REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES:NO
(3)	REVISED: YES
.....	26/07/2021
SIGNATURE	DATE

CASE NO: 2308/2021

In the matter between:

JOHANN MOLLER N.O.	First Applicant
JOHANN AUGUST MOLLER N.O.	Second Applicant
and	
CLOETE MURRAY N.O.	First Respondent
MIRELLE FIDELAI VALLIE	Second Respondent
FIRSTRAND BANK LIMITED	Third Respondent
JOHANN MOLLER N.O.	Fourth Respondent
HAZEL LAURA MOLLER N.O.	Fifth Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] The Applicants seek urgent interim relief in the following terms:

"1 ...

2. That the first and second respondents be interdicted and restrained from disposing of and/or selling and/or alienating Portion 6 (a portion of portion 2) of the Farm Lowhills 394, Registration Division J.U., Province of Mpumalanga, being approximately 860 hectares and Portion 8 of the Farm Lowhills 394, Registration Division J.U., Province of Mpumalanga, being approximately 890 hectares (*"the immoveable properties")* either by auction or otherwise, pending the finalisation of the application instituted in the above honourable Court under case number 2308/2021 for the setting aside of the liquidation of Pierriesfontein Boerdery (Pty) Ltd (in liquidation);

3. That the first and second respondents be interdicted and restrained from proceeding with the auction for the sale of the immoveable properties arranged for 27 July 2021;

4. That the first and second respondents are compelled to cancel the auction for the sale of the immoveable properties arranged for 27 July 2021;

5. ..."

FACTUAL MATRIX

[2] The background facts to this application are generally not in dispute. The Third Respondent ("FirstRand Bank") has obtained a court order for final liquidation of a company known as Pieriesfontain Boerdery (Pty) Ltd ("Pieriesfontein"). The indebtedness of Pieriesfontein to FirstRand Bank, which ultimately led to its liquidation, emanated from a suretyship agreement

("the agreement") that it executed in favour of FirstRand Bank in September 2017. In terms of the agreement Pieriesfontein bound itself as surety in solidum for and as co-principal debtor jointly and severally with J S W Moller Konstruksie)Pty) Ltd ("JSW") for the latter's obligations to FirstRand Bank.

[3] The agreement was limited to R7.2 million plus interest and charges. At the time of the execution of the agreement, Pieriesfontein owned two properties situate in Nkomazi, Mpumalanga Province. The properties are described as:

3.1 Portion 6 (a portion of portion 2) of the Farm Lowhills 394, Registration Division J.U., Province of Mpumalanga, being approximately 860 hectares; and

3.2 Portion 8 of the Farm Lowhills 394, Registration Division J.U., Province of Mpumalanga, being approximately 890 hectares.

I shall henceforth refer to these properties as *"the immoveable properties"*).

[4] The shareholders of Pieriesfontein were the Moller Family Trust ("MFT"), and Lowhills Trust whose shareholding in the issued share capital of Pieriesfontein is 55% and 45% respectively. When JSW defaulted on the loan advanced to it by FirstRand Bank and for which Pieriesfontein stood surety, FirstRand Bank launched compulsory liquidation proceedings, which culminated in Roelofse AJ granting a final liquidation order on 20 February 2021. On 10 March 2020 and Following the final liquidation order as aforesaid, the First and Second Respondents ("Murray") and ("Vallie") respectively, were appointed provisional liquidators of Pieriesfontein.

[5] On 1 July 2021, MFT brought an application that the winding-up of Pieriesfontein be set aside in terms of Section 354 of the Companies Act, 71 of 2008 ("the 2008 Companies Act") *alternatively,* that the winding-up order dated 20 February 2020 granted by Roelofse AJ be rescinded and set aside. The Applicants allege that having caught wind that MFT would be launching the application to set aside the liquidation order and having received a draft copy thereof, Murray and Vallie organized and advertised THE auction for the 27th of July 2021 for the sale of the two immovable properties referred to *supra.*

[6] Urgency is not an issue but it is worth mentioning that the source of thereof is the impending sale that has been arranged for the 27th of July 2021. It is clear that the urgency was not self-created and that the Applicants will not receive substantial redress in due course if they allow the sale to proceed. It is necessary that the application be heard as one of urgency.

ISSUES

[7] The central issue is whether or not the Applicants have made a case for interim relief that the public auction sale of the two properties planned to happen on 27 July 2021 be stayed pending the finalization of the setting aside application due for hearing by this Court in the normal course. It would seem not possible to consider this question independently of the merits in the setting aside application. I will make reference to the merits of the setting aside application to the extent that it may become necessary.

[8] To succeed, the Applicants must show that they have (i) a prima facie right even though it might be open to some doubt, (ii) an injury has actually been committed or that there is a reasonable apprehension of it occurring, (III) balance of convenience favours the interdict being granted to the Applicants and the Applicants lack adequate alternative remedy. The Applicants will be entitled to a relief in the terms sought by them if they can satisfy the court that they have met all the requirements described above.

LEGAL FRAMEWORK AND ANALYSIS

PRIMA FACIE RIGHT

[9] In this regard, the degree of proof required to establish a *prima facie* right has been formulated as follows:

9.1 The rights can be *prima facie* established even if it is open to some doubt;

9.2 Mere acceptance of the applicant's allegations is insufficient but weighing up the probabilities of conflicting versions is not required;

9.3 The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial;

9.4 The facts set up in contradiction by the respondent should then be considered and if they throw serious doubt on the applicant's case he cannot succeed. See *Webster v Mitchell* **1948 1 SA 1186 (W)**

[10] A court has a discretion whether or not to grant a temporary interdict. Thus, in *Messina (Transvaal) Development Co Lid v South African Railways and Harbours* **7929 AD 7 95 at 215 to 216** Curlewis JA said:

"In an application for an interim interdict pending action, the Court has a large discretion in granting or withholding an interdict. Where there is merely a possibility, not a practical certainty, of interference or injury, as in the present case, the Court will be reluctant to grant an interdict, especially if the party seeking the interdict will have other means of redress and will not suffer irreparable damage. *And the Court is entitled to and must regard the possible consequences, both to the applicant and to the respondent, which will ensue if an interdict be granted or withheld."*

[11] The Applicants assert that they derive their prima facie right from the fact that they own 55% and 45% of the issued share capital of Pieriesfontein. At the time when Pieriesfontein concluded the agreement with FirstRand Bank, the parties failed to observe the provisions of Section 45(3) as read with 45(6) of the 2008 Companies Act. The Section requires a party in similar circumstances as Pieriesfontein to obtain the consent of its shareholders prior to concluding an agreement such as the suretyship agreement that it entered into with FirstRand Bank. Short of the sanction by the shareholders of Pieriesfontein, the resultant agreement ought to be unlawful for lack of compliance with the Section. For completeness it is desirable to cite the relevant portions of the Section below:

"(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless—

(*a*) the particular provision of financial assistance is—

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(*b*) the board is satisfied that—

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company." And Subsection 6 provides that:

"(6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or

an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with—

(*a*) this section; or

(*b*) a prohibition, condition or requirement contemplated in subsection (4)."

[12] The Applicants argue that their rights as shareholders of Pieriesfontein require protection and this is what they set out to do when they approach this Court for assistance. Roelofse AJ was not alerted to the invalidity of the agreement caused by lack of compliance with Section 45 of the 2008 Companies Act. Had he been aware, so continues the argument, he would not have granted the final liquidation order. This, argue the Applicants, is because the underlying agreement (suretyship agreement) that supported the loan agreement to JSW and ultimately the bond, between FirstRand Bank and Pieriesfontein was invalid. Even when the matter went on appeal to the Supreme Court of Appeal it was dismissed on the basis that the appeal was late and not that the agreement was unlawful.

[13] It is common cause that when the Applicants appealed the granting of the final liquidation order, they had to file a condonation application as well because they were late. Prior to considering the appeal, itself therefore Roelofse AJ would have been compelled to entertain the condonation application. To demonstrate that condonation deserves to be granted, a party must show, among other things, that prospects of success in the main case favour it. Absent such demonstration, the application ought to fail.

[14] It is manifest from the papers filed that Mr Meintjies, the attorney who moved the condonation

application and the appeal before Roelofse AJ, that the invalidity of the agreement was brought up not only in his heads of argument but also during his address to the court on that day. Roelofse AJ assessed the argument and dismissed the condonation application. In short, it could not have been possible to refuse the condonation application without considering the validity of the agreement. The assertion that the validity of the agreement was not before court as such stands to be rejected.

[15] The applicants then proceeded to petition the SCA. The situation that played out before the Court a quo would have come before the SCA. The SCA, I was told in court during argument by Counsel for the Respondent, granted the condonation application but went ahead and dismissed the appeal. It is inexorable that the SCA in dealing with the condonation and appeal would have had regard to the issue whether or not there was compliance with Section 45 of the 2008 Companies Act when the agreement was concluded. Accordingly, the Applicants' assertion in this regard too do not attract this Court's favour and it is rejected.

APPREHENSION OF IRREPARABLE HARM:

[16] This entails a reasonable apprehension that the continuance of the alleged wrong will cause irreparable harm to the Applicant. See *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* **1969 (2) SA 256 (C).** Irreparable harm or loss is the loss of property (including incorporeal property and money) in circumstances where its recovery is impossible or improbable. The loss need not necessarily be any financial loss, it may consist of an irremediable breach of the applicant's rights. *Braham V Hood* **1956 (1) SA 651 (D) at 655B** and *Cliff v Electronic Media Network (Pty) Ltd and Another* **2016 (2) All SA 102 (GJ).**

[17] The Applicants assert that the irreparable harm which they will suffer is apparent. The only assets in the estate of the surety are the two immoveable properties. Moreover, as a property-owning company that does not trade, the sale of the immoveable properties in circumstances where the setting aside application subsequently succeeds, the can be no doubt of prejudice ensuing. The Applicants assert further that a risk that the immovable properties will be sold for far less than their value is real because the amount claimed by FirstRand Bank is far less than the value of the properties.

[18] Furthermore, say the Applicants, the risk become palpable by the refusal of FirstRand Bank to give any guarantees that it will stipulate a reserve price for the immovable properties. If the immovable properties are sold and the setting aside application is ultimately successful, the Applicants and the beneficiaries of MFT would be deprived of any future value in the

properties. All these arguments raised by the Applicants would hold if I had found that the right that they enjoy required protection. The finding of this Court that the Applicants have failed to establish a prima facie right means that there is no prima facie right to be protected. As such, the Applicants must fail in their attempt to demonstrate irreparable harm.

BALANCE OF CONVENIENCE AND ABSENCE OF OTHER SATISFACTORY REMEDY

[19] In this regard, the court must balance the prejudice to the Applicants if the interim interdict is refused against the prejudice to FirstRand Bank if it is granted. See, *Breedenkamp v Standard Bank of South Africa Ltd* **2009(5) SA 304 (GSJ) at 314G** and *Lieberthal v Primedia Broadcasting (Pty) Ltd* **2003 (5) SA 39 (W) at 43F**. The enquiry is whether or not the Applicants can obtain adequate redress in some other form of ordinary relief or an alternative legal remedy. See, *Camps Bay Residents and Ratepayers Association v Augoustides* **2009(6) SA 190 (WCC) at 195I- 196A.**

[20] Usually this will resolve itself into a consideration of the prospects of success in the main action and the balance of convenience. The stronger the prospects of success, the less need for the balance of convenience to favour the Applicant. The weaker the prospects of success, the greater the need for the balance of convenience to favour him. See Breedenkamp *supra*. I need to reiterate that once there exist no right, there will be nothing to protect. The prospects of success in the main case being tenuous in the setting aside application, it follows that the balance of convenience necessarily favours FirstRand Bank, which entails a dismissal of the application. The question of lack of any other satisfactory remedy stands to suffer the same fate as did the apprehension of harm and balance of convenience.

CONCLUSION

[21] The main finding of this Court is that, contrary to what the Applicants would have this Court believe, the validity of the agreement insofar as there might have been lack of compliance with Section 45 of the 2008 Companies Act were considered by both the Court a quo, per Roelofse AJ, and the SCA. The consideration of the validity argument notwithstanding, both courts dismissed the appeal. The validity argument may not have been addressed in the context of the liquidation itself but certainly it was during the hearing of the condonation application when both courts looked at prospects of success. Prospects of success in the setting aside application being minimal, the interim interdict must fail.

ORDER

[22] In the result, I make the following order:

The application is dismissed with costs.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 26 July 2021 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv N Marshall**
Instructed by:	**Marais Attorneys**
Counsel for the Third Respondent:	**Adv J Smith**
Instructed by:	**Werksmans Attorneys**
Date of Hearing:	**20 July 2021**
Date of Judgment:	**26 July 2021**