THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 684/2020

In the matter between:

PARK 2000 DEVELOPMENT11 (PTY) LTD **APPELLANT**

and

JOHAN MOUTON **FIRST RESPONDENT**

VAN SCHALKWYK VERVOER CC **SECOND RESPONDENT**

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **THIRD RESPONDENT**

SMOKEN CONSULTING (PTY) LTD **FOURTH RESPONDENT**

KENETH LOGAN STEWART N.O. **FIFTH RESPONDENT**

Neutral Citation: *Park 2000 Development 11 (Pty) Ltd v Mouton and Others* (Case no 684/21) [2021] ZASCA 140 (06 October 2021)

Coram: WALLIS, MBHA, PLASKET, CARELSE and MABINDLA-BOQWANA JJA

Heard: 06 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme

Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 06 October 2021.

Summary: Civil Procedure – Section 16(2)(*a*)(*i*) of the Superior Courts Act 10 of 2013, proscribes the hearing of an appeal which will not have any practical effect – as the only noteworthy property the appellant owned had since been lawfully sold and transferred to an independent purchaser, restoring appellant to its former status of being under business rescue would not have any practical effect – appeal dismissed with costs.

REASONS

Mbha JA (Wallis, Plasket, Carelse and Mabindla-Boqwana JJA concurring):

[1] At the hearing of this appeal on, 06 September 2021, this Court made the following order:

'1 In terms of s 16(2(*a*)(*i*) of the Superior Courts Act 10 of 2013, the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.
2 The reasons for this order will follow shortly.'

The reasons follow hereunder.

[2] The appellant, a property development company and erstwhile registered owner of two pieces of land, to wit Erf 541 in Riversdale and Erf 4573 in Stilbaai West, the latter being the remainder of portion 60, Plattebosch Farm (the properties), appealed against the whole judgment of the Western Cape Division, Cape Town (Sher J) delivered on 23 July 2019, in terms of which a resolution adopted by a director of the appellant to place the appellant under business rescue, was declared invalid and set aside. In addition, the appointment of the fourth respondent as business rescue practitioner was discharged.

[3] This appeal, with leave of this Court, mainly related to an application launched by the first respondent, Johan Mouton (Mr Mouton), in which he sought the above mentioned relief (the main application). The main application was heard together with two other related applications: one was launched by the fifth respondent, Kenneth Logan Stewart (Mr Stewart) in

his capacity as the purported business rescue practitioner (the BRP) of the appellant seeking an order interdicting the intended sale in execution of the aforementioned properties belonging to the appellant (the interdict application). The other application was brought by two of the appellant's creditors, in which they sought to intervene in the interdict application. The c*ourt a quo* dismissed both applications with costs.

[4] It is necessary to briefly set out the background facts underpinning the determination of this appeal. The appellant was a property development enterprise. The properties were the only noteworthy assets it owned. It had earmarked the two pieces of land for certain development in the course of its business activity.

[5] For the purpose of raising finance for the Stilbaai development, from 2006 onwards, the appellant offered debentures which were limited to proposed erven. These debentures were redeemable by a certain date from the net proceeds which were to be realised from the sale of erven, unless the requisite rezoning of the remainder of portion 60 had not occurred by 01 December 2009, in which event the directors could extend the redemption date. It appears that extensions were effected, the last of which supposedly occurred during November 2017.

[6] During May 2007, Mr Mouton purchased certain debentures from the appellant and on 04 February 2016 he sought to redeem the debentures by claiming repayment of the capital loan amount linked to the debentures plus interest alleging *inter alia,* that the extended redemption date for the debentures had since come and gone. As no payment was forthcoming, Mr Mouton issued summons against the appellant claiming the total amount of R400, 000.00 plus interest in respect of two debentures that he was holding

and costs. In July 2016, default judgment was granted in favour of Mr Mouton after the appellant had failed to file a plea. However, the appellant successfully applied to have the judgment rescinded during February 2017. After the appellant had again failed to deliver a plea, Mr Mouton applied for and obtained default judgment against the appellant for a second time on 11 October 2017.

[7] As the appellant failed to satisfy the judgment, Mr Mouton obtained a writ of execution against its movable property resulting in a *nulla bona* return. In July 2018 Mr Mouton obtained a writ of execution authorising the attachment and sale of the appellant's immovable property by public auction which was advertised and scheduled to take place on 12 December 2018.

[8] On 11 December 2018, the day before the auction for the sale of the immovable properties was to be held, Mr Mouton received, at around 15h44, an email from attorneys acting on behalf of a company called Meiprops Twee en Twintig (Pty) Ltd (Meiprops), notifying them that Meiprops had launched an application for the liquidation and winding up of the appellant. Furthermore, this application was enrolled for hearing on 14 December 2018.

[9] About 15 minutes after the receipt of the notification of the intended liquidation application, Mr Mouton's attorneys received a separate email from Smoken Consulting (Pty) Ltd, through which Mr Stewart conducted his business in consulting and business rescue services. This email advised Mr Mouton's attorneys that the appellant had made an application that same day to be placed under business rescue. It is common cause that two days later, the Companies and Intellectual Property Commission (the

CIPC) duly appointed Mr Stewart as the appellant's business rescue practitioner (BRP). The liquidation application of the appellant by Meiprops was subsequently withdrawn on 12 December 2018.

[10] It is not disputed that in both the liquidation and the business rescue applications, Mr Renier van Rooyen (Snr) a director of the appellant deposed to the motivating affidavits on 11 December 2018. In the liquidation application, he deposed to the founding affidavit on behalf of the creditor, Meiprops, of which he was a director, claiming that the appellant was indebted to this company in an amount of R2, 359,642, that it was unable to pay this amount and was therefore hopelessly insolvent. Consequently, it was just and equitable that it be wound up for the benefit of creditors. However, in stark contrast to these averments he alleged, in an affidavit he filed with the CIPC in support of the business rescue application, that the appellant was financially distressed, that it was 'reasonably unlikely' that it would be able to pay its debts within the ensuing six months, but that based on current sales volumes 'it could in all probability trade profitably' if it was placed in business rescue.

[11] The auction for the sale of the immovable properties proceeded as scheduled on 12 December 2018. It took place notwithstanding the fact that the appellant had sought to place itself under business rescue and that Mr Stewart had demanded that the sale in execution should be suspended and not take place. Mr Mouton's attorneys took the view that the business rescue proceedings were irregular, and that the appellant had not been validly placed in business rescue. The two properties, Erf 541 Riversdale and Erf 4573 Stilbaai West, were sold to the second respondent for R135, 000.00 and R3.89 million respectively.

[12] The *court a quo* found, rightly in my view, that the averments by Mr van Rooyen (Snr) were mutually contradictory and that, in at least one of the affidavits, he was being mendacious. The *court a quo* justifiably had harsh words for the conduct of Mr van Rooyen and Mr Stewart, the BRP who deposed to the founding affidavit in support of the business rescue application. It concluded, rightly in my view, that the resolution adopted to place the appellant in business rescue was not passed in good faith, that it had no intention of attaining the objectives of the Companies Act 71 of 2008, as amended (the 2008 Act) in regard to business rescue and that it was done with a view to frustrate the sale in execution. Importantly, the *court a quo* found that on its assessment of the facts, the resolution to institute liquidation proceedings was adopted by Meiprops at some point prior to when the appellant adopted its resolution to go under business rescue.

[13] In its judgment, the *court a quo* specifically granted an order declaring the sale in execution of the two properties valid and enforceable. Importantly, it also authorised the transfer of ownership in them to the purchaser, the second respondent against payment of any amount owing in respect thereof. It is significant to mention that transfer of ownership to the second respondent has since been effected.

[14] The issues that arise from the appellant's grounds of appeal against the *court a quo's* judgment can be summarised as follows: whether the alleged failure of Mr Mouton to serve and join the appellants' creditors in the main application was fatal; whether the resolution adopted to place the appellant under business rescue complied with the requirements contemplated in s 128 of the 2008 Act; whether the setting aside of the resolution commencing business rescue was just and equitable as

contemplated in s 130(5) of the 2008 Act; and whether the *court a quo* erred in its treatment[1] of the timing of the business rescue resolution and its regard to conflicting authorities regarding when liquidation proceedings are initiated. The *court a quo* was of the view that 'initiation' used in s 129(2) of the 2008 Act was intended to refer to the preceding causative act or conduct whereby the legal process in relation to such proceedings was set in motion.

[15] In his answering affidavit to the appellant's application for leave to appeal to this Court, Mr Mouton averred *inter alia* that the appeal is moot. His basis was the following: The appellant is no longer under business rescue and the two immovable properties concerned have since been sold and transfer into the name of the purchasers has been effected. In addition, the appellant did not apply for leave to appeal the costs order and accordingly, there is no live issue to be determined on appeal.

[16] As the issue of mootness was not dealt with in the appellant's heads of argument, this Court directed the Registrar to dispatch correspondence to the parties to file additional arguments on the question of mootness and any reasons why the Court should not consider and dispose of this point in terms of s 19(*d*) of the Superior Courts Act 10 of 2013. Both counsel duly filed their respective supplementary heads and the Court is indebted to them for their assistance.

[17] The appellant submitted that if it were successful with the appeal i.e. if the appellant's erstwhile business rescue status was restored, the transfer of the two properties to the second respondent could be set aside

[1] The court *a quo* took a different stance to that of Swain J in *First Rand Bank Ltd v Imperial Crown Trading (Pty) Ltd* 2012 (4) SA 266 (KZN) where it was held that the word 'initiated' in s 129(2) of the 2008 Act must have been intended to have the same meaning as the word 'commencement' in s 131 (6) of the Companies Act 61 of 1973.

retrospectively by the fifth respondent who should also have been reinstated to his previous position as the appellant's BRP. The appellant sought to place reliance on the case of *Knox N.O. v Mofokeng*[2] by drawing an analogy with the facts *in casu*. In that case the sale in execution had indeed been perfected, but the purchaser had knowledge of the proceedings instituted by the judgment debtor for rescission prior to registration.

[18] The appellant submitted further that even if the second respondent was oblivious to the fact that the appellant was under business rescue at the time it purchased the properties, it undoubtedly subsequently gained knowledge of the fact of business rescue before transfer was taken. As the second respondent was alive to the appellant's assertion that it was under business rescue and its attack on the validity of the sale due to s 133(1) of the 2008 Act might fail, so it was further argued, the second respondent assumed the risk that the sale might be set aside in due course.

[19] In my view the aforesaid argument by the appellant cannot succeed and falls to be rejected outright. The reliance on *Knox N.O* was misconceived as the facts in that case, which concerned a rescission and not a business rescue are totally distinguishable. Significantly, the validity of the sales in execution was not even challenged in the *court a quo*.

[20] It is important to note that the court a quo specifically granted an order dismissing with costs the application to interdict the transfer of the properties that was launched by the fifth respondent under case number 8488/2016. Significantly, that application does not form the subject matter of this appeal. In this regard, it is noted that in paragraph 24 of the founding

[2] *Knox N.O v Mofokeng* 2013 (4) SA 46 (GSJ).

affidavit of the appellant's petition to this Court for leave to appeal, it stated as follows:

'Although other interlocutory applications were also launched subsequently, it is the aforesaid (main) application that forms the subject matter of the current application. The other applications are rendered moot and need not be discussed here.' (My emphasis)

[21] It is clear from the aforesaid founding affidavit that the appellant accepted that it was no longer under business rescue and that Mr Stewart was the applicant's erstwhile BRP. The appellant had the two immovable properties concerned as its only noteworthy assets and nothing else. It has no assets left to administer. Clearly in those circumstances restoring it to business rescue will serve no purpose. The grant of the appeal will not reverse the transfer of the properties. The submission that the BRP once restored to his previous position, will be able to reverse the transfer of the properties which were lawfully and validly authorised by the *court a quo* cannot be sustained. It is by no means clear that Mr Stewart wishes to be restored to that position.

[22] Section 16(2)(*a*)(*i*) of the Superior Courts Act provides that 'when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone'. The effect is that if there is no longer any live controversy between the properties, then there is no longer an appeal that would have any practical effect.

[23] In *Legal Aid South Africa v Magidiwana and Others*[3] the court reiterated the position that 'courts should not and ought not to decide issues of academic interest only'.

[24] In light of what I have stated above, I find that there are no longer any live issues between the parties. The issues on appeal were accordingly of such a nature that the decision sought would have no practical effect or result between the parties. In the result, the Court granted an order dismissing the entire appeal with costs including the costs of two counsel, as set out in paragraph [1] above.

_____

B H Mbha
Judge of Appeal

[3] *Legal Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA) paras 2 – 4; 18.

APPEARANCES:

For appellant:	J P Steenkamp
Instructed by:	BDP Attorneys, Cape Town
	Honey Attorneys, Bloemfontein

For 1st and 2nd respondents:	T Dicker SC (with her, M A McChesney)
Instructed by:	ST Attorneys, Cape Town
	Bezuidenhouts Incorporated, Bloemfontein