IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 14618/2014

DATE: 27 NOVEMBER 2014

In the matter between:

RHETT JUSTIN CHRISTOPHER MOLYNEUX	1st Applicant
ZEREBA HOMES (PTY) LIMITED	2nd Applicant
and	
MOHAMED ISMAIL PATEL	1st Respondent
DUDLEY BERNARD DAVIDS	2nd Respondent
MASTER OF THE HIGH COURT (CAPE TOWN)	3rd Respondent
ISMAIL KASKAR N.O.	4th Respondent
RAEEZ KASKAR N.O.	5th Respondent
REGISTRAR OF DEEDS (CAPE TOWN)	6th Respondent

EX TEMPORE JUDGMENT

ROGERS J:

Introduction

[1] This is an application for an order declaring that a transfer effected in the Deeds Office on 2 October 2014 was not lawful. I shall refer to the first applicant as Mr Molyneux and the

second applicant as Zereba. The first two respondents are the liquidators of a company called Be-Vest 0043 (Pty) Limited. The third respondent is the Master of the High Court in Cape Town. The fourth and fifth respondents are the trustees of a trust called the Ismail and Raees Kaskar Trust, to which I shall refer as the Kaskar Trust. The sixth respondent is the Registrar of Deeds.

[2] Mr Molyneux appeared this morning in person for the two applicants. Ms Wharton appears for the liquidators. The other respondents have not participated in the proceedings. (All references in this judgement to 'the respondents' are to the first and second respondents.)

[3] I do not propose to set out at very great length the background and circumstances of the case. I shall just mention the following. The company in liquidation, which I shall refer to as BV, for some years owned a property in 65 Bowwood Road, Claremont, being Erf 56195. It appears that it was also the personal residence of Mr Molyneux.

[4] During October 2000 Absa lent money to BV on the security of the property. Default judgment was subsequently taken when BV fell into default. During July 2012 BV, or more accurately Mr Molyneux, caused resolutions to be passed

which purported to place BV in business rescue. Absa brought an application under case 17677/12 to set aside the business rescue resolutions and to have BV placed in liquidation.

[5] On 22 November 2012 Baartman J granted an order by agreement in terms whereof the business rescue resolutions were set aside and BV was placed in provisional liquidation with a return day of 24 January 2013. The liquidation was made final without opposition on 24 January 2013 and since that time BV has been in final liquidation. The first and second respondents were appointed as final liquidators during April 2013.

[6] On 13 May 2013 and in the days immediately preceding that date the liquidators and the Kaskar Trust signed an agreement of sale in terms whereof the liquidators sold the property to the Kaskar Trust for a price of R2,7 million.

[7] It appears that round about 22 May 2013, or perhaps a day or two later, Absa formally lodged its claim for proof in the liquidation of BV. That was in advance of the second meeting of creditors to be held on 28 May 2013. According to the minutes of the latter meeting, Absa was the only creditor present by proxy. Certain resolutions were passed to which I shall revert presently. Absa's claim was admitted to proof at

that meeting.

[8] On 4 September 2013 the liquidators' conveyancer caused the documentation for the transfer of the property to the Kaskar Trust to be lodged at the Deeds Office. According to the tracing report from the Deeds Office which Mr Molyneux annexed to his founding papers, the Deeds Office rejected the papers on 12 September 2013. They were re-lodged the next day, presumably after the correction of whatever formal defects existed. The transfer was registered on 2 October 2013.

[9] In between the re-lodging of the deeds on 13 September 2013 and the registration of transfer on 2 October 2013, the applicants in the present case issued and delivered to the liquidators an application in terms of s 131 of the Companies Act 71 of 2008 to place BV in business rescue. It is common cause that the application was delivered personally by Mr Molyneux to the liquidators on 23 September 2013. (To foreshadow one of Mr Molyneux's main points in the present case, he says that the delivery of the business rescue application suspended the liquidation with immediate effect pursuant to s 131(6) of the Act, in consequence of which the transfer registered on 2 October 2013 should be declared invalid.) In the event the business rescue application was

dismissed by an order of the Judge President on 17 March 2014.

[10] During March 2014 Mr Molyneux brought the first of two applications for declaratory relief, the second being the one that is before me today. The earlier application for declaratory relief also sought an order declaring that the transfer of 2 October 2014 was invalid by virtue of the sale not having been authorised in accordance with the Alienation of Land Act 68 of 1981. (It is also to the Alienation of Land Act that Mr Molyneux referred in the notice of motion in the present application for a declaratory order.)

[11] The liquidators opposed the earlier application for a declaratory order, just as they had opposed the business rescue application. In the first declaratory application Mr Molyneux failed, as he had done in the business rescue application, to file replying papers. He withdrew that application on 8 August 2014, tendering the liquidator’s costs.

[12] In the meanwhile, during April 2014, the Kaskar Trust commenced eviction proceedings in the Wynberg Magistrate’s Court to evict Mr Molyneux from the property.

[13] On 15 August 2014 Mr Molyneux filed his papers in the

present application, seeking relief which appears to be identical to that claimed in the earlier declaratory application which he withdrew. As I have said, the liquidators opposed the declaratory application and have filed answering papers. On 5 November 2014 the Judge-President by agreement postponed the matter to today with a time-table for replying papers and heads of argument. Although Mr Molyneux was late with his replying affidavit and only filed heads of argument this morning at the hearing, Ms Wharton for the liquidators does not ask that the application be dismissed on that ground.

[14] Although the notice of motion refers to an invalidity of the transfer supposedly arising by virtue of the provisions of the Alienation of Land Act, I will take into account that Mr Molyneux is a lay person (though he does appear to have considerable familiarity with legal process). He really raised three separate grounds for attacking the validity of the transfer. The first was the suspending effect of s 131(6) of the new Companies Act. The second was an alleged absence of authority by the liquidators to sell the property, having regard to the provisions of s 386 of the old Companies Act 61 of 1973. The third is alleged non-compliance with the Alienation of Land Act.

[15] Since the applicant seeks final relief, the *Plascon-Evans*

rule applies to the resolution of any genuine disputes of fact. Furthermore, since the relief sought is declaratory in nature, the court has the usual discretion which it has in such matters.

Discretion and delay

[16] I must say that, even without going into the merits of each ground of invalidity advanced by the applicants, I would be inclined to exercise my discretion against granting the declaratory order by virtue of the following circumstances. The transfer which is now sought to be attacked was registered on 2 October 2013. Mr Molyneux and Zereba brought an application to declare that transfer invalid in March 2014. If one assumes that Mr Molyneux only learnt of the sale and transfer shortly before he brought the first application, the first application could not be criticised for having been delayed. However, that application was not properly prosecuted and eventually it was abandoned by Mr Molyneux together with a tender for costs.

[17] We then have a virtually identical application, at least insofar as the relief is concerned, launched on 15 August 2014, around ten months after the impeached transfer. The facts on which the new application is based would have been facts known to Mr Molyneux when he brought the first application. In particular he obviously was aware of the

delivery of his business rescue application in September 2013. He was aware of the provisions of the Alienation of Land Act. And I have no reason to doubt that he was able to formulate and advance any case he might have wished to pursue based on s 386 of the old Companies Act.

[18] However and assuming I were wrong on this simple basis to dismiss the application, I proceed to consider the main points which arise under each of the grounds of attack.

Locus standi

[19] There is a preliminary question as to the *locus standi* of each of the applicants. Mr Molyneux alleged in very bald terms in the founding affidavit that he was a creditor of BV; and that Zereba was BV's sole shareholder and also a creditor by virtue of a building and improvement lien. All the facts surrounding *locus standi* are in dispute. Mr Molyneux did not make allegations in the founding papers to substantiate that he was a creditor. In his replying affidavit he contented himself with an allegation that he was at all material times the director of BV and therefore entitled to directors' fees. The question whether he has since 2009 been a director of BV is itself a disputed fact but, assuming that he were, there is no rule of law which decrees without more that a director is entitled to any particular fees. That is a matter for agreement between

the company and the director. No information is set out, even in the replying papers, regarding any directors' fees which may have been agreed. I therefore do not think that Mr Molyneux in his personal capacity has *locus standi* to attack the transactions concluded by BV's liquidators.

[20] In regard to Zereba, there is a dispute as to whether it is the sole shareholder of BV. The respondents' version, based on information supplied by the attorneys who have possession of BV's share register, is that since December 2008 the sole shareholder of BV has been a company called Eurocape. I am not sure that the dispute of fact can be said not to be a real or genuine one.

[21] In regard to the improvement lien and the underlying claim which Zereba allegedly has against BV, the claim was dealt with at some length in a letter written by the liquidators to the Master on 21 October 2014 and attached to the answering papers. Mr Molyneux is clearly unhappy about the inattention which Zereba's improvement lien and claim have received from the liquidators but the fact of the matter is that in the proceedings before me the claim is disputed and it has not been admitted as yet to proof. Be that as it may, I shall assume that, by virtue of the alleged claim, Zereba has a sufficient interest to seek the relief which it does.

Section 131(6) of the new Companies Act

[22] Turning then to the question of the business rescue application and its effect on the liquidation of the company, Ms Wharton raised as a first argument that a business rescue application could not be regarded as having been properly made and as thus triggering s 131(6) unless it has been served in accordance with s 131(2).[1] The latter provision requires an applicant for business rescue to serve a copy of the application on the company and on the Companies and Intellectual Property Commission ('CIPC') and to notify each affected person of the application in the prescribed manner. The affected persons for present purposes can be taken to be the creditors and members of BV since I accept that BV did not have any employees.

[23] We know that at least Absa was a creditor. As regards who the member was, there is a dispute of fact as to whether it was Zereba or Eurocape. The founding papers in the present matter did not provide any evidence of service or notification beyond an allegation that the application was handed to the

[1] I did not quote the terms of the section in my *ex tempore* judgment. Section 131(6) reads: 'If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until – (a) the court has adjudicated upon the application; or (b) the business rescue proceedings end, if the Court makes the order applied for.'

liquidators on 23 September 2013. As it happens the liquidators of a company are not defined as being included within the phrase ‘affected person’ in s 128 nor are they people on whom s 131(2) requires the application to be served, at least not expressly.

[24] In the answering affidavit the absence of evidence of proper service of the application on the CIPC and notification to affected parties was pointed out. No proof of such service/notification was provided in the replying papers. Given the potentially disruptive effects which s 131(6) could have, if it has the meaning for which Mr Molyneux argues, I consider Ms Wharton’s point to be well made that the application cannot be regarded as having been properly brought unless it has been served and notified in the required manner.

[25] Assuming this conclusion to be incorrect, one has to consider what was, legally, the effect of the delivery of the application. Now I would have thought, particular if s 131(6) has the effect for which Mr Molyneux contends, that one should confine its operation to a business rescue application which has been brought in good faith and for a proper purpose, namely for the rescue of the company and not for an ulterior purpose such as to disrupt the liquidation or for some personal benefit. In the answering papers there is an attack on Mr

Molyneux's *bona fides*, the liquidators alleging that he delivered the business rescue application in order to disrupt the liquidation and with a view to staving off eviction proceedings.

[26] There is evidence which lends credence to that view. One knows that Mr Molyneux previously caused BV to adopt resolutions placing itself in business rescue but, when Absa intervened to have those resolutions set aside and to liquidate the company, he and Zereba were party to an agreement in terms whereof the business rescue resolutions were abandoned and the company was placed in provisional liquidation. That occurred, I emphasise, with the applicants' agreement. They did not appear to oppose the final liquidation.

[27] I am thus not satisfied that the business rescue application, relating to a company apparently without employees and whose sole asset is an immovable property, can be regarded as having been brought by these particulars applicants in good faith rather than for an ulterior purpose. It appears to me to have been an abuse of the court's process.

[28] If I am wrong in expressing that view, I must consider the proper meaning of s 131(6). A first question which arises on the interpretation of that section is whether what is suspended

is a pending but un-adjudicated application for liquidation, or the subsequent administration of the liquidation once the company has been placed in liquidation, or both. I am aware of two judgments in Gauteng which held that s 131(6) does not apply to un-adjudicated pending liquidation proceedings but only to the actual administration of the winding-up itself. Those cases are *Absa Bank v Sumner Lodge (Pty) Limited* 2014 (3) SA 90 (NGP) and *Absa Bank v Makuna Farm* 2014 (3) SA 86 (SGP).

[29] I have read those cases carefully. I must say that I entertain considerable doubt as to whether they are correct. What s 131(6) says is suspended is liquidation proceedings which have been commenced 'by or against the company'. Once the winding up order has been granted, the administration of the liquidation cannot be properly regarded as something by or against the company. The phrase 'by or against the company' indicates to my mind that the proceedings contemplated in s 131(6) are legal proceedings by a company, or by a shareholder or creditor against the company, for a liquidation order.

[30] There are practical considerations in favour of that view. If s 131(6) were to have the effect indicated by the Gauteng cases and for which Mr Molyneux argues, it would mean that a

company would effectively be left rudderless from the moment the business rescue application is served until it has been determined. *Ex hypothesi*, there would not, pending the determination of the business rescue application, be a business rescue practitioner to guide the affairs of the company. On the other hand the liquidator, so it is contended, would not be able to do anything because the liquidation would have been completely suspended by s 131(6).

[31] What if the company in liquidation has a business? Can nobody pay its rent? Can nobody pay its employees? Can perishable stock not be sold? These anomalies and very considerable inconveniences do not arise if one limits s 131(6) to a suspension of pending liquidation proceedings prior to the grant of a final order of liquidation. Prior to the grant of a liquidation order the company will be in the hands of its directors. What is then suspended is the adjudication of the liquidation application. This seems to me to give effect to the policy objective of the lawmaker which is to give business rescue the best chance of succeeding. For that reason the business rescue application must be determined prior to a pending liquidation application, though often they may end up being adjudicated together.

[32] It may be argued, against this point of view, that if a

business rescue application did not suspend the actual administration of the winding-up after the granting of a final order of liquidation, the business rescue application might be rendered nugatory. This overlooks that in terms of s 354 of the old Companies Act, which still applies to companies which are being liquidated because of an inability to pay their debts, the court may at any time, on the application of the liquidator, creditor or member, stay or set aside the proceedings or the continuance of the winding-up on such terms and conditions as the court may deem fit. If the person applying for business rescue considers that the continued administration of the liquidation will prejudice the prospects of successful business rescue, he could, together with his business rescue application, apply to the court to stay the administration of the winding-up, either in whole or in part. The court could grant an order tailored to the particular circumstances of the case, allowing certain transactions to proceed but holding others in abeyance.

[33] Severe dislocation and disruption, and I would think prejudice to all affected persons, would be caused if s 131(6) had the effect for which Mr Molyneux contends and which admittedly finds support in the two Gauteng cases I have mentioned. In the present case, for example, there would have been a hiatus from September 2013 (when Mr Molyneux

delivered his business rescue application) to March 2014 (when it was dismissed). For those six months, so it is suggested, nothing could be done in relation to the affairs of this company. The company was forced, I suppose, to breach its sale contract with the Kaskar Trust. It could not pay rates or do anything else that was required. That sounds to me to be a most unpalatable view to take of s 131(6).[2]

[34] For these reasons I do not consider that the mere delivery of the business rescue application suspended the powers of the liquidators pursuant to the final order of liquidation.

[35] Even if I am wrong and s 131(6) does apply to the administration of the liquidation after a final winding-up order has been granted, the question arises precisely what it is that is suspended. In the present case we know that prior to the delivery of the business rescue application the liquidators and the Kaskar Trust had already concluded the deed of sale. The contract for the disposal of the property occurred a number of months before the bringing of the business rescue application.

[2] A point present to my mind when I gave my *ex tempore* judgement but which I omitted to mention is the following. It seems, with respect, to be a singularly pointless exercise to place a company in provisional or final liquidation (on the basis that the pending business rescue application does not suspend the legal proceedings for the obtaining of a liquidation order) while holding that as soon the liquidation order is granted its effect will be suspended (so that the liquidators will not be able to do anything), yet this appears to be precisely what *Sumner Lodge* and *Makuna Farm* entail. Presumably it would not even be possible to appoint liquidators since that is also part of the winding-up process.

By the time the business rescue application was brought, the deeds had been lodged and were simply awaiting final execution at the Deeds Office.

[36] If the liquidators in this case did anything after the delivery of the business rescue application, it was to allow their agent, the conveyancer, to attend at the Deeds Office on 2 October 2014 for purposes of actually having the concluded transaction registered. I cannot believe that s 131(6) was intended to suspend an act of that kind, in other words to have required the liquidators to instruct their conveyancer not to take the final step of that which was already almost completed. The section might, if I am wrong on the earlier point, prevent liquidators from concluding contracts for the disposal of property but I cannot see that it prevents them from allowing effect to be given to contracts which they have already concluded.

[37] The final point which would arise on s 131(6) is whether, assuming all the conclusions thus far are incorrect, the section necessarily has the effect of nullifying a transfer even though one knows, after the event, that the business rescue application was dismissed. The section does not say precisely what the effect is of the performing of acts by the liquidators during a period that the liquidation proceedings are

suspended. The section does not say that anything done during the period of suspension is a nullity.

[38] Where declaratory relief is sought, which is in the discretion of the court, and it is known by the time the court is asked to grant the declaratory order that the business rescue application which suspended the liquidators' powers was dismissed, the court should not in my view accede to the undoing of acts which may technically have been impermissible by virtue of the suspension. The suspension exists to aid the likelihood of a successful business rescue. Once the business rescue application has been dismissed, that objective is absent.

[39] In the present case, for example, if Mr Molyneux's contentions were correct, the liquidators could immediately after the dismissal of the business rescue application on 17 March 2014 have caused the deeds to be re-lodged at the Deeds Office whereupon the transaction could have been registered within a few days. I cannot think of anything more futile, in these circumstances, than exercising a discretionary power to declare an earlier transfer invalid.

[40] For all of those reasons I would reject the ground of attack based on s 131(6) of the Companies Act.

Section 386 of the old Companies Act

[41] Turning to s 386 of the old Companies Act, Mr Molyneux makes the point that the deed of sale was concluded prior to the second meeting of creditors. The sale of the property thus required the approval of the Master in terms of ss 386(2A) and (2B) of the old Companies Act. Although Mr Patel, one of the liquidators, made a statement in earlier proceedings that such consent had been obtained, it is clear on the papers before me that this statement was incorrect. It may therefore be said that at the time of the sale on 13 May 2013 the liquidators did not have the authority they required to conclude it.

[41] But on 28 May 2014 the second meeting of creditors took place. Section 386(3) says that the liquidator of a company has the powers set out in s 386(4) with the authority granted by meetings of creditors and members or contributories. Among those powers are the power to sell immovable property by public auction, public tender or private contract and to give delivery. At the time the second meeting of creditors took place on 28 May 2013 the only proved creditor was Absa. It was represented at the meeting according to the minutes thereof. Those minutes also reflect that resolutions which have been annexed to the answering papers were adopted.

[42] The resolutions included, as item 2, the following: 'That all actions of the ... liquidators to date be and are hereby approved and ratified'. It was decided in *Thorne v The Master* 1964 (3) SA 38 (N) at 44-45 and also at 51h-52a that the authority which creditors may confer on the liquidator at a second meeting of creditors includes the ratification of things previously done without authority. On the face of it, therefore (and as in the *Thorne* case), item 2 of the resolutions ratified the liquidators' conduct in concluding the sale.

[43] Mr Molyneux argues against this that there are documents lodged by Absa as part of its proof of claim dated 22 May 2013 which suggest that as at that date Absa was not yet aware of the sale which had been concluded about a week earlier. It is clear from Absa's documents dated 22 May 2013 that it wanted the property to be sold. The question is whether I can be satisfied that Absa did not, by the time of the meeting of 28 May 2013, have knowledge of the sale and intend to ratify it. Since Absa was keen for a sale to be concluded, it strikes me as most unlikely that, by the time of the meeting at which a report of the liquidators was adopted, Absa did not know of the sale.

[44] I can also draw inferences from certain facts. Firstly, it seems most implausible, where there is only a single proved

creditor, who happens to be the holder of a mortgage bond over the property, that the liquidators would not have discussed the sale with Absa. Secondly, as a fact the transfer went ahead. One knows that transfer of property which is subject to a mortgage bond cannot be effected without the cancellation of the mortgage bond. Absa must therefore have acquiesced in the transfer of the property. I also do not have anything in the present proceedings to suggest that Absa regards the transaction as having not been approved or ratified.

[45] In these circumstances the ground of attack based on s 386 of the Companies Act must fail.

The Alienation of Land Act

[46] The third and last ground I need consider is the ground of attack based on the Alienation of Land Act. This attack in my view is misconceived. That Act sets out formalities which must be complied with in relation to a deed of sale, failing which (unless the sale has been fully performed and transfer of the property has been affected) any of the parties to the sale may take the point that it is not enforceable. The parties to the sale in the present case were the liquidators on the one side and the Kaskar Trust on the other. None of them appears before me today to say that they have any objection to the sale. In

fact we know that transfer has already been effected. It may be that s 28(2) of the Alienation of Land Act does not strictly apply here because occupation has not yet been given and the sale may therefore not yet have been fully performed. I do not need finally to decide that point.[3] What I am satisfied of, however, is that the only persons who can take the point that formalities have not been complied with are the parties to the contract.

[47] I think, in any event, that the suggestion that the formalities were not complied with is misconceived. Mr Molyneux's argument on this aspect was closely tied up to what he said regarding s 386 of the old Companies Act, namely that at the time the sale was concluded the liquidators did not yet have the authority either of the Master or of the creditors at a second meeting of creditors to sign the deed of sale. That however seems to me to misapprehend the question of authority as contemplated in the Alienation of Land Act. In regard to the Alienation of Land Act, the question is whether a person who signs a deed of sale as an agent has the written authority of his principal to conclude it. In signing the sale agreement, the liquidators were not acting as the agents of the

[3] When editing this *ex tempore* judgement, I noticed that s 28(2) applies provided the alienee (here the Kaskar Trust) has performed in full and transfer has been given. Since the obligation to give vacant possession rested on the liquidators as alienators, not as alienees, my reservations about the applicability of s 28(2) were probably misplaced.

Master nor of the creditors or of the shareholder. They directly represented the company in the same way the directors would. They thus did not need written authority from anyone at that stage in order to comply with the formalities in the Alienation of Land Act.

[48] I accept that there is nevertheless a question as to whether the liquidators had the power to do what they did, having regard to company law and the powers which liquidators may exercise at any given point in the liquidation process. That however is something I have addressed on the second ground of attack which Mr Molyneux has advanced and I have concluded that, although the liquidators did not have the power on 13 May 2013 to sign a deed of sale, their conduct in so doing was ratified.

[49] In regard to the Alienation of Land Act there was also a question raised in passing about whether the Kaskar Trust had properly signed the document but I think that complaint is unsubstantiated. On the face of it there is a resolution authorising the person who signed it to do so. I can also take judicial notice of the fact that a conveyancer will not permit a transfer to be effected, and the Registrar of Deeds will not permit one to be registered, unless there is proper proof of authority from the transferor and the transferee.

[50] I think that I have now dealt with all the grounds that need to be covered and for those reasons **THE APPLICATION IS DISMISSED WITH COSTS, INCLUDING THOSE RESERVED BY THE ORDER OF 5 NOVEMBER 2014.**

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ROGERS, J