

SOUTH AFRICA / JUDGMENT

Willemhendriksvlei (PTY) Ltd and Another v Pieters (1563/2022) [2023] ZAMPMHC 1 (19 January 2023) [2023] ZAMPMHC 1

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa

CASE / FILE NUMBER

1563/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION (MIDDELBURG LOCAL SEAT)

CASE

NO.: 1563/2022

In

the application of:

WILLEMHENDRIKSVLEI
(PTY)
LTD
First Applicant
(REG.
NO.: 1975/001401/07)
LIDA
KAREN BEKKER VAN
AARDT
Second Applicant
(I.D.:
[....])
And
JACOBUS

HENDRIK
PIETERS
Respondent
(I.D.[....])
Married out of community of property
to
Anien Pieters I.D: [....])

JUDGMENT

Langa J

- [1] On 14 November 2022 two applications served before this court. One was for the sequestration of the respondent in the current matter in which costs are sought (Case number 1563/2022). The second was the winding up of a company of which the respondent in this matter is a director (Case number 1564/2022).
- [2] On the day of the hearing of the two matters the parties reached a settlement agreement and draft orders were presented to court in this regard. In respect of the winding up application (1564/2022) it is recorded in the draft order, which has since been made order of court, that the capital of the claim amount has been paid and the respondent company, Baroudeur Brokers is ordered to pay the applicants' agreed or taxed costs on party and party scale, such costs to include employment of two Counsel one being a senior Counsel.
- [3] In respect of the sequestration application (Case 1563/2022) the parties also presented a draft order pursuant their settlement agreement. In the draft it is recorded that the that "the capital of the claim amount has been paid" and "Costs to be argued."

Therefore, in both cases the merits have been settled in that payment of the capital amount including interest, which formed the foundation of the Applicants' claims against both the Respondents, was made to the Applicants. Unlike in the winding up application, there was no agreement between the parties regarding costs in respect of the sequestration application. The Applicants therefore seek a costs order against the Respondent, such costs to include those consequent upon the employment of two counsel. This judgment deals with the said costs.

- [4] The applicants rely upon the same facts and events in respect of both claims. In both claims the applicants allege that the respondent in the sequestration, Mr Pieters, used the company, the first respondent in the winding up application, to defraud the applicants by misappropriating part of the sale proceeds procured from a sale of farms of which the first applicant was the registered owner. The allegations were that the respondents, Mr Pieters and the company, acted in concert and were as such joint concurrent wrongdoers and therefore the applicants had a claim against both respondents.

- [5] The following brief history of the matter is necessary in the context of costs. Urgent ex parte applications for sequestration and the winding-up were launched on 13 April 2022 by the applicants against Mr Pieters and the company, respectively. Both were based on the alleged fraud or misappropriation of funds. On 19 April 2022 the court hearing did not proceed but the court directed that the papers must be served on the respondents. After the papers were served, the applications were re-enrolled for hearing on 03 May 2022. However, on this date the matter could not be proceeded with as the respondents had filed their opposing affidavits late. Consequently, both applications were postponed and the respondents were ordered to pay the costs occasioned by the postponement. The matters were eventually enrolled for hearing on 15 November 2022 after the applicants filed a replying affidavit and heads of argument were filed both parties save for the respondent company.
- [6] It is common cause that on 14 November 2022 payment was made by the respondents to the applicants of the full amount constituting both the capital and interest. The payments resulted in the applicants no longer having locus standi as creditors of Mr Pieters and the respondent company and consequently could not proceed with the sequestration and winding-up applications.
- [7] While it is now common cause that both respondents have paid the claims, neither Mr Pieters, nor the company tendered the applicants' costs notwithstanding the fact that payment was made a day before the date of hearing. Because of this, the matter was argued only in respect of costs. While initially the respondents in both matters were resisting the award of costs to the applicants, the costs were nevertheless conceded by the respondent in respect of the liquidation

application. Therefore, what remains to be determined is only the issue of costs in respect of the sequestration application, which the respondent's counsel argued should be borne by the applicants.

- [8] It is that trite that in the ordinary course of events, costs follow the event. It is only in special circumstances that this rule can be departed from. See *Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd* 1996 (3) SA 692 (C). There must be a good reason why a successful party should not be awarded costs.
- [9] In *Jenkins v SA Boilermakers* 1946 (WLD) 15 the Court held that where a disputed application is settled on a basis which disposes of the merits but does not dispose of the costs, the Court should not have to hear evidence to decide the disputed facts in order to decide the issue of costs. It held that the Court must, with the material at its disposal, make a proper determination as to costs. This approach was endorsed by the court in *Gamlan Investments*, supra, where the Full Court endorsed and quoted with approval passages from *Jenkins*, supra and stated that:

"In *Jenkins v SA Boilermakers, Iron & Steel & Ship Builders Society* 1946 WLD 15, the Court held that where a disputed application is settled on a basis which disposes

of the merits except insofar as the costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is

liable for costs, but the Court must, with the material at its disposal, make a proper allocation as to costs." The Court stated further that costs must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits of a case that has already been settled.

[10] It is therefore clear from the authorities that in cases where the costs are separate from the merits, the Courts must utilize the material at their disposal and make a determination without the need for a comprehensive assessment of the merits of the matter even though the prospect of success is generally still a relevant factor for consideration.

[11] Counsel for the respondent argued that sequestration proceedings are meant to bring about a concursus creditorium and not force someone to pay. He argued further that the application for sequestration was improper as it was used to exact payment from the respondent contrary to the Badenhorst rule. The Badenhorst rule essentially provides that "sequestration proceedings are designed to bring about a concursus creditorem to ensure an equal distribution between creditors, and are inappropriate to resolve a dispute as to the existence or otherwise of a debt. Consequently, where there is a genuine and bona fide dispute as to whether a respondent in sequestration proceedings is indebted to the applicant, the Court should, as a general rule, dismiss the application." *Exploitatie-en Beleggingsmaatschappij Argonauten 11 BV & another v Honig*

[2011] JOL 27924 (SCA). The court, however, further pointed out that the rule is not inflexible. It is however important to note that in *Estate Logie v Priest* 1926 AD 312 at 319 the 6 At 701C, the Appellate Division endorsed the principle that there is nothing wrong for an applicant to employ sequestration proceedings in order to procure payment of a debt.

[12] My understanding of the principles referred to above is that where there is a genuine and bona fide dispute as to whether a respondent in sequestration proceedings is indebted to the applicant, the Court should dismiss the application based on the Badenhorst principle. This appear not to be the case in casu. The argument by the respondent that the concession in the winding up application cannot be applied to the sequestration application also cannot be sustained. This is particularly so when taking into account the allegations that the respondents, Mr Pieters and the company,

acted in concert and were as such joint concurrent wrongdoers. (my emphasis).

[13] It is trite that costs are in the Court's discretion. It is clear in this case that the applications caused the respondents to make the payment of the amounts owing to the applicants. In this context the applicants clearly had substantial prospects of success in the sequestration as well. Consequently, based on the general rule that the costs must follow the result, the applicants are clearly entitled to costs in respect of the sequestration application as well. There is no justification for deviation from this rule. The costs therefore fall to be awarded to the applicants.

Order

[14] In the result I make the following order:

The respondent in this matter (the sequestration application) is ordered to pay the costs of the application on party and party scale and such costs to include costs consequent upon the employment of two counsel.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: Adv.MP vd Merwe SC and Adv. CJ Groenewald

Instructed by:

DR TC Botha Attorneys

Counsel for the Respondent: Adv. H Brauckmann

Instructed by:

Jordaans Inc.

Dates heard:

15 November 2022

Date of Judgment:

19 January 2023

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 19 January 2023 at 10h00.

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