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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 056043/2023

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

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SIGNATURE
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DATE
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In the matter between

DEON MARIUS BOTHA N.O.

FIRST APPLICANT

JOCHEN ECKHOFF N.O.

SECOND APPLICANT

VIMBIAI ANGELA TSOPOTSA N.O.

THIRD APPLICANT

and

MARIANNE VAN DER MERWE N.O.

FIRST RESPONDENT

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 17 April 2025.

JUDGMENT

MALI J

- [1] The applicants seek an interim interdict against further alienation of an aeroplane pending the institution of an action to set aside the sale of an aircraft known as Beechcraft A 36 with registration mark ZS-NFC with serial number E[...] (Beechcraft). The application is brought by the applicants in their official capacity as Insolvency practitioners and co-liquidators of the Project Multiply (PM). Beechcraft was registered in the name of PM. The respondents are cited in their capacity as trustees of Ronnie van Der Merwe Trust (the Trust).

Background

- [2] It is not in dispute that PM together with Velvetcream 15 (Pty) Ltd (in liquidation) (Velvet), the Merwede Trust ("Merwede Trust"), and its sole director at the time, being Mr. Carel Aron Van Der Merwe ("Van Der Merwe"), operated on the same properties, shared employees and movable assets. Its activities are interrelated and were further managed as one organization. PM with Velvet conjointly operated as a group under the umbrella name of "Merwede Farming", as a large-scale sheep farming enterprise and related industries covering approximately 75 000 hectares of land. This group will be referred to as Merwede group.

- [3] Towards the end of 2020, the Landbank instituted actions against, Van Der Merwe personally, the Merwede Trust, Velvetcream and PM. In terms of latter two entities, formal statutory letters of demand in terms of section 345 of Companies Act, 61 of 1973 were later disseminated to them by Landbank's attorneys. On 12 October 2022 a final winding-up order against the respondents in favour of Landbank was granted. Application for leave to appeal same was refused.
- [4] On 20 January 2021, both Project Multiply and Velvetcream were voluntarily placed under business rescue at the hands of Van Der Merwe. Van der Merwe was the sole director of PM at that time. Subsequently, a business rescue plan was prepared, and the second meeting of creditors was convened on 8 March 2021. Landbank voted against the business rescue plan, therefore same was rejected.
- [5] The Beechcraft, being the property of PM was transferred by PM to the Trust during May 2021. PM was finally liquidated by the order of Kimberley High Court on 11 October 2022. On 12 October 2022, the respondents launched an appeal to the Supreme Court of Appeals (SCA) against the order for final liquidation and extension of powers.
- [6] The applicants also brought an application for a declaratory that the application for leave to appeal does not suspend the extension of powers. On 13 December 2022 my sister Judge Mamosebo of the Kimberley High Court granted the order declaring that the extended powers are not suspended. On 19 December 2022 the respondents filed Notice in terms of Section 18 (4) of the Superior Courts Act (s 18 (4) automatic appeal.

Points in Limine

- [7] The respondents raised two points in *limine*; Lack of authority to institute legal proceedings and lack of Jurisdiction.

Lack of authority to institute legal proceedings.

- [8] The respondent's case is that the confirmatory affidavits filed by the second and third respondents are not signed. This defect challenges the deponent's statement that he is authorized by the two to institute legal proceedings.
- [9] The applicant's case to the above is that lack of authority can only be challenged in terms of Rule 7 of the Uniform Rules of Court. The respondents have failed to avail themselves Rule 7, therefore cannot challenge the unsigned confirmatory affidavits.
- [10] Rule 7 of the Uniform Rules provides: *"Power of Attorney (1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application".*
- [11] It is trite law that the respondents are compelled to utilize Rule 7(1) as above to challenge the lack of authority. This point in *limine* must fail.

Irregular Notice of Motion

- [12] The respondents' complaint in this regard is that in the heading of the application in the Kimberly High Court is written "In the matter between..." instead of "In the Ex Parte application ..."
- [13] Rule 30 of the Uniform Rules of Court provides that *"(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside."*
- [14] It is trite law that Rule 30 applies only to irregularities of form and not to matters of substance. In the present case the respondents decry the form

followed by the applicants. This is not the place, the respondents failed to raise the irregularity in the proper manner. In the result, the point in *limine* must fail.

Issue

- [15] Issues for determination are whether the applicants are entitled to the interim interdict.

Requirements for interim interdict

- [16] It is trite that the applicant seeking the order for interim interdict must establish:

- (a) that the right which is the subject-matter of the main application(s) and which it seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm if the interim relief is not granted, and it ultimately succeeds in establishing its right;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy.

- [17] The oft-quoted passage from *Webster v Mitchell*¹ explains the enquiry as follows:

¹ *Webster v Mitchell* **1948 (1) SA 1186** (W) at 1189-1190

“In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court...is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase “prima facie established though open to some doubt” indicates...that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required.”

[18] The applicants’ argument is that as liquidators they are not only vested with a clear right in terms of the 1973 Companies Act, consequent to their appointment, to take into their possession and under and their control all assets of the insolvent estate and **to preserve same** but are furthermore obliged to do so in the discharge of their statutory duties for the benefit of the *concursum*. [own emphasis]

[19] The argument proffered on behalf of the respondents is that the applicants do not have any right to bring this application whatsoever. This is due to the application in terms of s 18(4), the extension of powers of the liquidators are suspended. According to the applicants the respondents only filed notice in terms of s 18(4), not the application. Even if it is so the provisions of Section 150 (3) of the Insolvency Act of 1936 provide as follows:

“When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned.”

[20] From the above, the respondents’ counter argument is that applicants have no clear right and cannot succeed. The applicants have established a *prima facie* right.

[21] It was submitted on behalf of the applicants that there is the real apprehension that the respondents and conceivably Van Der Merwe, may

well dispose of the Beechcraft to the irreparable prejudice of the insolvent estate and its creditors based on the following:

21.1 During the period of 8 January 2021 to 10 May 2022 (therefore during the business rescue proceedings), subsequent to the commencement date of PM's winding-up and in the midst of ongoing litigation caused to be slaughtered more than R6.4 million worth of sheep, the proceeds of which was spirited away. An additional 7037 head of sheep, over and above the aforesaid, have been dissipated and/or spirited away.

21.2 Van Der Merwe has also alienated a Toyota Landcruiser VX Luxury 4x4 motor vehicle from his personal estate to another related Merwede entity, of which he was similarly the only director of at the time.

21.3 Furthermore, Van Der Merwe purportedly intimated to the Landbank's attorney, a certain Mr De Jager and the Sheriff of the Court:

"...Van Der Merwe could similarly not provide explanation as to this transfer of ownership other than that the aeroplane was exchanged for a farm. This he told the sheriff and Mr de Jager during the attachment of his assets after the provisional orders were granted..."

21.4 In converse, Ms Taljaard (purportedly in the context of being a director of Project Multiply) contended in her replying affidavit at paragraphs 35 to 38 (an extract of which is annexed hereto as annexure "FA20") that the Beechcraft was ostensibly sold and delivered to the Trust in 2018.

[22] The respondents' case is that Beechcraft was sold legitimately. In this regard the respondents attached a handwritten document with one of the names depicted as van der Merwe on it. This is done without taking the court into confidence as to who are the parties to the transaction. In fact, the respondents contradict themselves. The version pertaining to the sale of the Beechcraft contradicts their own version that the transfer was as result of set-off relating to the moneys owed by the farm to the Trust.

[23] Secondly, subsequent to the disposition of the Beechcraft the liabilities of PM exceeded its assets and fell to be set aside in terms of Section 26 of the Insolvency Act, which provides that:

“26. (1) Every disposition of property not made for value out value. may be set aside by the Court if such disposition was made by an insolvent- (a) ·more than· two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;”

[24] From the above I find that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted, and the applicants have ultimately succeeded in establishing their right.

[25] Regarding the balance of convenience based on the undisputed facts above, it favours the applicants. Furthermore, this is the liquidation matter, the liquidators are acting in their official capacity, and they are supposed to exercise their fiduciary duties for the benefit of all the creditors. The applicants have satisfied the third requirement.

[26] Pertaining to the absence of another adequate remedy should the Beechcraft be further alienated; it would have the effect that same may well be beyond the liquidators reach and impossible to recover at a later stage. There are no alternative avenues available to the liquidators. It is concluded that the applicants have no alternative remedy.

[27] I reiterate that the order sought herein is sought pending the institution of an action to set aside the sale of the Beechcraft. Therefore, I have not dealt with whether the Beechcraft was fraudulently transferred or alienated as one of the relief's sought by the applicants.

[28] For the foregoing the applicants have established the case for interim interdict. The application must succeed.

ORDER

1. The application is granted with costs at Scale C.

N P MALI
JUDGE OF THE HIGH COURT

Appearances:

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