FIRST NATIONAL BANK OF SA LTD v COOPER NO AND ANOTHER 1998 (3) SA 894 (W)

Citation	1998 (3) SA 894 (W)
Case No	29672/97
Court	Witwatersrand Local Division
Judge	Roux J
Heard	November 14, 1997
Judgment	November 14, 1997
Counsel	J P Coetzee for the applicant W van Reenen for the respondents

Insolvency - The trustee - Powers of - Insolvent rehabilitated - Insolvent negotiating with applicant regarding I immovable property in which insolvent had had half-share - Trustee of insolvent having chosen to exclude immovable property as asset in liquidation and distribution account - Trustee requesting applicant to hand over title deeds and subsequently obtaining search warrant - Trustee not having retained any vestige of power or locus standi after liquidation and distribution account confirmed - Role of trustee ending when liquidation and distribution account J

confirmed - Trustee not having obtained leave of Court to reopen accounts - Trustee's conduct warranting special A costs order - Application for setting aside of search warrant granted and trustee ordered to pay the costs de bonis propriis as between attorney and client - Insolvency Act 24 of 1936, ss 69(2), 112.

Costs - Costs de bonis propriis - When to be ordered - Trustee applying in terms of s 69(2) of Insolvency Act 24 of B 1936 for search warrant in respect of property he had chosen to exclude as asset from liquidation and distribution account - Application made without notice to applicant - No mention made in application for warrant that liquidation and distribution account confirmed - Trustee aware that applicant contested his right to obtain order for warrant - Doubtful whether magistrate would have issued warrant had he been aware of such facts - Trustee's C conduct sufficiently unacceptable to justify special order as to costs in application for a setting aside of warrant - Trustee ordered to pay de bonis propriis costs of such application taxed as between attorney and client.

Headnote : Kopnota
The applicant applied to have a search warrant issued by a magistrate in terms of s 69(2) of the Insolvency Act 24 of 1936 set aside. The second respondent had been sequestrated and then rehabilitated some four years later. The first respondent had been appointed the second respondent's trustee and had drawn up the liquidation and distribution account from which he had excluded as an asset a property in which the second respondent had a E half-share on the grounds that the property had no financial value. The account was later confirmed by the Master in terms of s 112 of the Act. There was no dividend payable in terms of the account and the only creditor in the estate had been called upon to make a contribution. Subsequently, the applicant and the second respondent entered into negotiations about the aforesaid property, which led to the first respondent's F reconsidering his previous stance on the value of the property and requesting that the applicant hand over the title deeds to the property. The first respondent then obtained a search warrant upon an *ex parte* application, which was countered by an urgent application by the applicant to suspend the warrant. In order to decide whether the warrant should be set aside, the Court had to determine whether the first respondent had retained any vestige of G power or *locus standi* to act as trustee four years after the liquidation account had been confirmed.
Held, that the role of the trustee had been disposed of and had ended when the liquidation and distribution account was confirmed. If the trustee wished to act again and reopen the account, he had to obtain leave from the Court as provided for in s 112 of the Insolvency Act 24 of 1936. The first respondent had not obtained leave H from the Court and, as no dividend had been available to be paid, it was arguable that that constituted an absolute bar to the reopening of the account. (At 897G and 897H--I.)
Held, further, as regards the issue of costs, that the first respondent had obtained the order without notice to the applicant and while he knew that the applicant contested his right to obtain such an order. Furthermore, no I mention had been made of the confirmed liquidation and distribution account in the first respondent's affidavit which had been placed before the magistrate. This omission was alarming, especially in an *ex parte* application and, had the magistrate been made aware of the true facts, it was doubtful that he would have granted the order authorising the search warrant. The first respondent's conduct was accordingly sufficiently unacceptable in the J

ROUX J
circumstances to warrant a special costs order. (At 897J--898A, 898B/C and 898D--F.) The application was A granted with costs to be taxed as between attorney and client, to be paid by the first respondent *de bonis propriis*.
Annotations:
Reported Cases B
Callinicos v Burman 1963 (1) SA 489 (A): dictum at 503B applied
Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another 1991 (1) SA 648 (A): referred to
Putter v Minister of Law and Order and Another NO 1988 (2) SA 259 (T): referred to.

Statutes Considered

Statutes C

Insolvency Act 24 of 1936, ss 69(2) and 112: see *Juta's Statutes of South Africa 1997* vol 2 at 1-448 and 1-458.

Case Information

Application for the setting aside of a search warrant granted by a magistrate in terms of s 69(2) of the Insolvency Act 24 of 1936. The facts

appear from the reasons for judgment. D

J P Coetzee for the applicant.

W van Reenen for the respondents.

Judgment

Roux J: This application concerns the legality of the search warrant issued by a magistrate in terms of s 69(2) of E the Insolvency Act 24 of 1936 at the first respondent's behest.

It is convenient to mention the facts which I consider relevant:

1. The second respondent was provisionally sequestrated on 28 July 1992. A final order followed on 18 August 1992.
2. The first respondent was appointed as the second respondent's trustee on 3 December 1992. F
3. A half-share in section 62 Arlington Court, Muizenberg (to which I will refer as 'the property') was an asset in the insolvent estate.
4. The first respondent considered that the property had no financial value and he elected not to include it as an asset when drafting the liquidation and distribution account. G
5. The liquidation and distribution account, drafted without inclusion of the property, lay for inspection as contemplated by s 112 of the Act.
6. The liquidation and distribution account was confirmed by the Master in terms of s 112 of the Act on 2 March 1993. H
7. There was no dividend payable to creditors in terms of the account. The only creditor who proved an account, ABSA, was called upon to pay a contribution.
8. The second respondent was rehabilitated on 3 December 1996.
9. Because of dealings between the second respondent and the applicant the first respondent appears to I have had second thoughts about the value of the property. These second thoughts apparently only surfaced during 1997.
10. On 14 May 1997 the first respondent requested the applicant to hand over the title deeds of the property.
11. On 9 October 1997 the first respondent obtained a search warrant upon an *ex parte* application. J

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12. The applicant launched an urgent application to suspend the warrant. A suitable agreement was reached A between the parties on 23 October 1997.

I am only concerned with section B of the notice of motion.

The last occasion on which the first respondent as trustee performed any function as such was when he drafted the liquidation and distribution account. I do not regard the report of the trustee, made in terms of s 124(4) of the B Act relating to an insolvent's rehabilitation, as a function in the winding up of an estate, much less do any other reports which he must make or chooses to make after the confirmation of the account.

The question is whether the first respondent retains any vestige of power or *locus standi* four years after the C liquidation account was confirmed, to act as a trustee. Section 112 of the Act provides:

> '112 Confirmation of trustee's accounts
>
> Where a trustee's account has been open to inspection by creditors as hereinbefore prescribed and - D
>
> *(a)* no objection has been lodged; or
>
> *(b)* . . .; or
>
> *(c)* . . .,
>
> 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 reopen it.' E

In *Callinicos v Burman* 1963 (1) SA 489 (A) at 503B Williamson JA said the following:

> 'In particular 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.' F

Although the remarks of Williamson JA were made in a separate concurring judgment they appear to have been approved unanimously by the Appellate Division in *Gilbey Distillers & Vitners (Pty) Ltd and Others v Morris No and Another* 1991 (1) SA 648 (A).

The effect is that the role of the trustee is also disposed of and ended when the liquidation and distribution account is confirmed. If a trustee for any reason wishes to act as such again and to reopen the account he must G have the leave of the Court as provided for in s 112. There is no reason to exclude the erstwhile trustee from the concept 'a person' as used in the section.

The first respondent has not obtained the leave of the Court to act as a trustee and to reopen the account, which must inevitably follow should he obtain a financial consideration by dealing with the property. In any event, when H no dividend is available to be paid it is certainly arguable that the absolute bar to the reopening of the account, as provided for in the section, must be deemed to have taken place, namely the requirement once a dividend is paid. Further, the first respondent's election to exclude the property from the account must not be lost sight of.

It follows in my judgment that the applicant is entitled to the relief. I

The question of costs now arises. The first respondent has sought a special order for costs against the applicant. This prayer opens the door for me to consider what order I should make against the first respondent. As mentioned, the first respondent, in terms of s 69(2), obtained an J

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order without notice to the applicant. This he did well knowing that the applicant contested his right to do so. A Whether or not the first respondent drew the magistrate's attention to the decision in *Putter v Minister of Law and Order and Another NO* 1988 (2) SA 259 (T) I do not know. If the magistrate decided not to follow that judgment, which requires notice to an interested party, I imagine he would have given a reasoned judgment. The B affidavit the first respondent placed before the magistrate is part of the record. No mention is made therein of the confirmed liquidation and distribution account. This omission is alarming, particularly in an *ex parte* application. Regarding the situation in July 1997 the first respondent in this affidavit said the following: C

> '5. I am, due to FNB's (ie the applicant's) failure to deliver the title deed to me, being hampered in my administration of the insolvent estate and I am unable to pass transfer of the property to Cannan. Cannan has threatened to cancel the sale which will have the effect of prejudicing the general body of creditors of Rosenberg's insolvent estate.'

I consider these allegations as at least questionable. It is no more than an attempt to influence the magistrate by D telling, at best, a half-truth. Had the magistrate been aware of the true facts, I doubt if he would have granted the order.

There is a duty upon an applicant in an *ex parte* matter to disclose all facts which could have, not would have, E influenced the Court. I find the

conduct of the first respondent, in his reliance on s 69(2) in the manner he did, unacceptable. It warrants a special order. The first respondent, whether he is still the trustee or not, is personally liable for the costs that he has brought about and I intend making an order in that regard.

In the result I make an order in terms of the notice of motion, which I have amended, but will read herein: F

1. The purported warrant is set aside.
2. The first respondent, except on the authority of a valid Court order granted upon notice to all particular parties, is interdicted and restrained from G
   (a) searching any business premises of the applicant;
   (b) taking possession of any papers in possession of the applicant; and
   (c) alienating or in any way encumbering the property.
3. The first respondent is ordered *de bonis propriis* to pay the costs of this application, including the costs H of section A of the notice of motion, which costs are to be taxed as between attorney and client.

Applicant's Attorneys: *Van Huyssteen & Associates*. First Respondent's Attorneys: *Hofmeyr, Herbstein, Gihwala, Cluver Inc*. Second Respondent's Attorneys: *Beder-Friedland Inc*.
