

SOUTH AFRICA / JUDGMENT

Industrial Development Corporation of South Africa Limited v Van Niekerk and Another (42726/13) [2013] ZAGPPHC 361 (28 November 2013)

[2013] ZAGPPHC 361

COURT

North Gauteng High Court, Pretoria

BEFORE

Tuchten

CASE / FILE NUMBER

42726/13

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IN THE NORTH GAUTENG
HIGH COURT, PRETORIA
REPUBLIC OF SOUTH
AFRICA

CASE NO: 42746/13

DATE: 28 NOVEMBER 2013

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION
OF SOUTH AFRICA
LIMITED.....Applicant
and
PIETER JOHANNES VAN
NIEKERK.....First
Respondent
ROELITA VAN
NIEKERK.....Second
Respondent

JUDGMENT

Tuchten J:

1. The applicant applies for the provisional sequestration of the joint estate of the respondents (“the joint estate”), who are spouses married in community of property. The test at this stage is whether, *prima facie* on a balance of probabilities¹, the applicant has established, pursuant to s 10 of the Insolvency Act, 24 of 1936, that the joint estate is indebted to it in a liquidated amount exceeding R200 and has committed an act of insolvency or is insolvent and that

... there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated ...

If those requirements are established, the court nevertheless has a discretion to refuse to sequestrate.

2. The applicant claims on two grounds to be a creditor of the applicant. I need at this stage deal with only one: the applicant lent and advanced an amount in excess of R84 million to SD Commercial Holdings (Pty) Limited (“SD”). As at 11 April 2013, the amount owed by SD to the applicant was, inclusive of interest and sundries, nearly R98 million. The loan was to be used for the construction of an hotel in Mossel Bay. The first respondent was SD’s director.
3. By deed of suretyship executed at Randburg on 22 July 2010, the first respondent bound the joint estate as surety and co-principal debtor with SD as principal debtor for the repayment of R90 million which, inclusive of interest, the applicant intended to advance to SD.

4. SD was finally wound up upon its own motion under ECLD case no 10/12 on the ground that it was unable to pay its debts. The liquidation commenced on 7 May 2012. The applicant proved a claim against SD in liquidation. As yet no dividend has been paid to the applicant. The hotel stands incomplete and has yet to be sold by the liquidators.

5. As the argument developed, it emerged that the respondents conceded that they owed the applicant in excess of R92 million which they are not presently in a position to pay. The joint estate is thus factually insolvent. The ground upon which the sequestration of the joint estate was resisted was that it had not been established that there was reason to believe that sequestration would achieve any benefit to creditors. It was not suggested that the assets of which the joint estate presently stands possessed would

demonstrate benefit to creditors. The case for the applicant was that the papers demonstrate, with the requisite degree of proof, that the first applicant has misappropriated substantial amounts from SD and has disposed of assets of the joint estate to the prejudice of creditors. The applicant submits that an investigation or enquiry, or both, following an order for the sequestration of the joint estate, would demonstrate this and enable the trustee to recover assets for the benefit of creditors.

6. Although counsel for the respondents referred to the discretionary power of the court to refuse to sequester, the essence of the argument was that the applicant had not established any likelihood that assets would be recovered pursuant to an investigation or enquiry.

7. So the question for decision at this stage is whether the applicant has demonstrated, *prima facie* on a balance of probabilities, that an investigation or enquiry under the insolvency law would enable the trustee to identify assets for recovery. To answer that question, I must set out the facts, as they appear from the papers, which led to the present application.

8. SD applied to the applicant on 3 October 2008 for the financing of its proposed hotel development, to be named the Beach Club Hotel. It was initially to comprise 81 residential units but before the loan agreement was concluded and money began to be paid out, the project was enlarged, ultimately to 189 rooms. But by late 2011, SD ran out of capital. The first respondent says that he invested all his private assets in the project and that he has shown on the papers that some of his own money went into it. SD concluded that it needed further money (the first applicant says R20-25 million) to complete the project and applied to the applicant through the first respondent for additional financing. The applicant proceeded to investigate.

9. The applicant concluded that of the amounts advanced to SD, some R25 million had not been expended in the construction of the hotel complex. This was directly relevant because clause 5 of the written loan agreement concluded between the applicant and, *inter alios*, SD at Randburg on 22 July 2010 provided that SD would use the loan only for “the purpose of... the Beach Club Hotel...” and that failure so to use the money would constitute a material breach of the loan agreement.

10. The applicant says that it asked the first respondent for proof that the loan amounts had indeed been invested in the building project only, and had not been used for any extraneous purpose. The applicant says that because the necessary proof of legitimate application of its funds was not forthcoming, it refused the application for further funding. These allegations were quite baldly denied by the first respondent. It seems however clear that the applicant did refuse further funding and that SD was unable to fund the project from his own resources or obtain alternative funding.

11. The first respondent does not put up any facts to support its denial that the applicant concluded that a substantial part of the money it had advanced was not used on the development but to my mind, *prima facie* on the probabilities this is so because no other motive on the part of the applicant for refusing additional financing has been suggested. This is significant because the hotel project was very important to the respondents. Their counsel described the project in argument as the first respondent's

life work. If the applicant had such reservations and communicated them to the first respondent, all of which I find for present

purposes it did have and did, and proof existed that the advances had been legitimately expended, the first respondent would have spared no effort to furnish such proof to the applicant. The first respondent must have known that if he did not satisfy the applicant on this score, his life's work would be destroyed.

12. In addition, the applicant relies on the fact that it sought SD's bank statements from SD's general manager and the respondents' son-in-law, Mr Weston² and that these essential documents were only forthcoming after a year's delay. This is not denied by the first respondent. In these circumstances I regard as highly improbable the first respondent's evidence that he believed that the additional

financing had been approved in principle by the applicant and that it was, in effect, only formalities that held up the additional

advances. SD desperately needed the additional financing and could not get it from any alternative source. If the first respondent

genuinely believed that the additional financing had been approved, he would have been on the telephone and would have sent emails

without respite to press for the advance of the additional money needed, according to the first respondent, to bring his life's

work to fruition.

13. The first respondent made much in his answering affidavit and his counsel made much in argument of the limited evidence which the applicant put before the court in an effort to substantiate its conclusions of misappropriation. I shall deal with each of them.

14. The first such alleged misappropriation is a claim that the bank statements of SD demonstrate that SD had paid R300 000 to the first respondent personally. There are a number of difficulties with this proposition: firstly, the bank statements of SD put up by the applicant (which it says that it struggled to extract from SD) do not demonstrate such a payment; secondly clause 14.13 of the loan agreement permitted SD to pay its directors and shareholder annual amounts up to R1,3 million, so the mere fact of a payment of R300 000 is neutral; thirdly there is no evidence before me that any amount paid by SD to the first respondent derived from the advances made by the applicant; fourthly, the first respondent denies having received the amount of R300 000 from SD. I cannot find this allegation made out on the papers.

15. Then there is the allegation that SD's accounting records show that some R25 million of the money advanced by the applicant has been misappropriated. The accounting evidence before me does not establish this allegation, even prima facie. The applicant relies on the investigations of Ms Ncube, a member of its accounting staff. The essence of Ms Ncube's evidence is that she established that substantial amounts of money went from SD to persons who, it may be, were not involved with the construction as such. I think that this approach misses the point, as does the approach of the first respondent in his attempt in his answering affidavit to justify the application

of the applicant's advances. In this regard, counsel for the respondents made much in argument of an architect's certificate which he said showed that hotel works to a substantial value had been carried out.

16.The certificate of the architect of 25 November 2011, taken at face value, shows that the value of the works at that date for the purposes of payment to the contractor(s) was in excess of R84 million. This, counsel for the respondents submitted, demonstrated that the applicant's advances had been legitimately applied.

17.But in my view it does not, any more than the fact that amounts were paid by SD to persons who were not directly involved with the construction proves the contrary. What the certificate proves, on the face of it, is that hotel works to the then value of some R84 million existed. It shows one nothing about the application of the funds. And the fact that amounts were paid to persons not directly involved with the construction does not show that the advances did not go to those for whom the funds were earmarked by the parties.

18.I am thus unable on these papers to conclude that the applicant has established, prima facie on a balance of probabilities, on accounting evidence that a substantial part of its advances has been misappropriated. I am equally unable to find the contrary. The value of the works to date is only part of the picture. The other, equally important, consideration is whether the contractors and professional consultants have been paid; in other words whether the money advanced by the applicant was used by SD for the purpose of the Beach Club Hotel. On this latter issue, the papers are silent.

19.A further ground upon which the applicant relies is that the first respondent caused ten motor vehicles held by SD to be sold and himself received the proceeds of these sales. Three of them were sold and transferred out of the name of SD in the six month period prior to SD's winding-up; one of them was so transferred on the date of commencement of the winding-up, 7 May 2012; a further vehicle was disposed of and transferred after the date of liquidation; two of the vehicles (a Mercedes SLK and a BMW Z4 Roadster) were sold to the respondents' daughter, who is married to Mr Weston. The nett proceeds of these sales, too, went to the first respondent. Apparently part of the proceeds of the sales of these motor vehicles went to the credit providers in relation to the vehicles.

20.The first respondent denies any wrongdoing in relation to the vehicles. But his account fails to explain why he caused SD to dispose of these vehicles at the time it did, in contravention of an undertaking in the loan agreement not to dispose of its assets³, why the proceeds were paid to the first respondent personally and why he caused vehicles to be sold to his daughter. The first respondent says that he paid a total of R1,1 million to SD. It may be that part of this money, if indeed so paid, derived from the proceeds of the sale of motor vehicles. But the question is why the first respondent sold assets of SD when he did and why he did not cause the proceeds to be paid into the account of SD. All this is indicative of an irregular approach on the part of the first respondent towards financial matters.

21.Finally, the applicant has demonstrated that as recently as April 2013, the joint estate owned no less than ten immovable properties. Six of those were thereafter transferred to the Edward and Sonika Trust for amounts barely sufficient to cover the amounts of the bonds and the costs of transfer. This trust is the family trust of the respondents' daughter and their son-in-law, Mr Weston. Another property was sold to a Mrs Rheeder on 10 September 2012 and transferred to her on 6 June 2013. The market values of these properties at the times of their disposal are in dispute. The applicant says they were sold for substantially below market values while the respondents say the contrary. I am unable to determine the true values of these properties in these proceedings.

22.But the mere facts that the respondents transferred away their immoveable assets at a time they were in dire financial straits and nearly all to the same close family members raise considerable suspicion that the transactions were not regular and were dispositions susceptible to attack by in due course. Only a trustee in insolvency (or a creditor if the trustee fails to act) has standing to approach the court in this regard⁴. In addition, all these transfers of assets out of the joint estate took place in breach of clause 3.13 of the deed of suretyship, in terms of which the first respondent undertook, for as long as the suretyship remained effective, not to dispose of any of the assets of the joint estate without the prior written consent of the applicant. That these joint estate assets were indeed disposed of, without any notice to the applicant, adds weight to the contention that the first respondent has acted less than scrupulously in relation to financial matters on behalf of both SD and the joint estate and that an investigation by a trustee or an enquiry, or perhaps both, are justified.

23.To summarise: I find that the following factors demonstrate, prima facie on a balance of probabilities, that there is reason to believe that an investigation by a trustee or an enquiry under the insolvency law would enable the trustee to identify assets for recovery and that, accordingly, in the language of s 10(c) of the Insolvency Act, there is reason to believe that it will be to the advantage of creditors of the joint estate if it is sequestrated:

23.1.The failure of the first respondent to demonstrate, promptly when he was called upon to do so and convincingly, by reference to the books of account and records of SD, that the applicant's suspicions of misappropriation of advances to SD by the applicant were unfounded;

23.2.The conduct of the first respondent in causing SD's motor vehicles to be sold, paying the relevant credit providers in preference to other creditors and receiving the proceeds personally;

23.3.The conduct of the first respondent in selling and transferring properties belonging to the joint estate to the trust controlled by his daughter and son-in-law.

24 In the result, therefore, I find that a case for a provisional sequestration order has been made out. As costs are regulated as a matter of law⁵, it is unnecessary, even undesirable⁶, to make any order as to costs. I make the following order:

1.The joint estate of the first and second respondents is hereby placed under sequestration in the hands of the Master of the High Court;

2.The respondents are hereby called upon to show cause to this court on Thursday 6 February 2014 at 10h00 or so soon thereafter as counsel may be heard why the joint estates of the respondents should not be sequestrated finally.

NB Tuchten

Judge of the High Court

27 November 2013

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1 Kalil v Decotex (Pty) Limited and Another 1988 1 SA 943 AD 978D

2Of whom more below

3 In clause 14.7 of the loan agreement, SD undertook not to sell, transferor otherwise dispose of any of its assets without the consent of the applicant, which it had no trouble to obtain.

3 In clause 14.7 of the loan agreement, SD undertook not to sell, transferor otherwise dispose of any of its assets without the consent of the applicant, which it had no trouble to obtain.

4Sections 32(1) and 104(3) of the Insolvency Act; Mars, The Law of Insolvency in South Africa, 10th ed para 13.1

5Section 14(2) of the Insolvency Act

6This is the view expressed in Meskin, Insolvency Law, looseleaf ed, para 2.1.14.1

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