REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

CASE NO: 32547/2017
6/5/2019

In the matter between:

TISSUE WORLD CC **FIRST APPLICANT**
EL-SAYED ADBEL HAMID HAFNI **SECOND APPLICANT**

And

PAVLOS KYRIACOU

(IDENTITY NUMBER NO: [….]) **RESPONDENT**
(MARRIED OUT OF CUMMUNITY OF PROPERTY)

JUDGMENT

COLLIS J:

INTRODUCTION

[1] In the present application, the applicants are seeking an order for the provisional sequestration of the estate of the respondent. If so granted by this

Court, and on a return date to be determined by this Court, to call upon the respondent and any other person to advance reasons, if any, why the Court should not order the final sequestration of the respondent's estate.

[2] The applicants are requesting that the costs of the application be costs in the sequestration of the respondent. The application is opposed by the respondent.[1]

BACKGROUND

[3] The dispute between the parties originates from a written sale agreement in terms of which the respondent and Sphynx Trading CC bought the business of the first applicant as a going concern for the amount of R 57 000 000.00. As per the founding affidavit the applicants allege that on 17 October 2016, at Johannesburg, the respondent acknowledged indebtedness to the applicants' in writing for the sum of R 93 945 187.00. He acknowledged that this sum was due, owing and payable. This acknowledgement was recorded in clause 2.2.1 of a written settlement agreement. A copy of this settlement agreement is attached as "FA2".[2]

[4] It was further agreed that the sum of R 93 945 187.00, was made up as follows-

4.1 an amount of R 57 000 000.00 being the purchase price of the first applicant's assets, which amount had to be paid on 24 November 2016. (Clause 2.2.2).

4.2 an amount of R 28 500 000.00 which was to be paid within one year of signing the settlement agreement, being 17 October 2017.[3]

[5] On or about 6 December 2016, the respondent addressed an email correspondence to the applicants, requesting that the purchase consideration for the applicant's asset in the amount of R 57 000 000.00 be rendered VAT exclusive and that payment of the sum would be split between: -

5.1 Industrial Development Corporation ("IDC"), from whom the

[1] Notice of Motion p1
[2] Founding affidavit para 7 & 8 p6 and Answering affidavit para 4.9, p126
[3] Founding affidavit para 9 p6

respondent obtained finance for the sum of R 30 334 500.00. The IDC would also pay VAT on this amount, in the sum of R 4 246 830.00 on a VAT exclusive basis;

5.2 that the respondent would pay the sum of R 26 665 500.00 and VAT on this amount in the sum of R 3 733 170.00, on a VAT exclusive basis.[4]

[6] On 15 December 2016, the IDC duly paid the amounts set out it in paragraph 5.1 above and the respondent thereafter proceeded to pay the amount of R 22 418 670.00, being the difference between the full sum paid by the IDC and the R57 million. The respondent however has failed to pay the remaining amount of R 7 980 000.00 which is the sum of R 57 million plus VAT.[5]

[7] On 10 May 2017, the applicants applied for the sequestration of the respondent on the basis that the respondent did not pay VAT in the amount of R 7 980 000.00. The notice of motion was first served unsuccessfully so on 16 May 2017 and thereafter service was effected although not personally on 18 May 2017 in terms of Rule 4(1) (a) (ii).[6]

[8] On 23 May 2017, the respondent gave notice of his intention to oppose the relief sought in terms of the notice of motion and as a result thereof, a notice of removal from the application on the unopposed roll was filed.[7] Thereafter the matter was enrolled on the opposed motion roll for hearing on 4 December 2017, this after all affidavits and Heads of Arguments were exchanged between the parties.[8]

[9] It is common cause between them, that on this date,[9] a provisional sequestration order was then granted by the Court in favour of the applicants against the respondent who was absent on the 4th December 2017.

[10] On 11 January 2018 , the urgent court, at the instance of the respondent,

[4] Founding affidavit para 11 p8
[5] Founding affidavit para 15 & 16 p9 & 10
[6] Index Additional Documents p2
[7] Index Additional Documents p7
[8] Index Additional Documents p12 & 13
[9] Index Additional Documents p14

rescinded the provisional sequestration order under case number 86371/2017 with costs.[10]

[11] On 28 February 2018, the applicants once again enrolled the sequestration application before me.[11]

[12] At the hearing, the respondent raised two *points in limine.* Firstly, placing reliance on the provisions of section 150 of the Insolvency Act, Act 24 of 1936 and secondly, contending that the matter is *res judicata.*

First point: Section 150 of the Insolvency Act

[13] The section is quoted hereunder for ease of reference.

> Section 150(1) of the Insolvency Act states that:
>
> "Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may, subject to the provisions of section 20(4) and (5) of the Supreme Court Act, 1959 (Act 59 of 1959) appeal against such order"
>
> Section 150(2) of the Insolvency Act states that:
>
> "Such appeal shall be noted and prosecuted as if it were an appeal from a judgment or order in a civil suit given by the court which made such final order or set aside such provisional order, and all rules applicable to such last- mentioned appeal shall *mutatis mutandis* but subject to the provisions of sub- section (3) apply to an appeal under this section."

[14] In this regard the respondent contends that where the applicants are aggrieved by the rescission of the provisional order they ought to appeal such order in terms of section 150 *quoted* above, instead of once again

[10] Index Additional Documents p17

enrolling the sequestration application for adjudication.

[15] It is common cause that the applicants pursuant to the provisional order being rescinded did not appeal against such order as required by section 150 of the Insolvency Act. It should be noted that the Supreme Courts Act, was repealed and replaced by the Superior Courts Act.[12]

[16] In the absence of an appeal against the decision of the urgent court granted on 11 January 2018 which is clear, unambiguous and decisive, that order stands.

Second point: Res judicata

[17] In addition to the first point raised, the respondent contends that the matter for adjudication is also *res judicata* in that it was premised on the same cause of action where on 4 December 2017 the provisional sequestration of the respondent was in dispute and adjudicated upon and where the same relief was claimed by the applicants under both case numbers being 32547/2017 and 86371/2017.

[18] In support of this contention the respondent had placed reliance on the matter of National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited 2001 (2) SA 232 (SCA), where the Olivier JA, expressed an opinion on the defence of res judicata or the *"once and for all"*

[19] At para [2] thereof the Judge of Appeal stated the following:

> "The requirements for a successful reliance on the exceptions were, and still are: idem actor, reus, and eadem causa pendent. This means that the exception can be raised by the defendant in a later suit against a plaintiff who is "demanding the same thing on the same ground" (per Steyn CJ in African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562A, or which comes to the same thing, "on the same cause

[11] Index Additional Document s p18

[12] Act 10 of 2013 assented to 12 August 2013 replaced the Supreme Court Act 59 of 1959

for the same relief' (per Van Winsten AJA in Custom Credit Corporation (Pty) Ltd v Shembe 1972(3) SA 462."

[20] At para [3] the Judge of Appeal stated further:

"The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause or to put it more succinctly, has the same issue now before the court been finally been disposed of in the first action?"

[21] In support of this further argument, the respondent also placed reliance on the matter of Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another 2014 (5) SA 297 (SCA). In paragraph [10] of the said judgment Brand JA expressed an opinion as follows:

[10] The expression "res judicata" literally means that the matter has already been decided.....According to Voet 42.1.1, the exception was available at common law if it were shown that the judgment in the earlier case was in a dispute between the same parties, for the same relief on the same ground or on the same cause.

[22] In paragraph [23] the Judge of Appeal went on to state:

"In our common law the requirements for res judicata are threefold: (a) same parties, (b) same cause of action, (c) same relief... ... . That purpose, so it has been stated, is to prevent the repetition of law suits between the same parties, the harassment of the defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see e.g. Evins v Shield Insurance Co Ltd 1980 (2) SA 815 (A) at 835G."

[23] In the Answering Affidavit, and more specifically paragraph 3.6 thereof, the

respondent referred this Court to pending action proceedings which he, together with Sphynx Trading CC instituted against the second applicant and two others. These action proceedings were instituted on 17 March 2017, under case number: 19536/17 and is pending before this Court, with the second applicant having defended same and having served his plea on the 10th May 2017. Significant to note, is that the action proceedings were instituted during March 2017, whereas the current proceedings were launched during May 2017.

[24] If one has regard to paragraph 16 and 17 of the said Particulars of Claim one of the claims relate to the very same subject-matter, i.e. the payment of the amount of R 7 980 000.00 which the applicants contend in terms of clause 2.2.2 of the settlement agreement attracted value added tax, whereas the respondent contends that the payment of R 57 000 000.00 was value added tax inclusive.

[25] On point the defendants/applicants had pleaded that the amount of R 7 980 000.00 was due and payable as the said amount represented payment on the amount of R 57 000 000.00 VAT exclusive.[13]

[26] The action proceedings embarked upon by the respondent clearly are illustrative that the payment of the amount of R 7 980 000.00 is disputed by him. If this had not been the position, no declaratory would have been sought by him from this court that the said amount should not be paid by him. As the action proceedings is still pending, it is yet to be decided upon.

[27] In terms of the Insolvency Act, provisional sequestration is specifically dealt with in section 10. The section reads as follows:

"If the court to which the petitioner for sequestration of the estate of a debtor has been presented is of the opinion that *prima facie*-

(a) the petitioner creditor has established against the debtor a claim as such 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 make an order sequestrating the estate of a debtor provisionally

[13] Index Opposed Application for Sequestration -Defendant s Plea p 207 & 208

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

[28] A court in considering a sequestration application, always has a discretion to grant or refuse a provisional sequestration order, even if all the requirements mentioned above have been met.[14]

[29] Having regard to timelines, it is clear that the respondent instituted the action proceedings prior the sequestration proceedings being launched. Therefore, at the time when the applicants launched the sequestration proceedings they were aware of the dispute concerning the payment of the R 7 980 000.00. Consequently, their initiation of the sequestration was wholly inappropriate.[15]

[30] In the matter Kalil v Decotex 1988 (1) SA 943 AD at 9808-0 the so-called "Badenhorst Rule" was accepted by the Appellate Division, where Corbett JA (as he was then) stated that:

"Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the Court will refuse a winding-up order. The *onus* on the respondent is not to show that it is not indebted to the applicant; it is merely to show that the indebtednessis disputed on bona fide and reasonable grounds."

[31] As per the founding affidavit, and more specifically paragraph 17.1 thereof the applicants allege as follows:

> "Kyriacou *(the respondent)* breached the provisions of the settlement as: -
>
> > 17.1 He paid the sum of R 57 million after 24 November 2016, and has failed to pay the remaining amount of R 7 980 000.00.

[32] In reply the respondent denied the said allegation and specifically denied

[14] Epstein v Epstein 1987 (4) SA 606 (C) at para 612G

that he does not have the money to pay the applicants. In paragraph 22.2 he specifically pleaded that on the applicants own version, he is a financially sound and stable person .

[33] Consequently, not only has the respondent disputed his indebtedness of payment of the amount of R 7 980 000.00 at the time when he issued summons, but he has also disputed his indebtedness to pay the said amount in his answering affidavit.

[34] At the hearing the applicants failed to present any arguments on the *points in limine.* Not only did the applicants fail to present argument at the hearing, but none was also presented in the Heads of Argument filed on behalf of the applicants.

[35] The applicant's failure to present any arguments regarding the point *in limine* deprived this Court of the benefit of arguments regarding the applicants' stance as to their election not to appeal the rescission of the provisional order, but instead to elect persisting with the re-enrolment of the same application.

[36] Having regard to what has been postulated above and with specific reference to both, points *in limine,* I am of the opinion that both points have merit and as a result they stand to be upheld.

[37] Furthermore, taking into consideration the dispute in respect of the payment of the R 7 980 000.00 and considering the fact that this dispute is the subject-matter of pending action proceedings between the parties, I am persuaded that the respondent has discharged his *onus* that his indebtedness is disputed on bona fide and reasonable grounds. Therefore, I deem it unnecessary to deal with the remainder of the disputed issues.

ORDER

[38] Consequently, the following order is made:

38.1 The points in lime are upheld.

38.2 The application is dismissed.

38.3 with costs on a punitive scale consequent on the employment of two counsel.

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[15] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347H-348C

COLLIS J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

For the Applicant: Adv. N. Cassim SC and Adv. M. Desai

Attorney of the Applicants: VALLY ATTORNEYS.

For the First Respondent: Adv A.J. Louw SC; Adv R. De Villiers and Adv W. Jungbluth

Attorney for the Respondent: BERT SMITH INCOPORATED

Date of Judgment: 6 May 2019