

SOUTH AFRICA / JUDGMENT

Zwarts v Janse van Rensburg NO and Others (590/10) [2011] ZASCA 70 (25 May 2011)

[2011] ZASCA 70

COURT

Supreme Court of Appeal

BEFORE

NAVSA, HEHER, SNYDERS, SHONGWE, MEER

CASE / FILE NUMBER

590/10

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 590/10

No precedential significance

In the matter between:

DANIEL JOSEPH ZWARTSAPPELLANT

and

JACOBUS HENDRIKUS JANSE VAN RENSBURG N.O.1ST RESPONDENT

PHILIP FOURIE N.O.2ND RESPONDENT

JACOB LUCIEN LUBISI N.O.3RD RESPONDENT

MAMPINA MALATSI-TEFFO N.O.4TH RESPONDENT

ENVER MOHAMMED MOTALA N.O.5TH RESPONDENT

RABOJANE MOSES KGOSANA N.O.6TH RESPONDENT

(in their capacities as joint-liquidators of

MP FINANCE GROUP CC [IN LIQUIDATION])

Neutral citation: Zwarts v Janse van Rensburg (590/10) [2011] ZASCA 70 (25 May 2011)

Coram: NAVSA, HEHER, SNYDERS, SHONGWE JJA and MEER AJA

Heard: 3 May 2011

Delivered: 25 May 2011

Updated:

Summary: Company – liquidation – consolidation of corporate entities for purpose of liquidating pyramid scheme – voidable disposition – s 29 of Insolvency Act 24 of 1936 – identification of debtor.

ORDER

On appeal from: Free State High Court (Bloemfontein) (Cillié J sitting as court of first instance):

The appeal is dismissed with costs.

HEHER JA (NAVSA, SNYDERS, SHONGWE JJA AND MEER AJA concurring):

- [1] The liquidators issued summons against Mr Zwarts in July 2005 claiming an order in terms of s 29 of the Insolvency Act 24 of 1936 setting aside payments allegedly made to him by the Krion Scheme and payment of R266 425-00 as an alleged undue preference together with mora interest on that sum.
- [2] The action was defended and proceeded to trial before Cillié J in the Free State High Court. The liquidators adduced the expert evidence of Mr Harcourt-Cooke and the first appellant testified as well as two former employees of Ms Prinsloo, on his behalf. Counsel for the defendant had conceded the locus standi of the liquidators. Before this Court he sought to withdraw that concession. As the issue has been disposed of in the Steyn judgment delivered today, which is of equal application to the present appeal, there is no need to take that matter further.
- [3] It is unnecessary to repeat my reasoning in relation to the aspects dealt with in the Steyn and Botha1 appeals the judgments in which will be handed down with this judgment. Suffice to say that other than in regard to the evidence of the respective defendants in the actions what I have said there applies with equal force in this appeal.
- [4] The remaining issue at the trial was the identity of the person or entity with whom Mr Zwarts contracted and by whom he was paid the ‘dividends’ on his investment. Cillié J said in this regard:

‘Ten aansien van paragraaf 1.2 is deurgaans deur Mnr Mills namens die verweerder tydens die eiser se saak voorgehou dat die verweerder

eintlik by ene Marietjie Prinsloo sy belegging gedoen het en nooit met enige van die maatskappye wat individueel die saamgevoegde

gelikwideerde boedel daarstel gekontrakteer het nie.

Die verweerder het egter somer in hoofgetuienis reeds getuig dat hy sy belegging by die maatskappy gedoen het. Dit is later uitdruklik deur hom toegegee in kruisverhoor dat hy dit nooit verstaan het dat Marietjie Prinsloo persoonlik sy mede kontraktant was nie. Ook is pertinent deur hom getuig dat hy die maatskappy aanspreeklik sou hou om sy fondse terug te betaal indien ooit nodig. Mnr Du Toit, namens die eiser, het hierop op sy betoog gesuggereer dat hierdie 'n teoretiese verweer is wat deur 'n regsverteenwoordiger

uitgedink is en wat nie gefundeer is in enige werklikheid nie. Ek stem hiermee saam.'

He accordingly made the order as prayed and subsequently refused leave to appeal. The matter is now before us with leave of this Court.

- [5] Substantially the same question must be answered in the appeal: Does the evidence prove that Mr Zwarts was an investor in the Krion Scheme? If it does, there is an end of the matter since, for the reasons given in the Steyn judgment he is bound by the order made by Harzenberg J.
- [6] Mr Harcourt-Cooke a chartered accountant who after liquidation conducted a forensic investigation into the affairs of the Scheme, produced the defendant's investor file which had apparently been recovered from the premises from which the scheme's activities were carried on in Vanderbylpark. Among the documents in the file were:
1. A membership certificate in MP Finance Sacco reflecting one share in that entity for an investment of R40 000 for a period of 12 months dated 11 October 2000.
 2. An agreement, apparently in relation to the same share, signed by Mr Zwarts and M J Pelser as 'Eienaar' on 11 October 2000.
 3. A share certificate for one share in Madikor Twintig (Edms) Bpk dated 11 October 2000 at a recorded price of R40 000,00.
 4. An agreement dated 11 October 2000 in which Martburt Finansiële Dienste Bpk acknowledges receipt of R40 000 and undertakes to pay to Mr Zwarts monthly dividends totalling R37 611.41.
 5. An agreement, apparently in relation to the same share, signed by Mr Zwarts and M J Pelser (Ms Prinsloo) as 'Besturende Direkteur' on 11 October 2000.
 6. A 'Pro Forma' certificate for one share in Madikor Twintig (Edms) Bpk dated 8 June 2001 for an investment of R40 000,00 for a period of 12 months. (This is on the letterhead of Martburt Finansiële Dienste Bpk and is signed by M J Pelser without further description, although six directors are named at the foot including M J Pelser and I Engelbrecht.)

7. A membership certificate in favour of D J Zwarts dated 8 June 2001 in which H H Prinsloo on behalf of M & B Koöperasie Bpk grants one share in that entity in return for payment of R115 000 for 12 months at a return of 10 per cent per month.
 8. A membership agreement dated 29 October 2001 between Mr Zwarts and M & B Koöperasie Bpk acknowledging receipt of R450 000 and undertaking to pay dividends totalling R1 412 292.77 to Zwarts.
 9. A receipt issued to the defendant by I Engelbrecht as agent for M & B Korporasie Bpk for R115 000 on 2 November 2001 for shares purchased in that entity.
 10. A notice of withdrawal 'van my geld by die maatskappy' (unspecified) dated 29 Maart 2002 for an amount of R194 035-70, signed by Mr Zwarts and an unidentified member on behalf of the (unspecified) company.
 11. An undated acknowledgement of receipt in which Mr Zwarts states that he confirms having invested the sum of R1 171 035.20 in Madikor Twintig (Edms) Bpk, M & B Koöperasie and Martburt Finansiële Dienste Bpk and having received that amount from the three entities as full and final payment on 1 April 2002.
 12. An application for 977 shares in Krion Financial Services Ltd in the name of the defendant dated 1 April 2002.
- [7] The evidence of Ms E V Denysschen did not assist the appellant. While insisting that Ms Prinsloo merely used the companies as a front, when driven into a corner she protested, 'Wel om eerlik te wees ons het ook nie geweet wat haar metode van haar werk was tot op die einde nie. Ons het maar net gedink ons doen 'n eerlike werk vir haar.'
- She conceded that 'die besigheid was alles maar een besigheid' irrespective of the succession of companies.
- [8] When Mr Zwarts enquired about the changing parade of companies he simply accepted the assurance of Ms Engelbrecht, one of Prinsloo's cohorts in the scheme, that he was investing in a new company. As he admitted, he was 'onkundig'. His evidence added nothing to suggest that Ms Prinsloo was operating the scheme in person or that she gave undertakings or incurred obligations in her own name.
- [9] In my view Cillie J was correct to find that in contracting with the agents representing the scheme Mr Zwarts was contracting with the corporate entities operating its business as from time to time and not with Ms Prinsloo personally. The debtor that made the disposition is in the circumstances deemed to be the consolidated estate into which each of those entities has been subsumed and the creditor entitled to claim repayment is likewise the consolidated estate in the hands of its liquidators.
- [10] The appeal has no merit. It is dismissed with costs.

J A Heher

Judge of Appeal

APPEARANCES

APPELLANT: G P Mills

Mills & Groenewald Attorneys, Vereeniging

Naudes Attorneys, Bloemfontein

RESPONDENTS: F du Toit SC

Thys Cronje Inc, Pretoria

C/o Van der Merwe & Sorour, Bloemfontein

1ZASCA 71 and 72 respectively.

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