

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 1771/2012

In the matter between:

ENGEN PETROLEUM LIMITED

Applicant

and

MR ROBERT HOWARD
VAN LOGGERENBERG NO

1st Respondent

MRS PETRONELLA FRANCINA
VAN LOGGERENBERG NO
(HJP TRUST (IT1876/1996))

2nd Respondent

JUDGEMENT: MTHEMBU, AJ

HEARD ON: 16 AUGUST 2012

DELIVERED ON: 20 SEPTEMBER 2012

INTRODUCTION

[1] On 17 May 2012 this court granted a provisional sequestration order calling upon the respondents to show cause why a final order of sequestration should not be granted winding up the estates of the respondents and placing them in the hands of the Master of the High Court, Free State Province.

- [2] The rule *nisi* was issued against the HJP Trust (“the trust”) (IT1876/1996) as represented by the respondents in their official capacities as trustees of the trust.
- [3] On 2 August 2012 the rule *nisi* was by agreement of the parties extended to the 16 August 2012 in order to afford the applicant the opportunity to file a replying affidavit with an application for condonation.
- [4] On 8 August 2012 the applicant filed its replying affidavit together with an application for condonation. The respondents did not oppose the condonation application and same was granted by this court at the hearing of this application.

SERVICE OF THE APPLICATION

- [5] Mr Snyman argued on service of the rule *nisi* to the respondents that same was only served by the sheriff of the court only on 15 August 2012, the day before the hearing of this matter, as per the supplementary index to an address different to where the application was served on respondents.

- [6] In respect of the service thereof, he argued that the applicant in its founding affidavit makes the averment that the chosen *domicilium* of the respondents is number 3 Hoop Street, Ferreira, Bloemfontein. However nowhere in its founding papers is it alleged on what basis the applicant avers that this is the chosen *domicilium* of the respondents.
- [7] One can only suspect that the applicant got the above address from the EDC membership application (annexure “C” of the founding papers) concluded by the applicant and the trust on 1 June 2004.
- [8] Mr Snyman argued that it must be borne in mind that the EDC Agreement was valid for thirty six (36) months and any amendment thereto had to be signed by both the parties. Neither the respondents nor the trust ever rekindled this agreement with the applicant on the expiration thereof during May 2007.
- [9] The respondents therefore on behalf of the trust deny that number 3 Hoop Street, Ferreira is either their chosen

domicilium nor that of the trust. The situation is that right through the respondents were absent at the alleged *domicilium*.

[10] That the respondents were absent at the alleged *domicilium* is confirmed by the return of service in that there was no personal service of the application on the respondents as alleged by applicant, instead the sheriff served same by affixing it on the door of the alleged *domicilium*. The supplementary return of service index also confirms this as the rule *nisi* was served by the sheriff at number 160 Klaradyn Avenue, Pellisier, Bloemfontein.

[11] As far back as May 2011, the respondents conveyed to the applicant that they intended to sell the properties situated at number 3 Hoop Street, Ferreira, Bloemfontein. Therefore at the time of service of the application, applicant knew that the respondents will probably not be at this address as the properties would most likely have been sold.

[12] The applicant concedes in its replying affidavit that the EDC Agreement ceased after thirty six (36) months.

[13] Mr Snyman argued that no proper notice of this application was given to the respondents and he relied on T & H SHAPIRO (PTY) LTD v PRINS 1982 (3) SA 41 (SWA) at 42B and MCKAY v CAHI 1962 (4) SA 193 (O), where the court held that notice of a sequestration application must be given to the respondent.

[14] Mr Snyman averred that he is not sure if the issue of service was mentioned to the court when the applicant obtained the rule *nisi*, and this shows the underhand manner in which the applicant obtained the order.

[15] He maintained that the applicant has not overcome the first hurdle of service of the papers on the respondents and on this aspect alone the rule *nisi* should not be confirmed.

WERE THE RESPONDENTS CREDITORS OF THE APPLICANT?

[16] Mr Snyman argued that the applicant based the debt owed to it on an acknowledgement of debt signed by the close

corporation HJP Vervoer during February 2011 and on this acknowledgement of debt the close corporation was sequestrated. “page 52” annexure “D” of the founding papers.

[17] He argued that in March 2011 the applicant on its own statements of account, (annexure HJP 14) was dealing and supplying diesel to a close corporation and on page 171, paragraph 7 of the founding papers, the applicant admits it in its statements of account annexures HJP 1 to HJP 14 addressed to the close corporation. When the EDC Agreement lapsed in 2007 and since then the trust did not do business with the applicant.

[18] Mr Snyman argued that it is trite law that in terms of the Insolvency Act, 24 of 1936, the applicant must show that it has a liquidated claim of at least R100,00 against the trust.

[19] However, even if one were to accept that the trust committed acts of Insolvency, does the applicant have a liquidated claim of R100,00 against the trust?

[20] The EDC Agreement was used to support the certificate of balance, as per paragraph 12 of applicant's founding affidavit, it is therefore clear that applicant's claim is based on the EDC Agreement (annexure "C" of the founding affidavit).

[21] He argued that in terms of the EDC Agreement the approved bank issues cards or tokens on behalf of the applicant (paragraph 19.2 of applicant's founding affidavit) then each month the issuing bank will send to the trust, one or more statements pertaining to general transactions carried out by the trust utilising EDC Cards, the trust will then make payment to the issuing bank of the balance reflected in the statement (paragraph 19.3 of the founding affidavit). How then would the debt vest in the applicant when the trust will make payment to the bank?

[22] Mr Snyman argued that the applicant has not shown that it is a creditor of the trust. All that the trust has to do is to show that it has *bona fide* disputed the applicant's claim on reasonable grounds. In this regard he relied on

BADENHORST v NORTHERN CONSTRUCTION

ENTERPRISES (PTY) LTD 1956 (2) SA 346 TPD at 349D

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WERE THE RESPONDENTS CREDITORS OF THE APPLICANT?

[23] Mr Zietsman argued that there was a dispute as to which entity is indebted to the applicant. The close corporation is now made the scapegoat.

[24] On 24 May 2011 annexure “J” of the founding affidavit, the trust’s attorneys wrote to the applicant and stated that the trust was willing to pay R900 000.00, and further that the applicant will receive the sum of R1,6 million from the sale of certain immovable property by the respondents. Why then would the respondents offer to pay from the proceeds of the immovable property? The answer is because they are sureties on behalf of the trust. This further confirms the settlement proposals made on 4 May 2011.

[25] The memorandum of agreement for admission of liabilities and breach, page 73 annexure “K2” of the founding affidavit was prepared in pursuance of the above.

[26] If the liability of the close corporation was limited to the acknowledgement of debt then the trust is liable for the balance. The court can therefore reject the respondent's disputed liability on the papers alone.

[27] The trust makes no indication who its debtors for the R900 000,00 are. He says the *onus* is on the trust to prove its solvency and without such proof, the exercise of the courts discretion on the basis of the trust's alleged solvency is precluded. He relied on **DE WAARD v ANDREW & THIENHAUS LIMITED** 1907 TS 727 at 733.

[28] Mr Zietsman argued that the certificate of balance makes it a liquidated claim and referred to **METJE & ZIEGLER v CARSTENS** 1959 (4) SA 434 (SWA).

[29] He argued that in terms of the EDC Agreement neither the applicant nor the approved bank become parties to any of the retail transactions in respect of the purchase and delivery of diesel fuel. Instead the approved bank settles

the retailer, the applicant in turn settles the approved bank, alternatively, becomes liable to the approved bank and the trust further in turn becomes liable to the applicant for having settled or having become liable to the approved bank.

[30] He argued that the sequestration of the trust will be to the advantage of creditors.

[31] In reply Mr Snyman argued that there are three points that the court should consider and they are the following:

31.1 The first issue is the interpretation of the EDC contract. In terms of paragraph 19.3 of the founding affidavit, it is the trust that makes payment to the bank;

31.2 The **DE WAARD** matter says that the *onus* is on the respondent to go further when it says I am not insolvent. The respondents dispute that the applicant is one of its creditors.

31.3 The respondents' attorney in an email to the applicant's attorney dated 3 August 2011 already in paragraph 2 thereof stated:

“It is not clear to whom diesel were supplied to after the signature of the AOD and how all the parties and/or entities are getting involved in each others business.”

Page 92 of the papers.

31.4 On page 70 of the papers in another letter from the respondents’ attorney to the applicant’s attorney dated 24 May 2011, in the second last paragraph thereof it is recorded that:

“We confirm this letter should not be regarded as an AOD, we reserve our client’s right.”

31.5 As per page 143 paragraph 29, the respondents maintain that their intervention as husband and wife to try and settle the debt of the close corporation cannot mean that the petroleum products were delivered by the applicant to the respondents and/or the trust and that anyone of the three or jointly were now the debtors in place of the close corporation to whom such delivery was made and which owed money to the applicant.

31.6 The amount of R900 000,00 that was offered, was offered for the close corporation and not for the trust. (annexure “F”, page 63 of the papers).

31.7 He argued that even the letter on page 59 of the papers from the applicant's attorney is addressed to HJP Vervoer and not HJP Trust. The former is the close corporation

THE APPLICABLE LAW

[32] The applicant brought this application in terms of section 10(b) of the Insolvency Act, 1936 (p8).

[33] Section 10(b) provides that:

“If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* –

- a) ...
- b) The debtor has committed an act of insolvency or is insolvent; and
- c) ...

It may make an order sequestrating the estate of the debtor provisionally.”

[34] Section 12 of the above Act provides that:

“(1) If at the hearing pursuant to the aforesaid rule *nisi* the court is satisfied that:

- a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
- b) the debtor has committed an act of insolvency or is insolvent; and
- c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated.

It may sequester the estate of the debtor

(2) If at such a hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*.”

[35] Section 9 of the above act provides that:

“(1) A creditor (or his agent) who has a liquidated claim for not less than R100,00 or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than R200,00 against the debtor who has

committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.

2) ...

3) ...”

[36] I proceed to consider whether the trust is indebted to the applicant in the liquidated amount of R2 716 933,13 together with interest thereon *a tempore morae* (p9) and that such indebtedness arises out of the EDC Agreement concluded during June 2004 (p10).

[37] The salient terms of the EDC Agreement are that it was valid for thirty six (36) months (p41) and came to an end during May 2007 (p178). Any amendment to this agreement was to be signed by both parties (p40). The agreement was never reviewed (p138). Further hereto the applicant uses the EDC Agreement to support the certificate of balance (p10). What can be gleaned from the papers is that post the lapse of the EDC Agreement the close corporation “acquired” the business of the trust. How this was done is not the subject of this application. What is clear is that the applicant then supplied diesel fuel to the

close corporation until March 2011. This is confirmed by a statement from the applicant to “HJP Vervoer BK” dated 30 September 2011 (p154 – 166). The applicant further signed an acknowledgement of debt with the close corporation (in terms whereof the latter was liquidated) on the 3rd February 2011. These factors then confirm the trust’s denial of having done business with the applicant post 2007 when the EDC Agreement lapsed. Logically therefore, the trust could not have been indebted to the applicant post 2007.

[38] It is trite law that to succeed the applicant must show that it has a liquidated claim against the trust of at least R100,00.

[39] Although the applicant as stated above has submitted that its claim is based on the EDC Agreement, it relies on an unsigned admission of liabilities and breach (p73) to prove acts of insolvency against the trust as well as an e-mail (p92) from the trust’s attorneys, wherein the latter informs the applicant’s attorney that it is his client’s intention to settle the matter and are still willing to discuss a way in

which this can be settled. However, it is unclear from this correspondence on whose behalf it was written viz the close corporation or the trust.

[40] Whether the applicant had a liquid claim against the trust and the trust was its creditor is further negated by the applicant itself where it submits as follows:

40.1 The issuing bank shall mean the approved bank which issues EDC Cards to the trust on behalf of the applicant (p13. para 19.2);

40.2 Each month the issuing bank will send to the trust one or more statements pertaining to general transactions carried out by the trust utilising EDC Cards (p13, para 19.3);

40.3 The trust will make payment to the issuing bank of the balance reflected in the above statement.

[41] Based on the above I cannot find that the applicant has a liquidated claim against the trust because the trust was not a creditor of the applicant, even if it could have been proven that the trust committed acts of insolvency.

[42] An application to sequester the estate of a trustee just like in liquidation proceedings, should not be resorted to enforce the payment of a debt which is *bona fide* disputed by the respondent. Compare **BADENHORST v NORTHERN CONSTRUCTION ENTERPRISES (PTY) LTD** 1956 (2) SA 346 (T). I am of the opinion that in *casu* the respondents have *bona fide* disputed the applicant's debt.

[43] In the premises, I am not prepared to confirm the rule *nisi* and make the following order:

ORDER:

The provisional order of sequestration is discharged with costs.

J. B. MTHEMBU, AJ

On behalf of the applicants:

Adv. P J J Zietsman
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of the respondents:

Adv. C Snyman
Instructed by:
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