

REPUBLIC OF SOUTH AFRICA



**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NO 6171/2012

DATE:16/03/2012

In the matter between

ULTRAPOLYMERS (PTY) LTD

APPLICANT

and

**CLIFFORD THABANG MAREDI NO
KHAZHAZILE SIMON MAHLANGU NO**

**FIRST RESPONDENT
SECOND RESPONDENT**

(In their capacities as joint liquidators of
Alfa Flexible Packaging (Pty) Ltd (in liquidation))

**SASOL POLYMERS, A DIVISION
OF SASOL INDUSTRIES LTD**

INTERVENING PARTY

Insolvency – section 32(1)(b) of the Insolvency Act 24 of 1936 – application for declaratory relief pending main proceedings – locus standi of proved creditor to institute interim proceedings – interpretation of “proceedings” in s 32(1) (b) of Act – considerations applicable – held: creditor has locus standi in circumstances requiring urgent interim relief.

Interim relief – requirement of a prima facie right, though open to some doubt – applicant relying on evidence given at s 417 enquiry – sufficiency of – held: requirement satisfied.

Interim relief – prejudice – administration costs of sale and preservation of assets – ordered to be paid from proceeds of sale thereof.

J U D G M E N T

VAN OOSTEN J:

[1] This is an application in which the applicant seeks certain interim relief, pending the outcome of an application or action to be brought by the applicant for declaratory relief in terms of s 32(1)(b) of the Insolvency Act 24 of 1936 (the Act). The respondents are the appointed joint liquidators of Alfa Flexible Packaging (Pty) Ltd (in liquidation) (Flexible) and they oppose the relief sought by the applicant.

[2] The applicant is a proved creditor in the insolvent estate of Alfa Plastex (Pty) Ltd (in liquidation) ("Plastex"), of which Rueben Miller, Theodore Wilhelm van den Heever and Keith Elwyn Lutchmia are the appointed joint liquidators. The assets purportedly belonging to Flexible form the subject matter of this application (the assets). The applicant contends that the assets in fact belong to Plastex, and not Flexible, and that Plastex disposed of its assets to Flexible in a purported transaction that was not genuine and that it therefore ought to be set aside in terms of s 26 and/or 29 and/or 30 and/or 31 and/or 34 of the Act (the main proceedings). The contention is based on certain evidence having emerged from an enquiry held in terms of s 417 of the Companies Act 61 of 1973, in respect of Plastex, to which I will revert.

[3] On 10 and 13 February 2012 the applicant became aware that the assets, in the liquidation of Flexible, were to be sold on an auction which was advertised to take place on 21 February 2012. This prompted the applicant to launch the present application, by way of urgency, on 17 February 2012. The respondents opposed the application, but conceded the urgency of the matter. An application for intervention was made by the intervening party (Sasol) to which the applicant consented. Sasol, likewise, opposes the application. The matter came up for hearing before Carelse J on 20 February 2012. The learned Judge postponed the application to 6 March 2012, reserved costs and further ordered that "Any or all sales at the auction to be held by Park Village Auctions on 21 February 2012 at the instance of the respondents shall be subject to confirmation by the respondents" and that such confirmation was not to be given on or before 19 March 2012. The auction went ahead and the assets were sold. As at the date of the hearing of

the matter before me, the confirmation of the sale was still pending. Counsel for the applicant informed me from the bar that the applicant is prepared to agree to the confirmation of the sales by the respondents, subject to the rider that the proceeds of the sales be held in trust pending the finalisation of the main proceedings. In view hereof, the applicant seeks relief in an amended form as set out in counsel for applicant's heads of argument.

[4] The respondents' and Sasol's (jointly hereinafter referred to as "the respondents") opposition to the relief sought by the applicant, is based on the grounds, firstly, that applicant has *no locus standi* to bring the application in its own name; secondly, that the applicant has failed to put up security as required in terms of s 32(1)(a) of the Act; thirdly, that the applicant has failed to make out a case that the assets belong to Plastex and not to Flexible; and, fourthly, and finally, that none of the other requirements of interim relief have been established and in particular that the interim relief, if granted, would unduly prejudice the respondents. I turn now to a consideration of each of the grounds of opposition under a separate heading.

THE *LOCUS STANDI* OF THE APPLICANT

[5] The provisions of s 32 of the Act are pertinent to this issue. It reads:

'(1) (a) Proceedings to recover the value of property or a right in terms of section 25 (4), to set aside any disposition of property under section 26, 29, 30 or 31, or for the recovery of compensation or a penalty under section 31, may be taken by the trustee.

(b) If the trustee fails to take any such proceedings they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof.

(2) In any such proceedings the insolvent may be compelled to give evidence on a subpoena issued on the application of any party to the proceedings or he may be called by the court to give evidence. When giving such evidence he may not refuse to answer any question on the ground that the answer may tend to incriminate him or on the ground that he is to be tried on a criminal charge and may be prejudiced at such a trial by his answer.

(3) When the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher.'

[6] The *locus standi* of the applicant, as creditor of Plastex, is challenged on the ground that the application should have been brought by the liquidators of Plastex and not the applicant. In support of the contention, reliance is placed on the wording of s 32(1) as well as the judgments in *Volkskas Beperk NO v Barclays Bank (DC&O)* 1955 (3) SA 104

(T), and *Reynolds and Others NNO v Standard Bank of South Africa Ltd* 2011 (3) SA 660 (W). The reference in s 32(1)(a) is to “proceedings” without specific reference to interim proceedings. The meaning of the noun “proceedings” has been pronounced on in a large number of cases, particularly in regard to the use of the word in diverse statutory provisions (see Claassen *Dictionary of Legal Words and Phrases* Vol 3 201). The mere use of the word “proceedings” in s 32(1)(a) absent, for example, qualifications such as “all proceedings”, or “any and all proceedings”, which would have made it clear that a wide meaning is intended, in my view, precludes simply reading “interim proceedings” into “proceedings” (cf *Ramjan v Khassimgadu* 1940 NPD 275). There are significant differences between the two. In the present matter the interim proceedings are completely separate from the main proceedings to be instituted, should the relief herein be granted. I am accordingly driven to the conclusion that, had it been the intention of the legislature to include interim proceedings in s 32(1)(a), words to that effect would have been used. In my view, the lack of qualification means that the “proceedings” referred to in s 32(1)(a) do not include interim proceedings.

[7] The cases relied upon by the respondents are clearly different. In *Volkskas*, Naser J upheld an exception against a declaration in an action where the plaintiff purported to act on behalf of the trustee in instituting that action. In *Reynolds*, Blieden J held that the trustees, as plaintiffs in the action, and not the creditor, were entitled to make discovery in terms of rule 35(1), for the reason, so the learned Judge held, “They are the plaintiffs because they are the only parties entitled to embark on the litigation concerned”. Both cases dealt with proceedings by way of action and the issue concerning the *locus standi* of a creditor to institute interim proceedings that we are now concerned with, neither featured nor was it dealt with.

[8] In the absence of any direct authority on the interpretation of the word “proceedings” in s 32(1)(a) with regard to interim relief, I proceed to do so, on the basic and, in my view, decisive point of departure which is to have regard to the nature of the interim proceedings. The application was brought on the basis of urgency shortly after it had come to the notice of the applicant that the assets were to be sold. The potential prejudice the applicant would have suffered had the auction proceeded, is apparent. The application was clearly urgent. The applicant proceeded to launch the application

without having obtained the consent of the liquidators, in its own name, and moreover without having put up security. The applicant has indicated that it will provide security in the main proceedings, should that become necessary. In these circumstances it would be both unreasonable and impracticable to have required the applicant to first follow the time consuming procedure of obtaining the consent of the three liquidators of Plastex. I am fortified in this view by subsequent events. It now appears that obtaining their consent would not have been without difficulty: one of the joint liquidators of Plastex seems reluctant to proceed with the main proceedings and further, some form of disagreement on this aspect seems to be lingering between the liquidators. Be that as it may, a creditor, in my view, where circumstances require swift action, will be entitled to institute interim proceedings in its own name for the protection of a right, in particular where vindicatory or quasi vindicatory rights, as is the case here, are in jeopardy. For these reasons, I conclude that the respondents' objection to the applicant's *locus standi* must fail.

APPLICANT'S RELIANCE ON EVIDENCE HAVING EMERGED FROM THE S 417 ENQUIRY

[9] It is trite that an applicant seeking interim relief is required to establish and satisfy as one of the requirements, a *prima facie* right, though open to some doubt (see for example *SA Taxi Securitisation (Pty) Ltd v Chesane* 2010 (6) SA 557 (GSJ) 559 para [11]). In this regard the applicant relies on the s 417 enquiry evidence I have already referred to. The enquiry was held during 2009 and 2010. Mr Miller, who, as I have mentioned, is one of the joint trustees of Plastex, apparently was present at the enquiry and advised the applicant of the evidence that had emerged from the enquiry. A brief summary of the evidence is the following. Flexible and Plastex shared common directors and shareholders. Flexible took possession and control of the business of Plastex, including the assets, books and records of Plastex prior to its liquidation thereof. The self-same business continued as before from the same premises and in the same manner as before. Plastex dissipated its assets, including the assets which are the subject matter of this application, to Flexible, without any value and consequent upon collusion between Flexible and Plastex. Based on this information the applicant contends that the purported transaction between Plastex and Flexible whereby Flexible

purportedly acquired ownership of the assets of Plastex, is liable to be set aside in terms of the applicable provisions of the Act I have already referred to.

[10] The respondents attack the admissibility of the evidence referred to by the applicant as constituting inadmissible hearsay evidence which, it was further submitted, would in any event, be inadmissible against Flexible. In my view the objection is without foundation. The information was disclosed by Miller who was present at the enquiry. It extends well beyond Miller merely having expressed his own conclusions and opinions concerning the evidence, as counsel for the respondents would have it: the facts disclosed by Miller to the applicant, if accepted, clearly reveal the collusion referred to. Furthermore, the applicant states in its founding affidavit that its attorneys are in possession of the transcripts of the evidence adduced at the s 417 enquiry, which, it is further stated, confirm the information relayed to the applicant. The transcripts, although not annexed to the papers, have been made available for perusal which the respondents evidently did not avail themselves of. The applicant accordingly, intends seeking the permission of the Master to use those transcripts as evidence in the main proceedings. The Master has already given such permission albeit to different parties. There is no reason to believe that the applicant will not succeed in obtaining the necessary permission of the Master. The court, in any event, has the final say in this regard.

[11] I accept that the answers given by the witnesses at the s 417 enquiry will be admissible in the main proceedings against those witnesses only and not against Flexible (*Simmons NO v Gilbert Hamer and Co Ltd* 1962 (2) SA 487 (N)). But that, of course, would not disentitle the applicant in the main proceedings to call those witnesses to testify and answer questions *inter alia* concerning their evidence given at the enquiry. It is impossible and in any event undesirable, at this stage, to embark upon a prognosis of the effect this would or might have on the applicant's prospects of success in the main proceedings. Suffice to say, the *prima facie* indications of a collusion of the nature referred to by the applicant, although open to some doubt, are sufficiently clear to satisfy the *prima facie* right requirement for obtaining the relief sought in this application.

PREJUDICE

[12] Concerning prejudice, it is only necessary to consider and decide the liability and payment of the costs of the administration, thus far incurred by the respondents in regard to the sale and preservation of the assets. That those costs have in fact been incurred is not in dispute between the parties. In this regard the first respondent has filed a supplementary affidavit (which was not objected to) setting out all the necessary details concerning the assets, including what assets were sold at the auction, the proceeds derived from the sale, the assets encumbered where Standard Bank is a secured creditor, the assets subject to a rental agreement in favour of Compass Finance, the assets encumbered by security held by Sasol, the unencumbered assets, the costs relating to an agreement of lease and, finally, the costs in respect of security. I pause to mention that both Standard Bank and Compass Finance, although having been invited to join this application, have chosen not to do so.

[13] The administration costs as I have alluded to, have been incurred in respect of the assets. Those costs, accordingly, were necessary and incurred for the benefit of all parties. The same applies to the further costs that will be incurred pending the finalisation of the main proceedings. Counsel for the respondents submitted that the administration costs ought to be paid from the proceeds of the sale of the assets. I agree. The prejudice that the respondents would otherwise suffer outweighs any possible prejudice the applicant might suffer. The liability for payment of the administration costs, it must be emphasized, will remain, even if the applicant is successful in the main proceedings.

[14] In the result the following order is made:

1. The proceeds of the sale by the respondents of the assets at the auction held on 21 February 2012 are to be held in trust by the respondents' attorneys, subject to paragraph 2 below.
2. All administration costs, as referred to in the supplementary affidavit of the first respondent, dated 2 March 2012, are to be paid from the monies held in trust referred to in paragraph 1 above.

3. The order in paragraph 1 above is to operate as an interim order pending the outcome of an application *alternatively* action by the applicant in the name of the liquidators of Alfa Plastex (Pty) Ltd (in liquidation) in terms of section 32(1)(b) of the Insolvency Act 24 of 1936, against the first and second respondents as the liquidators of Alfa Flexible Packaging (Pty) Ltd (in liquidation), for relief declaring that the assets referred to in paragraph 1 above belonged to Alfa Plastex (Pty) Ltd (in liquidation) and for payment by the first and second respondents, as the liquidators of Alfa Flexible Packaging (Pty) Ltd (in liquidation), of the balance of the amount held in trust referred to in paragraph 1 above.
4. The application *alternatively* action referred to in paragraph 3 above must be instituted within 30 days of the date of this order.
5. The costs of this application are to be costs in the cause in the application *alternatively* action referred to in paragraph 3 above.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT

ADV L HOLLANDER

APPLICANT'S ATTORNEYS

PHILIP SILVER & ASS INC

***COUNSEL FOR RESPONDENT
& THIRD PARTY***

ADV E L THERON

RESPONDENT'S ATTORNEYS

SHAUN NEL & ASS

THIRD PARTY'S ATTORNEYS

MESSINA INC

DATE OF HEARING

9 MARCH 2012

DATE OF JUDGMENT

16 MARCH 2012