



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: 5554/2023

In the matter between:

ABRAHAM WILLEM LE ROUX

Appellant

And

KOBUS VAN DER WESTHUIZEN N.O.

1st Respondent

KGASHANE CHRISTOPHER MONYELA N.O.

2nd Respondent

SIYABONGA SAMUEL MOHLOMI N.O.

3rd Respondent

In re:

KOBUS VAN DER WESTHUIZEN N.O.

1st Plaintiff

KGASHANE CHRISTOPHER MONYELA N.O.

2nd Plaintiff

SIYABONGA SAMUEL MOHLOMI N.O.

3rd Plaintiff

And

ABRAHAM WILLEM LE ROUX

Defendant

JUDGMENT BY:

MHLAMBI, J

HEARD ON:

19 SEPTEMBER 2024

DELIVERED ON:

20 FEBRUARY 2025

- [1] In their capacity as joint liquidators of the insolvent company, Hydro Oil Cooling & Engineering (Pty) Ltd, (Hydro Oil), the respondents claimed payment for three claims from the applicant in the sum of approximately R15 000 000.00. The first and second claims are founded on sections 31 and 36 of the Insolvency Act, as the payments are alleged to constitute collusive transactions and dispositions without value of the insolvent company's assets. The applicant defended the action and sought an order for the respondents to furnish security in the amount of R500 000.00 for his costs in prosecuting his defence in the main action.
 - [2] The applicant stated in the founding affidavit that Hydro Oil was liquidated by a final winding-up order of the High Court on 17 August 2017. The respondents were appointed as final liquidators on 5 December 2017. The applicant was a director of Hydro Oil until his resignation as director and employee on 30 May 2014. Hydro Oil was expanded, and a closed corporation was Incorporated to accommodate the business of its cash customers. A banking account of the closed corporation, known as HOC Engineering CC (HOC Engineering), was opened in the applicant's name and was utilized by and for the business of Hydro Oil. Distribution of funds in the banking account was done by cheques and signed by the applicant. The closed corporation's banking account remained in the applicant's name after he departed Hydro Oil.
 - [3] On 29 April 2019, the applicant received a letter of demand from the respondents' attorneys to pay R1 880 677.00 based on his loan account with Hydro Oil. This was the third claim. He was later subpoenaed to appear for interrogation at a special meeting of creditors of Hydro Oil (in liquidation) on 13 June 2019. The meeting was postponed until 29 July 2019, when he was informed that the banking account of HOC Engineering had been investigated and that the account had been used to receive money due to and owed to Hydro Oil. Cash cheques withdrew the money. He was enriched or benefited unduly by the funds so withdrawn, which amounted to eleven million rands and increased to fourteen million rands in August 2019.
 - [4] In the main action, the first and second claims were based on cash payments by Hydro Oil's customers, which were received in HOC Engineering's bank account bearing his name. At the special meeting of creditors, the respondents were
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informed that the claim for the loan debt on the applicant's loan account with Hydro Oil was discharged on his resignation on 30 May 2014 by agreement, when the remaining directors acquired his shareholding and full interest in Hydro Oil. The respondents were also informed that the applicant did not receive or appropriate any payment made by Hydro Oil's customers to HOC Engineering concerning the first and second claims. That money was used and distributed by HOC Engineering.

- [5] The applicant contended that it was evident from the respondents' first and final liquidation, distribution, and contribution account that there were no funds available in the insolvent estate of Hydro Oil or accessible by the liquidators to cover any costs order that the court might grant against them in his favour. An order for the security of costs was justified in that the respondents' inability to comply with such an order was amplified by the fact that the main action is, given his defences, unsustainable. The facts necessary to institute the claims in the main action were known to the respondents for more than three years before the service of the summons on 18 October 2023.
- [6] Given the delay in instituting the main action, the respondents' knowledge of his defence on the merits, and the prescription of the claims, the main action was not only objectively unsustainable but also unsustainable to the respondents' knowledge. Their persistence with the main action was, in the circumstances, vexatious and an abuse of the process of the Court.
- [7] The motive for the institution of the main action against him was dubious because:
 - 7.1 The first and final L&D account was confirmed as a complete and true account of the administration of the insolvent estate of Hydro Oil, and it was pertinently confirmed that there were no further assets to be realised. All the realised assets were reflected in the account.
 - 7.2 In November 2023, on inquiry by his attorney, the respondents stated in an email that the Master confirmed the first and final L&D account on 6 October 2021.

7.3 The Master of the High Court confirmed the final L&D account on 6 October 2021, and the only outstanding issue was the interest on funds received in the liquidation process and the allocation of such interest.

- [8] The applicant believed that, on the face of it, the main action was instituted for an ulterior motive, done solely to annoy the applicant and to cause him unnecessary trouble and expense. Moreover, his defences were unassailable to the respondents' knowledge. The main action was vexatious and an abuse of the process of the Court.
- [9] The respondents opposed the application because the applicant failed to show any exceptional circumstances which warranted the provision of security to the applicant. Their action was not reckless, vexatious, or an abuse of the court process. The main action concerned three claims against the applicant. The first and second claims were based on facts involving the applicant with a fraudulent scheme in terms of the transactions conducted by Hydro Oil that were invoiced in the name of a separate entity with a confusingly similar name, namely HOC Engineering. The invoice payment details specified a bank account in the applicant's name. The applicant admitted the general tenor of the scheme in his founding affidavit but denied any involvement therewith, especially after he resigned from Hydro Oil.
- [10] They stated in their answering affidavit that the nature of the transactions was, by their very design, not traceable from a review of Hydro Oil's financial records. They could not identify the impeachable transactions or know the debtor's identity without additional information relating to such transactions. The information about the scheme was provided to the respondents' attorney by the attorneys who acted for one of Hydro Oil's erstwhile directors, Mr Dennis Ralph Shushu, on 29 October 2020. Prior thereto, the respondents did not know the facts that gave rise to the scheme or the identity of the debtors, namely the applicant. The respondents' claim relating to the first and second claims could, therefore, only prescribe on 29 October 2023 in terms of the Prescription Act 68 of 1969. The summons was delivered within 3 years of 29 October 2020, and the claims had not prescribed, and were still valid.

- [11] The third claim had to be raised through a special plea because there may be facts that negate such a plea, and the court may not *mero motu* raise the aspect of prescription. Even though the third claim would be dealt with during the proceedings, the possible prescription of the claim did not render such process reckless, vexatious, or an abuse of process.
- [12] The applicant, relying on *Duet and Magnum Financial Services CC (In Liquidation) v Koster*, contended that the claims in sections 26 and 31 of the Insolvency Act were debts in terms of the Prescription Act.¹ This case dealt with whether the remedies created by sections 26, 29, and 30 of the Insolvency Act relating to dispositions without value, voidable preferences, and undue preferences were capable of prescription. The court believed that these sections gave a right to a liquidator, in prescribed circumstances, to have a person declared to be a debtor of the estate. Its complement is a “*debt*” for prescription purposes, in that the person concerned is liable to have such a declaration made.
- [13] Section 26(1) of the Insolvency Act provides that every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent. Section 31(1) of the same Act provides as follows:
- “1. After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.
 2. Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.
 3. Such compensation and penalty may be recovered in any action to set aside the transaction in question.”
- [14] The respondents contended that, as apparent from the wording of sections 26 and 31 of the Insolvency Act, the court has the discretion to set aside such

¹ *Duet & Magnum Financial Services CC (In liquidation) v Koster* 2010 (4) SA 499 (SCA), para 27.

transactions if the criteria in each section are met. Prayer 1 of the plaintiff's particulars of claim seeks an order that the payments made to the defendant in terms of the "scheme" are set aside. Following such order, and only if the court sets aside the payments, does an obligation to pay arise on the defendant's part as prayed for in prayer 2 of the plaintiff's particulars of claim in terms of section 32 of the Insolvency Act. Until the court sets aside the transactions, there is no obligation to pay, and no debt arises as contemplated in the Prescription Act. The respondents argued that the court should not follow the approach in *Duet & Magnum* but the narrow construction of the word "debt" as espoused in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*,² where it was common cause that "debt" was "that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another."

- [15] The respondents referred to *Makate v Vodacom*,³ and *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others*.⁴ They contended that the broad meaning of "debt" was rejected in *Makate* following section 39(2) of the Constitution. A more circumscribed meaning to the word relating only to payment or delivery was preferred. In *Off-Beat Holiday Club*, it was emphasized that *Makate* held that the broad interpretation of "debt" in *Desai*,⁵ was inconsistent with earlier decisions that gave the term a narrow definition. The respondents contended that, upon a reasonable interpretation of sections 26 and 31 of the Insolvency Act, it was clear that the express wording of these sections contemplated the setting aside of the relevant transaction or disposition. Applying the narrow test formulated in the *Electricity Supply Commission* case and referred to by the Constitutional Court, there was no existing or current obligation on the defendant to pay anything to the plaintiff.
- [16] The respondents contended further that the plaintiff's first and second claims were claims to set aside the transaction or disposition and not to enforce an existing obligation to pay money, deliver goods or render services to another.

² 1981 (3) SA 340.

³ 2016 (4) SA 121 (CC).

⁴ 2017 (5) SA 9 (CC).

⁵ *Desai NO v Desai and Others* 1996 (1) SA 141 (A).

The provisions must be read with section 32(3) of the Insolvency Act, which states that:

"When the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher."

- [17] The Insolvency Act assumes that such a transaction is valid unless and until it is set aside by the court in specific circumstances by, *inter alia*, section 26 or 31. Nothing in the text of the Act supports the view that upon sequestration, any party who received any asset or money from the insolvent must, *ipso facto*, repay what they received from the insolvent trustees or liquidator.
- [18] The correct characterisation of a claim for purposes of the Prescription Act is the characterisation arising from the relevant legal provisions on which it is based.⁶ The court stated in *Off-Beat Holiday Club* that the claim in that case was a far cry from something owed or due or an obligation to pay money, deliver goods, or render services to another. If anything, it was the right to seek a judicial determination as to whether the applicants were entitled to a statutory remedy. I agree with the respondents that the applicant's reliance on prescription was, on applying the rationale of *Off-Beat Holiday Club*, open to a serious and *bona fide* legal challenge that is neither vexatious nor unsustainable.
- [19] Considering the alternative defences raised is unnecessary, as the main defence is dispositive of this application. There is nothing to show that the action was instituted for any other reason than the bona fide discharge of the respondents' duties for the benefit of the general body of creditors. I am not persuaded that the matter is vexatious or an abuse of the court process so as to order the respondents to furnish security.

- [20] In the result, I make the following order:

Order:

⁶ *Off-Beat, supra*.

The application is discharged with costs on Scale C, including the costs of two counsel employed.


MHLAMBI, J

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