

SOUTH AFRICA / JUDGMENT

Thomas v Thomas and Another (2756/2018) [2020] ZANCHC 84 (13 November 2020)

[2020] ZANCHC 84**COURT**

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

2756/2018

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Source record**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN
CAPE DIVISION, KIMBERLEY**

Case No:	2756/2018
Heard on:	08/10/2020
Delivered on:	13/11/2020
In the matter between:	BAREND JOHANNES THOMAS and APPLICANT JAMES WILLIAM THOMAS 1 ST RESPONDENT MIDDELPLAAS-SUID LANDGOED (EDMS) BPK 2ND RESPONDENT

JUDGMENT**MAMOSEBO J**

[1] This application was initially filed on an ex parte basis with the applicant, Mr Barend Thomas, seeking a declarator in the following terms:

1.1 That his right, title and interest in the action that he, as plaintiff instituted against his brother, James William Thomas, as the first defendant, and Middelpaas-Suid Landgoed (Pty) Ltd as the second defendant, under case number 202/2003 in this court, be deemed not to form portion of his insolvent estate;

1.2 That his creditors and the trustees of his insolvent estate have, by not laying claim thereto, waived all rights that they may have had in the said action;

1.2 That the trustees be authorised to relinquish on behalf of the insolvent estate and in his favour, all claims to his right, title and interest in the action; and

1.4 That he be authorised to pursue and enforce his right, title and interest in the action for his own benefit; and

1.5 Costs of suit against any creditor opposing the application.

[2] The first and second respondents, James William Thomas and Middelpaas-Suid Landgoed (Edms) Bpk respectively, filed an answering affidavit as parties having an interest who may be affected by a decision on an application brought ex parte.[1] On the day of the hearing the parties resolved the interlocutory application for leave to intervene. The Master of the High Court, the trustees and other creditors did not oppose the application.

The factual background

[3] The applicant and the first respondent are brothers. The applicant had instituted action in this court against the respondents under Case Number 202/2003. In Claim 1, he claims delivery of certain livestock alternatively, payment of the value of the livestock in the amount of R663,111.00; Claim 2, special damages in the amount of R800,000.00 due to failure by the respondents to deliver the livestock to him and the consequent financial distress suffered.

[4] The respondents are defending the action and have filed their plea. While this case was pending, the respondents successfully applied for the applicant's eviction from the farm under Case Number 1155/2004. A cost order was granted against him in that case. His failure to honour the cost order after taxation thereof resulted in a writ of execution being granted against him. After a nulla bona return was received, the respondents successfully applied for his sequestration under Case Number 1560/2005 which was granted on 17 March 2006.

- [5] The applicant's estate vested in the hands of the Master of the High Court, Kimberley, whereafter, Messrs Johannes Wilhelmus Wilmans of the firm Elliot, Maris, Wilmans & Hay and Stephen James Groenewaldt of Towell & Groenewaldt were appointed as the trustees by the Master of the High Court Kimberley.
- [6] According to the applicant the only claim proved against his insolvent estate was the respondents' claim in the amount of R97,483.
- [5] The trustees levied a contribution of R42,457.89 which the respondents paid. The creditors resolved to accept the trustees' report in the second meeting and authorised the trustees, in their discretion, to abandon any asset that could not be monetized. On 23 October 2008 the Master confirmed the first and final Liquidation and Distribution Account in the insolvent estate. However, the right, title and interest in that litigation was not recorded as an asset in the Liquidation and Distribution Account.
- [7] The applicant was rehabilitated by an order of this Court on 28 May 2010 and the application was not opposed by the Master of the High Court and the trustees. The applicant seeks to be re-vested of his right, title and interest which he claims the trustees have abandoned.

The issue for determination

- [8] The issue to be determined is whether the applicant's right, title and interest in the action under case number 202/2003 is part of the insolvent estate to which the trustees and the creditors have waived their right to lay a claim entitling him to pursue and enforce his right, title and interest for his own benefit.
- [9] It was argued on behalf of the respondents that since the applicant was divested of his estate in terms of s 20 of the Insolvency Act[2], which incorporated his right, title and interest, which formed part of his insolvent estate he cannot pursue the case for his personal benefit as the proceeds of that case, should he be successful, vested in the insolvent estate.
- [10] It is the applicant's contention that upon the final sequestration of his estate his right, title and interest in the action proceedings

became an asset in the insolvent estate and despite this knowledge by the trustees they excluded it in the final Liquidation and

Distribution Account. The applicant's further contention is that his brother, the first respondent, or any other creditor for that matter, was also aware of his right, title and interest in the pending action but did not take any action to monetize this right, title and interest. It is on this basis that the applicant made the averment that the trustees have abandoned their right, title and interest or have waived their right to lay claim thereto.

- [11] Relying on the case of *Ex Parte Van der Merwe*[3] and other cases cited therein, Mr du Preez SC, for the applicant, highlighted the following passage in support of the contention in para 10 above:

"[5] ... The trustee appears to have bona fide abandoned the immovable property by excluding it from the final liquidation and distribution account. The question which arises is whether the applicant should be allowed to benefit from the trustee's abandonment of the immovable property... ' "

"[12] the issue to be decided in this application can safely and reasonably be resolved on the basis that the trustee abandoned the immovable property when he decided to exclude such property from the final liquidation and distribution account ' "

"[14] [quoting from Hockley, Insolvency Law, 8th Edition, para 19.4, p201, and referring to Ex parte Parker[4], Ex parte Kriel,[5] and Ex parte Olivier[6]] "If the insolvent can show that neither the trustee nor his creditors lay claim to an asset in his estate.... he may, on applying for rehabilitation, or thereafter, ask for an order declaring that he is entitled to the asset... The court may grant the order on the basis that the trustees and creditors, by making no claim in respect of the asset, have waived whatever rights they might have had to it.... " "

"[18] [quoting pp553 — 534 of Ex parte Olivier] "The basis, however, of the claim in this case would be that after adequate notice and full knowledge of the position, the trustee and creditors have laid no claim to the asset, and have, therefore, waived whatever rights they may have had. That they could waive such right is not disputed. The rights are statutory rights which, if so minded, they could, have full knowledge of all the particulars, waive ' "

"[22] The trustee duly investigated the matter, but thereafter elected to abandon the asset and excluded same from the first and final liquidation and distribution account.

[12] Mr Van der Walt SC, for the respondents, submitted that it is common cause that the applicant was divested of his estate in terms of s 20 of the Act which vested first in the Master and subsequently in the trustees upon their appointment. It follows that the applicant's right, title and interest also vested in the trustees. According to counsel, when the trustees abandoned the litigation under Case No 202/2003, the right to continue with litigation perished. Should it be held, however, that the trustees did not abandon the claims, then the respondents contend, the applicant abandoned his rights to continue with litigation by failing to take any steps since his rehabilitation on 28 May 2010 until 19 June 2014 when he decided to pursue the litigation.

[13] The following was cited with approval by Van Heerden JA in *Niewoudt v The Master and Others* NNO[7]:

"Die locus classicus in hierdie verband is die volgende dictum van Innes HR in *Mears v Rissik*, Mackenzie NO and *Mears' Trustee* 1905 TS 303 op 305:

'Now, no doubt the general rule is that an unrehabilitated insolvent cannot, over the head of his trustee, bring actions connected with his estate.... The reason of the rule is that his estate has been taken out of him and vested in his trustee; and that therefore the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the trustee, and not the insolvent. But from the fact that the insolvent is under this disability, it does not

follow that he has no rights whatever regarding the estate. In my opinion he has a very real reversionary interest in it. The law provides that if there is any residue after paying the debts it is to be handed to the insolvent. Not only so, but it is to his interest that as many assets as possible shall be brought into the estate, and the debts reduced to their proper limits. He has an interest in seeing that this is done. An asset may suddenly become valuable which has been considered worthless, or he may have a legacy left to him which may enable him to clear off all his liabilities. Apart from that it is to the interests of the insolvent that his assets should be increased and his liabilities reduced, because in that way the stigma of insolvency rests less heavily upon him; and when he applies for his rehabilitation he is in a better position than if he had a very large margin of unpaid debts. Therefore from whatever standpoint we regard it the insolvent has a very real interest in the administration of his estate.

As I have said, generally the trustee is the person to take action in matters connected with the estate; but if the trustee will not do so, or whether bona fide or mala fide does not see his way to take action, is the insolvent on that ground to be without remedy? I should say upon general principles he ought not be; the law should provide some remedy. ' ' (Emphasis added)

[14] A plethora of correspondence was exhausted between the applicant's attorneys, Engelsman Magabane Inc, and the trustees particularly

around the aspect of abandonment of the claim. I quote in part from some of the letters:

14.1 On 02 November 2015 para 3 of the letter addressed to the trustees:

"Dit blyk dat voorgemelde aksie ingestel was voor die sekwestrasie van Mnr Thomas en benodig hy derhalwe nou 'n sessie van sy vorderings regte in hierdie verband vanafu as kuratore ten einde hierdie aksie voor te sit."

14.2 Para 3 of the response to the aforementioned letter signed by Mr Wilmans on behalf of the trustees is dated 11 November 2015 reads:

"Dit is nie vir skrywer duidelik waarom 'n sessie benodig word nie. Volgens paragraaf 5.6 van Mnr Thomas se verklaring ter ondersteuning van sy aansoek om op 27 Oktober 2015 die Hofte vra vir uitstel van die verhoor, vermeld hy dat Advokaat du Preez SC 'n opinie gegee het waarin aanbeveel word dat 'n sessie van die vorige kurators verkry moet word."

14.3 Mr Wilmans also addressed a letter to the applicant's attorneys dated 12 September 2016. Para 2 thereof reads:

"In elk geval wil dit voorkom volgens die Hofbeslissings dat wanneer 'n saak geabandonneer is, word dit res derelico. Blykbaar is daar geheel en al afstand gedoen van enige aanspraak op 'n vorderingsreg wanneer dit geabandonneer is soos in paragrafe 2 en 3 gestel in u brief van 14 Julie 2016. Dan is daar blykbaar niks wat gesedeer kan word nie."

[15] It was further contended on behalf of the respondents that at the beginning of the trial on 23 November 2004 the applicant had amended

his claim by deleting certain averments and abandoned the second claim in its entirety. It is not, for present purposes, necessary to decide on these submissions. Of importance is whether the applicant should be revested of his right, title and interest to pursue the pending litigation for his benefit or not; which issues will depend on the outcome of the application should the applicant succeed in pursuing the litigation for his own benefit.

[16] Mr Van der Walt on the aforesaid abandonment urged this court to exercise its discretion and grant a vesting order. Counsel submitted that the facts in *Van der Merwe* (supra) are clearly distinguishable in that the case dealt with immovable property involving only one creditor. The argument is without substance. The case before me, while dealing with incorporeal property also had one creditor whose claim was proved.

[17] While it remains within the discretion of the Court on whether to grant prayers 1.2 and 1.3, submitted Mr Van der Walt, granting the order will result in prejudice to the respondents as the litigation against them will continue as the applicant has not tendered any previous costs incurred by the respondents. The asset, namely, the right, title and interest, should therefore remain the property of the insolvent estate. The applicant may approach the trustees to sell the asset for the benefit of the insolvent estate as it will be unfair to transfer it for the benefit of the applicant, continued the argument.

The legal position

[18] Sec 20(1)(a) of the Insolvency Act stipulates:

"(1) The effect of the sequestration of the estate of an insolvent shall be —

(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him."

[19] The following remarks by the Full Bench in *Cook NO v SJ Coetzee*[8] ties the legal position:

"[11] It is clear from the provisions of the Act that once a trustee is appointed he is vested with the property of the insolvent (as defined) and exercises the powers set out in the Act until there is a composition or until the insolvent is rehabilitated. The confirmation of the trustee's first and final liquidation account does not affect this. The effect of the sequestration of the estate of an insolvent is to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him (s 20(1)(a)). The estate of an insolvent includes all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or messenger under writ of attachment, as well as all property which the insolvent may acquire during the sequestration, except as provided in s 23 (s 20(2)). The exceptions, trustee remains vested with all property of the insolvent prior to sequestration and acquired by him after sequestration. The estate of the insolvent remains vested in the trustee until the insolvent is reinvested therewith pursuant to a composition in terms of s 119 or until the insolvent is rehabilitated in terms of s 127 or 127M (s 25). Unless the trustee vacates the office, is removed or resigns or dies the estate continues to vest in him (s 25(2)). When an insolvent wishes to apply for his rehabilitation he

must give notice to the trustee (s 124(1)). A trustee who has received such a notice must report to the Master any facts which would justify the court in refusing, postponing or qualifying the insolvent's rehabilitation (s 124(4)). " (Emphasis added)

[20] The following is stipulated in s 25 of the Act:

‘(1) The estate of an insolvent shall remain vested in the trustee until the insolvent is reinvested therewith pursuant to a composition as in section 119 provided, or until the rehabilitation of the insolvent in terms of s 127 or 127A: Provided that, subject to the provisions of subsection (3), any property which immediately before the rehabilitation is vested in the trustee shall remain vested in him after the rehabilitation for purposes of realisation and distribution.’

[21] Composition as contemplated in s 119 of the Act is not applicable in this application as the applicant did not enter into any offer pertaining thereto. What remains is the effect of rehabilitation on the insolvent estate:

21.1 Section 129 of the Act, which deals with the effect of rehabilitation, provides:

- (1) Subject to the provisions of sub-section (3) and subject to such conditions as the court may have imposed in granting a rehabilitation, the rehabilitation of an insolvent shall have the effect —
 - (a) of putting an end to the sequestration;
 - (b) of discharging all debts of the insolvent, which were due, or the cause of which had arisen, before the sequestration, and which did not arise out of any fraud on his part;
 - (c) of relieving the insolvent of every disability resulting from the sequestration.”

21.2 In Mars[9] the following is said:

"On obtaining his rehabilitation, he is at once relieved of every disability resulting from the sequestration. It also has the effect of discharging all his debts."

21.3 Footnote 417 in Mars explains discharge in these terms:

"A discharge in terms of the Act does not have the effect of an extinction of all pre-sequestration debts. It only renders them unenforceable as against the debtor. See *Dicks v Pote* 3EDC 74 at 81 and 85. It should be noted however, that the *Dicks* case was decided with reference to s 120 of Ordinance 6 of 1843 which provided that rehabilitation 'shall have the effect to discharge the insolvent from all debts ' while s 129 (1)(b) of the current Act provides that 'rehabilitation shall have the effect of discharging all debts of the insolvent It is submitted that the wording in s 129(1)(b) points to an intention that pre-sequestration debts should be extinguished that a complete discharge is afforded to the debtor."

[22] The resolution ("FA6") taken by the creditors in their second meeting held on 30 August 2006 accepted the trustees' report and authorised the trustees a discretion to abandon the book debt or any assets which could not be monetized. Notwithstanding the mandate, the trustees did not monetize the right, title and interest of the applicant. In *Laws v Rutherford*[10] Innes CJ made this pronouncement:

"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances."

[23] Mpati P, writing for the unanimous court in *Stratgro Capital (SA) Ltd v Lombard NO and Others*,[11] observed that:

"[16] A litigant's right, title and interest in a claim constitutes incorporeal property which may be attached at the instance of a judgment creditor and sold in execution.

It is apparent that the judgment creditor, the respondents in this instance, did not attach the applicant's right, title and interest and thereby monetizing the claim.

[24] Mr Wilmans, one of the trustees, addressed a without prejudice to the rights of the trustees letter dated 10 June 2016 ("FA10") to the applicant's attorneys, Engelsman Magabane Inc putting forward two proposals to which the second proposal was reacted to:

"Your client should apply to the High Court, Kimberley, on Notice of Motion given to the 1st and 2nd defendants in case number 202/2003 and Mr Wilmans and Mr Groenewaldt as 3rd and 4th respondents for an order whereby it is declared that your client is entitled to proceed with the action instituted under case number 202/2003; on the basis that no claim for costs should be asked against Mr Wilmans and Mr Groenewaldt. In this event we will not oppose the application....."

[25] It is inescapable to note from the contents of the aforementioned letter (para 21.3 above) that the trustees were aware of the pending

litigation and elected not to pursue it. It is also perspicuous in the correspondence that the trustees did not lay any claim to the applicant's right, title and interest in Case No 202/2003. Further discernible in the papers is that while the trustees were aware of the rehabilitation application they did not advance any report to the Master stating any facts which would justify the court in refusing, postponing or qualifying the insolvent's rehabilitation. What is apparent from "FA10" is that they rather advised him to approach this court for a declarator. The submission by Mr Van der Walt that because the trustees have failed to deal with the right, title and interest in the brokered deal they therefore subsequently waived their right of action with the result that it has perished, lacks merit. The resolution entered into by the creditors ("FA6") firstly, accepted the curator's report and afforded the trustees a discretion to abandon any asset which could not be monetized.

[26] Mr Van der Walt also submitted that because the applicant mainly relied on correspondence between the trustees and his attorneys not supported by affidavits it is hearsay evidence and in the absence of a formal application in terms of s 3 of the Law of Evidence Amendment Act[12] the respondents stand to be prejudiced. The respondents cannot approbate and reprobate. A submission was made on their behalf by counsel requesting this Court to read the letters in order to determine the intention of the trustees.

[27] As the applicant is now rehabilitated therefore pre-sequestration debts should be extinguished. The respondents' prejudice claim is unsubstantiated. Regard being had to the absence of opposition at rehabilitation stage of all debts afforded to a rehabilitated

insolvent based on s 129(1)(b) of the Act, the application stands to succeed.

[28] On the question of costs. There is no reason why costs should not follow the result.

[29] In the result the following order is made:

1. It is declared that the applicant's right, title and interest in the action instituted against the first defendant, James William Thomas, and Middelplaas-Suid Landgoed (Pty) Ltd, respectively, under Case Number 202/2003 in the Northern Cape Division of the High Court of South Africa, Kimberley, does not form part of the applicant's insolvent estate.
2. The applicant's creditors and the trustees of his insolvent estate have, by not laying claim thereto, waived all rights that they may have had in the applicant's right, title and interest in the said action.
3. The trustees are authorised to relinquish on behalf of the insolvent estate and in favour of the applicant, all claims to the applicant's right, title and interest in the action.
4. The applicant is authorised to pursue and enforce his right, title and interest in the action for his own benefit.
5. The respondents are ordered to pay the applicant's costs jointly and severally, the one paying the other to be absolved.

NORTHERN CAPE HIGH COURT

For the applicant:

Adv D. B. du Preez SC

Instructed by:

Engelsman Magabane Inc

For the 1st and 2nd respondents: Adv D.J. van der Walt SC

Instructed by:

Duncan & Rothman Inc.

[1] Rule 6(4)(b) and (c) stipulate: Any person having an interest which may be affected by a decision on an application being brought ex parte, may deliver notice of an application for leave to oppose, supported by an affidavit setting forth the nature of such interest

and the ground upon which such person desires to be heard, whereupon the registrar must set such application down for hearing at the same time as the initial application. (c) At the hearing the court may grant or dismiss either of or both such applications as the case may require, or may adjourn the same upon such terms as to the filing of further affidavits by either applicant or otherwise as it deems fit.

[2] 24 of 1936

[3]

[2008] ZAGPHC 88; 2008 (6) SA 451 (WLD) at 455E -F (para 5); 460B -C (para 12); 461C-D (para 14); 464F-G (para 18); 467B — C (para 22)

[4] 1946 CPD 536

[5] 1949 (1) SA 971 (O)

[6] 1948 (2) SA 545 (C)

[7] 1988 (4) SA 513 (A) at 524H

[8] 2012 (2) SA 616 (GNP) at 620 para 11

[9] Bertelsmann (et al), *Mars The Law of Insolvency in South Africa*, 9th Edition at para 25.29 at 591

[10] 1924 AD 261 at 263

[11] 2010 (2) SA 530 (SCA) at 536D

[12] 45 of 1988

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