

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

Case No.: 1607/2013

In the matter between:

QUATROTECH CC

APPLICANT

and

MAGISTRATE C. NEYT

1st RESPONDENT

RUBNIC OIL (PTY) LTD (in liquidation)

2nd RESPONDENT

CORAM:

MOLOI , J

HEARD ON:

06 FEBRUARY 2014

DELIVERED ON:

27 FEBRUARY 2014

JUDGMENT

[1] This is a review in terms of Rule 53 of the Uniform Rules of Court against the refusal by the Magistrate, Sasolburg, to allow the applicant's claim under the provisions of section 151 of the Insolvency Act No 24 of 1936 submitted for approval at a special meeting of creditors in the insolvent estate of the second respondent held on 18 February 2013. This court is approached to review and set aside the magistrate's ruling and order that the applicant's claim is properly proved and that the costs be costs in the winding up of the second respondent, alternatively be paid by an unsuccessful party to these proceedings.

[2] The applicant submitted a claim as required by section 44(4) of the Insolvency Act No 24 of 1936 in a form of an affidavit to which was attached two tax invoices for consideration by the magistrate, the first respondent. The invoices were for goods sold and delivered by the applicant to the second respondent which was liquidated by the applicant. The affidavit stated:

“1. That Rubnic Oil (Pty) Ltd... in terms where ownership of the goods were reserved in favour of the creditor....

(5) That I, the said Pieter Willem Bronkhorst has not, nor has any other person, to my knowledge on my received any security for the said debt or any part thereof, except for reservation of ownership in terms of section 84 of the Insolvency Act. We solely reply (sic) on this proceeds of the goods sold as per annexure A.”(sic).

Annexure A is a tax invoice on which, under the address of the second respondent, the following words were endorsed in clearly different typestyle “All equipment installed stays our property until fully paid.” The same appears on Annexure B though the amounts differ as a charge for services rendered was deleted in Annexure A.

[3] The first respondent rejected the claim and noted:

“ die eis behoort verwerp te word op grond van geen bewys van eiendomsreg voorbehou en daar is geen sekuriteit waardeer nie. Eis 5 verwerp.”

The applicant argued that the magistrate erred in rejecting the claim as she had merely to look at the applicant’s evidence that the goods were installed and ownership thereof was retained and not go into the other evidence to prove a claim as one would do in the court of law. This argument was based on the decisions in **Aircondi Refrigeration (Pty) Ltd v Ruskin N.O and Others** 1981 (1) SA 799 (W) at 803 – 4 and **Cachalia v De Klerk N.O and Benjamin N.O** 1952 (4) SA 672 (T) at 675 E- F. The magistrate, so it was argued, had to decide the validity of the claim merely on the face of it without regard to any extrinsic evidence. As to the second part of the rejection of the claim it was argued that it was clear where reference was made to the retention of ownership, that the proceeds of the sale of the goods was the only security the appellant had, and that what

the amount of the security would be, could only be determined when the goods were sold.

- [4] The applicant's claim is thus based on the goods sold to the second respondent wherein the ownership thereof was reserved until fully paid for. Those goods thus constituted the applicant's security. The applicant relied on the proceeds of those goods as contained in the sale invoice. On the same invoice the applicant had also abandoned the remainder of the claim made up of services rendered leaving the amounts on annexures A and B different.
- [5] In its opposition of the review proceedings the second respondent contended that the invoices attached to Section 44(4) affidavit were more than three (3) years old and could therefore not suffice to establish ownership of the goods; the applicant stated categorically on oath that it held no security for the payment of the debt in the liquidation proceedings it instituted against the second respondent; that the invoice it attached to the founding affidavit in those proceedings had no endorsement retaining the ownership of the goods and that such endorsement on Annexures A and B of the section 44(4) affidavit was done ex post facto. The second respondent further contended that the failure by the applicant to provide the evaluation of the security was fatal to its claim and that the magistrate was consequently entitled to reject the claim.

As regards the proceedings in the liquidation of the second respondent, the applicant argued that they should not be considered in this review as the liquidation proceedings did not form part of the section 151 enquiry held by the magistrate, but were raised only in the review proceedings before this court. As to why, in the liquidation proceedings the applicant stated on oath that it held no security for the claim it was contended that the applicant was a lay person who cannot be expected to know the implications of what is contained in the affidavit he deposed to and that such evidence was extrinsic and inadmissible in the determination of a valid claim against the second respondent.

- [6] During the hearing I enquired if this court can ignore the discrepancies regarding the reservation of ownership evidenced in the invoice used in support of the liquidation proceedings and those used in support of the claim in terms of section 44(4) of the Insolvency Act. I could not be provided with a cogent answer. I also enquired whether reservation of ownership was not a matter of agreement/contract and not merely an endorsement of the reservation clause and, in particular, under the address of the second respondent on the invoice. It was conceded that in the normal course of events, reservations of ownership were a matter of agreement/contract. No other document suggesting the existence of such an agreement was placed before the magistrate nor this court.
- [7] The genuineness of the applicant's claim is questionable on at least two grounds. Firstly, there is no indication nor averment that the

second respondent knew about and agreed to the alleged reservation of ownership of the goods installed in its place of business. Such an arrangement forms an integral part of the agreement of sale. No such agreement could be produced nor referred to. **Marendaz v Smuts**, 1966 (4) SA 66 (T) at 73A. Secondly, the endorsement of the reservation clause at the most unlikely place on the invoice, viz under the second respondent's address must raise many eye brows as it cannot be seen to be authentic. In **The New Shorter Oxford English Dictionary**, Clarendon Press- Oxford 1993 edition an "invoice" is described as "*A list of items or goods sent or services performed, with a statement of the sum due.*" In practice those are the *essentialia* of an invoice and it is generally accepted as such. The reservation clause could not be part of an invoice and the magistrate was entitled to reject the claim on that score alone. The applicant's miseries did not end there. Section 44(4) requires that where security is alleged to be held, the nature and particulars of that security "*and the amount at which the security is valued by the creditor*" be provided. **BOE Bank Ltd v Bassage**, 2006 (5) SA 33 (SCA) at 36 D-E. The failure of the applicant to provide the information regarding the value of the security held amounts to non-compliance with the requirements of section 44(4) of the Insolvency Act and entitled the magistrate to reject the claim as a consequence: **Marendaz v Smuts, supra**. The argument that the proceeds of the items held as security would determine the value of the security is misplaced. The section is very clear viz the creditor and not the sale of the security must state the value of the security.

[8] I do not need, for purposes of this review application, refer to the same invoice used by the applicant in support of its liquidation of the second respondent. What becomes clear, however, is that the applicant is not honest with the court and its modus operandi leaves much to be desired. This glaring inconsistency and discrepancy is not explained. It also needs to be noted that the sworn statement made in the liquidation proceedings that the applicant did not hold security for the debt is dangerously mischievous. The fact that the deponent is a lay person is the shallowest of all explanations under the sun. It also needs to be noted that the deponent of the section 44(4) affidavit is not the person authorized to institute these proceedings as the powers were given to one Philippus Petrus Bronkhorst by, inter alia, the selfsame Pieter Willem Bronkhorst who deposed to the section 44(4) affidavit.

[9] In the premises the following order is made:

- 1. The review application is dismissed.**
- 2. The applicant is ordered to pay the costs on an attorney and client scale.**

K. J. MOLOI, J

On behalf of the applicant: Adv. H van Twisk
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of 2nd respondent: Adv. HP van Nieuwenhuizen
Instructed by:
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