REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No.: 55825/2021

Reportable: No
Of Interest to other Judges: Yes

5 Oct 2023 Vally J

In the matter between:

Bidvest Bank Limited **Applicant**

and

Waste Partner Investments (Pty) Ltd **Respondent**

JUDGMENT

Vally J

[1] This is an application for leave to appeal. In the main matter the only issue before court was one of costs. The applicant had abandoned its main claim in the matter but persisted with its subsidiary claim, namely that it be awarded costs on an attorney and client scale. I issued a judgment that succinctly captured the facts, which are not in dispute. The judgment concluded with an order which read: the application is dismissed with costs. The applicant is aggrieved by the order and asks for leave to appeal, to either the Supreme Court of Appeal (SCA) or to a full bench of this court.

[2] In the main judgment I said that the applicant brought two applications[1] when it should have launched a single application seeking both reliefs, alternatively, it should have consolidated the two applications and then secured the relief it sought by having the same court consider both of their causes of action in one hearing. This, I said, was the appropriate route to follow. In my view the merit of the approach lies not only in the fact that it would be less costly for the parties but, moreover, it would result in the optimal utilisation of the very limited but hugely sought after judicial resources available in this Division.

[3] The applicant points out that the sequestration and the liquidation applications had to be brought separately as the two applications involve separate procedures, are governed by different statutory regimes, and each debtor has a separate body of creditors. The legal obligation, it says, is derived from the common law as enunciated in *Ferela,*[2] where it was found that two different persons ought not to be sequestrated in the same application. The court found some support for its conclusion in the reasoning in *Breetveldt*. [3] This argument was not raised in the main application. It is therefore necessary to give detailed consideration to it here.

Kirkwood Garage (Pty) Ltd v Lategan and Another[4]

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[1] a sequestration proceeding as well as liquidation proceedings to secure payment of a debt owed to it by the present respondent, but which was secured by virtue of a surety agreement concluded between it and the only shareholder of the respondent
[2] *Ferela (Pty) Ltd v Craigie* 1980 (3) SA 167 (W) at 171F-H
[3] *Breetveldt and Others v Van Zyl and Others* 1972 (1) SA 304 (T)
[4] 1961 (2) SA 75 (E)

[4] Before dealing with *Breetveldt* it is appropriate to record the approach of a court in 1961 from the then Eastern Cape Division which records - as if it is trite - the procedural approach that should be followed by a creditor who sues for the compulsory sequestration of two or more debtors whose liability for the debt is joint and several. The court expressed the position in the following terms:

> 'In the first place I think it was unnecessary to present two separate applications to the Court in a matter of this character. It has been held that in cases of debtors whose liability to the creditor is joint and several it is quite competent to join more than one of these debtors in an application for compulsory sequestration and if the application is granted the practice is to order that the costs of the sequestration be apportioned between the estates so sequestrated. I refer to two cases in which this view has been taken. The first is the case of *Solomon v Lotter and Another*, 1924 W.L.D. 205, and the second is *Chellan v Reddy and Another*, 1928 N.P.D. 387. The decision in each of these cases was one of the Full Bench of the respective Divisions. As far as I am aware the correctness of this practice laid down in these cases has never been questioned and it appears to me to be quite unreasonable and unnecessary duplication of costs to have brought two separate petitions in these matters, particularly having regard to the fact that the papers are swollen by the inclusion of these somewhat lengthy minutes, the relevance of which is by no means clear to me at the present stage. Had I been disposed to grant an order for the sequestration of the estates of the two respondents I would certainly not have allowed the costs of the two petitions to be included in the costs of the sequestration. The order I would have made would have allowed the costs of one application only to be apportioned between the two estates of the two respondents.'[5]

Breetveldt

[5] One can safely accept that this was the state of the procedural law until *Breetveldt* and to an extent *Ferela* entered the stage. In *Breetveldt,* the court faced a call for the liquidation of 'four separate companies, under one and the same notice of motion' and held that … 'such a proceeding cannot be allowed

[5] Id. at 76G-77A

except possibly by the consent of all interested persons, or in the case where there is a complete identity of interests.'[6] This is because,

> '… each company has its own separate share capital, separate shareholders and separate creditors, and the fusing of the interests of all four companies in one proceeding is confusing and prejudicial to persons interested in only one such company. … If, for example, creditors in one or other of the companies in this case should wish to intervene on the return day, or to suggest a compromise under sec 103 of the Companies Act, there is no reason why they should have to become involved in the affairs of three other companies.'[7]

[6] The *dictum* quoted above correctly identifies the divergent interests of some of the creditors of the companies facing liquidation. However, in my view, it does not give any consideration to the fact that where two or more debtor companies are facing a claim for their liquidation from the same creditor for the same debt, and their liability is joint or even joint and several, they have an identity of interest in the debt. And, if one of them manages to liquidate the entire debt, then the claim against the other would fall away. This would be equally applicable in circumstances where one debtor is a company facing liquidation and the other a private individual facing sequestration.

Ferela

[7] In *Ferela*, the court was faced with an application for the sequestration of two partners and the partnership. The court noted that a case of insolvency was made against the two partners but not against the partnership. The court noted that as a matter of law, if the partnership was sequestrated the individual members too are sequestrated. At the same time, if no case is made out against the partnership, then whether each of the partners can be

[6] *Breetveldt*, n 3, at 314F
[7] Id. at 314F-H

sequestrated, and whether they can be joined to an application where the sequestration of the partnership is sought, becomes relevant. As no case was made against the partnership, and as the applicant indicated that it sought the sequestration of each of the partners on grounds separate from those for the sequestration of the partnership, the court was enjoined to consider the application to sequestrate the estates of each of the two partners. The court felt it necessary to consider whether it was appropriate to join each of the partners in a single matter under a single notice of motion. The court examined the previous cases[8] where the court had no problem with the procedure where more than one party was sought to be sequestrated in the same proceedings, and found that the reasoning for adopting this approach was not clearly and unambiguously articulated. The court came to the conclusion that the matter should be decided in terms of Rule 10 of the Uniform Rules of Court which attends to the issue of joinder. Sub-rule 10(3) allows for more than one party to sue or be sued in a single matter if the determination of the matter involves substantially the same question of law or fact. The court noted that there are three requirements that have to be satisfied for a sequestration order to be issued, (i) the creditor has established a claim, (ii) the debtor has committed an act of insolvency and lastly, (iii) that there is reason to believe that there would be an advantage to creditors if the debtor's estate is to be sequestrated. In the case of both respondents the first requirement was satisfied – they were both liable for the same debt – but as for the second and third requirements the court was concerned that these

[8] These were: *Kirkwood*, n 4 above, and the two cases mentioned therein as supportive authority, *Solomon v Lotter and Another* 1924 W.L.D. 205; *Chellan v Reddy and Another* 1928 N.P.D 387

were to be determined separately and independently of each of the respondents. To wit:

> 'The facts which have to be investigated to decide whether each of the persons committed an act of insolvency do not overlap in any sense whatsoever. But even more important is the fact that, as far as the third requirement is concerned, one has to do with two sets of creditors, two different sets of assets, two different sets of circumstances which will each have to be investigated in order to decide whether in that particular case there is the likelihood of an advantage to creditors in respect of that particular debtor. It could therefore quite easily be that two completely different cases, both as far as the act of insolvency or actual insolvency and the advantage to creditors are concerned, may have to be heard and determined by the Court'[9]

[8] The court was fortified[10] in its view by the *dictum* in *Breetveldt* referred to in [5] above. However, while not explicitly endorsing or rejecting the view that the procedure 'cannot be allowed', it did say:

> 'I believe that, if anything, the case of liquidation of companies, from the point of view of joining them as respondents in one application for winding-up, is principally a stronger one in favour of joinder than that of the sequestration of individuals.'[11]

[9] And so, the court – bearing in mind that a sequestration achieves a *concursus creditorum*[12] – came to the conclusion that it would be 'even more inadvisable that they should ever be joined in an application for their sequestration as respondents in one application.'[13] Thus, by holding that the procedure was 'even more inadvisable' rather than 'cannot be allowed' the court in *Ferela* was less robust and somewhat more ambiguous than that in *Breetveldt.*

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[9] *Ferela*, n 2, at 171D-E
[10] Id. at 171G
[11] Id. at 172C-D
[12] A coming together of the all the creditors, resulting in the establishment of the principle that the joint interests of the creditors as a group takes precedence over the interests of the individual creditors
[13] *Ferela*, n 2, at 172C-D

Business Partners Ltd v Vecto Trade 87 (Pty) Ltd and Others[14]

[10] A case that bears greater resemblance to the present one is *Business Partners Ltd*. There the applicant sought to liquidate the first respondent, a private company, for its failure to pay a debt that was due and owing, and sequestrate two individuals married in community of property who stood as sureties and co-principal debtors for the debt. After exploring all the judgments referred to above the court noted that two opposing approaches were adopted by the courts: one captured in *Breetveldt* and *Ferela* and the other in *Kirkwood*.[15] The court indicated that it understood the judgment in *Kirkwood* to say that if an order is granted against more than one debtor then the practice was 'to apportion the costs of the proceedings between the estates to be sequestrated.'[16] *Kirkwood* did not 'purport to say that it was practice to join more than one respondent in sequestration proceedings (although he did state that it is competent in certain circumstances).'[17] The court went further to dissociate itself from the criticism mounted in *Ferela* against *Kirkwood,* namely that the reasoning allowing for the seeking of the sequestration of two debtors in one application was not clearly and unambiguously articulated. On the contrary, says the court in *Business Partners*:

> '(1) It is implicit in what he [the judge in Kirkwood] said that he approved of the approach in the two earlier cases cited that it is competent to join two debtors in one sequestration application if they were jointly and severally liable to the applicant on the debt in question.
> (2) The learned judge further considered that the approach had much to commend itself by reason of the savings of costs that

[14] 2004 (5) SA 296 (SE)
[15] *Kirkwood*, n 4
[16] *Business Partners,* n 14 at [31]
[17] Id

> would result, particularly with regard to the duplication of the papers filed in the applications before him.'[18]

[11] Having said that, the court in *Business Partners* said that while it saw merit in the view espoused in *Kirkwood* there were considerations other than the joint and several liability of two debtors for the same debt, and the incidental saving of costs that came into play when deciding whether it is competent to bring a single application for their respective sequestration or liquidation. These relate to the issues raised in *Breetveldt* (about the divergent shareholders and their divergent interests, as well as the divergent creditors and their divergent interests in the case of companies) and in *Ferela* (about the establishment of a separate *concursus creditorum* for each sequestration). For this reason, says the court:

> 'I am persuaded, because of the different requirements that require to be satisfied, that there is in principle serious objection to a single application for the liquidation of a company and the sequestration of an individual.'[19]

[12] However, the court did not endorse the view that a single application was not competent unless there was 'a complete identity of interests' of the debtors. The court said:

> 'Accordingly, subject to what follows I align myself with the approach followed in *Breetveldt, Ferela* and *Caltex Oil*. I have, however, some difficulty with the stance that a complete identity of interests is a *sine qua non* for the valid joinder of more than one debtor in liquidation and/or sequestration proceedings. One cannot readily conceive of a situation where there would in fact be a complete identity of interests between debtors. Perhaps a preferable test would be that mooted by counsel for the applicant, viz a sufficiently substantial coincidence of interests such as would practically or at least substantially place the case outside the objections to joinder that were adverted to in the

[18] Id at [32]
[19] Id at [33]

> three cases referred to above and properly bring the case within the ambit of Rule 10.'[20]

[13] There are two further judgments in this court on the issue. The first is *Bobroff*[21] while the second is *Strutfast.*[22] The court in *Bobroff* held that *Ferela* was wrongly decided. The court in *Strutfast* on the other hand, held that *Ferela* was correctly decided.

Analysis

[14] *Breetveldt* is the only judgment where it was explicitly said that the joining of more than one company in a single application seeking the liquidation of each one of them 'cannot be allowed' unless the companies to be liquidated consent thereto. *Ferela*, simply said it 'is inadvisable' to sequestrate more than one individual in a single application. *Business Partners* read the two judgments to say that, absent consent from each of the respondents to be liquidated or sequestrated, none of the respondents can be joined in a single application unless there is a complete identity of interests between the respondents, and on that understanding disagreed with them. Instead, it held that as long as there is 'a sufficiently substantial coincidence of interests' placing them 'outside the objections to joinder', a single application seeking an order that each one is liquidated or sequestrated would be competent.

[15] All three judgments correctly observe that the reasons for allowing an objection to the joinder of all the respondents to a single application is that the

[20] Id at [34]
[21] *Maree and Another v Bobroff and Another* [2017] ZAGPJHC 116 (7 March 2017)
[22] *Strutfast (Pty) Ltd v Uys and Another* 2017 (6) SA 491 GJ

interests of the creditors of each of the respondents are different. Creditors of one of the parties do not have any interests in the affairs of the other parties. Therefore, they should not be dragged into an application where the liquidation or sequestration of that other party is sought. Two observations regarding this approach are apposite. Firstly, the interests of those creditors are not taken into account if the respondents consent to being joined to the single application. Secondly, in one of the cases mentioned, *Ferela*, there was no objection by any of the respondents – the application was unopposed. In the other two cases the objection to the joinder was not from any of the creditor(s) of the respondents but by the respondents themselves. If a creditor took the objection then it could make sense to uphold the objection to the joinder (assuming an appropriate costs order would not remedy any prejudice that the creditor suffers). But this remedy is less readily available if it is the respondents making the claim on behalf of their creditors when the creditors themselves do not do so, especially if the raising of the misjoinder point is really a dilatory tactic raised by the respondents.

[16] It is important to remember that we are dealing here with a procedural matter. As mentioned *Breetveldt* is the only decision that prevents the joinder of more than one respondent in a single application for liquidation of each of the respondents. *Business Partners* certainly saw the possibility of such a procedure being utilised, at least in circumstances where there is ‘substantial coincidence of interests’ between the respondents. *Ferela* did not say that the joinder can never be allowed. In my view, it would be wrong to hold that, as a matter of principle, the joining of more than one respondent in a sequestration

or liquidation application is not to be allowed. No rule to this effect can be established. The court must adopt a flexible and pragmatic approach to the matter, and one that serves the interests of justice. That should be the sole consideration for the court. The interests of justice, it goes without saying, takes note of the interests of all parties. Thus, whether two or more separate applications should be brought, or whether a single one would be a more appropriate approach in a particular case, is fact-specific. Significantly, one of the elements to be established in both sequestration and liquidation applications is the existence of a debt which is due and owing. Where two or more debtors are sued on the same debt, and the defence of each is identical, then there is merit in bringing the claims against each debtor in a single application split into two (or more) parts: a claim A being against debtor A and a claim B being against debtor B (and a claim C against debtor C, etc). By bringing a single application the one issue common to all the respondents can be dealt with once. This has the benefit of ensuring that the optimal utilisation of the limited resources of the court is achieved. Apart from avoiding the duplication of hearings, the risk of conflicting judgments on the same issue is avoided. It is therefore not simply a matter of convenience to the parties and the court. It is a matter of what serves the interests of justice best.

The present case

[17] I, therefore hold that *in casu*, noting that separate requirements have to be met for each of the orders to be granted in the two cases brought by the applicant, nothing prevented the applicant from bringing a single application with two separate claims – Claim A being the liquidation of Waste Partners

and Claim B being the sequestration of Mr Moeng - setting out the factual substratum of their case for each claim separately. In the event that the liquidation proceeding is met with a defence that the debt is not owed or not due, then that defence would hold in the sequestration proceeding too.

[18] We are dealing with the liquidation of one entity – the present respondent Waste Partner (Pty) Ltd (Waste Partner) – and the sequestration of an individual – Mr Moeng. Mr Moeng is the sole shareholder of the respondent. Whether the respondent was his *alter ego* or not is not clear but there is no doubt on the papers that he is the controlling mind of the respondent. The debt against both debtors is identical - it is the debt of the respondent, for which Mr Moeng stood surety and co-principal debtor. The defence to the debt was identical in both cases. There was only one reason to bring the two applications; to secure full payment of the debt. This was achieved when the first application was called before court.

[19] In *Kirkwood* the court said that the saving of costs by bringing one application was an important consideration. The court in *Business Partners* agreed thereto. Further, in *Kirkwood* it was said that generally the practice was to issue a single order of costs to be shared by both respondents. The court in *Business Partners* had no problem with this. The court in *Ferela* said nothing on this issue.

<u>The test for leave to appeal</u>

[20] The applicant for leave to appeal has to satisfy the Court that 'the appeal would have a reasonable prospect of success or that there are some other compelling reasons'[23] to grant leave. The 'would have reasonable prospect of success' test is more stringent than the test that prevailed before the amendment of s 17 of the Superior Courts Act. It must not just be a mere possibility that another court would issue a different order. The prospect of success must be reasonably strong in order for leave to be granted.

[21] This court has a very wide discretion on the issue of costs in a matter. The only inhibiting factor is that the court should exercise the discretion judicially. That requires the court to give due consideration to the interests and conduct of all the parties affected by its costs order. This, I believe, was done. The applicant had recovered full payment of the debt, and costs of application on an attorney and client scale in the first application. It had already been vindicated.

[22] For these reasons I do not believe there is any prospect that another court would come to a different conclusion. Costs should follow the result.

Order

[23] The following order is made:

a. The application for leave to appeal is dismissed with costs.

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Vally J
Gauteng High Court, Johannesburg

[23] Section 17 of the Superior Courts Act, 10 of 2013

Date of hearing:	2 August 2023
Date of judgment:	5 October 2023
For the applicants:	C van der Linde
Instructed by:	Du Toit Sanchez Moodley
For the respondent:	R V Mudau
Instructed by:	Makuta Attorneys