THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20785/2014

In the matter between:

NICOLAAS JOHANNES SWART	**APPELLANT**
And	
CONRAD ALEXANDER STARBUCK	**FIRST RESPONDENT**
JAMES HENRY VAN RENSBURG	**SECOND RESPONDENT**
TSIU VINCENT MATSEPE	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT	**FOURTH RESPONDENT**

Neutral citation: *Swart v Starbuck & others* (20785/2014) [2016] ZASCA 83 (30 May 2016)

Coram: Ponnan, Seriti, Dambuza and Mathopo JJA and Fourie AJA

Heard: 12 May 2016

Delivered: 30 May 2016

Summary: Claim by insolvent on behalf of his insolvent estate for the payment of damages by his trustees in terms of s 82(8) of the Insolvency Act 24 of 1936 – section 82(8) does not find application where the trustees sold immovable properties of the estate prior to the second meeting of creditors – sale of the immovable properties of the estate valid and enforceable – claim for damages dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Strijdom AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

JUDGMENT

Fourie AJA (Ponnan, Seriti, Dambuza and Mathopo JJA concurring):

[1] This appeal concerns an action brought by the appellant (the insolvent) against the first to third respondents, the trustees of his insolvent estate (the trustees), for the payment of damages allegedly caused by them in the administration of his estate. The matter was heard by Strijdom AJ in the Gauteng Division of the High Court, Pretoria, who dismissed the claim with costs, but granted the insolvent leave to appeal to this court.

[2] The estate of the insolvent was provisionally sequestrated by order of the Gauteng Division, Pretoria, on 4 October 2005 and a final order of sequestration was granted on 1 November 2005. On 24 January 2006 the trustees were appointed as the provisional trustees of the insolvent estate by the fourth respondent (the master). Their appointment as final trustees followed on 16 November 2006.

[3] At the time of his provisional sequestration the insolvent was the registered owner of certain immovable properties known as portions 5, 8 and 13 of the Farm Doorndraai 2A, Registration Division KR, Limpopo Province (the properties). Portion 5 had been granted water rights for agricultural purposes in terms of s 21*(a)* of the National Water Act 36 of 1998.

[4] On 16 November 2005 the L J Möller Trust (the trust) submitted three written offers to purchase the properties (including the water rights attaching to portion 5) for

a total purchase price of R1 625 000. The offers were addressed to the first respondent only and not to his two co-trustees. The trustees had by then not yet been formally appointed as provisional trustees of the insolvent estate, but had apparently been advised by the master on 6 October 2005 of the latter's intention to appoint them as provisional co-trustees. The offers to purchase were addressed to the first respondent in his capacity as 'trustee' of the insolvent estate. It has become common cause that each of the three offers to purchase had been accepted by the first respondent who signed same as the 'seller' on 1 December 2005.

[5] The three offers to purchase were similarly worded save for the description of the relevant property in each instance and the purchase price payable in respect thereof. Each offer contained the following suspensive condition:

'The agreement is further subject to the condition that the Seller and/or Master of the High Court must grant the required consent, if applicable. Should the consent of the Master of the High Court or any court be required before transfer of the property or any portion thereof can be registered in the name of the Purchaser, this agreement is subject to such consent being obtained and it shall fall away and be regarded as pro non scripto if such consent cannot be obtained.'

[6] On 12 January 2006 the trustees submitted a written application to the master in terms of s 80*bis* read with s 18(3) of the Insolvency Act 24 of 1936 (the Act), for the extension of their powers to enable them to sell the properties by private treaty. The application motivated the decision to sell the properties of the insolvent estate prior to the second meeting of creditors, and included a consent from the two secured creditors; a circular sent to all known creditors regarding the decision to sell the properties; valuations of the properties and the three written offers to purchase received from the trust. The trustees further expressed the view that the properties should be sold by private treaty in terms of the offers received from the trust. I should add that no creditor responded to the circular by objecting to the anticipated sale of the properties.

[7] On 31 January 2006 the master responded to the trustees' application by consenting to the sale of the properties in the following terms:

'The powers of the provisional trustees are hereby extended in terms of s 80*(bis)* of the Insolvency Act 24 of 1936, as amended, to sell the immovable properties of the above-mentioned insolvent estate, subject to the following conditions'. (There being no conditions stated.)

[8] Having received payment of the agreed purchase consideration for the properties, the trustees executed written powers of attorney on 13 April 2006, in which they declared that the properties had been sold on 1 December 2005 and authorised the transfer thereof to the trust as purchaser. Pursuant thereto, on 14 June 2006, the transfer of the properties by the trustees to the trust was registered by the deeds office, Pretoria. The first meeting of creditors was held on 7 September 2006 with the second meeting of creditors taking place on 12 October 2006. At the second meeting, the creditors approved the trustees' report reflecting the sale and transfer of the properties to the trust.

[9] It is convenient to consider the opposing contentions of the parties against the backdrop of the relevant provisions of the Act. They are the following:

Section 18(1)

The subsection provides for the appointment of a provisional trustee by the master as soon as an estate has been sequestrated (whether provisionally or finally). The provisional trustee is required to furnish security to the satisfaction of the master for the proper performance of his or her duties as provisional trustee and holds office until the appointment of a trustee.

Section 18(3)

In terms of this subsection a provisional trustee shall have the powers and the duties of a trustee, as provided in the Act, except that, without the authority of the court or the master, he or she shall not sell any property belonging to the insolvent estate. Such sale shall be after such notices and subject to such conditions as the master may direct.

Sections 54 and 56

These sections provide that, at the first meeting of the creditors of an insolvent estate, the creditors who have proved their claims against the estate may elect a trustee. The selection has to be confirmed by the master and the person so selected has to provide security to the master for the proper performance of his or her duties

as trustee. Where (as happened in this case) the creditors do not elect a trustee at their first meeting the master would, virtually as a matter of course, appoint the provisional trustee as trustee.

Section 80*bis*

This section provides that, at any time before the second meeting of creditors, a trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the master in writing accordingly, stating his or her reasons for such recommendation. The master may thereupon authorise the sale of such property on such conditions and in such manner as he or she may direct.

Section 82(1)

In terms of this subsection the trustee of an insolvent estate shall, as soon as he or she is authorised to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct. However, if the creditors have not, prior to the final closing of the second meeting of creditors given any directions, the trustee shall sell the property by public auction or public tender.

Section 82(8)

The relevant part thereof reads as follows:

'If any person . . . has purchased in good faith from an insolvent estate any property which was sold to him in contravention of this section . . . the purchase . . . shall nevertheless be valid, but the person who sold . . . the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of this section.'

[10] In his pleadings the insolvent contended that the trustees did not, on 1 December 2005, have the necessary authority (or rather capacity) to accept the offers to purchase made by the trust, as they had not yet been appointed as provisional trustees. Nor had the powers of the trustees, when they purported to accept the offers to purchase, been extended in terms of s 18(3) of the Act to authorise them to sell the properties. Also that at 1 December 2005, the trustees had not been granted any authorisation by the master in terms of s 80*bis* of the Act, to sell the properties to the trust. Therefore, according to the insolvent, the sale of the properties and the resultant transfer thereof to the trust were irregular ('onreëlmatig') and constituted maladministration of his estate. He further alleged that the sale of the

properties had to take place in terms of s 82(1) of the Act and as the trustees had failed to follow the prescripts of this subsection, they were liable in terms of s 82(8), to make good to the insolvent estate twice the amount of the loss which the estate had sustained as a result of their irregular dealing with the properties.

[11] In their plea, the trustees denied that on 1 December 2005 any agreements of sale were entered into by them in their capacities as trustees of the insolvent estate, but admitted that the first respondent signed and thereby accepted the offers to purchase on that date, 'subject to the permission of the master being granted and by implication their formal appointment by the master.' They further pleaded that, on 31 January 2006, they were granted authority in terms of s 80*bis* of the Act to sell the properties by way of private treaty. Therefore, the trustees contended, the properties had been validly transferred to the trust on 14 June 2006, which transfer took place after the master had granted the necessary authorisation in terms of s 80*bis* of the Act. They accordingly denied any maladministration on their part and disavowed liability for the payment of any damages.

[12] The court a quo, in essence, held that the trustees had been granted the necessary authorisation by the master in terms of s 80*bis* of the Act to sell the properties to the trust, and that compliance with s 82 of the Act was accordingly not required. Therefore the action was dismissed with costs.

[13] In evaluating the insolvent's claim it has to be borne in mind that he is an unrehabilitated insolvent who would, save for the exceptions mentioned in s 23 of the Act (which do not apply in this instance), not have had locus standi to institute legal proceedings in his own name. However, as appears from the particulars of claim, the insolvent sought an order compelling the trustees to pay damages to his estate caused by their alleged maladministration of the estate. Our law has recognised that in certain circumstances an insolvent has locus standi by virtue of his or her real interest in the administration of the estate, to institute a claim on behalf of his insolvent estate. See *Mears v Rissik, MacKenzie NO and Mears' Trustee* 1905 TS 303 at 305; *Muller v De Wet NO & others* 1999 (2) SA 1024 (W) at 1029D-1030H. Whether or not the insolvent had locus standi in this case is unnecessary to decide, for I will assume, without deciding, that he did.

[14] Turning to the insolvent's cause of action, I must confess that I have some difficulty in appreciating the legal basis of the claim. As recorded above, the insolvent's case on the pleadings appears to be that the sale of the properties and the transfer thereof to the trust were 'irregular', constituting maladministration of his estate, entitling him to claim damages on behalf of the estate from the trustees. In the heads of argument filed on his behalf and in argument on appeal counsel for the insolvent expanded on this submission by contending that the agreements in terms of which the properties were sold were in fact void ab initio. However, as I understood the argument on his behalf, the insolvent did not seek to attack the validity of the transfer of the properties and have the parties restored to the status quo ante, but only to recover damages for and on behalf of the insolvent estate.

[15] According to the insolvent's pleadings and the written heads of argument filed on his behalf on appeal, his cause of action was based squarely on s 82(1), read with s 82(8), of the Act. He contended that, in view of the absence of a valid authorisation by the master in terms of s 80*bis* of the Act, the sale of the properties had to take place in terms of s 82(1), in such manner and upon such conditions as the creditors may direct at their second meeting, failing which, the properties had to be sold by public auction or public tender. As the trustees had sold the properties in contravention of s 82(1), they were, in terms of s 82(8) of the Act, liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of their dealing with the properties in contravention of s 82(1). That this was the basis of the insolvent's cause of action is borne out by the emphatic statement in his heads of argument, that 'the case is based on s 82(8) as read with s 82(1) of the Act'.

[16] At the hearing of the appeal, counsel for the insolvent, however, attempted to change course by pinning his colours to the mast of a delictual claim for damages, based on a breach of their fiduciary duties by the trustees in disposing of the properties without the necessary authorisation by the master. As I understood the adapted cause of action, it was not based on s 82(8) as read with s 82(1) of the Act, but s 82(8) was invoked in order to recover twice the amount of the loss which the estate had allegedly suffered due to the breach of their fiduciary duties by the

trustees. I should mention that, even on a liberal reading, the pleadings do not disclose a delictual claim advanced along these lines.

[17] In my view, both the insolvent's original cause of action based on s 82(8), read with s 82(1) of the Act, and the more recently adopted delictual cause of action based on the breach of a fiduciary duty by the trustees, are misconceived and devoid of any merit. At the outset, it is clear that both causes of action depend, inter alia, upon the absence of a valid authorisation by the master for the sale of the properties. However, as recorded earlier, the master did on 31 January 2006 extend the powers of the trustees by authorising the sale of the properties in terms of s 80*bis* of the Act. This authorisation was granted by the master after the trustees had been appointed as provisional trustees. The granting of permission in terms of s 80*bis* of the Act is clearly an administrative act which has legally valid consequences until such time as it is set aside. See *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 14. It is common cause that no application had been made to set aside the s 80*bis* authorisation granted by the master. It accordingly stands as a legally valid authorisation and on this basis alone the insolvent's claim had to fail.

[18] Returning to the cause of action as originally pleaded, it is clear from the wording of s 82(1) that it deals with the sale of property of an insolvent estate after the second meeting of creditors, in circumstances where the trustee sells the property in a manner or on conditions contrary to those directed by the creditors at their second meeting, or, absent such direction, sells the property other than by public auction or public tender. Section 82(1) has no application in a case such as the present where the sale of the properties had taken place prior to the first meeting of the creditors. When the present sales took place there were obviously no directives given by creditors at a second meeting that the trustees had to comply with, nor were the trustees bound, to sell the properties by public auction or public tender. They were perfectly entitled to sell the properties, having been duly authorised thereto by the master in terms of s 80*bis* of the Act.

[19] In *Cronje NO & others v Hillcrest Village (Pty) Ltd & another* [2009] ZASCA 81; 2009 (6) SA 12 (SCA), this court dealt with an analogous situation where the

liquidators of a company had sold the company's property prior to the general meeting of the company's creditors. Streicher JA, writing for the court, said the following at para 22:

'Section 82(1) of the Insolvency Act deals with the sale of property after the second meeting of creditors and is not applicable to the auction of WKP's [the company in liquidation] property. The auction sale was a sale authorised by the Master in terms of s 386(2B) of the Companies Act [the equivalent of s 80*bis* of the Act] before a general meeting of WKP's creditors had been convened. The court below therefore erred in considering the section to be of application in respect of the auction sale.'

The present matter similarly did not concern a sale of property after the second meeting of creditors and therefore ss 82(1) and 82(8) did not find application.

[20] It follows that the insolvent's claim, whether based on s 82 of the Act or a delictual claim as belatedly contended for, fell to be dismissed. It is in any event telling that this action, which the insolvent purportedly instituted for the benefit of his insolvent estate, ie in effect for the benefit of the creditors of the estate, did not carry the support of the creditors. On the contrary, as recorded earlier, the two secured creditors whose claims represented the lion's share of the value of the total claims against the estate, actively supported the sale of the properties to the trust. Nor did any concurrent creditor respond negatively to the circular sent by the trustees advising them of the intended sale.

[21] It has to be borne in mind that the creditors of an insolvent estate are in law the masters of the realisation of the assets of the estate. This was emphasised in *Janse van Rensburg v Muller* [1995] ZASCA 136; 1996 (2) SA 557 (A), where the trustees of an insolvent estate, contrary to s 82(1) of the Act, disposed of an asset of the estate (a claim for damages) without value, by ceding same to the insolvent's spouse. This occurred with the consent of the majority of the creditors in number and value, but in the litigation that followed the validity of the cession was put in issue. Joubert JA, writing for the court, concluded that, notwithstanding non-compliance with s 82(1) of the Act, the wishes of the creditors reigned supreme. It was put as follows at 565A-B:

'Dit is duidelik dat die skuldeisers in die onderhawige geval nie die risiko van die skadevergoedingseis wou aandurf nie. Dis skadevergoedingseis het vir die skuldeisers geen

praktiese betekenis en nut gehad nie. Hulle is regtens meesters van die tegeldemaking van die insolvente boedel se bates. Hulle optrede was geoorloofd . . . Dit volg na my oordeel dat die sessie geldig is en geensins in stryd met die openbare belang is nie.'

In the instant case the sale of the properties to the trust took place without objection from the body of creditors and enured to their benefit. There is no reason in law or public policy for the trustees to be mulcted in damages for acting in the best interests of the creditors.

[22] This effectively disposes of the matter. However, I do believe that it is necessary to clear up a misconception that seems to have permeated the submissions made on behalf of the insolvent, namely that the sale and transfer of the properties were irregular (or maybe even void), thereby giving rise to a claim for damages on behalf of the insolvent estate against the trustees. It appears to me that the misconception is founded on a lack of appreciation of the principle laid down by this court in *Legator McKenna Inc & another v Shea & others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA), namely that the abstract theory of transfer applies to immovable property as well, ie the validity of the transfer of ownership is not dependent on the validity of the underlying transaction such as, in this case, the contracts of sale. The abstract theory postulates two requirements for the passing of ownership of immovable property, namely delivery – which is effected by registration of transfer in the deeds office – coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to pass ownership and the intention of the transferee to become the owner of the property. The abstract theory does not require a valid underlying contract, eg an agreement of sale, but ownership will not pass, despite registration of transfer, if there is a defect in the real agreement. As explained by Ponnan JA in *Du Plessis v Prophitius & another* [2009] ZASCA 79; 2010 (1) SA 49 (SCA) para 11, it is at the moment of passing of ownership that the transferor must have the intention of transferring ownership (and obviously when the transferee must have the intention of acquiring ownership), which supplies the subjective element for the passing of ownership.

[23] Moreover, in *Legator McKenna* para 28 this court also expressed its unequivocal approval of the 'rule' in *Wilken v Kohler*. The 'rule' has its origin in an

obiter dictum by Innes JA in *Wilken v Kohler* 1913 AD 135 at 144, dealing with performance under sales of land that were invalid for want of compliance with a statute requiring the contract to be in writing. The 'rule' provides that, where both parties had performed in full in terms of such an invalid contract, neither party can recover its performance purely on the basis that the contract was invalid.

[24] In *Legator McKenna* a curator bonis was appointed to a patient, but before receiving his letters of curatorship the curator bonis sold the immovable property of the patient. Pursuant thereto the letters of curatorship were received and the curator bonis thereafter effected transfer of the property to the purchaser. The validity of the transfer of the property was in issue. This court assumed that a sale concluded by a curator without letters of curatorship would be invalid and the transfer by a curator without letters of curatorship would therefore not pass ownership to the transferee, but as the curator had received his letters of curatorship before he concluded the real agreement, he was properly authorised to enter into that agreement when he did so. Therefore, the fact that the curator lacked authority when he purported to enter into the prior agreement of sale, was of no consequence. In view of the abstract theory, it did not affect the validity of the real agreement. This court held that to transpose the curator's lack of authority when he concluded the sale to the real agreement was to ignore the implications of the abstract theory. It accordingly held that the property was validly transferred.

[25] In the present appeal it is similarly of no consequence that, at the time of the acceptance of the offers to purchase by the first respondent, the trustees had not yet been appointed. The fact of the matter is that they had been subsequently appointed as provisional trustees on 24 January 2006, whereafter, on 13 April 2006, they executed written powers of attorney in terms of which they authorised the transfer of the properties to the trust and the transfer was registered in the deeds office. In addition, at the time when the parties concluded the real agreement and registration of transfer took place, the master had extended the powers of the trustees and granted the necessary authority to them in terms of s 80*bis* of the Act to sell the properties. The properties were accordingly validly transferred to the trust.

[26] Neither counsel relied on nor made reference to *Legator McKenna*, but counsel for the insolvent set much store by the decision in *Simplex (Pty) Ltd v Van der Merwe & others NNO* 1996 (1) SA 111 (WLD), where Goldblatt J held that an agreement of sale concluded by trustees who had not yet been authorised to act in that capacity, was null and void and could not be 'resuscitated by subsequent ratification either by the Master or by the trustees after receipt of the necessary authority'.

[27] There are, however, two material distinguishing features in the instant matter. First, the agreements of sale resulting from the three offers to purchase were subject to the suspensive condition referred to in para 5 above. Second, the properties were subsequently validly transferred to the trust in terms of real agreements between the trustees and the trust after the master had provisionally appointed the trustees and granted them authority in terms of s 80*bis* of the Act to sell the properties to the trust.

[28] By means of the suspensive conditions incorporated in the offers to purchase, the parties intended to render their contracts subject to the master granting the required consent to the trustees to transfer the properties to the trust. As pointed out by Brand JA in *Legator McKenna*, para 15, there is no rule that a contract cannot be rendered subject to compliance with a condition imposed by statute, such as s 80*bis* of the Act in this instance. The agreement would then only become final and binding upon the fulfilment of the condition. The absence of a similar suspensive condition in *Simplex* formed a significant part of the reasoning of Goldblatt J in declaring the relevant agreement void. This appears at 114E of *Simplex* where the court noted that 'it was never the intention of the parties to have a limping contract which would only become whole on approval by a duly authorised trustee or the master or the beneficiaries or the court'.

[29] The lack of authority on the part of the trustees when they (represented by the first respondent) accepted the offers to purchase, was accordingly of no legal consequence and could not somehow have served as a basis for a claim for damages against the trustees.

[30] For these reasons the appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

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P B Fourie

Acting Judge of Appeal

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