IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

APPEAL No: **A120/2022**

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

In the appeal of:

SUMEIL (PTY) LTD Appellant

and

COOGAL FINANCE (PTY) LTD (IN LIQUIDATION) First Respondent

KAREN FONTEIN N.O. Second Respondent

CORAM: MBHELE DJP *et* REINDERS J *et* LOUBSER J

HEARD ON: 20 MARCH 2023

DELIVERED ON: 14 JULY 2023

JUDGMENT BY: REINDERS J

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[1] On 26 August 2021 a single judge of this Division ordered the appellant (Sumeil (Pty) Ltd – “Sumeil”) to pay an amount of R 944 000-00 (nine hundred and fourty-four thousand rand) together with interest *a tempore morae* to the

respondent (Coogal Finance (Pty) Ltd (in liquidation) – “Coogal”). This order was granted pursuant to the respondent herein (being a company in liquidation), amongst others, having applied for the liquidation of the appellant’s estate and in the alternative judgment in money for the aforesaid amount. The application by the respondent for liquidation of the appellant’s estate was refused, but the monetary judgment prayed for, was granted. Reference to the parties will be as appellant and respondent, or Sumeil and Coogal interchangeably.

[2] The appellant sought leave to appeal against the monetary judgment but such leave was declined. Leave to this court was granted by the Supreme Court of Appeal.

[3] The appellant submitted that the trial court erred in finding that it was indebted to the respondent in the amount of R 944 000-00 together with interest at the deemed date of Coogal’s liquidation (“the deemed date”), that there was no evidence that payments made by a third party, namely the Maritz Nel Family Trust (“the trust”) to Absa Bank was made on behalf of the appellant to discharge its indebtedness to the respondent and that the appellant’s alleged indebtedness was not disputed on *bona fide* and reasonable grounds. It was suggested that the trial court failed to properly apply the principles enunciated in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** [1] and failed to adjudicate the matter on the aforesaid basis or put differently, that the court a quo should have adjudicated the matter on the version set out by the appellant in its answering affidavit together with such allegations in the founding affidavit which were not disputed. It was submitted that the trial court should have found as proven general ledger, the customer ledger, the master rental agreement transactions and the supplier ledger (attached to the papers) as averred by the appellant in its opposing affidavit and that on the deemed date, the respondent in fact owed the appellant an amount of R 1 227 906.83.

[1] 1984 (3) SA 623 (AD).

[4] The following paragraphs from the judgment by the trial court set out the backdrop to the subsequent finding for the monetary judgment appealed against (emphasis added):

> “[6] From the background sketched by the applicant and the respondent in the Founding and Answering Affidavits respectively, it emerges that over the years, **Coogal purchased vehicles which were financed by Absa Bank (Absa) in terms of instalment sale agreements**, and leased them…
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> [7] According to the respondent, in approximately 2012, Coogal concluded lease-to-buy agreements with a transport contractor (DP Botes Vervoer) in respect of all of its vehicles. **In terms of such an agreement the hirer has the option to acquire ownership of the hired vehicle at no cost, when the master rental agreement has run its course.** This, in effect, meant that Coogal was unable to service the needs of its short-term clients, **which led it to purchase four Volvo trucks**, ostensibly for the latter purpose. **Sumeil, being in the transport business, contracted with Coogal for transport services, and leased the four trucks from Coogal, in respect of which monthly payments were made by Sumeil to Coogal. Subsequently, in March 2016, Sumeil concluded a master rental agreement with Coogal in respect of each truck. These agreements were due to mature on 28 February 2019. Coogal was provisionally liquidated on 7 March 2019 and the order was made final on 11 April 2019. The application for the provisional liquidation of Coogal was filed in court on 4 February 2019, which was, therefore, the deemed date of liquidation**.”

The trial court considered the monetary claim and found at paragraph [28]:

> **"I deal now with the alternative claim in the Notice of Motion for the payment by Sumeil of the amount of R944 000.00, made up of the amounts I have set out in para 5 of this judgment. The amount of R185 000.00 has been admitted by Sumeil as owing by it to Coogal. The four balloon payments of R189 750.00 in respect of each Volvo truck was owing to Coogal at the date of liquidation, which has not been disputed by Sumeil. As I indicated, the payment of these amounts was made directly to Absa, instead of to Coogal in terms of the master rental agreement, by the Family Trust who is the sole shareholder of Coogal, and not by Sumeil. Although the latter claims that such payment was made on its behalf, there is no supporting evidence to this effect. These payments were made some two weeks after the date of liquidation, so it does not fall to be taken into account. In my view, the payments by the Family Trust did not extinguish Sumeil's indebtedness to Coogal. It may well be that the Family Trust's recourse is to recover the money from Absa."**

[5] That the deemed date of Coogal's liquidation was 4 February 2019, is common cause. So was the master rental agreement concluded between Sumeil and Coogal and the terms recorded therein (as attached to the papers). In respect hereof Sumeil would pay monthly instalments for a fixed period, with a final payment of R 165 000 (excluding VAT) for each of the four trucks being due and payable on 28 February 2019 (the "final balloon payment"). On appellant's own version the trust, as its only shareholder, was utilised to make four payments to Absa on 18 February 2019 in respect of the loan agreements concluded between Absa and Coogal for financing the four trucks. The proofs of payments attached evidenced that these payments were made some two weeks after the deemed date.

[6] I find it apposite to deal with the trite principles applicable in respect of the matter at hand. A *concursus creditorium* is established upon the court

granting of an order/provisional order of liquidation, and a debtor cannot burden the estate any further.[2] No transactions, apart from those legally sustainable, which would lead thereto that the estate assets are diminished or the rights of other creditors are prejudiced, may hereafter be effected.[3] Any disposition not sanctioned by a court after the deemed date, is void.[4] Unless mutuality of respective claims existed at the time of liquidation, no set-off can take place.[5] The required mutuality is the existence of reciprocal debts which had to be liquidated and payable before the establishment of the *concursus creditorium*[6].

[7] Appearing for the appellant, Mr Zietsman SC argued that the trial court erred in finding that Sumeil did not dispute its indebtedness to Coogal in respect of the four balloon payments of R 189 750.00 as per the terms of the master rental agreement. According to him, as averred in Sumeil's answering affidavit and the annexed financial statements, on a calculation of the reflected amounts owed to Sumeil by Coogal, and *vice versa*, Coogal was in fact indebted to Sumeil in the amount of R 1 227 906.83 at the deemed date. It therefore is of no significance, so his argument went, whether payments by the trust to Absa were made after the deemed date as Sumeil was not indebted to Coogal in the amount of R 944 000.00 or on the latter date.

[8] Mr Kruger SC on behalf of Googal, submitted the trial court did not err in its finding that Sumeil could not dispute its indebtedness to Coogal on *bona fide* grounds as no documentary evidence was placed before it to prove that payments were made on behalf of Sumeil. Moreover, the master rental agreement contained no clause requiring Sumeil to repay the bank in any way whatsoever. He argued that there was simply no evidence before the court a quo indicating any means of transferring the responsibility for payments in terms of the various agreements (including set-off or transfer) or that of a cession taking place before the deemed date. Even should the

[2] ***Fairleigh NO Whitehead and Another*** *2001(2) SA 1197 (SCA) (29 September 2000).*
[3] ***Ward v Barrett NO and Another [****1962] 4 All SA 557 (N).*
[4] See ***Pride Milling Company (Ltd) v Bekker NO and Another*** *[2021]4 All SA 696 (SCA)* for a comprehensive discussion in respect of void dispositions.
[5] ***Thorne and Another NNO v The Government*** *1973 (4) SA 42 (T).*
[6] ***Richter NO v Riverside Estates (Pty) Ltd*** *1946 (OPD) 223-224****.***

aforementioned have been agreed upon, so the submission went, it would have been unlawful as same would have the effect of preferring one creditor over the others.

[9] On appeal before us it was not submitted that the trial court misdirected itself to the facts. It was rather submitted that the trial court came to the wrong conclusion and as mentioned, did not properly apply the principles in ***Plascon- Evans***. In ***Pillay v Krishna*** [7] it was held that the onus is on the party who avers payment and, if he fails to satisfy the court that there is a sufficiently strong balance of probabilities in his favour, judgment will be given to the claimant.

[10] The court a quo had due regard to the Sumeil's version and applied the ***Plascon-Evans*** principle. It however found that the appellant placed insufficient evidence before it to prove that the trust paid the amount in respect of these particular debts which it found existed at the deemed date of liquidation. I am not convinced by any means that the court a quo erred in its findings. On the contrary, I am satisfied with the conclusions reached by the court a quo. In my view Coogal succeeded in showing that the appellant owed it the judgment amounts at the deemed date. A duty was therefore cast upon appellant to adduce cogent and sufficient evidence in rebuttal.

[11] A final, and in my view insurmountable, obstacle to the appellant's case is that the payments upon which it relies made by the trust to Absa, were made after the deemed date. There can be no dispute that such payments were void *ab initio* (and was most certainly not declared to be valid in the exercise of a court's discretion) as was held in ***Pride Milling*** supra. The appellant's indebtedness to the respondent was in my view not extinguished.

[12] For the above reasons I am satisfied that there is no merit in the appeal and that the appeal ought to fail.

[7] 1946 (AD) 946 at 953.

[13] Apart from the monetary judgment against Sumeil, the court a quo ordered Sumeil to make payment of interest on the ordered amount *a tempore morae* and ordered it to pay thirty percent of the costs of the application. In granting leave to appeal against these orders, the Supreme Court of Appeal set aside the cost order of the court a quo in dismissing the application for leave to appeal and ordered the costs of the application for leave to appeal both to the Supreme Court and court a quo, to be costs in the appeal. There is no reason why cost should not follow the event.

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

The appeal is dismissed with costs, such costs to include the costs of the applications for leave to appeal both to the supreme Court of Appeal and to the court a quo.

C. REINDERS J

I concur.

N.M. MBHELE DJP

I concur.

P.J. LOUBSER J

On behalf of the appellant:	Adv PJJ Zietsman SC
Instructed by:	MULLER GONSIOR INC BLOEMFONTEIN
On behalf of the respondents:	Adv TP Kruger SC
Instructed by:	JACO ROOS ATTORNEYS INC c/o NOORDMANS INC BLOEMFONTEIN