



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

SIGNATURE

DATE: 11 November 2024

Case No. A24/048690

In the matter between:

**BIDVEST BANK LIMITED**

Appellant

and

**WASTE PARTNER INVESTMENTS (PTY) LTD**

Respondent

CORAM: WINDELL J, WILSON J AND MITCHELL AJ

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**JUDGMENT**

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**WILSON J (with whom WINDELL J and MITCHELL AJ agree):**

- 1 The appellant, Bidvest, financed the sale of six vehicles to the respondent, WPI, in terms of an instalment sale agreement. WPI's sole executive director, Mr. Moeng, stood as guarantor of WPI's performance under the agreement. WPI defaulted on the agreement and, on 15 March 2021, Bidvest obtained judgment against Mr. Moeng and WPI, jointly and severally, for payment of

the full amount outstanding under the agreement, together with interest and costs.

- 2 Bidvest was, however, unable to obtain payment of the judgment debt from either WPI or Mr. Moeng. Nor was Bidvest able to secure the return of the vehicles financed under the agreement. Accordingly, Bidvest launched proceedings for WPI's liquidation. It also sought Mr. Moeng's sequestration.
- 3 It was ultimately unnecessary either to sequester Mr. Moeng or to liquidate WPI, because the full debt owing under the instalment sale agreement, including interest, was paid on 29 August 2022. Bidvest nonetheless persisted in both the liquidation and sequestration applications for the sake of obtaining its costs. In both applications, Bidvest sought costs on the attorney and client scale. A punitive order of this nature was said to be justified because WPI and Mr. Moeng had conducted themselves frivolously and vexatiously in seeking to frustrate execution on the original judgment debt, and in seeking to delay the hearing of the liquidation and sequestration applications, chiefly by taking points that were transparently without merit.
- 4 On 5 September 2022, Bidvest's attorneys offered to withdraw the liquidation application provided that WPI tendered its costs. It is not clear whether Bidvest wanted its costs tendered on the attorney and client scale, or the party and party scale, but there is in any event no evidence on the record of a response to its offer to withdraw the liquidation application.
- 5 On 9 September 2022, the sequestration application came before Mohamed AJ. Bidvest confirmed that it did not persist in the sequestration relief, but it

sought and obtained an order against Mr. Moeng for the costs of that application on the scale as between attorney and client.

- 6 Bidvest then pressed on with its liquidation application, again purely for the purposes of obtaining its costs on the scale as between attorney and client.

### **The hearing of the liquidation application**

- 7 That application came before Vally J on 17 January 2023. On 23 April 2023, Vally J dismissed the liquidation application with costs. The gravamen of his decision was that Bidvest had engaged in what Vally J called “luxurious” litigation, by choosing to launch two separate applications – one for WPI’s liquidation and one for Mr. Moeng’s sequestration. Vally J criticised this decision by pointing out that the motive behind both applications was really to secure the payment of the judgment debt. That objective had been achieved shortly before the hearing of the sequestration application. It was, in Vally J’s view, neither just nor fair to saddle WPI with the consequences of Bidvest’s election to escalate costs by pursuing the two applications separately.

- 8 Bidvest then sought leave to appeal against Vally J’s decision to order costs against it, and his refusal to award costs on the attorney and client scale against WPI. It appears from the judgment on the application for leave to appeal that Vally J’s attention had not initially been drawn to a line of authority in this division which holds that it is generally not competent to join two or more debtors in liquidation or sequestration proceedings. This is because the respondents’ shareholders, assets and creditors are likely to be different, and because it is unfair and inappropriate to drag creditors of one respondent into proceedings for the liquidation or sequestration of another (see, for example,

*Ferela (Pty) Ltd v Craigie* 1980 (3) SA 167 (W), at 171B to 172F). Bidvest argued that to seek sequestration and liquidation relief against WPI and Mr. Moeng in the same proceedings would have fallen foul of that rule. It also pointed out that the statutory regimes applicable to liquidation and sequestration proceedings are different, which was an additional reason not to proceed against WPI and Mr. Moeng in the same case.

- 9 However, in his judgment dismissing the application for leave to appeal, Vally J pointed out that there is no hard and fast rule against joinder of debtors and causes of action in sequestration and liquidation proceedings. There are exceptions to the rule in instances where the respondents have agreed to be joined in one application, or where there is an identity, or at least a substantial coincidence, of interests between them (see *Breetveldt v Van Zyl* 1972 (1) SA 304 (T) at 314F-G, *Business Partners Ltd v Vecto Trade 87 (Pty) Ltd* a 2004 (5) SA 296 (SE) (“*Business Partners*”), paragraph 34, and, generally, *Strufast (Pty) Ltd v Uys* 2017 (6) SA 491 (GJ) (“*Strufast*”). The question is accordingly whether there is a sufficient identity of interests between the respondents sought to be joined (see *Brack v Front Runner Racks* 2000 (Pty) Ltd 2011 JDR 0429 (GSJ), paragraph 22). The cases on joinder in liquidation and sequestration proceedings do not seem to explore what counts as an identity of interests in much detail. There is also equivocation in the cases about the extent to which a set of debtors’ interests must align before it is appropriate to join more than one of them in the same proceedings (compare, for example, *Business Partners*, paragraph 34 with *Strufast*, paragraphs 12, 14 and 35).

- 10 Vally J nonetheless appears to me to have found an identity of interests in the fact that both the liquidation and sequestration proceedings in this case arose from the same judgment debt, for which Mr. Moeng and WPI were held jointly and severally liable, and in the fact that Mr. Moeng is the sole shareholder of WPI.
- 11 Vally J went on to emphasise that there was really only one reason to bring both the sequestration application and the liquidation application, which was to secure full payment of the judgment debt. Given that this was achieved before the sequestration application was called before Mohamed AJ, who granted an attorney and client costs order against Mr. Moeng, Vally J persisted in his view that it was inappropriate to proceed against WPI for a further punitive costs order. It seems clear from both of Vally J's judgments that he considered that Bidvest had already extracted what he called its "pound of flesh" (see Vally J's judgment on the main application, paragraph 4), and that the pursuit of attorney and client costs in the liquidation application was gratuitous.

### **The appeal**

- 12 Bidvest then approached the Supreme Court of Appeal, which granted leave to appeal to this court against Vally J's order. We must, however, approach the appeal with caution. In ordering Bidvest to pay WPI's costs in the liquidation application, Vally J exercised a discretion in the true sense. This means that we are not at liberty to set Vally J's order aside if, and simply because, we think it is wrong. We must rather be satisfied that a higher standard of appellate review has been reached: viz. that Vally J's order was

not one of the range of reasonable and equally permissible options available to him in exercising his discretion; or that Vally J's discretion was exercised capriciously; or that it was tainted by a misconception of fact; or that it was exercised under a mistake of law (see *Trencon Construction (Pty) Ltd v Industrial Development Corporation* 2015 (5) SA 245 (CC), paragraphs 85 to 89 and *Hotz v University of Cape Town* 2018 (1) SA 369 (CC), paragraph 25).

13 It seems to me that we cannot be convinced of this.

14 In the first place, I agree with Vally J that the pursuit of attorney and client costs in the liquidation application was gratuitous, especially in circumstances where the debt had been paid and Bidvest had obtained an attorney and client costs order against Mr. Moeng in the sequestration proceedings well before the liquidation application was pressed to a hearing.

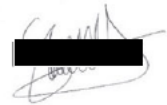
15 Moreover, although Vally J did not expressly say so, he clearly thought that there was the substantial identity of interests between WPI and Mr. Moeng that the applicable case law requires. Bidvest's written and oral argument before us was notably bald on that point. Bidvest submitted in its written argument merely that it was unable to make an assessment as to the relationship between WPI's and Mr. Moeng's interests. Pitched at that level of generality, the submission is obviously incorrect, since Bidvest clearly knew that Mr. Moeng and WPI were jointly and severally liable for the judgment debt on which Bidvest founded its liquidation and sequestration applications. That seems to me to amount, at the very least, to a substantial coincidence of interests.

- 16 Speaking for myself, I would not have ordered Bidvest to pay WPI's costs, because I think that Bidvest was reasonable in issuing separate applications for WPI's liquidation and for Mr. Moeng's sequestration. The mere fact that, as Vally J pointed out, the applicable law left open the possibility of joining the two causes of action against WPI and Mr. Moeng in the same proceedings does not, in my view, mean that Bidvest should have to pay the costs of the liquidation proceedings. Notwithstanding the apparent proximity of interest between WPI and Mr. Moeng, and the fact that both sets of proceedings sprang from the same judgment debt, Bidvest made its decision to pursue two separate applications in the expectation that it would be criticised for joining the two respondents and the two causes of action in the same proceedings. Even though it may have been competent to join the sequestration and liquidation proceedings, it seems harsh to me that Bidvest should be punished for adopting a different but reasonable course of action.
- 17 However, the question is not how I would have exercised the discretion that Vally J possessed. It is whether Vally J's particular exercise of that discretion was reasonably open to him, free of caprice, and untainted by material factual or legal error. I believe that it was. It would have been different if there were a firm rule against joining different debtors or causes of action in sequestration or liquidation proceedings no matter what the circumstances. But the applicable law is that such joinder is competent either where there is consent, or where there is an identity, or near identity, of interests between the respondents. Indeed, it has been held that joinder of debtors and causes of action is the more appropriate course to take where, as here, the debtors'

liability for an underlying judgment debt is joint and several (see, for example, *Kirkwood Garage (Pty) Ltd v Lategan* 1961 (2) SA 75 (E), at 76G-77A).

18 The more fundamental point, though, is that Bidvest did nothing before us to show why the facts Vally J found did not permit him to form the reasonable expectation that Bidvest would join its causes of action against Mr. Moeng and WPI in the same proceedings, on the basis that their interests were essentially identical. While I would not myself have criticised Bidvest for failing to join the causes together, I cannot say that Vally J's criticism was unreasonable, or legally or factually misguided in any material sense.

19 The appeal is dismissed with costs.



**S D J WILSON**  
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 11 November 2024.

HEARD ON: 30 October 2024

DECIDED ON: 11 November 2024

For the Applicant: AAR Marques  
Instructed by Du Toit Sanchez Moodley Inc

For the Respondent: RV Mudau  
Instructed by Makuta Attorneys