

SOUTH AFRICA / JUDGMENT

Van der Merwe v Chicken Manor (2836/2020) [2021] ZAFSHC 14 (28 January 2021) [2021] ZAFSHC 14

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

2836/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case number:

2836/2020

In the matter

between:

JOHANNES
PETRUS LOUIS VAN DER MERWE
Applicant
and
CHICKEN
MANOR
Respondent
(REGISTRATION
NUMBER: 2007/225971/23)

JUDGMENT

BY: MHLAMBI J,

HEARD ON:

22 October 2020

DELIVERED ON: 28 January 2020

MHLAMBI, J

- [1] On 04 August 2020, a provisional order of liquidation was issued in the main application calling upon the respondent and any other interested party to show cause on 17 September 2020 as to why a final order of liquidation should not be granted.
- [2] An interlocutory application was filed on 04 September 2020 by the four trustees of the Het Mari Trust, seeking to be joined in the main application as second, third, fourth and fifth respondents; the founding affidavit in the joinder application to serve as the opposing affidavit in the main application and that the rule nisi in the main application be discharged. The costs in the application to be costs in the main application and that the applicant, Johannes van der Merwe, be ordered to pay the costs of the main application and any amount due to the current provisional liquidators including any expenses incurred by them.
- [3] The first respondent in the interlocutory application is the applicant in the main application and the second, third and fourth respondents are the appointed provisional liquidators of the respondent in the main application, Chicken Manor CC (in liquidation). In this application, the parties shall be referred to as in the main application and the applicants in the interlocutory application shall be referred to as the trustees.
- [4] On 17 September 2020, the return date of the provisional liquidation order was extended to 22 October 2020 to enable the parties to file the relevant papers in relation to the interlocutory application. On 13 October 2020, an application for the condonation of the late filing of a further opposing affidavit (styled a duplication) in the interlocutory application was filed by the trustees of the Het Mari Trust.
- [5] At the inception of this hearing, the joinder of the trustees as respondents two, three, four and five was granted. The costs of the interlocutory application would be costs in the main application. The trustees' application to file a further affidavit was also granted. The confirmatory affidavit of Dr IS Ferreira was admitted to evidence as annexure "RA5".

The facts

A brief background is gleaned from the affidavits filed of record.

The founding affidavit

- [6] A written sale agreement for the farm, Spes Bona, situated in the district of Bloemfontein, entered into between the applicant and the respondent, was concluded on 30 September 2015. The agreed purchase was R3 200 000 of which R2 800 000.00 was paid on 28 September 2015 for onward transmission to the respondent. The property was not transferred to the to the applicant, despite repeated requests. The only mortgage registered against the property at the time of the agreement was for R500 000.00 in favour of one WCO Wessels, the previous owner. It transpired subsequently that there was an additional mortgage bond over the property for R1 500 00 in favour of the Het Mari Trust.

- [7] The applicant and the respondent agreed during 2019 that the sale agreement be cancelled and that the farm be offered for auction to enable the respondent to repay the applicant's debt and the other mortgage bonds registered over the property. A purchase price obtained during an auction held in June/July 2019 was not acceptable. Having received information from Dr N Ferreira that the farm was sold in an auction during September 2019 by Nico Smith Auctioneers, the applicant, despite the lockdown regulations, travelled to Bloemfontein on 24 July 2020 to ascertain the position with the farm. He established that the transfer of the farm was to take place on Wednesday, 5 August 2020. On 31 July 2020, he consulted with his attorneys and instructed them on 3 August 2020 to proceed with an urgent interdict to liquidate the respondent.

The opposing affidavit/ founding affidavit (interlocutory application)

- [8] The primary thrust of the interlocutory application is properly captured in the founding affidavit of JG van der Linde, the first applicant, in which it was stated that the deponent was advised that there were two issues at hand: the value of the farm and what should be done with the proceeds.[1]
- [9] The secondary objective of the application was to enable the trustees of the Het Mari Trust to be joined as respondents in order to raise the following grounds in opposition of the main application: lack of urgency, the applicant's lack of locus standi, prescription, the lack of the disclosure of relevant facts.[2] The view was expressed that the applicant's strategy was to obtain a provisional order of liquidation without opposition from the Het Mari trustees and to use the appointment of the director of his firm of attorneys to circumvent a previous court order.[3]
- [10] The first and second applicants in the interlocutory application are the parents of Marlene Wessels, the sole member of the respondent in the main application, a company which owed an amount of R 1 500 000.00 to the Het Mari Trust. The trust issued summons during 2016 against the respondent, as principal debtor, the sole member of the closed corporation (Marlene Wessels) and her husband Dries Wessels as sureties. A deed of settlement was entered into and was made a court order on 15 August 2018 in terms of which the amount of R 1 807 300.00, together with interests and costs, was payable on/ or before 01 September 2019. As security for the capital amount and costs, the respondent caused a second mortgage bond to be registered over the farm, Spes Bona, in favour of the trustees of the Het Mari Trust.
- [11] The respondent failed to effect payment on 01 September 2019. An auction by a private auctioneer was arranged and the property was sold but Marlene Wessels refused to sign the transfer documents as stipulated in the deed of settlement which was made a court order[4]. Dries Wessels arranged a public auction and the best offer made was the amount of R 2 700 000.00 which was not acceptable to the

respondent, Dries himself or the Het Mari trustees. Another auction was arranged by Nico Smith Auctioneers and a bid of R 2 900 000.00 was made and later increased to R 3 000 000.00. The bid was withdrawn, and an offer of R 3 000 000.00 by Dr SA Barrett was accepted.

- [12] After the sale of the property, the respondent, as represented by Dries and Marlene Wessels, was of the opinion that the sale was not in accordance with the agreement since the property had to be sold by the sheriff in execution and not by any other auctioneer. The trustees filed an application with the court to compel Marlene to sign the necessary documentation, alternatively, that the registrar of the court should be authorised to sign the transfer documents. The application was granted by the court on 12 March 2020 and the first respondent was ordered to sign all necessary documents to pass transfer of the property to the purchaser, Dr Shelly Anne Barret within five (5) days from the date of the order. The respondent filed an application for leave to appeal which was subsequently abandoned. Several days followed and the trustees believed that the respondent (Chicken Manor), through its representative, frustrated the transfer of the property to Dr Barrett, having as consequence that the trustees of the Het Mari Trust could not be paid in terms of the court order.
- [13] During August 2015, a deed of sale was entered into between James Griffiths Shaw and the respondent (Chicken Manor) as represented by Marlene Wessels. JG Shaw paid the amount of R 2 800 000.00 which was used by the respondent to settle a loan due to Senwes[5]. The deed of sale and the two mortgage bonds over the property held by the said Shaw were cancelled at the instance of the respondent during September 2015 and the applicant, Johannes Van Der Merwe, paid the amount of R 2 800 000.00 to Shaw on 28 September 2015. This amount represented a loan and the deed of sale (which was never disclosed to the deponent at the time) was only signed as security for such loan which corresponded with the financial statements of the respondent, Chicken Manor CC.[6]

The replying affidavit

- [14] In his replying affidavit, the applicant pointed out that:

14.1 The deponent to the founding affidavit did not seek leave and or condonation for the facts that constituted hearsay evidence, nor did he proffer any acceptable explanation for such failure. The deponent elected to make several defamatory, fallacious, and unnecessary allegations in circumstance not premised in fact, alternatively, premised on widely speculative conjecture that did not contribute meaningfully to the adjudication of the application.

14.2 Although the Het Mari Trust had a real and substantial interest in the outcome and adjudication of the application, the submission was made that it was not necessary to cite the trust as a respondent party to the main liquidation proceedings.

14.3 The deed of sale dated 30 September 2015 between the parties, reflected the true intention of the parties as confirmed by its author, attorney Willem Jacobus Herbst. Had the issue of prescription been real and meritorious, the respondent would have filed a short affidavit stating the same. Such failure had the effect that the allegations deposed to by the applicant in founding, served before the court on an uncontested and unchallenged basis. It was for this reason that the applicant and Marlene Wessels, on behalf of the respondent, Chicken Manor, agreed that the agreement of sale be cancelled during the middle of 2019 so that the farm could be offered for sale on auction to obtain funds for the respondent to repay its debts. At no stage was the prescription of his claim at issue.

14.4 The provisionally appointed liquidators circulated a notice to the creditors, to which was attached the valuation by Bidex Auctioneers indicating that the value of the immovable property was R4 669 580.00. This valuation was R900 000.00 more than the offer by Dr Barret.

The further opposing affidavit (duplication)

[15] In the duplication, Mr Van der Linde maintained that:

15.1 The property (the farm) was over-valued in an endeavour to set aside the sale to Dr Barret. The applicant misled the court about the imminent transfer of the property as he should have become aware of its sale by 1 September 2019.[7]The applicant had no locus standi as his claim prescribed in 2018. The amount paid by the applicant was nothing else than either a loan or a pre-payment of an agreement

still to be concluded.[8]

15.2 Marlene Wessels was estranged from him and his wife. The relationship deteriorated since 2016 when the Het Mari Trust

instituted action against her, her husband Dries and the respondent, until there was a total collapse in communication. She only briefly spoke to them when she tried to convince them to waive the sale to Dr Barret.[9] They could not do so, as they could have been exposed to damages, inclusive of commission paid to Smith auctioneers of more than R200 000.00, by Dr Barret.

[10]Furthermore, the applicant snatched a judgment which prevented them from opposing the application before there was a provisional liquidation order.[11]

The issues

[16] The main issues for determination are whether the respondent is insolvent and whether it would be just and equitable to liquidate it. The subsidiary issues are whether the grounds of opposition raised by the trustees are sufficient to stave off the liquidation.

Discussion

[17] It is appropriate to traverse the grounds of opposition raised in the interlocutory application before dealing with the main issues. Annexure “RA5”, the confirmatory affidavit by Dr IS Ferreira, confirmed the allegations in the applicant’s replying affidavit and the contents of

Dr Ferreira's email to the applicant's attorneys to the effect that he contacted the applicant at the end of June 2020, advising him that he stood to lose his money if the farm were to be sold. According to the email, he spoke to the applicant again during the middle of July 2020, informing him to come to Bloemfontein to consider the liquidation of the respondent, otherwise he would lose his money.[12] This aspect of the evidence is uncontested.[13]

- [18] It is significant to note that the contents of Dr Ferreira's email are misquoted, misinterpreted, and wrongly imputed to the applicant to show the lack of urgency and the prescription of the claim.[14] What is clear from the papers and the testimony of Dr Ferreira, is that, having informed the applicant of his possible loss of money at the end of June 2020, he was requested by the latter to approach the Wessels family and the Het Mari Trust for a possible settlement. The farm would not have been transferred (as alleged by the trustee, Mr Van der Linde) at the end of June 2020, but that it would be sold. It was only after the conversation of 24 July 2020 that the applicant realised that something was wrong and immediately travelled to Bloemfontein and ascertained that the property would be transferred on 5 August 2020.
- [19] The argument on behalf of the trustees that there was no urgency or that the urgency was "grossly, negligently self-created"[15] is without substance as the trustees admitted that the applicant had to travel to Bloemfontein during July 2020 as he realised that he was at risk of losing his money.[16]
- [20] It is common cause that Marlene Wessels did not file an affidavit in support of the trustees' case. In fact, Mr Van der Linde confirmed that since 2016, the relationship between them had deteriorated to such an extent that there was a total collapse in communication; save for the brief encounter when she attempted to persuade the trustees to waive the sale to Dr Barrett.[17] In the opposing affidavit,[18] Mr Van der Linde stated that he had personal knowledge of the contents of his affidavit due to the family ties between Marlene, her husband, Dries, the first applicant and himself. It is therefore strange that in the further opposing affidavit of 3 September 2020,[19] he confirmed that neither his wife (the first applicant) nor himself knew about the deed of sale between the respondent and the applicant. Had he known; he would have brought it to the attention of Dr Ferreira. I agree with the applicant's counsel that had the issue of prescription been real and meritorious, the respondent would have filed a short affidavit stating the same, failure of which had the effect that the allegations deposed to by the applicant in founding, served before the court on an uncontested and unchallenged basis. Besides, the lack of communication between Marlene and Mr Van der Linde makes nonsense of the latter's allegations that he had personal knowledge of most of the facts contained in his affidavit. He is therefore not able to contest the applicant's allegations that prescription was never at play in this matter and that at all relevant times the respondent admitted its indebtedness to the applicant.

[21] It was argued on behalf of the respondent that the applicant, save for some enquiries, failed to stay, or suspend prescription which was the main reason why he snatched the provisional order. As the right to claim the transfer of a debt prescribed after three years from date of commencement, the applicant knew that he had to prove, by subjecting himself to

cross-examination, that the claim had not prescribed by 13 October 2018, otherwise he had no claim to the money received from Dr

Barret.[20]It was correctly pointed out by the applicant's counsel that it was not open to the the trustees, who were not parties to the agreement of sale, to interpret such agreement differently from the parties involved. Furthermore, they were not party to the admissions of liability made by the respondent to the applicant. As such, it did not proverbially fall within their mouth to criticise the same on speculative grounds.[21]Prescription may be interrupted by either an express or tacit acknowledgment of liability by the respondent or its agent.[22]

[22] Save for the allegation that the deponent to the opposing affidavit was advised that the applicant did not have locus standi to interfere in the business of the Het Mari Trust, no factual basis was set for this assumption.[23]In the trustees' heads of argument, it was submitted that the applicant's locus standi could not be adjudicated on affidavit.

The basis for this statement remains unclear.[24]On the contrary, the applicant demonstrated that it was not necessary to cite the trustees as respondents in the main application as they, though they had a financial interest, had no legal interest in the relief sought.[25] I am content that the grounds advanced by the trustees in opposition of the application, are unsound and deserve to be dismissed for lack of substance.

The main issues

[23] The applicant's case is that the respondent is insolvent, and the relief sought was based on the respondent's inability to pay its debts and that it would be just and equitable to liquidate it. The applicant pointed out that the respondent failed to repay its admitted indebtedness to the applicant since 28 September 2015. The respondent had also failed to repay its debts to W.C.O. Wessels and the Het Mari Trust, who registered mortgage bonds over the immovable property, the respondent's only asset, in the amounts of R480 000.00 and R2 168 760.00 respectively.[26]These facts, it was argued, justified the inference that the respondent was unable to repay its debts to its creditors. It behoves to mention that the respondent, Chicken Manor CC, does not oppose the application for its liquidation.

[24] A company may be wound up by the court when it is proved to the satisfaction of the court that the company is unable to pay its debts.[27]Section 66(1) of the Close Corporations Act 1984, provides that the laws[28] contemplated in item 9 of Schedule 5 of the new Companies Act[29]apply to the liquidation of a corporation. A company must be regarded as a reference to a corporation.[30]A corporation is deemed unable to pay its debts when it is proved to the satisfaction of the court that it is unable to pay its

debts^[31] and in this regard, the court shall also take into account the contingent and prospective liabilities of the corporation.^[32]

^[25] A company that is unable to meet its day to day liabilities in the ordinary course of its business is in a state of commercial insolvency as it is unable to pay its debts.^[33] The fact that a company in such a state is solvent in the sense that the value of its assets exceeds its liabilities is a factor to be taken into account in the exercise of the court's discretion whether or not to wind up. The court has a discretion (albeit limited) to refuse a winding up order in these circumstances.^[34]

Conclusion

^[26] It is not in issue that the applicant is a creditor to whom the respondent is indebted in a certain amount of money. The applicant, as a creditor, is entitled *ex debito justitiae* to execute its unpaid claim against a company by means of winding up proceedings. The opposition by the trustees was, as shown above, more about the value of the farm and attempts to avoid a possible legal action by Dr Barrett. It is correct, as suggested by the applicant's counsel, that the Bidex valuation was the correct and proper valuation in the circumstances and there is no reason whatsoever why it should not be accepted as such.

^[27] It is crystal clear that the respondent was in insolvent circumstances since 2015 as it unclothed Peter to clothe Paul in as far as its financial responsibilities were concerned. The respondent was just unable to pay its debts in the sense of being unable to meet the current demands upon it.^[35] In the circumstances, I find no reason why the order for liquidation should not be granted as this would bring about a convergence of the claims in the insolvent estate to ensure that the respondent is wound up in an orderly fashion and that the creditors are treated equally.^[36]

^[28] In the result, I make the following order:

ORDER

1. The interlocutory application is dismissed.
2. A final order of liquidation is granted.

JJ MHLAMBI, J

Counsel for the applicant: Adv. S Tsangarakis

Instructed by:

Symington & De Kok

169B Nelson Mandela Drive

Bloemfontein

Counsel for the respondent: Adv. P.J Heymans

Instructed by:

EG Copper Majiedt Inc

77 Kellner Street

Westdene

[1] Paragraph 94.1

[2] Paragraph 11 on page 78 of the indexed papers

[3] The decision of Jordan, J under case number 5798/2019, marked as annexure “FA 5” to the Founding affidavit in which the respondent (Chicken Manor) in the main action was ordered to provide the trustees’ attorneys with a signed power of attorney to pass transfer of the immovable property, Spes Bona, to Dr S Barret.

[4] Paragraph 44.10 and 44.11 of the opposing affidavit

[5] Paragraph 32 ibid

[6] Para 39.4 ibid

[7] Para 36.3 of the duplication

[8] Paras 42 and 43 ibid

[9] Para 46 ibid

[10] Para 47 ibid

[11] Para 48 ibid

[12] Paras 29 of the replying affidavit

[13] Paras 6.11 of the founding affidavit and 79 of the opposing affidavit

[14][14] Trustees’ heads of argument paras 20-22

[15] Para 27 ibid

[16] Para 80 of the opposing affidavit.

[17] Para 46 of the further opposing affidavit.

[18] Para 6.

[19] Para 47.

[20] Paras 53-55: heads of argument.

[21] Applicant’s heads of argument, para 56.6.

[22] Section 14 of the Prescription Act.

-
- [23] Para 17: Opposing affidavit.
- [24] Para 58.
- [25] Absa Bank Limited v Troskie N.O. and Others (1940/2018) [2018] ZAFSHC 183 (29 November 2018)
- [26] Paras 35: applicant's heads of argument.
- [27] Section 344(h) read with 345(1)(c) of the Companies Act 61 of 1973. Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd 2014(2) SA 518 (SCA) para 22.
- [28] The Companies Act, 61 of 1973.
- [29] 71 of 2008.
- [30] Section 66(1)(a) of the Closed Corporations Act.
- [31] Section 69(1)(c) *ibid*.
- [32] Section 69(2) *ibid*.
- [33] Rosenbach and Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA (D)
- [34] Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C)
- [35] Rosenbach, *supra*.
- [36] Investec Bank Ltd and Another v Mutemeri and Another 2010(1) SA 265 (GSJ)
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2021/14.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/van-der-merwe-v-chicken-unknown-topic-afshc-2021>

Prepared on 13 October 2026 · Esheria