

SOUTH AFRICA / JUDGMENT

Van der Walt and Others v Magistrate of the District Court Hoopstad and Others (2845/2018) [2019] ZAFSHC 165 (13 September 2019)

[2019] ZAFSHC 165

COURT

Free State High Court, Bloemfontein

BEFORE

L.B.J. Moeng, N.M. Mbhele

CASE / FILE NUMBER

2845/2018

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 2845/2018

In the matter between:

SAREL VAN DER WALT 1ST APPLICANT

RIETTE VAN DER WALT 2ND APPLICANT

ERNIE VAN DER WALT 3RD APPLICANT

CORNELIUS COETZEE 4TH APPLICANT

And

THE MAGISTRATE OF THE 1ST RESPONDENT

DISTRICT COURT HOOPSTAD,

HIS WORSHIP MR. MMUSI

THE MASTER OF THE HIGH COURT 2ND RESPONDENT

BLOEMFONTEIN

CLOETE MURRAY NO 3RD RESPONDENT

(Cited herein in his capacity as duly

Appointed provisional trustee in the

Insolvent estate: Sarel Jacobus

Van der Walt: B85/2017)

RUWANE SMITH NO 4TH RESPONDENT

Appointed provisional trustee in the Insolvent estate:

Sarel Jacobus Van der Walt: B85/2017)

CORAM: MBHELE, J et MOENG, AJ

JUDGMENT:

MOENG, AJ

HEARD ON: 26 AUGUST 2019

DELIVERED ON: 13 SEPTEMBER 2019

I.

INTRODUCTION

- [1] This is an application in terms of rule 53 of the Uniform Rules of Court. The applicants seek an order in the following terms:
1. That the first respondent's decision dated 11 May 2018 refusing the applicants' legal representative, Mr. FJ Senekal to appear on their behalf is reviewed and set aside;
 2. That the second respondent's decision dated 20 April 2018 authorising the holding of an enquiry in terms of section 152 of the Insolvency Act 24 of 1936 (as amended) is reviewed and set aside;
 3. That the witness summonses issued by the second respondent pursuant to the decision sought to be reviewed and set aside in terms of paragraph 2 is set aside;
 4. The warrants of arrest issued by the first respondent pursuant to the decisions in paragraph one and two above is set aside;
 5. Costs of the application be paid by the 3rd and 4th respondent jointly and severally, the one to pay and the other to be absolved, on an attorney and client scale.
- [2] Prior to the filing of this application, the applicants brought an urgent application to suspend the warrants of arrest issued by the first respondent (the magistrate) and the summonses issued by the second respondent (the Master), pending the finalisation of this review. Interim relief suspending the warrants of arrest and summonses pending the review was subsequently granted on 7 June 2018.

- [3] The magistrate and the Master filed notices to abide whereas the third and fourth respondents (the trustees) opposed the relief

sought. In compliance with the notice of motion, the Master and the magistrate provided the applicants with all documents which had a bearing on the impugned decisions. These included all records and documents which the magistrate and the Master were by law required to provide.

II. FACTUAL

BACKGROUND

- [4] A short outline of the facts is essential to comprehend the issues at hand. The estate of the first applicant was provisionally

sequestered on 4 October 2017 and the third and fourth respondents were appointed as provisional joint trustees in the insolvent estate. This order was made final by an order of this Court on 1 November 2018.

- [5] On 9 April 2018, the trustees applied to the Master to conduct an enquiry in terms of section 152 of the Insolvency Act (the Act) and permission was granted on 20 April 2018. The Master subsequently issued summonses to the applicants to appear before the magistrate on 11 and 28 May 2018.
- [6] On this date, the applicants failed to appear before the magistrate. They were represented by their attorney, Mr FJ Senekal (Senekal) in their absence. Senekal sought to argue that the summonses were invalid. The third respondent objected to Senekal's appearance at the enquiry. He informed the magistrate that Senekal, at the time of the first respondent's sequestration, was a partner at a law firm (Matsepes), which represented Kempston Finance (Kempston), one of the creditors in the insolvent estate.
- [7] The third respondent submitted before the magistrate that, in his opinion, Senekal will be conflicted to act on behalf of the insolvent as his firm acted for Kempston. The magistrate concluded that there would indeed be a conflict of interest should Senekal represent the applicants at the enquiry and he excluded him from the proceedings. Warrants of arrest were subsequently issued for all the applicants. This course of events led to the urgent application and subsequent review application.
- [8] I propose to first deal with the grounds relating to the Master's decision to hold the section 152 enquiry and his/her decision to issue the summonses (the Master's decision). I will then deal with the magistrate's decision to exclude Senekal from the section 152 proceedings and his decision to authorise warrants of arrest against the applicants (the magistrate's decision).

III. THE MASTER'S DECISION

- [9] Counsel for the applicants, Mr Puis conceded during the hearing that in as far as the first and second applicants were concerned, the Master was justified in authorising the section 152 enquiry. Counsel likewise conceded that the subpoenas in respect of the first and second respondents were properly issued. Counsel however maintained that there were no grounds which warranted the enquiry in respect of the third and fourth applicants.
- [10] I find it difficult to comprehend how the Master could have been justified in authorising the enquiry in respect of certain witnesses and not the others. As will be seen later in this judgment, the Master was, in my view, justified in authorising the enquiry and issuing all the summonses pursuant thereto.
- [11] In this case, a distinction should be drawn between the Master's decision to hold the enquiry and his/her decision to subpoena the witnesses as reflected in the summonses. This distinction is reflected in the manner in which the notice of motion was drafted. In paragraph two of the notice, the applicants sought the review and setting aside of the Master's decision in authorising the enquiry in terms of section 152. Separate thereto, in paragraph 3 of the notice, the applicants sought the setting aside of the summonses issued against them. This distinction is also made in the applicants' heads of argument.
- [12] The decision to authorise the enquiry was premised on a number of considerations, in addition and other than the information which was sought from the applicants. As it is evident from the record of the proceedings provided by the magistrate, two other witnesses were subpoenaed, apart from the applicants. One of the witnesses already commenced with his testimony.
- [13] Inasmuch as the applicants were required to provide crucial information in determining the affairs of the insolvent estate, there seem to be no sustainable objection to the interrogation of all the other witnesses, save for the third and fourth applicants. For this reason, it is clear that the Master's decision to authorise the enquiry was justified in light of the concession that was made by counsel for the applicants.
- [14] My understanding of the concession is that, what is challenged is not the Master's decision to hold the enquiry, but his/her decision to issue the subpoenas against the third and fourth applicants. It is not the discretion to hold the enquiry that is in dispute but the permissible scope of the enquiry in as far as it relates to the witnesses that had to be subpoenaed. The discretion to hold the enquiry and the decision to issue the summonses is therefore separate. It is the latter decision that is in issue.
- [15] What therefore has to be considered, in relation to the Master's decision, is whether there were grounds to issue the subpoenas against the third and fourth applicants and not whether the discretion to authorise the enquiry in itself was properly exercised.
- [16] Section 152(2) provides that:

‘If at any time after the sequestration of the estate of a debtor and before his rehabilitation, the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers desirable to obtain, concerning the insolvent, or concerning his estate or the administration of the estate or concerning any claim or demand made against the estate, he may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice, at the place and on the date and hour stated in such notice, and to furnish the Master or other officer before whom he is summoned to appear with all the information within his knowledge concerning the insolvent or concerning the insolvent's estate or the administration of the estate.’

[17] It goes without saying that the Master’s decision to conduct section 152 enquiries and to subpoena witnesses is reviewable.

Contrary to what counsel for the applicants submitted, I did not understand Mr Zietsman, counsel for the third and fourth respondents,

having contended that the decision at hand is not reviewable. He submitted that the Master’s decision is reviewable but that the Master properly exercised his/her discretion.

[18] The purpose of an interrogation is to enquire on all matters relating to the insolvent, his business or affairs, whether before or after the sequestration of his estate. It is trite that the potential scope of such an enquiry is extremely wide.

[19] The fundamental question is whether the decision of the Master to issue the summonses is for a purpose contemplated by the Act. Once it is accepted that there was a permissible purpose in causing a witness to be summoned to an enquiry, the summons would have been validly issued.

[20] The approach to be followed in determining the Master’s powers in issuing subpoenas is appositely stated in *Mantis Investment Holdings (Pty) Ltd v Eastern Cape Development Corporation and Others* 2018

(4) SA 439 (SCA) at paragraph 6:

‘The very essence of our Bill of Rights is that an individual should not be subjected to unreasonable intrusions on their liberty or the privacy of their person, property or effects. The Master has no reservoir of power outside the statutory instruments that authorise an intrusion upon those rights, and thus no general authority to make an order that impinges on those rights. A subpoena, even one at the hands of the Master, is a significant invasion of the rights of an individual and must therefore be exercised within certain clearly defined limits’.

[21] As in other cases where discretionary powers are exercised, a Court will not generally interfere if the person concerned has acted within the terms of his authority and has applied his mind to the proper exercise of his discretion. See *Leech and Others v Farber NO and Others* 2000

(2) SA 444 (W). Although it is said that the Master has an unfettered discretion to authorise an enquiry and subpoena witnesses, such discretion may not be exercised capriciously.

[22] The Constitutional Court warned courts in *Bernstein and Others v Bester and Others* NNO [1996] ZACC 2; 1996

(2) SA 751 (CC) that examinations of the kind conducted at these enquiries is open to abuse and that the proceedings ought to be watched carefully. It was held that the judiciary is to ensure that the 'examination is not made an instrument of oppression, injustice or of needless injury to the

individual'.

[23] The principles enunciated in *Roering NO and Another v Mahlangu and Others* 2016

(5) SA 455 (SCA), though with reference to section 417 of the Companies Act, are equally applicable to section 152 enquiries. Wallis JA held as

follows at 464G-H:

'Section 417(1) sets out the permissible scope of the enquiry. Any person who is known or suspected to have in their possession any property of the company, or is believed to be indebted to the company, or any person deemed capable of giving information concerning the trade, dealings, affairs, or property of the company, may be summoned to give evidence or produce documents'.

[24] There is no doubt that courts have the power, and indeed the obligation, to restrain the use of the power to authorise an enquiry

and to summon witnesses where the discretion was not rationally exercised. The decision to issue the summonses should therefore be rationally related to what the Act aims to achieve, that is to enquire into the affairs of the insolvent.

[25] The applicants contended in the founding affidavit that the mere fact that the third applicant is the son of the first applicant was not sufficient to warrant a subpoena being issued against him. They submit, similarly, that the mere fact that the fourth respondent is a member of the SRE Trust, did not justify his subpoena.

[26] The high water mark of the applicants' contention, as set out in the founding affidavit, was that the letter addressed to the Master by the third respondent, marked as CM2 dated 2 November 2017, was not part of the material which was considered by the Master when the decision to hold the enquiry was made. They in addition alleged that the annexures to the letter marked CM3, addressed to the Master by Gerrit Coetzee Attorneys, representing one of the creditors, Cargill RSA (Pty) Ltd, (Cargill) were similarly not placed before the Master when the decision was made. They contended that the holding of the enquiry in the absence of these documents, was not justified.

[27] Contrary to these averments, counsel for the applicants conceded during the hearing that CM2 and the annexures to CM3 were at the disposal of the Master when the decision to hold the enquiry was made. These documents were indeed attached to the record that was provided by the Master in compliance with the provisions of rule 53(1) (b).

[28] The contents of CM2 and the annexures to CM3 were fatal to the applicants' case. The fact that the third applicant was the son of the first applicant and that the fourth applicant was a trustee of the SRE Trust should not be viewed in isolation but in light of all the documents that were provided to the Master. The Master was expected to consider all these documents as a whole to exercise his/her discretion.

[29] The fact that the third applicant had intimate knowledge of the farming operations should be viewed in light of the following

circumstances that were disclosed in CM 2 and the annexures to CM3: The documents disclosed that some assets belonging to the first

applicant were sold prior to his sequestration and that such sales may be impeachable. The documents further reflect that Cargill had a special and general notarial bond over the first applicant's moveable assets. The first applicant, at the time of the registration of these bonds, had declared moveable assets totalling more than R69 million but assets worth less than R2 million were recovered on the first applicant's farm after his sequestration. Maize and sunflower, the proceeds of which had to be paid to Cargill, was sold to another institution and the proceeds were not paid over to Cargill.

[30] The third applicant allegedly had intimate knowledge of the activities on the first applicant's farm and, in the trustees

view, he could provide valuable information regarding the above. Considering this information in totality and avoiding a piecemeal

consideration of the fact that the third applicant was the first applicant's son, I am satisfied that he can provide information

regarding the insolvent's assets on the farm.

[31] With regard to the fourth applicant, the documents disclosed that the insolvent estate held 100% shares in Karis Boerdery (Pty) Ltd (Karis). The fourth applicant replaced the first applicant as the sole director of Karis shortly before his sequestration. Payments totalling more than R3, 3 million were made by the first applicant to Karis shortly before his sequestration. These payments may be impeachable. The trustees allege that these payments and additional 'intergroup' payments made to Karis, in their view, had to be subjected to the enquiry. The fourth applicant was in a position to provide valuable information regarding these aspects.

[32] Having regard to the above, I am satisfied that the Master properly exercised his/her discretion in issuing the summonses against the third and fourth applicants. The third and fourth applicants were in my view able to give information which the Master considered

desirable concerning the insolvent or concerning the insolvent's estate or the administration of his estate.

IV. THE MAGISTRATE'S DECISION

[33] Not only did the applicants take issue with the magistrate's decision to exclude Senekal from the enquiry, they also contended

that the trustees did not have locus standi to raise the issue of his purported conflict of interest before the magistrate.

[34] Mr Pruis submitted that Kempston should have raised Senekal's entitlement so to act at the enquiry and not the trustees. Counsel contended that 'it does not lie in the mouth of a non-client to raise an objection to a legal representative appearing based on a conflict of interest'. It was submitted that the magistrate ought to have dismissed the objection since it was not raised by Kempston.

[35] I will first deal with the issue regarding the trustees' locus standi in raising the objection to Senekal's appearance. A trustee occupies a position of trust, not only towards creditors but also towards the insolvent himself. The trustee also stands in a fiduciary relationship to the insolvent and to the creditors. Essentially this entails that he should act honestly and with good faith in all his dealings in the course of his administration of the estate. See Merskin's Insolvency Law service issue 50 at 4-27. There is further a view, though criticised, that the role of a trustee is akin to that of an officer of court. Compare Shokkos v Lampert NO 1963 (3) SA 421 (W) at 426 and Gilbert v Bekker and Another 1984 (3) SA 774 (W) at 778-781.

[36] The Insolvency Act prescribes a procedure whereby once a surrender of an estate is accepted or a person's estate is declared insolvent a concursus creditorum is instituted with a trustee who is invested with the assets of the estate, including the insolvent's property rights and obligations. The trustee is under an obligation to hold and administer the estate and distribute the proceeds amongst the competing creditors in the manner and order of preference laid down in the Insolvency Act. See Meskin's Insolvency Law.

[37] Considering that the trustees acted concursus creditorum and that Kempston was not represented at the enquiry, the third trustee, in my view, had to raise the issue relating to the possible

conflict of interest. As was stated in Shokkos supra 'The trustee is an officer of the Court upon whom the duty devolves of doing everything necessary for or collateral to the administration and distribution of the estate of the insolvent'.

- [38] It would, in my view, have been improper for the trustees not to have brought this under the magistrate's attention. It was then for the magistrate to decide whether such purported conflict warranted Senekal's exclusion from the proceedings. I am satisfied that it was not improper for the third trustee to raise the issue relating to Senekal's purported conflict of interest.
- [39] It is common cause that Senekal enquired from the legal representative acting for Kempston whether he had any objection if he (Senekal) acted for the applicants. This was done after his exclusion from the proceedings and in anticipation of the review proceedings. Kempston subsequently deposed to an affidavit in which it renounced any legal privilege and disputed that such conflict existed. This was however not the position when the matter served before the magistrate.
- [40] After the magistrate was informed that Senekal was a partner at a law firm which represented one of the creditors in the insolvent estate at the time of the first applicant's sequestration, the following exchange took place between the magistrate and Senekal:

'COURT: Were you aware at the time that Batsepis was involved in this insolvency or this insolvency matter?

MR SENEKAL: The Kempston matter?

COURT: Ja the Kempston matter.

MR SENEKAL: It might have been discussed. You discuss cases and matters but I have never been intimately involved, I don't even know what the relationship insofar as the relationship between Mr Van Der Walt and Kempston is.'

- [41] In their answering affidavit, the trustees attached correspondence between Matsepes, Erasmus De Klerk Inc and Sechaba Trust. The correspondence relates to Kempston Finance and SJ Van Der Walt (the first applicant). The reference to all these letters is

'NOORDMAN/Senekal'.

- [42] Counsel for the applicants submitted that these letters were irrelevant as they were not at the magistrates' disposal when the impugned decision to exclude Senekal from the proceedings was made. I disagree. The magistrate may not have been aware of these facts but the letters are in my view relevant in as far as they indicate Senekal's knowledge of the relationship between the first applicant and Kempston when he appeared before the magistrate.
- [43] It is in this regard important to note that Senekal informed the magistrate that 'I have never been intimately involved, I don't even know what the relationship insofar as the relationship between Mr Van Der Walt and Kempston is'. Senekal submitted to the magistrate that it is trite law in relation to conflicts of interest that it will have to be shown that he has knowledge in his possession that he can use to the detriment of the previous client.

- [44] The correspondence suggests that Senekal was one of the references in the communication with Erasmus De Klerk Inc and Sechaba Trust. The letters further indicate what the exact relationship between Van Der Walt and Kempston was. The heart of the correspondence relates to Kempston's assertion that its assets that were in possession of Van Der Walt did not form part of the insolvent estate. The letters further suggest that the instalment sale agreements between Kempston and Van Der Walt were cancelled prior his sequestration.
- [45] Logic dictates that a person referred to as a reference in a letter should have knowledge of the contents thereof. The objective

facts

therefore indicate that Senekal previously represented one of the creditors and that he had knowledge of the relationship between the first applicant and Kempston. The de facto position before the magistrate was that Senekal represented the first applicant against whom he previously acted. Kempston, which was previously his client, was now his adversary.

- [46] Mr Pruis referred us to the decision in *Wishart and Others v Blieden NO and Others* 2013

(6) SA 59 (KZP) in his heads of argument. This decision is in my view distinguishable from the facts before us. In that case, the applicants were not clients of the legal representatives and they had not disclosed any confidential information to them. There was no possibility that the legal representatives could use their secrets against them as they were never their clients.

- [46] On appeal to the SCA, cited as *Wishart and others v Justice P Blieden NO and Others* [2014] 4 All SA 334 (SCA), Lewis JA held that our law affords protection to the former client of a legal practitioner such that he will be precluded from acting against a former client where the practitioner has confidential information about the former client that may be misused.

- [47] The SCA referred with approval to *Robinson v Van Hulsteyn, Feltham and Ford* 1925 AD 12 at 21 where Wessels JA said the following:

‘According to our law a solicitor is an officer of the Court; the Court exercises a jurisdiction over him and will see that in the conduct of his professional work he displays towards the Court and towards his clients a very high standard of conduct. In order to advise a client as to his legal position the solicitor must know all the circumstances of his client's case, and therefore a client is often compelled to reveal to his solicitor the most intimate circumstances of his life. The solicitor may thus become the repository of the most vital secrets of the client. These confidences reposed in him he may not divulge, and if he does the Court will punish him for his breach of duty towards his client. If a solicitor who in the course of advising a client has become possessed of his client's secrets is engaged by another person to act against his former client, his knowledge of the latter's secrets may be of great advantage to his client's opponent. Although the solicitor may conscientiously endeavour to do his duty to his new client without revealing the secrets of his old client, yet he may find himself in an invidious position and his knowledge of the secrets of his

former client may unconsciously affect him in doing his duty towards the other. In order to avoid such a dilemma the Court will restrain a solicitor in whom confidences have been reposed by a client from acting against such a client where it is made clear to the Court in the words of Cozens-Hardy M R [in *Rakusen v Munday & Clarke* (1912 1 Ch D 831, 835)], ‘that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act’.

[48] Considering the objective facts before us, I am satisfied that confidential information was imparted or received as a result of the attorney-client relationship between Kempston and Matsepes. Logic dictates that the information remains confidential. The information is relevant to the matter at hand since it relates to a creditor and debtor relationship that existed between Kempston and the first applicant. All that is required is that there should be a possibility that he may use such information to the detriment of his former client. I am also satisfied that at the time of the enquiry before the magistrate, the trustees were satisfied that the interests of the first applicant were adverse to those of Kempston.

[49] As was stated in *Robinson*, even if the attorney may conscientiously attempt to do his duty to his new client without revealing the secrets of his old client, he may find himself in an impossible position and his knowledge of the secrets of his former client may unconsciously affect him in doing his duty towards the other. In order to avoid such a dilemma the magistrate correctly restrained Senekal in whom confidences may have been entrusted. The magistrate was thus, in my view, justified in excluding Senekal from the proceedings.

[50] Although counsel did not concede that the warrants of arrest against the first and second applicants were valid, a logical result of the concession is that the warrants of arrest were validly issued against them. These warrants were issued pursuant to the master’s decision to issue the summonses against them.

[51] Conversely stated, if accepted that the subpoenas were valid, nothing prevented the magistrate from issuing the warrants against the first and second applicants. Having concluded that the summonses against the third and fourth applicants were valid, it follows that the warrants issued by the magistrate were also lawful. The applicants did not appear before the magistrate and he was thus correct in issuing the warrants.

[52] I will in the result make the following order:

1. The application is dismissed
2. The first to fourth applicants are ordered to pay the costs of the application jointly and severally the one paying the others being absolved.

L.B.J. MOENG, AJ

I concur .

N.M MBHELE, J

On behalf of the Applicants: Adv. D.A Pruis SC and Adv. A. Sander

Instructed by: FJ Senekal Inc

Bloemfontein

On behalf of the third and fourth respondents: Adv. Paul Zietsman SC

Instructed by: Gerrit Coetzee Attorneys Potchefstroom

c/o Horn and Van Rensburg

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