Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case No: 7048/2018

In the matter between:

NELS INVESTMENTS CC Applicant

and

CHRISTOPHER BELLINGHAN Respondent

JUDGMENT 31 OCTOBER 2018

KUSEVITSKY AJ:

[1] This is an opposed application for the provisional sequestration of the estate of the Respondent. The Respondent stood surety in favour of the Applicant, for an entity called Biothane Energy CC ('Biothane'). He was the sole shareholder. Biothane entered into a lease agreement with the Applicant, occupying commercial premises. The Applicant instituted these proceedings against the Respondent on the basis that the Respondent committed certain acts of insolvency in his endeavour to settle Biothane's debt allegedly owed to it.

[2] The Respondent defends the matter on the basis that he has not committed any acts of insolvency. He avers that the Applicant has failed to distinguish between Biothane's debts and his obligations as surety. He

claims that there is a dispute in respect of the rental amount owing to the Applicant, as Biothane has effected certain improvements on the leased premises and as a result, Biothane has a counterclaim against the Applicant. This would mean, so it is argued, that any accessory obligation towards the Applicant is dependant on the existence and extent of Biothane's principal obligation to it and any defences attaching to the principal debt would ostensibly, also be available to him as surety.

Summary of factual background

[3] Biothane entered into a lease agreement in respect of certain commercial factory premises, owned by the Applicant, on 20 June 2017 ('the lease'). It was however mentioned that Biothane had occupied presumably other sections, for much longer. According to the founding papers, the Respondent and Biothane could not make payment of the rental due in terms of the lease for a long period and as a result, the parties entered into settlement negotiations in respect of the termination of the lease and the payment of the arrear rental. During November 2017, the Applicant directed a letter of demand to Biothane for the amount of R 236 997.67 which was for outstanding rental for the months of May 2017 in part, through to November 2017.

[4] When no payment was forthcoming, the Applicant met with the Respondent on 1 December 2017 in order to discuss the settlement of the arrear rental. It also discussed the date upon which Biothane would vacate the premises in view of the breach of the rental agreement. According to

Applicant, it was agreed at this meeting that the lease agreement would be cancelled and that Biothane would vacate the factory premises on or before 31 December 2017. This agreement was denied by the Respondent. He argued that the agreement was that Biothane would vacate the premises by 31 January 2018 and that the lease agreement would be terminated on 1 February 2018. The Applicant further stated that the Respondent advised it, that he had no funds to pay the arrear rental, but proposed that he would settle the debt from the proceeds of the sale of certain of his assets and that of Biothane, and that he had arranged a public auction during December 2017 for this purpose. Applicant needed confirmation that the proceeds from the auction would be utilised to settle the full arrears. According to the Applicant, they were somewhat dismayed and surprised that Respondent decided to utilise the proceeds for other purposes and only received an amount of R 120 000.00 from the proceeds of this auction. It averred that not only did this amount not cover the arrears, but Biothane also reneged on its agreement that it would vacate the premises by 31 January 2018. Instead, it sought a further indulgence to remain on the premises until 31 March 2018 and offered to pay an amount of R 50 000.00 in five equal payments from February 2018.

[5] On 5 December 2017, the Respondent's attorneys of record, directed an email to the Applicant in reply to its request for Biothane to vacate the premises by 31 December 2017. The Respondent ended the letter by stating the following:

> *"Ons is van oordeel dat dit in beide partye se belang sal wees indien tot 'n aanvaarbare en werkbare ooreenkoms rondom die beëindiging van die huurkontrak gekom kan word. Ons kliënt glo dat sy optrede tot op datum, wat insluit die aansienlike verbeterings wat hy op sy kostes tot voordeel van die verhuurder aangebring het (wat insluit die bou van 'n wooneenheid, die aanlê van 'n tuin, die boor van 'n boorgat met pompe en pype en algemene voorkoms van die huurperseel), sy bona fides bevestig."*

[6] On 13 February 2018, Respondent directed a further letter to the Applicant, advising that it was in the process of vacating the leased premises. The letter also stated that during the last nine years of its occupation, it had effected certain improvements to the premises and that in terms of the lease agreement, they had the option of removing these and leaving the premises as they had found it, alternatively they would give the Applicant the option of purchasing the items, which included *inter alia*, automated gates and a mezzanine floor measuring some 100 square metres. Further requests for payments and undertakings to pay were made, which never materialised.

[7] On 12 April 2018, the Respondent's attorney of record directed further correspondence to the Applicant, attaching to it a draft settlement agreement. In this letter, the Applicant *inter alia* was advised that the Respondent was of the view that he was entitled to a larger credit as a result of the improvements, and advised that the Respondent was only prepared to pay an amount of R 75 000.00 in full and final settlement of all claims that Applicant had against them. The letter also stated that, according to the Respondent, he could not afford to make a greater offer. The specific paragraph reads as follows:

"Ons sonder benadeling van regte gesprek gister by u kantore, verwys.

Dankie vir die vriendelike en openhartige wyse waarop ons gesprek kon plaasvind.

Ek het in breë trekke die uitslag van ons gesprek met mnr Bellingan bespreek en hy aanvaar dit, behalwe wat betref die betaal van 'n addisionele R 100 000 ten opsigte van die agterstallige huurgeld. Hy glo dat die verbeterings wat hy aangebring het, 'n groter krediet regverdig en daarom is hy slegs bereid on R 75 000 in volle en finale vereffening van alle eise, te tender soos in die aangehegte skikkingsakte uiteengesit. Volgens hom het hy nie die geld om 'n groter aanbod te maak nie.

….Lewer dan die oorspronklike document aan mnr.Bellingam vir sy onderteken (beide namens Biothane en in sy persoonlike hoedanigheid) en stuur dan 'n afrif van die akte vir ons rekords sodat ons kan toesien tot die betaal van die balans van die skikkingsbedrag aan u namens die Huurder." ("own emphasis")

[8] According to the Applicant, the aforementioned admission could only have been a reference to the Respondent and argues that this letter amounts to a clear act of insolvency in terms of section 8 (g) of the Insolvency Act[1] in that he informed the Applicant that he did not have money to pay the full debt due to the Applicant.

[9] The Applicant further contends that neither the Respondent nor Biothane, during the initial negotiations regarding payment of the outstanding arrear rental, made any mention of a right to be compensated for any additions and alterations to the leased premises. In any event, it argues that

1. [1] Section 8 of the Act 24 of 1936 (as amended) provides as follows:
"8 Acts of insolvency
A debtor commits an act of insolvency-
…
(g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts;"

the lease contains provisions, which precludes compensation for any alterations or improvements.

The parties contentions'

[10] It is not in dispute that Biothane was in arrears with its rental obligations to Applicant. It is also not in dispute that the parties entered into without prejudice negotiations to settle same.

[11] According to Applicant, the Respondent's defence of a counterclaim that it has against Applicant is not *bona fide* and not good in law. In reliance hereof, the Applicant relied on the provisions of the lease agreement.

[12] Clause 6.1 and 6.2 of the Lease Agreement provides as follows:

> "6.1 The Lessee shall have the right to install in the premises such fixtures and/o fittings as shall be reasonably required for the purpose of its business and it shall have the right upon termination of the tenancy to remove any such fixtures and/or fittings, provided that it shall make good any damage caused to the premises by such installation and/or removal.
>
> 6.2 The Lessee shall not make any alterations in or additions to the premises without the Lessor's written consent, which shall not be unreasonably withheld, and in respect of any such alterations and/or additions so made, the Lessor shall have the right upon termination of the lease, from any cause whatsoever, to insist upon the removal by the Lessee at its own costs of such alterations and/or additions, and the making good of any damage caused by such removal, or alternatively *the Lessor shall have the right to receive the premises as altered or added to without payment of any compensation for such alterations and/or additions to the Lessee.*"

[13] Clause 6.2 of the lease agreement therefore makes it clear, that the Respondent and Biothane are not entitled to any compensation in respect of improvements.

[14] Clause 3.3 of the lease agreement provides that all rental payments should be made in advance, free of bank exchange and free from any deductions and in terms of clause 12.1, the lessee (Biothane) is not entitled to withhold, delay or abate payment of any amounts due to the Applicant by reason of any alleged breach of the Applicant's obligations.

[15] According to the Applicant, it was only during April 2018 that the Respondent for the first time *via* his attorneys alleged that the Applicant had to compensate Biothane for the improvements made to the property. This, ostensibly, despite the provisions of the aforementioned clauses 6.2 and 12.1 of the Lease. This was denied by the Respondent. The Respondent claims that the Applicant instructed Biothane not to remove the improvements when it vacates the premises.

[16] The Applicant furthermore contends that, as the formal requirements in terms of the Act were met, and given that this is not a friendly sequestration, the Respondent has failed to satisfy that its defence of a counterclaim is a reasonable ground for opposition and finally, that he has failed to show that he is solvent.

[17] The Respondent on the other hand claims that he has a *bona fide* claim against the Applicant and that it is disputed on reasonable grounds. He also disputes that he committed any acts of insolvency. He argued that with

regard to the sale of the assets, that the Applicant was well aware on its own admission, that some of the assets were to be auctioned off, and the remaining equipment were to be moved to make way for another tenant. There was thus no orchestrated attempt to dispose of assets.

[18] The Respondent finally claims that the offer made to the Applicant was not made in his personal capacity but made on behalf of Biothane. In any event, he claims that since the offer was not accepted by the Applicant on behalf of Biothane and himself as surety, those communications and admissions are privileged and constitute inadmissible evidence. It will also not be to the benefit of creditors to sequestrate the Respondent as there are no significant creditors.

Evaluation

[19] It is trite that in order for Applicant to succeed in this application, it must *prima facie* show that:

19.1 It has a claim sounding in money against the Respondent for more than R100,00;

19.2 The Respondent has committed an act of insolvency or is factually insolvent;

19.3 There is reason to believe that sequestrating the estate of the respondent will be in the interests of his creditors; and that

19.4 The formal requirements of section 9 of the Insolvency Act, 24 of 1936 ("the Act") have been met.

[20] It is common cause that Biothane was in arrears with its rental obligations to Applicant and that the Respondent, as sole member of Biothane and surety, entered into settlement negotiations. The issue in my view to be determined is whether a creditor can rely on admissions or concessions made by a debtor of an inability to pay made during without prejudice settlement negotiations as a ground for an act of insolvency. In this case the Applicant also needs to show that such an act was made in the Respondent's personal capacity.

[21] The issue of 'without prejudice' communications was dealt with in *Absa Bank Limited v Hammerle Group (Pty) Ltd 2015 (5) SA 215 (SCA*)[2] where the court held that a written communication, which qualifies as an act of insolvency in terms of section 8(g) of the Act, may be admissible against the debtor notwithstanding that it purports to have been made "without prejudice".

[22] An act of insolvency can also be committed via an agent or third party. In the matter of *Eli Spilkin (Pty) Ltd v Mather 1970 (4) SA 22 (E) at 23-24*, the court held that a debtor also commits an act of insolvency by his agent where the latter is authorised accordingly, expressly or impliedly.

[2] At para 13

[23] In *Chenille Industries v Vorster [1953] 2 All SA 330 (O)*, the court held that a debtor also commits an act of insolvency through another when the latter acts with the former's knowledge and consent. Horwitz J said:[3]

> *"The question whether respondent knew of, and consented to or authorised, the issue of the circular is one essentially within the knowledge of the respondent and his wife. Neither of them has made the allegation that respondent did not authorise it or that he did not consent to its issue. In the total absence of any such denial the admitted facts and the surrounding circumstances suffice to establish the existence of authority or knowledge and consent. Even the English cases on bankruptcy do not go so far as to hold that an agent's act of bankruptcy committed with the principal's knowledge and consent or with his authority does not bind the principal. (See Halsbury, Laws of England, vol. 2, para. 22, p. 16 (Hailsham Ed.)).*
>
> *I may add, however, that the contention is based on a number of English decisions such as Ex parte Blain, In re Sawers, 1879 (12) Ch. D. 522, to the effect that an act of bankruptcy must be a personal act or default and it cannot be committed through an agent or by a firm as such. BRETT, L.J., indicated that a man cannot 'commit an act of bankruptcy by a particular act of his agent which he has not authorised and of which act he has had no cognisance'. Where, however, a circular letter suspending payment of debts was issued by the bankrupt's accountants with the knowledge and authority of the bankrupt, it was held to constitute an act of bankruptcy in In re J. R. Lamb, Appeal of Gibson and H. Boland, 55 L.T. 817 at pp. 818 – 819… point."*

[24] In *Walsh v Kruger*, 1965 (2) SA 765 (E), Munnik J said:

> *"A careful reading of the cases satisfies me that, unlike the position in English law, an act of Insolvency can be committed through an agent but the Court must be satisfied that the agent acted with the knowledge and consent of his principal".*[4]

[25] If one considers the context in which the letter of 12 April 2018 was written, it is clear that settlement negotiations were made in respect of both Biothane and the Respondent in his personal capacity as surety. The draft settlement agreement bears evidence of this. There were no allegations

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[3] Chenille Industries v Vorster 1953 (2) SA 691 (O) at 698; Walsch v Kruger 1965 (2) SA 765 (E) at 759H

[4] at 759H

made that the Respondent did not have the necessary authority to act on behalf of Biothane and in fact, no such challenge could in any event have been made given the Respondent's close relationship to Biothane. I am of the view that given this close relationship, Respondent being the only member of Biothane and which, for all intents and purposes, was the alter ego of Respondent, committed an act of insolvency in his *personal* capacity.

[26] The Applicant further relies on act of insolvency committed by the Respondent in terms of section 8(c) of the Insolvency Act. It says that on 20 April 2018, the respondent, without notice to the Applicant, removed machinery and equipment from the premises and by removing same, the Applicant contends that it has lost all security it had over the equipment in the form of a Lessor's Hypothec. In response to this claim, the Respondent avers that the Applicant was well aware and had full knowledge that machinery and equipment, which belonged to Biothane were in part disposed of by public auction on 13 December 2017 and the full proceeds thereof were used by Biothane to partially settle the Applicant's claim for arrear rental. The remaining stock, machinery and equipment in the workshop area of the leased premises were disposed of and removed to storage in April 2018 on the Applicant's own request in order to make space for a new tenant who was meant to take occupation of the workshop portion of the leased premises.

[27] If one has regard to the Applicant's founding affidavit, it is clear that the Applicant had knowledge that the Respondent had planned the sale of some of Biothane's equipment via an auction. The allegation therefore, that

the Respondent was disposing of its assets without notice is not supported if one has regard to the correspondence of 5 December 2017 from the legal representative of the Respondent to Applicant in which he advises the following:

> "Soos u bewus is, word 'n veiling van roerende bates op of omtrent 14 Desember 2017 op die perseel gehou en onderneem ons klient om die grootse gedeelte van die netto opbrengs daarvan, sodra dit deur die afslaers geïn en deur ons klient ontvang word, aan u te betaal ter delging van enige agterstallige huurgeld wat dan nog uitstaande mag wees…" .

[28] In its reply, the Applicant merely stated that this demonstrated that the equipment and machinery sold at the public auction belonged to Respondent and not Biothane. This however is contrary to its founding affidavit in which it stated that " *the respondent advised that he had no funds to pay the arrear rental but proposed that he would settle the debt from the proceeds of the sale of certain of his assets and that of Biothane and that he had arranged a public auction during December 2017 for such purpose*." It must therefore be accepted on the basis of the Plascon-Evans rule[5] that the Applicant on its own version, knew about the disposition. However, this is not the end of the enquiry. Given that a sale of the Respondent's and Biothane's assets did in fact occur, would this qualify as a *disposition* within the meaning of the Act and upon which the Applicant can rely as a ground of insolvency? It seems to me that the real complaint by the Applicant is not so much that the disposition has been made to prefer one creditor above the other. What is actually complained of is the fact that it expected to be paid more or all of

[5] Plascon-Evans Plaints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635D

the proceeds of the sale of the auction than it ultimately was paid. In my view, a creditor cannot accede to the sale of a debtor's assets with the hope that *it* will ultimately be preferred above other creditors when the proceeds of sale are received, and complain when it does not materialise, or the creditor is not satisfied with the amount received, and then complain that there is a dispossession of assets and as a result, that *it* is being prejudiced as a creditor. Put differently, a creditor cannot raise unfair advantage or prejudice within the meaning of sections 8(c) and (d) of the Act, where it is clear that the initial intention of the creditor was that its debt should have been extinguished and consequently, should have been preferred. I am also not persuaded that the Applicant has proven that there was an intention by the Respondent to prefer other creditors above it, in fact, as I have just stated, quite the contrary is evident.

[29] Now turning to the *bona fides* of the counter-claim. It is the Respondent's case that Biothane has a counterclaim for improvements against the Applicant and that it would be premature for this court to decide on whether that counterclaim is valid. The Respondent also argued that the Applicant's refusal to allow Biothane to remove the improvements is unreasonable conduct and that it is entitled to remove the fixtures and fittings in terms of clause 6.1 of the lease agreement.

[30] In this regard, it was argued that there are currently action proceedings pending which have been instituted by Biothane against the Applicant in order to determine either a claim for damages or unjustified enrichment against the Applicant.

[31] Mr Wessels for the Applicant relied on the comments made by Rogers J in *Gap v Goal Reach 2016 (1) SA 261 (WCC)*. That court stated that whilst it is so that the general rule of winding up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is *bona fide* disputed on reasonable grounds and that liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed, the so called '*Badenhorst rule*'[6], a distinction has to be drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage the other requirements must be satisfied on a balance of probabilities.[7]

[32] Mr Wessels also argued that, despite the existence of a counter-claim, a court has a general discretion and there is no reason for a court to generally dismiss an application purely on the existence of same. In this regard, reliance was placed on the *dicta* of Binns-Ward J in *Absa Bank Ltd v Erf 1252 Marine and Another (23255/2010)*[8] who said at para 26:

> *"In my view reliance by a respondent on a 'genuine and serious' unliquidated counterclaim to oppose an application for its a liquidation is a quite distinguishable basis for resisting winding-up from that premised on a bona fide and reasonable dispute of an alleged indebtedness to a creditor-applicant. As pointed out by van Reenen J in Ter Beek, reliance by a respondent company on a counterclaim to avert a winding-up order actually entails an admission by it of the alleged indebtedness to the applicant relied upon by the creditor applicant. The allegation of the existence of the unliquidated counter-claim is nothing more than the putting*

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

[7] Gap at 267F-H

[8] [2012] ZAWCHC 43 (15 May 2012) at

up by the respondent of a basis upon which it is able to ask the court to exercise its discretion against making a winding-up order, notwithstanding that the applicant may have satisfied the technical requirements to achieve the remedy. There is accordingly no basis in our law in such circumstances to treat the application for winding-up as an inappropriate procedure, as a court would, applying the Badenhorst rule, in the circumstances of a claim for winding-up by a creditor when the existence of the debt in question is reasonably and bona fide disputed. For the same reason there is no reason in our law for a court, as a matter of principle, to adopt a general disposition against the granting of the remedy just because the existence of an unliquidated counterclaim is alleged by the respondent. There is also no basis in our law, in the postulated circumstances, to apply s 347(1) of the 1973 Companies Act[9] in a manner as would circumscribe the judge's discretion, as under English law.''

[33] In my view, the act of insolvency was committed by the Respondent in both his personal capacity (as surety of Biothane) and on behalf of Biothane. Reliance for this conclusion can be had on the wording of the settlement agreement. The litigation by Biothane against Applicant in my view does not detract from the actual act of insolvency committed by the Respondent, even if Biothane is successful. I am also not persuaded that the counter-claim is *bona fide*. As stated by Rogers J in Gap:

"[26] I see no reason for adopting a different approach when considering, in liquidation proceedings, whether the applicant's claim is bona fide disputed on reasonable grounds. Bona fides relates to the respondent's subjective state of mind, while reasonableness has to do with whether, objectively speaking, the facts alleged by the respondent constitute in law a defence. The two elements are nevertheless interrelated because inadequacies in the statement of the facts underlying the alleged defence may indicate that the respondent is not bona fide in asserting those facts. As Hülse-Reutter makes clear, the objective requirement of reasonable grounds for a defence is not met by bald allegations lacking in particularity; and, as appears from Breitenbach and El-Naddaf, bald allegations lacking in particularity are unlikely to be sufficient to persuade a court that the respondent is bona fide."

[9] Act 61 of 1973.

[34] Objectively, the lease agreement precluded any claims in terms of improvements and set-off. That to my mind would be sufficient to persuade me that the Respondent's counter-claim is not *bona fide*. However, there are other considerations that reinforce this belief. From the correspondence, it is clear that during December 2017, the main factor for consideration was the date upon which Biothane would vacate the premises. The only settlement or "*aanbod*", which was proposed to the Applicant by the Respondent's legal representative, was that the lease agreement terminate on 1 February 2018, that Biothane would vacate the premises by no later than 31 January 2018 and that once the proceeds of the sale of assets were received, that it would be paid "*ter delging van enige agterstallige huurgeld wat dan nog uitstaande mag wees*". From the correspondence it is clear that the premises were not vacated by the promised date. In Respondent's letter of 13 February 2018, he advised of improvements made to the premises, and enquired from the Applicant "*indien julle belangstel is die volgende items te koop*", and whether they were interested in purchasing the items. Thus on the Respondent's own admission, he was aware that Biothane could not simply claim for the improvements. It was only by April 2018, some four months after the initial undertaking to vacate the premises, that mention was made of a possible counterclaim relating to the improvements. In my view, the defence is contrived.

[35] An applicant in addition also has to show at a provisional stage of sequestration that there is a reason to believe that it will be an advantage to creditors. It is common cause that the Respondent sold assets belonging to himself in his personal capacity and on behalf of Biothane, to pay its debt.

This is an indication that the Respondent has financial challenges and that neither he nor the company is solvent to pay his and its debts. Although I am not persuaded by the Applicant's argument that there was an intention by the Respondent to dispose of his movables, I am satisfied that the Respondent has failed to show, despite the submission of a sparse statement of assets and liabilities, that he solvent. In fact, I am persuaded that his actions reflect otherwise.

The Order:

[36] As a result, the following Order is made:

1. The Respondent's estate is provisionally sequestrated.

2. All persons who have a legitimate interest in the outcome of this application are called to put forward reasons why this court should not order the final sequestration of the Respondent on 28 November 2018 at 10h00 or soon thereafter as the matter may be heard.

3. A copy of this Order must be forthwith served on:

    3.1 The Respondent personally;

    3.2 The employees of the Respondent, if any;

    3.3 The trade union, if any, to which such employee may belong;

    3.4 The Master; and

    3.5 The South African Revenue Services.

4. The costs of this application are costs in the sequestration of the Respondent's estate.

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KUSEVITSKY AJ