



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1123/2022

In the matter between:

EMONTIC INVESTMENTS (PTY) LTD

Appellant

and

PETER CHARLES BOTHOMLEY N.O.

First Respondent

SALIM ISMAIL GANIE N.O.

Second Respondent

ETHNE MARY VAN WYK N.O.

Third Respondent

MONTIC DAIRY (PTY) LTD (In liquidation)
Respondent

Fourth

KOPANO AUCTIONEERS (PTY) LTD

Fifth Respondent

THE MASTER OF THE HIGH COURT, PRETORIA

Sixth Respondent

Neutral citation: *Emontic Investments (Pty) Ltd v Bothomley NO and Others*
(Case no 1123/2022) [2024] ZASCA 1 (9 January 2024)

Coram: NICHOLLS, MOTHLE and MEYER JJA and KATHREE-SETILOANE and MASIPA AJJA

Heard: 9 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 11:00 am on 9 January 2024.

Summary: Company – Winding-up – s 83(10) of the Insolvency Act 24 of 1936 – set-off – whether a creditor who has realised its security in terms of s 83(3) can claim set-off of a post-liquidation debt owed to it against the amount of the proceeds of the

realisation of the property that it is obliged to forthwith pay to the trustee or liquidator in terms of s 83(10).

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Munzhelele J, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Meyer JA (Nicholls and Mothle JJA and Kathree-Setiloane and Masipa AJJA concurring):

[1] Can a creditor who has realised its security in terms of s 83(3) of the Insolvency Act 24 of 1936 (the Insolvency Act) claim set-off of a post-liquidation debt owed to it against the amount of the proceeds of the realisation of the property that it is obliged to forthwith pay to the trustee or liquidator in terms of s 83(10) of the Insolvency Act? The Gauteng Division of the High Court, Pretoria (the high court) said no. It, *inter alia*, ordered the creditor to pay the amount of such net proceeds of the realised security to the joint liquidators. It is that finding and order which the creditor wishes to assail in this appeal. The appeal is with leave of the high court.

[2] First, the background facts. The appellant, Emontic Investments (Pty) Ltd (Emontic), is the owner of an immovable property known as the farm Tamboekiesfontein near the town of Heidelberg, south of Johannesburg (the premises) from where the fourth respondent, Montic Dairy (Pty) Ltd (in liquidation) (Montic), previously conducted business. The first to third respondents, Mr P C Bothomley, Mr S I Ganie and Ms EM van Wyk NNO, are the joint liquidators of

Montic (the liquidators). Messrs Wayne van Biljon and Karl Kebert served as directors of Montic and Emontic (the directors).

[3] Montic was founded in 1984. Its large, sophisticated milk processing and bottling complex included laboratories. Montic operated profitably for almost twenty years. Mr Martin Swanepoel (Mr Swanepoel), the director of Sonnendal Dairy (Pty) Ltd (Sonnendal), wanted to expand Sonnendal's operations into Gauteng and considered Montic an ideal merger partner. Sonnendal was the proprietor of a sizeable dairy in the Western Cape. On 12 February 2014, Montic and Sonnendal finalised a merger agreement. On 25 February 2014, the Competition Commission granted approval for the Sonnendal-Montic merger. On 1 March 2014, Mr Swanepoel was appointed Montic's chief executive officer.

[4] Montic retained possession of the premises and remained financially responsible to Emontic for the monthly rent. Operating difficulties plagued it from May 2014 until January 2015. A significant number of its personnel embarked on a three-month strike, which resulted in tremendous financial losses. The Tetra Pack filter machine, utilised for the packaging of long-life milk, encountered technical difficulties shortly thereafter, resulting in a significant decline in operational efficiency. Montic failed to provide its clients with sufficient long-life milk. Pick n Pay and Mr Swanepoel entered into an exclusivity agreement on the provision of UHT milk. Other potential revenue-generating clients, including Makro and Shoprite, were neglected as Montic executed the exclusivity agreement. It prepared and transported substantial volumes of long-life milk to Pick n Pay. Nonetheless, Montic was unable to fulfill the contractual obligations regarding the delivery of those quantities. Their financial difficulties were exacerbated when Pick n Pay drastically cut its orders for long-life milk.

[5] The commercial relationship between Sonnendal and Montic deteriorated, prompting Mr Swanepoel to apprise Montic of Sonnendal's decision to withdraw from the merger. When Montic's bankers, First National Bank, received notice that the Montic-Sonnendal merger had ceased, it terminated its finance facilities to Montic in an amount of more than R14 million. In the end, on the recommendation of its attorneys, the directors of Montic resolved to initiate business rescue proceedings

voluntarily and be subject to supervision under Chapter 6 of the Companies Act 71 of 2008 (the Companies Act). Its business rescue practitioners secured R3 million and R500 000 respectively in post-commencement loan financing. Montic continued operating from the premises notwithstanding its non-payment of the monthly rent. Cesare Cremona (Cesare) purchased Montic's dairy business from the business rescue practitioners. Significant breaches of the sale agreement by Cesare thwarted the sale. The business rescue proceedings were converted into liquidation proceedings. On 14 June 2016, Montic was placed under final winding-up by order of court. It was profoundly insolvent. Claims exceeding R112 million were proved against Montic.

[6] At the time of its liquidation, Montic was substantially indebted to Emontic due to its failure to pay rent for a prolonged period. Emontic proved a claim against Montic in the amount of R5 675 536.19 pertaining to the lease of the premises in terms of s 44 of the Insolvency Act. It maintained that it held security for its claim as a secured creditor by virtue of its common law landlord's lien over all Montic's movable property (the property) on the premises. The property included various tanks of between 7 500 and 1 000 litres, a pasteurizer, a creamer plant, a 100 000 litre silo, a 20 000 litre sterilising tank, an acepack six-packer, a boiler and feeder tank, a compressor, office furniture, and various vehicles.

[7] A lease is not automatically terminated on the sequestration or liquidation of a lessee. It is for the trustee, in terms of s 37(2) of the Insolvency Act, to notify the lessor, within three months of his appointment 'that he desires to continue the lease on behalf of the estate', otherwise 'he shall be deemed to have determined the lease at the end of such three months'. The liquidators did not give such notice within three months of their appointment. Rather, they notified Emontic of the termination of the lease with effect from the end of November 2016, which was well beyond the stipulated three-month period.

[8] Prior to the second meeting of creditors, Emontic, in its capacity as secured creditor for its pre-liquidation rental claim, notified the liquidators and the sixth respondent, the Master of the High Court (the master), in accordance with s 83 of the

Insolvency Act,¹ of its intention to sell the property over which it held security. On 25 October 2016, Emontic's attorneys addressed a letter to the liquidators in which they advised, *inter alia*, that Emontic had engaged the services of the fourth respondent, Kopano Auctioneers (Pty) Ltd (Kopano), to dispose of the property as its agent in terms of s 83 of the Insolvency Act. The letter reads:

'My client entered into a written lease agreement with Montic Dairies (Pty) Limited and an amount of R5 674 536.19 is outstanding in respect of the rental payable up to the date of liquidation.

¹ In relevant parts s 83 of the Insolvency Act reads:

- '(1) A creditor of an insolvent estate who holds as security for his claim any movable property shall, before the second meeting of the creditors of that estate, give notice in writing of that fact to the Master, and to the trustee if one has been appointed.
- (2) ...
- (3) If such property does not consist of a marketable security or a bill of exchange, the trustee may, within seven days as from the receipt of the notice mentioned in subsection (1) or within seven days as from the date upon which the certificate of appointment issued by the Master in terms of subsection (1) of section eighteen or subsection (2) of section fifty-six reached him, whichever be the later, take over the property from the creditor at a value agreed upon between the trustee and the creditor or at the full amount of the creditor's claim, and if the trustee does not so take over the property the creditor may, after the expiration of the said period but before the said meeting, realize the property in the manner and on the conditions mentioned in subsection (8).
- (4) ...
- (5) The creditor shall, as soon as possible after he has realized such property, prove in terms of section forty-four the claim thereby secured and he shall attach to the affidavit submitted in proof of his claim a statement of the proceeds of the realization and of the facts on which he relies for his preference.
- (6) ...
- (7) ...
- (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) ...
- (10) 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 preferential 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 or 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.
- (11) ...
- (12) If the claim of a secured creditor exceeds the sum payable to him in respect of his security he shall be entitled to rank against the estate in respect of the excess, as an unsecured creditor, and if the net proceeds of any such property exceed all claims secured thereby by the balance, after payment of those claims, shall be added to the other free residue (if any) in the estate in question.'

My client is also owed administrative rental which we will deal separately for the period referred to in the Insolvency Act, post liquidation.'

[9] On 25 October 2016, Emontic's attorneys addressed a further letter to the liquidators, providing them with information regarding the auction's specifics and noting that the letter's author had 'advised both [his] client and the auctioneer of the provisions of s 83(10) of the Insolvency Act.' A public auction was held on 8 November 2016 at the premises. The net amount paid by Kopana to Emontic was R6 745 561.78.

[10] By letter dated 30 November 2016, Emontic's attorneys informed the liquidators, *inter alia*, that the company had set-off the post-liquidation rental amount owed to it from the date of liquidation until 30 November 2016, when the liquidators terminated the lease. The attorneys further stated that set-off was not permitted without the consent of the liquidators. On the same day, Emontic's attorneys paid to the liquidators an amount of R2 420 000.05 of the net amount of R6 745 561.78 paid by Kopana to Emontic. The liquidators' attorney responded on 6 December 2016, stating that set-off was not permitted and that the liquidators had not given their assent to it. The letter emphasised Emontic's unlawful conduct in purporting to deduct amounts from the net proceeds of the realisation of the property. It was also noted that the 'administrative rental' claimed by Emontic did not accord with the terms of the lease agreement. The post-liquidation rental would be paid to Emontic as a portion of the sequestration costs only if the liquidators determined that the sums sought were owed. Emontic was placed on terms to pay the outstanding balance, without set-off or deduction of any amount other than that provided for in s 83.

[11] The attorneys for Emontic made an additional payment of R139 536 to the liquidators on 26 January 2017. Emontic declined to remit to the liquidators the remaining balance of the net proceeds from its sale. As a result, the liquidators initiated the application in the high court, which is the subject of this appeal.

[12] The liquidators sought an order compelling Emontic to pay over to them the net proceeds of Montic's property realised at the auction. They asserted that Emontic was obliged, pursuant to ss 83(5) and 83(10) of the Insolvency Act, to render a statement to them of the proceeds of the realisation and to 'forthwith pay over the net proceeds of the realisation' to them. Fundamentally, Emontic opposed the application on two grounds. First, it argued that the 'administrative rental' ought to be classified as an expense incurred in the realisation of the property and be subtracted from the gross proceeds in determining the net proceeds. Second, it argued that it had the right to set-off the 'administrative rental' from the debt it owed the liquidators in relation to the property's sale proceeds. Additionally, Emontic filed a conditional counter-application seeking an order: (a) compelling the liquidators to remove all Montic's remaining assets from the premises; (b) declaring that it is entitled to administrative rental for the period from Montic's liquidation to 30 November 2016; and (c) that it is entitled to deduct such rental from the proceeds of the sale.

[13] The high court granted the relief sought by the liquidators and issued the following order in the conditional counter-application:

- '6. The [liquidators] are ordered to take steps necessary to remove their movable assets, records and books belonging to Montic Dairy (Pty) Ltd from the property known as Tamboekiesfontein within 390 calendar days from the date of the order.
7. The claim for administrative rental for the period between the date of Montic Dairy's liquidation and 30 November 2016 is dismissed.
8. [Emontic's] counter application has partly succeeded and therefore each party will pay its own costs on [Emontic's] counter application.'

[14] It is expedient to conclude the appeal against the high court's dismissal of the declaratory relief sought by Emontic. There exists an irresolvable dispute of fact on the papers in respect of whether any post-liquidation rental is payable to Emontic. Generally, an application to hear oral evidence or be referred to trial must be made *in limine*.² However, this requirement was not adhered to. Therefore, the high court's refusal to grant the declaratory relief is above reproach.

² *Nel v Ramwell t/a Ramwell Attorneys* [2019] ZAGPJHC 28, paras 10-13.

[15] In argument before us, Emontic's counsel, in my opinion, correctly and appropriately, conceded that its set-off defence determines the appeal. This is so because, albeit within the framework of a divorce order-incorporated settlement agreement, the meaning ascribed to the phrase 'net proceeds generated' from the sale of a property 'are those costs that flow directly from the sale of the property'.³ An identical result is derived from an interpretative analysis of the phrase 'net proceeds of the realization' as it appears in s 83(10) of the Insolvency Act, in accordance with the well-established trinity of language, context and purpose.⁴ Merely having the goods sold at an auction situated in the location where the auction took place, does not establish a sufficient link to the expenses incurred in the sale of the property. The post-liquidation rental claim is not a claim 'flowing directly from the sale of the property'. In other words, the post-liquidation claim does not originate from the sale of the property. Post-liquidation rental is a cost of sequestration/liquidation to be paid, not from the proceeds of the realisation, but from the free residue at the end.

[16] It is to Emontic's set-off defence that I now turn. The four conditions for set-off to operate are that both debts must be: (a) of the same nature; (b) liquidated; (c) fully due; and (d) payable by and to the same persons.⁵

[17] A *concursus creditorum* is established with a trustee or liquidator who is entrusted with the estate's assets, including the property rights and obligations of the insolvent or company. The liquidator is obliged to hold and administer the estate and distribute the proceeds among the competing creditors in the manner and order of preference specified in the Insolvency Act. This procedure is followed after an estate is sequestered or a company is liquidated. The hand of the law is laid upon the estate and no transaction can thereafter be entered into regarding estate matters by a single creditor to the prejudice of the general body of creditors. The claim of each

³ *Swart v Swart and Others* [2022] JOL 53996 (GJ), paras 26-28.

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 25; *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* ZASCA 16; 2020 (4) SA 428 (SCA), para 8; *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

⁵ François du Bois et al *Wille's Principles of South African Law* (9 ed) at 832.

creditor must be dealt with as it existed at the issue of the order.⁶ That is the fundamental purpose of insolvency legislation.⁷

[18] The Insolvency Act contains numerous provisions relating to *inter alia* the proof of claims, the realisation of securities, the distribution of realisation and the costs of sequestration. Regarding the proof of claims, s 44 stipulates that a claim shall be proved at a meeting of creditors to the satisfaction of the officer presiding. He or she is not required to examine a claim too critically and only has to be satisfied that the claim is *prima facie* proved.⁸ The admission of a claim is provisional only, as the appropriate stage to determine the validity of the claim is when the trustee examines the claims proved against the estate in terms of s 44.

[19] In regard to the realisation of securities, the starting point is found in s 82 which stipulates that, subject to the provisions of ss 83 and 90, the trustee of an insolvent estate shall sell all the property in that estate as directed by the creditors. The Insolvency Act contains detailed provisions prescribing the costs to which securities are subject (s 89, often referred to as ‘the s 89 costs’); the manner in which the proceeds of securities are to be applied (s 95); how the costs of sequestration are to be defrayed (ss 97 and 106); when and how liquidation and distribution or contribution accounts are to be framed (ss 91 and 92); the ranking of preferent and concurrent claims (ss 98A to 103); the lodging of accounts with the Master; and, the inspection and confirmation thereof and the distribution of dividends (ss 107 to 116).

[20] Emontic’s set-off defence is legally unsustainable. First, the explicit and unambiguous language of s 83(10), which states that ‘[w]henever a creditor has realized his security . . . he shall promptly pay the trustee the net proceeds of the realization to the trustee’, does not permit for set-off to operate against a liquidator’s s 83(10) claim for payment of the net proceeds of the realisation of his security by a

⁶ See cases such as *Walker v Syfret*, N.O. 1911 AD 141 at 16; *Ward v Barrett*, N.O. and Another, N.O. 1963 (2) SA 546 (AD) at 552; *Thorne and Another*, NNO v Receiver of Revenue [1976] 2 All SA 393 (C) at 396.

⁷ *Minister of Justice and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2016] ZASCA 196; [2017] All SA 331 (SCA); 2017 (3) 95 (SCA) para 55.

⁸ See *Breda NO v Master of the High Court, Kimberley* [2015] ZASCA 166 and Mars *The Law of Insolvency in South Africa* (10th Ed), para 18.6 at 441.

creditor. According to subsection 124(4), a secured creditor of an insolvent estate who has realised his security in accordance with s 83 and has not remitted the proceeds of the realisation in accordance with the provisions of s 83(1) despite written demand shall be guilty of an offence and subject to the penalties specified in ss (2), in addition to any other offence he may have committed in relation to those proceeds.⁹

[21] The obligation imposed on a creditor under section 83(10) to pay over the net proceeds of his realised security and the obligation of the trustee to pay the creditor his preferential claim out of such proceeds, are not reciprocal obligations. The section imposes on the creditor an obligation to pay the trustee the proceeds forthwith whenever he has realised his security. The creditor is entitled to receive payment out of the proceeds only ‘thereafter’, and only if certain requirements have been met. It is not permissible for the creditor to require the trustee to first offer payment of his claim.¹⁰

[22] The liquidators were, and remain, obliged to recover the proceeds from the sale of the property from Emontic. It is legally impermissible for the liquidators to agree that Emontic retain any portion of the proceeds of its realised security, on any basis. In *Townsend*¹¹ it was held:

‘The statute imposes a peremptory and unequivocal duty upon a creditor who disposes of his security. The liquidator is likewise not a free agent in the matter. His duty is to realise the property in the estate as soon as possible and pay the creditors promptly or, at least, within a reasonable time. He does not have a power (without a direction from the creditors) to speculate with the assets, whether by delaying realisation or by expending money on them. No more may a liquidator properly rely on his judgment of whether a creditor is “good for the money” to avoid or delay compliance with the duty to pay over under s 83(10). To recognise such a discretion would be to countenance speculation of a different kind which might, in the result, be just as damaging to the estate (for example, should the creditor abscond or fail to live up to the liquidator’s expectations). The passivity of the liquidator in spite of his duty in this case cannot therefore redound to a benefit to the plaintiff. The hard fact is that, by

⁹ These penalties include a fine not exceeding R1 000 or imprisonment without the option of a fine for a period not exceeding one year.

¹⁰ See *Standard Bank of South Africa Limited v Townsend and Others* 1997 (3) SA 41 (W) at 49C-50C (*Townsend*); *Venter NO v Avfin (Pty) Limited* 1996 (1) SA 826 (A) at 835-836; *Barlows Tractor Co. (Pty) Limited v Townsend* 1996 (2) SA 869 (A).

¹¹ At 52.

ignoring the liquidators demand, it failed to comply with the terms of s 83(10). Fundamental to the plaintiff's reliance upon the proceeds of the securities and the proof of its preferred claim was possession of the estate of the proceeds.'

[23] And, in *Commissioner, SARS v Stand Two Nine Nought Wynberg*,¹² this Court said:

'The proposition that a debtor of an insolvent estate might arrange with its trustee or liquidator to pay the claim of a particular estate creditor is an unusual one. Giving effect to such an arrangement would enable the parties to subvert the scheme of distribution laid down by the Insolvency Act 24 of 1936.

In terms of s 391 read with s 342 of the Companies Act 61 of 1973 it is a liquidator's duty to recover and reduce into possession all of the assets and property of the company to realise them and apply the proceeds in satisfaction of the costs of winding-up; and, if there is a residue, to distribute it to creditors entitled thereto in the order of preference and manner set out in ss 95-104 of the Insolvency Act.'

[24] Second, common law set-off can, in any event, not operate *in casu* because its condition that both debts must be payable by and to the same persons,¹³ is absent. According to s 37(3), the rent owed under the lease from the date the lessee's estate is sequestrated until its determination or cession by the trustee 'shall be included in the costs of sequestration'. The costs of sequestration are, in terms of s 97, to be defrayed from the free residue after the payment of any death bed expenses. If the free residue is insufficient to cover the costs of sequestration, all creditors who have proved claims against the insolvent estate or company in liquidation, shall be obliged to pay for any shortfall in accordance with s 106.

[25] In the result, the appeal is dismissed with costs, including those of two counsel.

P A MEYER
JUDGE OF APPEAL

¹² *Commissioner, SARS v Stand Two Nine Nought Wynberg* [2005] ZASCA 55; [2006] 4 All SA 11 (SCA); 2005 (5) SA 583 (SCA) paras 8-9.

¹³ See para 16 *supra*.

Appearances

For the appellant:

J Vorster with JA Booyse

Instructed by:

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BJ Manca SC with M Maddison

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