IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2009-11-20

Case Number: A1088/07

In the matter between:

ANNETTE COOK N.O. Appellant

and

S.J. COETZEE INC Respondent

JUDGMENT

SOUTHWOOD J

[1] On 23 April 2004, Bid Financial Services (Pty) Ltd ('Bidfin'), a creditor in the insolvent estate of Erf 824, Faerie Glen Ext 2 Trust ('the Trust'), in accordance with the provisions of section 32(1)(b) of the Insolvency Act 24 of 1936 ('the Act') instituted action in the name of the appellant, the trustee in the insolvent estate of the Trust, against the respondent, for payment of R877 152,60 on the grounds that the payment by the

Trust to the respondent of this amount should be set aside in terms of s29 alternatively s30 of the Act.

[2] The respondent raised a special plea that the appellant is not competent to institute the action and has no *locus standi*. This plea was based on the fact that on 23 August 2003 the appellant had already prepared a first and final liquidation and distribution account; the Master had confirmed the account on 30 September 2003; in terms of section 112 of the Act confirmation of the account is final and it may not be reopened save with the permission of the court; that the appellant had not been permitted to reopen the account and the appellant was therefore not authorised to act as trustee. The thrust of the special plea seems to be that as a result of the confirmation of the account in terms of section 112 of the Act the appellant ceased to be the trustee because the insolvency had come to an end.

[3] The parties agreed to deal with the special plea in terms of Rule 33(4) and for that purpose agreed on the relevant facts in accordance with Rule 33(1).

[4] The court *a quo* (Basson J) upheld the special plea with costs. With the leave of the court *a quo* the appellant appeals against the judgment and order.

[5] The agreed facts may be summarised as follows (I shall refer to the litigating parties as on appeal; to the other parties, where appropriate, by their abbreviated names and shall quote relevant passages from the annexures in parenthesis):

(1) The appellant is Annette Cook N.O., an insolvency practitioner who is the trustee of the Trust. On 23 April 2004 Bidfin instituted this action in the name of the appellant in terms of section 32(1)(b) of the Act, after Bidfin had indemnified the appellant against the costs relating to these proceedings.

(2) The respondent is SJ Coetzee Inc, an incorporated firm of attorneys practising as such in Pretoria.

(3) On 20 September 2002 the Trust was indebted to the respondent in the sum of R877 152,60 in respect of legal fees and disbursements. On the same date the Trust paid that amount to the respondent.

(4) On 3 December 2002 the Trust was sequestrated by order of this Court.

(5) Bidfin was at all relevant times the only proved creditor in the insolvent estate of the Trust in an amount of R940 570,78.

(6) The appellant contends that the aforementioned payment by the Trust to the respondent constitutes a disposition in terms of the provisions of sections 29 or 30 of the Act and falls to be set aside.

(7) Prior to the confirmation of the first and final liquidation and distribution account the appellant did not take any steps to recover the alleged debt, neither was the appellant instructed by Bidfin before the said date to do so.

(8) On 20 August 2003, prior to the confirmation of the first and final liquidation and distribution account, Bidfin's attorney Mr. M.W. Nixon, in a letter, requested an enquiry in terms of section 152 of the Act for the reasons set out in the letter. ('The reason for the application in terms of Section 152 of the Insolvency Act for the holding of an inquiry is that less than six (6) months before the sequestration of the trust, attorney Coetzee appropriated an amount of R877 152,60 towards fees and disbursements. She appears to have regarded herself as a creditor of the trust, having rendered services to the trust. The purpose of the inquiry will be to procure precise details as to whether the appropriation by her of the aforesaid amount constitutes a voidable preference'.) The inquiry was held in 2003 and 2004.

(9) On 30 September 2003 the Master confirmed the first and final liquidation account of the insolvent estate of the Trust. A copy of the account is attached to the statement of facts as annexure E. (This two page document contains a list of receipts and expenses and a bank reconciliation statement.) Pursuant to the confirmation of the account the appellant paid two dividends to Bidfin, i.e. R300 000 on the 8th of August 2003 and R61 290,88 (as a final dividend) on 1 October 2003. These were the only dividends paid to proved creditors in accordance with the account.

(10) The s 152 inquiry commenced on 1 October 2003 and continued on 14 February 2004. Pursuant to the inquiry Bidfin's attorney, Mr. Nixon, on 11 March 2004 in a letter requested the appellant's permission to institute this action. ('An enquiry in terms of section 152 of the Insolvency Act is currently in progress and was postponed until 15 April 2004. We confirm that our client is funding the enquiry in terms of Section 104 of the Insolvency Act. We have been instructed by our client to institute action against the recipients of the funds which had been received on behalf of the Trust by attorney SJ Coetzee, approximately two (2) months prior to the sequestration of the Trust. Our client will fund the actions as envisaged in terms of section 104 of the Insolvency Act. Please urgently furnish us with your consent to institute action in the name of the trustee

against the recipient of the funds'.) The appellant consented in a letter dated 12 March 2004. ('We have no objection to you instituting action against the recipients of all the funds under discussion in the name of the Trustee. In doing so the following must be taken into consideration. (1) The Trustee has distributed all funds available in the sequestration. (2) The sequestrated estate is not vested with any funds and therefore no attorneys fees and/or cost orders which may be granted, can be accommodated. In proceeding with this matter we will need a written indemnification to file with the Master of the High Court for proof that the estate will not be liable for any costs. If you are successful, it is trite law that the proceeds will fall within the estate and the sequestrated estate will then accommodate all costs and your client will then reap the benefits of section 104(3), which clearly makes your client preferential to any monies recovered. On receipt of such indemnification, you may consider this letter as consent to institute action in the name of the Trustee'.) Bidfin instituted the action on 23 April 2004.

(11) The appellant did not apply for, nor was granted permission to reopen the said account as provided in section 112 of the Act. Bidfin did not object to the final account, nor did it take any steps contemplated in section 111 of the Insolvency Act.

(12) On 19 November 2005 the Master wrote a letter to the appellant to inform her that as all his requirements had been met and the final liquidation and distribution account had been filed the security bond may be reduced to nil.

[6] As already mentioned the respondent contends that the appellant is no longer competent to act as a trustee and has no *locus standi* to sue because of the Master's confirmation of the first and final liquidation and distribution account in terms of s 112 of the Act. The appellant's contention is that confirmation of the account in terms of s 112 of the Act has no bearing on her authority to act as trustee or her right to sue.

[7] In upholding the special plea the court *a quo* found that –

(1) Before the appellant submitted her first and final liquidation and distribution account to the Master the appellant knew that Bidfin intended to recover the debt (i.e. the amount of R877 152,60 now claimed from the respondent), payment of which was made prior to the sequestration of the Trust;

(2) The account should have dealt with that debt;

(3) No objections to the account were filed in terms of s 111 of the Act;

(4) On 30 September 2003 the Master confirmed the account in terms of s 112 of the Act;

(5) The debt was finally disposed of as a result of the Master's confirmation of the account; and

(6) Because Bidfin did not object to the account and did not seek to reopen the account Bidfin is now non-suited.

[8] The court *a quo* clearly erred in finding that before the appellant submitted the account to the Master the appellant knew that Bidfin intended to recover the debt and that the debt should have been dealt with in the account. Mr Nixon's letter dated 20 August 2003 makes it clear that Bidfin wished to conduct an inquiry to establish whether the payment of R877 152,60 to the respondent could be set aside in terms of the relevant provisions of the Act and his letter dated 11 March 2004 makes it equally clear that it was only after the inquiry commenced that Bidfin was satisfied that it had a claim. When the appellant submitted her account to the Master there was no debt which Bidfin wished to recover: there was only the possibility that a cause of action for the setting aside of the payment would be established. Section 92(4) of the Act requires that when the account is not the final account the trustee must set out therein *inter alia* all outstanding debts due to the estate and the reasons why these debts have not been collected. The

appellant's account was obviously intended to be the final account and, accordingly, there was no need to comply with section 92(4).

[9] The real question to be answered is what is the effect of the confirmation of the appellant's account in terms of s 112 of the Act? Is it irrelevant as far as the appellant's action is concerned, as the appellant contends, or does it preclude the action because it omitted a reference to the possible claim and no objection was taken thereto in terms of section 111 of the Act, as the respondent contends?

[10] It is well-settled that s 112, in providing that the confirmation of an account by the Master 'shall be final', means that the matters dealt with in the account, being purely estate matters, are finally disposed of and cannot be reopened – see ***Callinicos v Burman*** **1963 (1) SA 489 (A)** at 503B: ***Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another*** **1991 (1) SA 648 (A)** at 657D-658G. The trustee is then obliged to give effect to the matters dealt with in the account in accordance with s 113 of the Act: i.e. distribute the funds or collect from each creditor liable to contribute the amount for which he is liable. It is also clear that confirmation of the trustee's account relates only to the matters referred to in the account itself – see ***Cools v The Master and Others*** **1998 (4) SA 216 (C)** para 24. It does not bring an end to the trustee's appointment or the insolvency of the estate – see ***Cools v The Master and Others supra*** 27; ***Standard Bank of SA Ltd v The Master and Others*** **1999 (2) SA 257 (SCA)** at 264C-265J. After

confirmation of the account the trustee is still obliged to collect debts and recover property – see ***Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D)** at 605A. And if other funds are available the trustee must deal with these in a supplementary account – see ***Wilkens v Potgieter NO and Another* 1996 (4) SA 936 (T)** at 940J-941E.

[11] It is clear from the provisions of the Act that once a trustee is appointed he is vested with the property of the insolvent (as defined) and exercises the powers set out in the Act until there is a composition or until the insolvent is rehabilitated. The confirmation of the trustee's first and final liquidation account does not affect this. The effect of the sequestration of the estate of an insolvent is to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and upon the appointment of a trustee, to vest the estate in him (s 20(1)(a)). The estate of an insolvent includes all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or messenger under writ of attachment, as well as all property which the insolvent may acquire during the sequestration, except as provided in section 23 (s 20(2)). The provisions of sections 23 and 24 make it plain that, subject to certain exceptions, the trustee remains vested with all property of the insolvent prior to sequestration and acquired by him after sequestration. The estate of the insolvent remains vested in the trustee until the insolvent is reinvested therewith pursuant to a

composition in terms of section 119 or until the insolvent is rehabilitated in terms of section 127 or 127A (s 25). Unless the trustee vacates the office, is removed or resigns or dies the estate continues to vest in him (s 25(2)). When an insolvent wishes to apply for his rehabilitation he must give notice to the trustee (section 124(1)). A trustee who has received such a notice must report to the Master any facts which would justify the court in refusing, postponing or qualifying the insolvent's rehabilitation (s 124(4)). (The statement in ***First National Bank of South Africa v Cooper NO and Another*** **1998 (3) SA 894 (W)** that the trustee retains no vestige of power after the confirmation of the account and payment of the dividends is therefore clearly wrong.)

[12] It is also clear from the provisions of the Act that the submission and confirmation of accounts are simply steps in the liquidation process – see ***Cools v The Master and Others supra*** (and in the context of liquidation of companies ***Standard Bank of SA Ltd v The Master and Others supra).*** The primary object of the Act is to ensure the proper distribution of the proceeds of the insolvent's assets amongst his creditors and it is the trustee's function to discharge that object – see ***Mars Law of Insolvency in South Africa*** **9 ed Bertelsmann et al** 513. To ensure that this is done the Act provides that the trustee must submit an account of his administration to the Master.

[13] Briefly the scheme of the Act is as follows:

(1) Within a period of 6 months from the date of his appointment the trustee must submit to the Master a liquidation account and a plan of distribution of the proceeds of the property in the estate for payment to creditors – alternatively, in appropriate circumstances, a plan of contribution apportioning liability to contributors (s 91);

(2) The contents of the liquidation account are prescribed. It must contain an accurate record of all monies received and of all monies disbursed by the trustee otherwise than in the course of a business which he carried on for the insolvent estate. The record of each such receipt and disbursement must set out the amount and date thereof and sufficient particulars to explain its nature. If the liquidation account is not the final liquidation account the trustee must also set out therein –

> ‘(a) all property still unrealized;
>
> (b) all outstanding debts due to the estate;
>
> (c) the reasons why that property has not been realized or those debts have not been collected.
>
> In that event the trustee shall, from time to time and as the Master may direct, but at least once in every six months, unless he has received an extension of time as provided in section 109, frame and submit to the Master periodical accounts in form and in all other respects

similar to the accounts mentioned in subsections (1) and (2)' (s 92(1)-(4));

(3) If the trustee has carried on any business on behalf of the estate he shall in addition submit a trading account containing the prescribed data (s 93);

(4) The form of the plan of distribution is prescribed. It must reflect all claims and make provision for the distribution of the proceeds of the property in the insolvent's estate in the order of preference set out in sections 95-104 of the Act (s 94);

(5) The form of the plan of contribution is prescribed. It must show each claim in respect of which a creditor is liable to contribute, the amount which the creditor must contribute and make provision for all the contributions in accordance with section 106 (s 105);

(6) The trustee must sign and verify every account submitted to the Master by affidavit. He is required to say in the affidavit that the account is a full and true account of the administration of the estate up to the date of the account and that so far as he is aware all the assets of the estate have been disclosed in the account (s 107);

(7) The trustee must give notice in the Government Gazette and a prescribed newspaper that he has submitted the account and that it will lie for inspection at the Master's and magistrate's offices for 14 days as from the date of the publication in the Government Gazette (s 108);

(8) The trustee may apply for an extension of time within which to submit an account (s 109);

(9) The Master may compel the trustee to submit an account (s 110);

(10) The insolvent or any person interested in the account may at any time before the confirmation of the account in terms of s 112 of the Act object to the account in writing (s 111);

(11) The account is confirmed by the Master in terms of s 112 which reads as follows:

'When a trustee's account has been opened to inspection by creditors as herein before prescribed and –

(a) no objection has been lodged; or

(b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again been opened for

inspection if necessary as in paragraph (b) of subsection (2) of section 111 prescribed and no application has been made to the court in terms of paragraph (a) of the said subsection (2) to set aside the Master's decision; or

(c) an objection has been lodged but withdrawn or has not been sustained and the objector has not applied to the court in terms of the said paragraph (a),

the Master shall confirm the account and his confirmation shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to re-open it.'

[14] The trustee's power to institute proceedings to set aside improper transactions in terms of section 32(1) of the Act is not subject to any time constraints. While in office the trustee may institute proceedings at any time if so advised. If at any time after the confirmation of his account a trustee becomes aware that there is an improper disposition which can be impeached the trustee may institute proceedings in terms of the relevant section. If the trustee can institute proceedings it follows that a creditor may also be able to institute proceedings in terms of s 32(1)(b). Confirmation of an account in terms of section 112 therefore has no bearing at all on a claim in terms of section 32.

[15] The court *a quo* therefore erred in upholding the special plea and the appeal must be upheld.

[16] Finally it must be recorded that the respondent did not file heads of argument or appear at the hearing of the appeal. Shortly before the hearing the respondent informed the court by letter that it did not intend to appear and that it is dormant.

Order

[17] I The appeal is upheld and the order of the court *a quo* is set aside and replaced with the following order:

'The special plea is dismissed with costs';

II The respondent is ordered to pay the costs of the appeal.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

W.R.C. PRINSLOO
JUDGE OF THE HIGH COURT

I agree

L.M. MOLOPA
JUDGE OF THE HIGH COURT

CASE NO: A1088/07

HEARD ON: 4 November 2009

FOR THE APPELLANT: ADV. P. ELLIS SC

INSTRUCTED BY: Mark W. Nixon

FOR THE RESPONDENT: No appearance

DATE OF JUDGMENT: 20 November 2009