

SOUTH AFRICA / JUDGMENT

Van Rensburg NO and Others v Botha (18146/2005) [2010] ZAGPPHC 88 (30 July 2010) [2010] ZAGPPHC 88

COURT

North Gauteng High Court, Pretoria

BEFORE

HJ Fabricius

CASE / FILE NUMBER

18146/2005

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IN

THE NORTH GAUTENG HIGH COURT,
PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case

number: 18146/2005

Date:

30/07/2010

In

the matter between

JACOBUS

HENDRIKUS JANSE VAN RENSBURG N.O.

First

Plaintiff

PHILIP

FOURIE N.O.

Second

Plaintiff

JACOB

LUCIEN LUBISI N.O.

Third

Plaintiff

LILY

MAMPINA MALATSI TEFFO N.O. Fourth

Plaintiff

ENVER

MOHAMMED MOTALA N.O. Fifth

Plaintiff

RABOJANE
MOSES KGOSANA N.O. Sixth
Plaintiff
(in
their capacities as joint-trustees of
MP
FINANCE GROUP CC (in liquidation)
and
CHRISTIAAN
JOHANNES BOTHA Defendant

JUDGMENT

FABRICIUS J:

1. The six Plaintiffs herein are liquidators practicing as insolvency practitioners. In the particulars of claim they allege that they act herein in their capacities as the duly appointed liquidators of the estate of MP Finance Consultants CC (in liquidation), Krion Financial Services Ltd (in liquidation), Marburt Financial Services Ltd (in liquidation), Madikor 20 (Pty) Ltd (in liquidation) and M&B Co-operative Limited Partnership.
2. All of the mentioned estates have been consolidated into a single estate by order of the High Court of South Africa (Witwatersrand Local Division) under case number 21098/2003. This so-called consolidated estate is then referred to as MP Finance Group CC (in liquidation) and is further referred to in the particulars of claim as the "Krion Scheme".

It appears that the correct case number of the so-called consolidation application is 2002, and not 2003.

3. Because of the defence that was raised herein and the evidence presented both in support of the Plaintiffs' claim and Defendant's defence, it is necessary to refer to the allegations in the particulars of claim in some detail.
4. It is alleged that the Krion Scheme and the transactions entered into by it were unlawful and void. The Krion Scheme conducted business inter alia:

4.1. in contravention of the provisions of the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988, in that the Krion Scheme

constituted a multiplication scheme as defined in Government Notice 1135 of 9 June 1999, read in conjunction with Government Gazette No. 20169 of 9 June 1999, and more specifically by offering an annual interest rate to investors in excess of 20% above the Repo Rate as determined by the South African Reserve Bank and declared illegal in terms of Section 12 of Act 71 of 1988;

4.2. of a Bank in contravention of Section 11 (2) of the Bank's Act, 94 of 1990.

5. It is also alleged that the Krion Scheme was a fraudulent scheme and was in fact declared unlawful by an order of this Court, which declarator was confirmed by the Supreme Court of Appeal on or about 1 April 2004, under case number 522/2003.
6. It is convenient at this stage to refer to the Judgment of the Supreme Court of Appeal, reported in the All South African Law Reports (2005) 4 393, the date of the Judgment being 1 April 2004. The Court referred to the relevant facts which are also common cause herein. The Krion Scheme was operated from the beginning of 1998 and later collapsed when the inflow of funds could no longer sustain the outflow of extravagant returns to participants.
7. The Scheme was conducted at one time or another by the various entities that I have already referred to and that are mentioned in the Plaintiffs' particulars of claim, and the way in which the Scheme was conducted made it attractive for investors to invest for periods as short as three months. When the loan capital with Interest' was repaid at the end of the agreed investment period, the investor would more often than not reinvest the capital and interest. The advantage for the investor of doing business in this way was of course that his already enormous interest was compounded. Typically an investor would invest an amount in the Scheme having been promised a return of 10% per month, capital and profit repayable within three months.
8. Until the collapse of the Scheme, investors received payment of their capital and their profit when due. Sometimes an investor would leave the capital and/or the profit in the Scheme and this would then have been reflected by means of a book entry as a payment and a new investment. Other investors would take the capital and profit on the due date, some of whom returned after a while to reinvest a similar amount.
9. The Court also mentioned that it was in fact an anomaly to speak of investors in a scheme that was illegal from the beginning, but it did so for the sake of convenience.
10. In an attempt to simplify the administration of the various insolvent estates, the liquidators proposed a scheme of arrangement in terms of Section 311 of the Companies Act, 61 of 1973, between those of the entities that are companies and their creditors. The Scheme, sanctioned on 22 November 2002, purported to ratify and confirm the consolidation of the assets and liabilities of the companies in the MP Finance Group (such order was in fact only granted on 4 February 2003).
11. MP Finance Group is cited in the papers (before the SCA) as a Close Corporation but in fact was not a legal persona. It is in fact no more than the name under which the liquidators are winding-up the affairs of the Krion Scheme.
12. The appeal arose from an order made by Hartzenberg J in this Court on 28 February 2003, under Sections 26 and 30 of the Insolvency Act. The Learned Judge declared, inter alia, that the investment scheme was at all material times insolvent in that its liabilities exceeded its assets and that contracts concluded between the investment scheme and the investors in the scheme were illegal and null and void.

13. The Scheme had been conducted by one Marietjie Prinsloo (formerly Pelser) during the period 1998 to June 2002, under various names including those that I have already referred to (her trustee does not appear to have been a party to the litigation before the High Court nor herein).
14. The order of Hartzenberg J was later on amended to make it clear that only that amount which exceeded the investment of each investor, in other words the gain made by each investor, was to be set aside in terms of Section 30(1) of the Insolvency Act. The SCA held, and this is of course also common cause herein, that all loans to the Scheme were illegal and therefore void, and that the Scheme never had the least entitlement to retain investors' money until a date which had supposedly been agreed as the date for repayment. The perpetrators of the Scheme knew the investments to be illegal, but before the SCA, there was no evidence that any of the investors knew their investments to be tainted, nothing from which to infer that any of them acted *ex turpi causa*.
15. Upon receipt of a payment, the Scheme was liable promptly to repay it to the investor who had a claim for it under the *condictio ab iniustam causum*. Instead, it used the money to pay the claims of other investors who had invested earlier. That was in fact the whole idea of the Scheme. The nature of the Scheme dictated its insolvency and it had no assets of any importance and huge liabilities.
16. It is also clear from the Judgment that whatever purported to be done, or whatever a Court order intended, did not bind each and every so-called investor in that each one was free to maintain at any appropriate stage that he was no party to any litigation, was unaware thereof and had no intention to have waived any of his individual rights or interests.
17. The order that the Court of Appeal made (at 402, par 24) dealt with the provisions of Section 26 of the Insolvency Act.
18. I return to the particulars of claim.
19. Having regard to the already mentioned facts, it was pleaded that to the extent that a payment to the Defendant was made within the last six months before the date of liquidation, it had the effect of preferring the Defendant above other creditors and was liable to be set aside under Section 29 of the Insolvency Act and was repayable by the Defendant. The relevant amount in the present context was agreed upon to be R192 710.00. Interest was also sought.
20. The Defendant pleaded that the mentioned entities, before liquidation, had no assets or liabilities, no bank account and no financial

statements had ever been produced. No incorporated company under the name M&B Corporation or a partnership with that name existed.

21. The mentioned Mrs Prinsloo conducted an unlawful pyramid scheme and to hide the illegality thereof, had made use of false names of various so-called legal entities. The so-called consolidation order of these ostensible entities did not bind the Defendant, who was not a party thereto.
22. The Defendant denied that the Krion Scheme had received any money or that it had made any payments to the Defendant.
23. The Scheme had been driven, managed and conducted by the said Prinsloo, who had received the monies from the so-called investors in cash, who in turn received cash payments from her under the name of MP Finance Services.
24. The Defendant denied that Section 29 of the Insolvency Act was applicable to him in that he denied that any payment had been made to him by the Krion Scheme, as I have said, or that the Krion Scheme had any creditors.
25. In its replication, the Plaintiff admitted that Krion Financial Services Ltd did have a bank account for the period 7 March 2002 to 1 June 2002, that the other entities forming part of the Krion Scheme did not have a bank account, that no formally registered entity under the name of M&B Corporation Ltd existed, but that it was in fact one of the names under which the Krion Scheme was conducted, which trading name was also included in the consolidation order of 4 February 2003, under case number 21098/02 and that none of the entities forming part of the Krion Scheme had in fact any form of financial statements. The illegality and the fraudulent nature of the Krion Scheme was admitted but it was pleaded that the said Prinsloo did not conduct this Scheme in her personal name, but under various names, including those referred to in the particulars of claim that I have mentioned.
26. It was then pleaded that "Plaintiffs case is not to pierce the corporate veil of the different entities to hold Marietjie Prinsloo personally liable, but to wind up the estates of such different entities which were consolidated into a single estate to be known as MP Finance Group CC per direction of the Court order dated 4 February 2003 under case number 21098/02."
27. Defendant denied that the jurisdictional facts required by Section 29 of the Insolvency Act had been proven and/or that they existed objectively. He denied having been bound by any of the previous Court orders.
28. Section 29 of the Insolvency Act, insofar as it is applicable in the present proceedings, reads as follows:

"SECTION 29(1)

Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value

of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary sense of business, in that it was not intended thereby to prefer one creditor above another"

29. In this context it is simply Defendant's case that the Plaintiffs' claim is based on a Statutory provision, and that if the Plaintiffs do not bring themselves within each and every jurisdictional fact contained in such provision, they cannot succeed. As a general principle, this submission is of course correct.
30. It was submitted that Section 29 deals with dispositions, and that there was no evidence in this case that any of the mentioned entities referred to, either received monies or paid out any monies. This meant that it had to be determined who had in fact received the monies, who had repaid them and whose monies they were, so it was contended.
31. Plaintiffs in turn argued that Prinsloo had received the cash ostensibly on behalf of legal entities and then had in fact repaid such amounts ostensibly on behalf of those legal entities.

Defendant regarded this as mere speculation. Essentially, therefore, it was Defendant's case that Plaintiffs had to prove that:

- 31.1. the disposition had been the property of the insolvent;
- 31.2. the insolvent had disposed of his assets;
- 31.3. the disposition had the effect of preferring one creditor above the other;
- 31.4. immediately after such disposition, the liabilities of the insolvent exceeded the value of his estate;
- 31.5. the insolvent was not capable of paying its debts.
32. In that context, the first question had to be: who was the insolvent?
33. Plaintiffs in this instance relied on the entity MP Finance Group CC. Defendant argued that no such entity existed in law and that a Court could not create such. No CC of that name had been registered and a Close Corporation could only be a creature of statute if registered according to the relevant legislation. This Group could not be the insolvent and a Court was not empowered to "manipulate" the provisions of the Companies Act or the Close Corporations Act or the Insolvency Act, or interfere with the rights of persons who were not part of any so-called consolidation order.
34. It was also contended that even if it was accepted for the benefit of Plaintiffs, that MP Finance Group CC did exist, it was the high water mark for Plaintiffs that the insolvent in this case was either MP Finance Consultants CC, Madikor 20 (Pty) Ltd, Martburt Financial Services Ltd and Krion Financial Services Ltd. Accordingly, and on that basis, Plaintiffs had to prove that one or all of those entities were the owners of the assets that were disposed of, that such disposition occurred viz a viz the Defendant, and that the Defendant was a creditor of such entity. Further, at the time of such disposition, that the liabilities of such entities

exceeded the value of their assets.

35. It had to be asked who was the owner of the cash that was admittedly paid? All payments were made in cash, and they were packed in containers and safeguarded by Prinsloo who, in turn, provided such cash to her agents and via them to the investors. That was after she had taken her share and had paid the agents their commission.
36. Those facts were never in dispute in the present proceedings and it is unnecessary to refer in that context to the detailed evidence given by the witnesses called in these proceedings.
37. It was alleged that Prinsloo had therefore kept such investor money separately, that it had never been her intention to have become the owner thereof and that her intention had in fact been to use that money to pay existing investors. There was therefore no evidence that those monies belonged to any of the legal entities for which the liquidators acted. Apart from that, there existed "other entities who were not legal persons at alt. There was no evidence that any of those companies or entities had functioned, and that there was any record of any of the monies received by them. The only record of payments were those in the name of MP Financial Services, which was Prinsloo herself. There was also no acceptable evidence that any of those companies did business as MP Financial Services. Accordingly, Plaintiffs had not proven that monies had been received were the monies of any of those legal entities on behalf of which the Plaintiffs acted, and that those monies had belonged to them.
38. Plaintiffs had therefore failed to prove that the specific dispositions had taken place by any of those legal entities for which they acted.

A disposition of property is a factual matter, it was contended, and it was clear that the monies emanated from the containers which had been kept by Prinsloo and had been under her control. There was no evidence at all in these proceedings that she had acted on behalf of any of the legal entities referred to and that was mere speculation.

39. Accordingly, Plaintiffs could not succeed with a claim under Section 29 of the Insolvency Act. Whether they had any other claim in law was irrelevant for present purposes.
40. It was further contended that Plaintiffs also had not proven that the Defendant was a creditor of any of the entities for which the Plaintiffs appeared herein.
41. It was also contended, lastly, that the Defendant was not bound by the so-called consolidation order, and it was denied that a Court could issue a declaratory order in vacuo viz a viz persons who were not a party thereto or had at least been given notice thereof. In any event, the consolidation order was not competent in law. Neither Section 18 of the Insolvency Act nor Section 386(4)(a) of the Companies Act made provision for such. A Court could also not create any company or legal entity or close corporation except insofar as this was done in accordance with the relevant legislation.

42. I was referred to a number of judgments handed down by other Judges of this Division and others. Some of those are distinguishable on the facts, and some of those were not correct, so it was contended. It is not necessary to deal with them.
43. Defendant's submissions are supported by the evidence herein as far as the facts are concerned. The legal arguments are similarly sound, and their rationale have also been found to be sound by Tuchten A.J. in the unreported decision of JH Janse Van Rensburg & Others v SJL Steyn, case number 18137/2005, delivered on 30 October 2009. The Learned Judge was similarly astounded by the notion that a Court (in the present context) has the power to "create" legal entities and obligations outside the applicable statutory provisions that regulate them.
44. I agree with Plaintiffs contentions that:
- 44.1. a Court is not competent to "create" either a company or a close corporation or any other statutory entity unless this is done strictly in accordance with the applicable Statute;
- 44.2. the so-called consolidation order that I have been referred to, did not and does not bind the Defendant;
- 44.3. the Plaintiffs have not proven the jurisdictional elements required by Section 29 of the Insolvency Act, on which they specifically and solely rely, and I have mentioned which of those facts have not been proven herein.
45. Accordingly, I have no choice but to dismiss the Plaintiffs' claim with costs, which I do.
- DATED at PRETORIA on this the 30th day of JULY 2010.
- SIGNED: HJ FABRICIUS
- JUDGE OF THE HIGH COURT, NORTH GAUTENG DIVISION
- Counsel for Plaintiff: F Du Toit SC
- Counsel for Defendant: T Strydom

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