



COURT UNVEILS RECKLESSNESS AND COLLUSION IN COMPANY LIQUIDATION: TRIAL ORDERED TO UNRAVEL FRAUDULENT PROPERTY SALE AND DIRECTOR LIABILITY

SUMMARY OF THE JUDGEMENT JOCHEN ECKHOFF NO 1 AND OTHERS v PAUL JOHANNES VAN DEN HEEVER AND OTHERS

COURT AND CASE DETAILS

- **Court:** High Court of South Africa, Western Cape Division, Cape Town
- **Case No:** 16404/23
- **Date of Hearing:** 19th November 2024
- **Date of Judgment:** 11th February 2025
- **Judge:** Thulare J

PARTIES INVOLVED

- **Applicants:**
 - Jochen Eckhoff NO (Joint Liquidator of The Vines Construction (Pty) Ltd)
 - Legadimane Arthur Maisela NO (Joint Liquidator)
 - K2012076290 South Africa (Pty) Ltd (Creditor with a claim of at least R2 million)
- **Respondents:**
 - Paul Johannes van den Heever (Sole director and controlling mind of the company prior to liquidation)
 - Sonnet Stemmet (Second respondent, alleged colluder)
 - Oude Chardonnay Retail (Pty) Ltd
 - Registrar of Deeds, Cape Town
 - ABSA Bank Ltd

BACKGROUND FACTS

- The Vines Construction (Pty) Ltd, formerly Oude Chardonnay Rusoord (Pty) Ltd (the company), was a property holding and development company.
- The company purchased an immovable property from the third applicant for R6 million, with a balance of R2 million still owed, secured by a mortgage bond that was never registered in favour of the third applicant.
- The company failed to pay the R2 million balance and the mortgage bond was not registered, leading the third applicant to initiate legal proceedings to compel registration.
- The company underwent a name change shortly before voluntary liquidation in November 2019.
- The first respondent was the sole director of both the company and a related company, Oude Chardonnay Retail (Pty) Ltd.
- The applicants alleged that the second respondent, a personal friend of the first respondent, colluded with him to purchase the company's sole asset (the property) for half its value, prejudicing creditors.
- Proceeds from the sale were paid to Retail to settle its revolving credit liability, with no provision made for the company's debt to the third applicant.
- The company and Retail were then wound up as empty shells, leaving the third applicant with a significant loss and no recourse.

LEGAL ISSUES AND CLAIMS

- **Setting Aside the Disposition (Section 31 of the Insolvency Act, 1936):** The applicants sought an order setting aside the disposition of the company's immovable property to the second respondent, or alternatively, to recover its value, on the basis of collusive dealings prejudicing creditors.
- **Personal Liability of the First Respondent (Section 424 of the Companies Act, 1973):** The applicants sought a declaration that the first respondent was personally liable for the company's debts due to reckless or fraudulent conduct of business.
- **Prescription:** The respondents contended that the claims against them had prescribed (expired) under the Prescription Act, 1969, asserting that the applicants had knowledge of material facts more than three years before instituting proceedings.

CONCLUSION

The court recognized the complexity and factual disputes inherent in allegations of collusion and fraudulent conduct in the winding up of The Vines Construction (Pty) Ltd. While some relief under section 31 was granted, the serious allegations against the first respondent required a full trial for proper adjudication. The court stressed the importance of action proceedings for resolving disputed factual issues, particularly those involving intention, knowledge, and collusion.

KEY LEGAL PRINCIPLES AND FINDINGS

- **Section 31 - Collusive Dealings**
 - The court referenced Nat Industries (Pty) Ltd (In Liquidation) v Grindrod Bank Ltd, confirming that to set aside a disposition under section 31, four facts must be proven:
 - i. The insolvent made a disposition of property.
 - ii. The disposition occurred when liabilities exceeded assets but before liquidation.
 - iii. The disposition was intended to prefer one creditor above another.
 - iv. Liquidation followed the disposition.
 - Intention to prefer involves subjective assessment; proof of knowledge of impending insolvency and intention to prefer a creditor is essential.
 - Collusion requires that both parties knowingly participate in reckless or fraudulent conduct.
 - Motion proceedings are not typically suitable for resolving disputes involving collusion due to factual complexities; action proceedings are preferred.
- **Section 424 - Liability for Reckless or Fraudulent Conduct**
 - The court emphasized the need to prove on a balance of probabilities that the director acted recklessly or fraudulently with intent to defraud creditors.
 - Mere suspicion is insufficient; detailed examination of the company's records and circumstances is required to establish knowledge and intent.
 - Reckless conduct involves carrying on business without concern for the company's solvency or prospects of paying debts.
 - Knowledge ("knowingly a party") includes actual knowledge or dolus eventualis (subjective foresight of risk and reconciliation to it).
 - The evidence must show that the first respondent was knowingly involved in reckless or fraudulent business conduct.
 - Disputed factual issues relating to the first respondent's conduct warrant referral to trial rather than resolution on motion.
- **Prescription**
 - The court held that the applicants had knowledge of critical facts sufficient to start prescription more than three years before the application was issued.
 - However, some material facts, including the disposition of the sale proceeds to Retail and the breach of trust regarding the R300,988.10 tender, only emerged during a 2022 enquiry.
 - The belated discovery of the personal friendship between the first and second respondents was not a material fact for prescription purposes.
 - The claim based on section 424 was not barred by prescription as the applicants could not have known all relevant facts earlier.

COURT'S DECISION AND ORDERS

- **Prayer 1 (Setting Aside Disposition under Section 31):** Granted.
- **Prayer 2 (Claim against Second Respondent and Others):** Dismissed with costs, including costs on attorney and client scale.
- **Claim Against First Respondent (Section 424):** Referred to trial due to factual disputes.
- The notice of motion, answering, and replying affidavits shall stand as combined pleadings for the trial.
- Further trial procedures were to follow.
- Costs in respect of the claim against the first respondent to be in the cause (borne by the party ultimately unsuccessful).

VDM SERVICES

- | | | |
|--|--------------------------------------|--|
| • ALTERNATIVE DISPUTE RESOLUTION | • DECEASED ESTATES, TRUSTS AND WILLS | • NOTARY PUBLIC AND NOTARIAL SERVICES |
| • CIVIL LITIGATION AND DEBT COLLECTION | • DIVORCE AND FAMILY LAW | • PERSONAL INJURY AND PUBLIC LIABILITY |
| • COMMERCIAL LAW | • EMPLOYMENT AND LABOUR LAW | • PROPERTY LAW AND SECTION TITLE |
| • CONVEYANCING AND PROPERTY TRANSFERS | • INSOLVENCY AND LIQUIDATION | • MARRIAGE AND MATRIMONIAL PROPERTY |