION FOR LEAVE TO APPEAL

KUNY AJ:

- 1) The applicants apply for leave to appeal against the dismissal of their application to sequester the DVB House Trust (“the Trust”).
- 2) The applicants are the liquidators of the insolvent estate of De Bruyn van der Elst & Bokwa Inc (“DBV Attorneys”), a firm of attorneys that was sequestered in February 2014 due to the misappropriation of trust funds. The applicants alleged that De Bruyn, the controlling mind of DVB Attorney, was the culprit.
- 3) The first respondent was initially cited in his capacity as a trustee of the Trust. However, on 3 November 2017 he brought an application to intervene in his personal capacity, alleging that he was also a creditor of the Trust and had a direct and substantial interest in the outcome of the application for its sequestration. This application was granted. The first respondent’s founding

affidavit in the application to intervene also served as the respondents’ answering affidavit in the sequestration application.

- 4) The Trust’s sole asset is a consolidated property consisting of Erven 1853 and 1864 Brackenhurst Ext 2 (referred to as “the Property”). Prior to being transferred to the Trust, the Erven were respectively owned by two companies, being SBD Legal and Administration (Pty) Ltd and SBD Legal Admin (Pty) Ltd (referred to in the papers as SBD 1 and SBD 2). These companies which were also alleged to be controlled by De Bruyn, were also liquidated.
- 5) The essence of the case put forward by the applicants in their founding affidavit is that the Trust was funded by money that was misappropriated from the trust account of DVB Attorneys. It is alleged that these monies were channeled through SBD 1 and SBD 2 and used to fund the Trust. At paragraph 11.6 of the founding affidavit the applicants alleged that the insolvent estate of DVB Attorneys has a “massive financial claim that must still be calculated” against the Trust. They allege that it is their duty to “collect this debt”. At paragraph 13.6 of the founding affidavit the applicants allege:

I respectfully repeat that large amounts of monies flowed from DVB Attorneys, through the SBD Companies, to the trust, or at least to the benefit of the trust. It is, with respect important that the trust be sequestered, so that independent trustees could be appointed to investigate all the financial affairs involving the trust, so as to ensure maximum recovery on behalf of the trust’s creditors”

- 6) As against these allegations the first respondent stated that he is a creditor of the Trust in the amount of R4 533 837,16. This debt arose from the fact that he loaned money to the Trust to enable it to settle a Nedbank loan that was secured by a mortgage bond over the Trust’s

immovable property. In paragraph 24 of his affidavit, the first respondent sets out payments that he alleges he personally made to Nedbank in respect of the bond account. The first respondent alleges that all payments in respect of the Property and the bond account are up to date and that the Trust is solvent.

- 7) The first respondent further alleges that initially it was intended that he would purchase the properties. However, De Bruyn proposed instead that the first respondent take over the Trust on the basis that he would settle the arrears owing on the property and assume liability to pay the bond.
- 8) The first respondent, second and third respondent were duly appointed as trustees of the Trust in terms of section 6(1) of the Trust Property Control Act No 57 of 1988. A copy of their letters of authority was annexed to the affidavit filed on behalf of the respondents. It is common cause that an amendment was brought about to the trust deed in terms of which the respondents were appointed as trustees and the beneficiaries were replaced.
- 9) The applicants do not allege in their founding affidavit that the Trust has committed an act of insolvency or that it is factually insolvent. Having regard to all the circumstances, I found that the applicants had not established a liquidated claim against the Trust. I found that if there is a claim at all, this still has to be proved.
- 10) The applicant relied on two main points in argument of the application for leave to appeal to persuade me that there was a reasonable prospect that another court would come to a different conclusion.
- 11) The first of these points was that I should regard the transaction by which the respondents acquired control over the Trust and varied the trust deed as a disposal of the property. This, so it was argued, should be considered to be an act of insolvency in terms of section 8(c) of the Insolvency Act, 24 of 1936. The applicants' counsel conceded that this had not been raised on the papers. However, he submitted that it was still open to him to argue the point on the facts as they stood.
- 12) The second point was that the variation of the trust deed and replacement of the trustees was invalid. It was argued in this regard by counsel for the applicants that the document that purported to vary the trust deed was executed on 27 August 2014 whereas the letters of appointment of the trustees are dated 15 September 2014.
- 13) The second point seems to me to be destructive of the first point. If the amendment to the trust deed and appointment of the respondents as trustees was invalid, as argued on behalf of the applicants, then it could not be contended that there was a disposal of the property by reason of the change in control of the Trust and the substitution of its beneficiaries. The presentation of mutually destructive arguments, each argued with equal vigour, is inherently problematic to the applicants' attempt to persuade me that there was a reasonable prospect that another court would come to a different conclusion.

- 14) I made no finding in my judgment as to the validity of the variation of the trust deed and the appointment of the respondents as trustees. No allegations were made in the founding affidavit as regards this aspect and it was never part of the relief sought by the applicants. Accordingly, I did not consider it necessary or appropriate that I make such a finding.
- 15) Furthermore, even if it is assumed that the variation of the trust deed and replacement of the trustees was invalid this would not provide the applicants with a basis on which to sequester the trust. In my view, this may found a basis for other remedies against the Trust and possibly the respondents. However, a case was not made out for the sequestration of the Trust on this basis.
- 16) If it is assumed that the amendment to the trust deed and appointment of the respondents as trustees was valid and that there was a disposition of the trust property, I am not persuaded that the Trust committed an act of insolvency as envisaged in terms of section 8(c). It still has to be shown that the disposition would have the effect of prejudicing the Trust's creditors or of preferring one creditor above another. It therefore would be incumbent on the applicants to satisfy the court that there was an actual demonstrable preference of one creditor above another when more than one debt has fallen due. See *De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T).
- 17) This brings again into sharp focus the question as to whether the applicants had established that DVB Attorneys has a liquidated claim against the Trust. I found in my judgment that even if the applicants could substantiate that it has a cause of action against the Trust, which in my view was sketchy, its claim is very far from being liquidated. I applied the majority decision in *Osborne v Cockin NO and Others* (549/2017) [2018] ZASCA 58 (17 May 2018) unreported which I was bound to do. The nexus between funds that were misappropriated from DVB Attorneys and the Trust is at this stage a matter of conjecture and in my view, has not been established on the papers. I conclude that there is no reasonable prospect of another court finding otherwise.
- 18) The applicants did not make out a semblance of a case against the respondents in their founding affidavit in respect of both of the above points raised by their counsel in the application for leave to appeal. Another court, presented with the same facts, would be hard pressed to find any merit in the conflicting contentions being on the one hand, that the respondents' actions in relation to the trust were invalid and on the other, that a disposal of property took place.
- 19) I hesitate to add that if any entities have potential claims against the Trust it is more likely to be SBD1 and SBD2 who disposed of the erven constituting the Property to the Trust. There was a direct nexus between these parties. The liquidators of these companies did not join in the proceedings and no allegations were made to suggest that there should be a piercing of the corporate veil.

- 20) The applicants also suggested in argument that DVB Attorneys had a claim against the Trust for the return of rentals paid by the legal practice during the period it occupied the property owned by the Trust. Any rentals paid would have been in consideration for the right to occupy the property and in my view this submission is far fetched and untenable.
- 21) I have carefully considered the other grounds of appeal raised in the application for leave to appeal. All the issues were dealt with in my judgment and I am of the view that there is no reasonable possibility of another court would come to a different conclusion.
- 22) In all the circumstances I make the following order:

1 The application for leave to appeal is dismissed.

2 The applicants are ordered to pay the costs of the application.

S Kuny

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Date heard:

12 August 2019

Date of judgment: 18 September 2019

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