Bib 155/95

Case No 193/94
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

GERT HENDRIK JOHAN VENTER, N.O. APPELLANT

and

AVFIN (PROPRIETARY) LIMITED RESPONDENT

CORAM: JOUBERT, NESTADT, HARMS, EKSTEEN JJA et SCOTT AJA

HEARD: 3 NOVEMBER 1995

DELIVERED: 29 NOVEMBER 1995

J U D G M E N T

SCOTT AJA/...

SCOTT AJA:

The appellant, in his capacity as the duly appointed liquidator of Townsend Plant Hire CC ("the corporation"), sought an order in the Witwatersrand Local Division directing the respondent, a creditor of the corporation, to pay the appellant the proceeds derived from the realisation of certain earthmoving equipment which the respondent had held as security. The relief claimed was founded on s 83 (10) of the Insolvency Act 24 of 1936 ("the Act") which is applicable to the administration of an insolvent close corporation (see s 66 of the Close Corporations Act 69 of 1984 read with s 339 of the Companies Act 61 of 1973). Various defences were raised in the answering papers but Roux J who heard the application found it unnecessary to deal with these and instead upheld a point in limine that the applicant had failed to make out a case in the founding papers for the relief claimed. Shortly stated, the conclusion to which the learned judge

came was that the appellant was not entitled in terms of s 83 (10) of the Act to recover the proceeds derived from the realisation of the equipment as the respondent had failed to effect the realisation in accordance with the preceding subsections of s 83. Accordingly, and because the appellant had formulated his claim in terms of s 83 (10) as opposed to a claim at common law for the value of the property realised, it was held that the claim had to be dismissed. The appellant, with the necessary leave, now appeals to this court against the judgment and order of Roux J.

Shortly before the hearing in this Court the respondent's attorneys withdrew as attorneys of record and wrote to the registrar advising that the respondent, which was no longer trading, had decided not to incur the costs of engaging an attorney and briefing counsel to appear to oppose the appeal. By this time, however, heads of argument had been filed on behalf of the respondent in which submissions were made with regard to

the other defences raised in the papers as well as the point on which the judgment of the Court a quo was based. I shall deal with these defences later in this judgment and after first considering the basis upon which the claim was dismissed.

Before dealing with any of these issues, it is necessary, however, first to set out as briefly as the circumstances permit the principal events leading up to the appellant instituting proceedings against the respondent for the relief claimed.

On 10 December 1990 the corporation, which carried on business as the lessors of earthmoving equipment, entered into three separate instalment sale agreements with the respondent for the purchase of three items of earthmoving equipment. In each instance ownership remained vested in the respondent pending payment of the purchase price which was to be effected in monthly instalments over a period of thirty-six

months. It is not disputed that each transaction constituted an "instalment sale transaction" as defined in s 1 of the Credit Agreements Act 75 of 1980. On 18 January 1991 a provisional winding up order was granted against the corporation. By this time it had taken delivery of the equipment from the respondent and had let two of the items to clients but still had the third item on its premises. It remained, of course, substantially indebted to the respondent in terms of the agreements. The appellant was appointed liquidator of the corporation on 1 February 1991.

On 4 February 1991 the appellant held an informal meeting with creditors who had concluded instalment sale agreements with the corporation, including the respondent. It was agreed that each creditor would repossess the subject matter of each instalment sale agreement in respect of which it had a claim and hold the property as security for such claim. Although not expressly stated in the papers, it would seem that in

arriving at this agreement the parties had in mind the provisions of s 84 of the Act in terms of which (subject to the defence considered below) the creditors would have lost their ownership in the subject matter of each transaction and acquired a hypothec in its stead.

The following day, ie 5 February 1991, the appellant wrote to the respondent confirming the arrangement that the latter was to take possession of the equipment and hold it as security for its claim. The letter concluded:

> "I now wish to deal with the realization of your security which is set out in Section 83 of the Insolvency Act, a copy of which is attached hereto for your information with particular reference to sub-paragraphs 8, 9, 10 and 11.
>
> Claim documents will be forwarded to you under cover of a separate letter. Please have these completed and returned to me in order that a decision regarding the realization of your security can be made."

The respondent took possession of the equipment and the winding up order

was in due course made final.

The second meeting of creditors was held on 6 June 1991. Despite a reminder from the appellant, the respondent failed to submit its claim which was accordingly not proved at the meeting. The respondent had also by that date not given notice in writing to the Master and to the appellant of the fact that it held the equipment as security for its claim as required by s 83 (1); nor had it realised the equipment. On 13 June 1991 and in terms of s 83 (6), the appellant wrote to the respondent demanding that the equipment immediately be delivered to him. The subsection provides as follows:

> "(6) If he has not so realized such property before the second meeting of creditors, he shall as soon as possible after the commencement of that meeting deliver the property to the trustee, for the benefit of the insolvent estate and if the creditor has not delivered the said property to the trustee within a period of three days as from the commencement of the said meeting the trustee may demand from

him delivery of such property. If the creditor fails to comply with such demand of the trustee, the Master, at the request of the trustee and after notice to the creditor shall direct the deputy-sheriff within whose area of jurisdiction the property is situate to attach the property and to deliver it to the trustee, and in that case the creditor shall be liable for the deputy-sheriff's costs, as taxed and allowed by the Master. If those costs cannot be recovered from the creditor, they shall be paid out of the estate as part of the costs of the sequestration."

The respondent simply ignored the demand and on 14 June 1991 submitted its claim. Instead of taking the steps detailed in s 86 (6) for the recovery of the property, the appellant made arrangements for a special meeting of creditors for proof of claims to be held on 5 September 1991.

In the meantime and on 19 July 1991, the respondent realised a part of the equipment for R140 955,00. Although not stated expressly in the papers, it is clear that the realisation was not effected in the manner provided for in ss 83 (8) and (9) of the Act. Indeed, the appellant became

aware of the sale only some considerable time thereafter. The relevant portion of these subsections reads:

> "(8) The creditor may realize such property in the manner and on the conditions following, that is to say -
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) if it is any other property, the creditor may sell it by public auction after affording the trustee a reasonable opportunity to inspect it and after giving such notice of the time and place of the sale as the trustee directed.
>
> (9) As soon as the trustee has directed a creditor in terms of paragraph (d) of sub-section (8) to give notice of a sale by public auction, the trustee shall give notice in writing to all the other creditors of the estate in question of the time and place of the proposed sale."

At the meeting on 5 September 1991 the respondent's claim was rejected on technical grounds.

On 8 November 1991 the respondent sold the remaining items of equipment for R243 524,23. Once again the sale was not effected in

accordance with the provisions of subsections (8) and (9).

Some months thereafter and in pursuance of s 366 (2) of the Companies Act the Master fixed 14 May 1992 as the final date for the proof of claims. At the meeting of creditors held on that day the respondent's claim was again rejected. The meeting was postponed to 24 August 1992 on which day the claim was yet again rejected, apparently because of some defect of a technical nature.

The appellant then adopted a new approach. On 8 December 1992 and for some inexplicable reason he wrote to the respondent demanding payment of the sum of R160 000,00 being the amount at which the respondent in its claim lodged on 14 June 1991 had valued its security. The demand was ignored by the respondent as were a number of similar demands which the appellant was content to make. Eventually a further meeting of creditors for the proof of claims was convened for 20 April

1993. On that day the meeting was postponed to 17 May 1993. In the meantime and on 28 April 1993, the respondent submitted a fresh claim which contained the details concerning the realisation of the equipment to which reference has been made above. The respondent's fresh claim was submitted for proof but still not accepted. The meeting was then adjourned to 16 August 1993 when the claim was finally proved.

But by 5 August 1993 and after having done virtually nothing for a period of more than two years other than write a few letters, the appellant was finally galvanised into action. On that day he caused the proceedings to be instituted which have led to the present appeal.

Before finally turning to the reasoning of Roux J it is necessary to observe that from the aforegoing it is apparent that the respondent failed to comply with the provisions of s 83 in the following respects: (i) it did not before the second meeting of creditors give notice in writing to the

Master and to the appellant of the fact that it held the equipment as security (s 83 (1)); (ii) it did not realise the equipment before the second meeting of creditors; (iii) when it did realise the equipment, it did so in a manner other than as provided for in ss 83 (8) and (9); (iv) it did not prove its claim. Section 83 (10), being the section on which the appellant's claim is founded, reads:

> "Whenever a creditor has realized his security as hereinbefore provided he shall forthwith pay the net proceeds of the realization to the trustee, or if there is no trustee, to the Master and thereafter the creditor shall be entitled to payment, out of such proceeds, of his preferent claim if such claim was proved and admitted as provided by section forty-four and the trustee or the Master is satisfied that the claim was in fact secured by the property so realized. If the trustee disputes the preference, the creditor may either lay before the Master an objection under section one hundred and eleven to the trustee's account, or apply to court, after notice of motion to the trustee, for an order compelling the trustee to pay him forthwith. Upon such application the court may make such order as to it seems just."

The learned judge held in effect that the consequence of the respondent's failure to adhere to the provisions of s 83 was to deprive the appellant of

his right in terms of s 83 (10) to recover from the respondent the proceeds from the realisation of the equipment. This somewhat startling result was based on an interpretation of the phrase "as hereinbefore provided" in the subsection as requiring strict compliance with all the procedural steps set out in the earlier subsections of s 83, failing which s 83 (10) would have no application and the trustee would be left with no more than the common law remedies to vindicate the property from whoever possessed it or to recover its value from the creditor. I use the word "startling" because the construction results in the anomaly that a creditor would be able to obtain his release from his statutory obligation to pay over to the trustee the proceeds of the realisation by the expedient of failing to comply, whether deliberately or otherwise, with one or other of the procedural steps set out in the section.

In Bowman NO v De Souza Roldao 1988 (4) SA 326 (T) the

question arose whether the liquidator of a company was entitled to recover in terms of s 83 (10) of the Act certain debts which had been collected after the liquidation by a creditor who purported to hold the money in pursuance of a cession of book debts and in circumstances where the creditor, as in the present case, had not complied with the preceding subsections of s 83.

Kirk-Cohen J dealt with counsel's argument, at 330 H - J, as follows:

> "Mr Zar submitted that should a creditor, who is given permission to realise an asset, not pay over the proceeds, the trustee may sue him for the amount realised. I agree that such right is conferred upon the trustee by the provisions of s 83. Mr Zar argued further that, should a creditor not seek permission to realise a security, do so, and fail to pay over the proceeds in terms of ss (10), a fortiori the trustee has the same right of recovery. I find this latter portion of Mr Zar's argument logical and in consonance with the object and wording of the Act. To hold otherwise would stultify the powers of the trustee I have referred to. It would place a creditor who has ignored the provisions of the subsection in a better position than one who has obtained the required consent to realise the security. The Legislature could surely not have so intended."

After observing that the argument advanced by counsel was "cogent" the

learned judge, however, found it unnecessary to have to decide the point. Roux J in the present case referred to the passage quoted above and dismissed what was said as follows:

> "Had I heard such an argument I would with respect have rejected it as illogical and not founded on any provision in the statute ..."

This observation was based, however, on the literal interpretation placed by the learned judge on the phrase "as hereinbefore provided" and which Kirk-Cohen J felt could not have been what was intended by the legislature. Roux J himself made no attempt to resolve the obvious anomaly to which his interpretation would give rise.

The phrase in question cannot, of course, be considered in vacuo. On its own it is meaningless. It must be read both in the context of the provision in which it occurs and together with the preceding provisions to which it refers. In the sentence in which it occurs the legislature is there dealing primarily with what is to be done when a

creditor has realised his security. There is no reference in that sentence or elsewhere in the subsection to the failure on the part of the creditor to comply with any of the procedural steps detailed in the preceding subsections or the consequences of such a failure. What immediately strikes one is that had the legislature intended the meaning which the court a quo attributed to the phrase, it would be surprising having regard to the far-reaching consequences of such a meaning that the legislature should have expressed itself in such an indirect and indefinite manner. Had this been the intention one would ordinarily have expected an express provision dealing with the consequences of non-compliance by the creditor with specified procedural steps, rather than a general reference to earlier provisions.

The interpretation, I think, becomes all the more unlikely when the phrase is considered in the broader context of the Act. The trustee is

the person burdened with the task of administering and winding up the insolvent estate. In terms of s 20 of the Act the effect of insolvency is to divest the insolvent of his estate and to vest it in the trustee upon the latter's appointment. The trustee, in turn, is required in terms of s 69 to take into his possession or under his control all movable property, books and documents belonging to the insolvent. At common law a creditor who held movable property as security for his claim could not realise it himself. He had to deliver it to the trustee who had the right to administer it subject to the preference of the creditor in relation to the proceeds derived from its realization (see National Bank of South Africa Ltd v Cohen's Trustee 1911 AD 235 at 250). Section 83, however, permits a creditor who holds movable property as security for his claim, subject to certain limitations, to retain possession of such property and to realise it himself. But once the property is realised he must pay the proceeds to the trustee. The provisions

in s 83 (10) requiring him to do so are consistent with the general scheme of the Act and, to the extent that the trustee is entitled to receive such proceeds, with the common law.

Viewed against this background it could not, I think, have been intended that a creditor by his own non-compliance with the provisions of the Act could notionally place himself in a more favourable position vis-a-vis the trustee and avoid his statutory obligation to pay over the proceeds to the trustee. That the trustee may himself have failed earlier to recover the property in terms of s 83 (6) does not detract from the obvious anomaly which would result from such a construction. Indeed, the non-compliance by the creditor may occur prior to the second meeting of creditors.

In my view, therefore, the reference in the phrase in question to the preceding provisions was intended to be no more than a general reference to the realisation of securities as contemplated in the earlier

subsections of s 83. It was not intended to import into s 83 (10) a requirement of compliance with those subsections as a precondition to the obligation of the creditor to pay over the proceeds of his security to the trustee.

It follows that in my view the court a quo erred in upholding the point in limine.

I turn now to the two other defences raised in the respondent's answering papers and advanced in the heads of argument filed on its behalf. The first was that because certain of the items of earthmoving equipment were never in the possession of the appellant the provisions of s 84 (1) did not apply and consequently ownership in respect of those items did not pass to the appellant and the provisions of s 83 were similarly not applicable. The contention was no doubt inspired by the decision of the Full Court of the Transvaal Provincial Division in UDC Bank Ltd v Seacat Leasing and

Finance Co (Pty) Ltd and Another 1979 (4) SA 682 (T) in which it was held that the provisions of s 84 (1) apply only in cases where the trustee of an insolvent estate or the liquidator of a company being wound up was in possession of the goods referred to in the section.

Section 84 (1) reads:

> "If any property was delivered to a person (hereinafter referred to as the debtor) under a transaction which is an instalment sale transaction contemplated in paragraphs (a) and (b) of the definition of 'instalment sale transaction' in section 1 of the Credit Agreements Act, 1980, such a transaction shall be regarded on the sequestration of the debtor's estate as creating in favour of the other party to the transaction (hereinafter referred to as the creditor) a hypothec over that property whereby the amount still due to him under the transaction is secured. The trustee of the debtor's insolvent estate shall, if required by the creditor, deliver the property to him, and thereupon the creditor shall be deemed to be holding that property as security for his claim and the provisions of section 83 shall apply."

In the UDC Bank case Human J who delivered the judgment of the court stated at 694 B - D:

"Section 84 (1) contemplates that any steps taken by the creditor

under the section shall be taken against the trustee, because the section assumes that the trustee is in possession of all the assets, or at least possibly in the possession of the insolvent.

Section 84 (1), in my opinion, can only apply in a case where the trustee is in possession and then only does the creditor lose his rights of ownership. It could never have been in contemplation that he loses both his rights of ownership as well as his rights in terms of s 84 (1) if the trustee is not in possession."

It was accordingly held that because the property in question was not in the possession of the company when it was placed in liquidation, ownership had not passed from the creditor to the liquidator.

In Hubert Davies Water Engineering (Pty) Ltd v The Body Corporate of "The Village" and Others 1981 (3) SA 97 (D) Hefer J declined to adopt this interpretation of s 84 (1). At 101 G - H the learned judge explained:

"A trustee who does not have possession of the assets of the estate has not exercised the right nor indeed carried out the duty which he has in terms of s 69 (1) of the Act to reduce all the movable property belonging to the estate into his possession or under his control. He

> may exercise that right against anyone in respect of any movable property belonging to the estate, and he may do so specifically for the purpose of being able to comply with a demand for delivery of hire-purchase goods in terms of s 84 (1). There is thus no question of not being able to comply with such a demand: if the trustee does not have possession, he can and must obtain it."

I respectfully agree with the above statement.

It is true that s 84 (1) assumes the trustee to be in possession. But, as pointed out by Hefer J at 102 E, after referring to a passage in the judgment of Solomon J in Haak's Garage v Simpson 1928 (WLD) 185 at 187;

> "... in an insolvency which proceeds normally, the trustee will obviously carry out the elementary task of taking possession or control of the assets; that he will do so is assumed and that is why, for the purposes of s 84 (1), it is assumed that he is in possession of the hire-purchase goods."

With regard to the situation that may arise where the trustee is not in possession of the property, the learned judge at 102 F - G posed and answered the obvious question:

"Can he (the trustee), eg, when faced with a demand for delivery in terms of that section (s 84 (1)), in the light of his duty to reduce the assets of the estate into his possession or control, ever be heard to say simply that he does not possess the property which the creditor wants him to deliver? Obviously not, because he will be obliged to carry out his duty, to obtain possession and to deliver the property to the creditor."

In my view the reasoning of the learned judge cannot be faulted. I accordingly adopt the decision in the Hubert Davies case in preference to that in the UDC Bank case (see also Morgan en 'n Ander v Wessels NO 1990 (3) SA 57 (O) at 65 D - G where the Hubert Davies case was similarly followed in preference to the UDC Bank case).

It follows that this defence raised on behalf of the respondent must fail.

The remaining defence can be disposed of shortly. On behalf of the respondent it was contended that in terms of s 83 (10) the obligation imposed on a creditor to pay over the proceeds of his realised security and

the obligation of the trustee to pay the creditor his preferent claim out of such proceeds were reciprocal obligations; that the respondent had tendered payment of the proceeds subject to the applicant undertaking to make reciprocal payment, and because such undertaking had not been forthcoming it had been entitled to refuse to pay the proceeds to the appellant.

In my view, there is no substance in the contention. One need go no further than the provisions of s 83 (10) to see that the respective obligations of the appellant and the respondent are not reciprocal. The section imposes on the creditor an obligation to pay the trustee the proceeds "forthwith" whenever he has realised his security. His entitlement to receive payment out of the proceeds arises "thereafter" and only if certain requirements have been met.

It follows that the appeal must succeed.

Counsel for the appellant drew our attention to the fact that the

information regarding the actual dates upon which the various items of earthmoving equipment had been sold, were obtained from annexures to the respondent's claim which had not formed part of the papers placed before the Court a quo. He accordingly did not ask for interest to run from those dates and suggested instead that it run from 1 December 1991 in view of the allegation made in the respondent's answering affidavit that the equipment had been sold during the period July to November 1991.

In the result the following orders are made:

1. The appeal succeeds with costs, such costs to include the costs of two counsel.

2. The order of the Court a quo is set aside and the following order is substituted:

"(a) The respondent is directed to pay the applicant

(i) the sum of R384 479,23;

(ii) interest thereon at the rate of 18.5 per cent per annum from 1 December 1991 to date of payment.

(b) The respondent is directed to pay the costs of the application, such costs to include the costs of two counsel."

D G SCOTT

JOUBERT JA
NESTADT JA - Concur
HARMS JA
EKSTEEN JA