THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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

Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs including those of two counsel. The appellant, Emontic Investments (Pty) Ltd (Emontic), had appealed against the order of The Gauteng Division of the High Court, Pretoria, *per* Munzhelele J (the high court).

The appellant 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 E M van Wyk NNO, are the joint liquidators of Montic (the liquidators). 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.

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 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 resulted in the termination of 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 000.00 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.

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 24 of 1936 (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. 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, 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.

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 Kopano to Emontic was R6 745 561.78.

By letter dated 30 November 2016, Emontic's attorneys informed the liquidators, inter alia, that the company had applied set-off of 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 Kopano 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 attorneys for Emontic made an additional payment of R139 536.00 to the liquidators on 26 January 2017. Emontic declined to remit to the liquidators the remaining balance of the entire total net proceeds from its sale. As a result, the liquidators initiated the application in the high court which was the subject of the appeal before the SCA.

The issue before the SCA was whether a creditor who has realised its security in terms of s 83(3) of the Insolvency Act is legally permitted to 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.

In addressing the issue, the SCA held that Emontic's set-off defence is legally unsustainable as the explicit and unambiguous language of s 83(10) of the Insolvency Act 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 or her security by a creditor. It further reasoned that the liquidators were and remain obliged to recover the proceeds from the sale of the property from Emontic, holding that it was legally impermissible for the liquidators to agree that Emontic retain any portion of the proceeds of its realised security, on any basis.

Secondly, the SCA reasoned that common law set-off cannot operate in casu because its condition that both debts must be payable by and to the same persons, was absent. Post-liquidation rental expenses are included in the costs of sequestration and according to s 37(3) of the Insolvency Act, 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.

In the result, the SCA dismissed the appeal with costs, including those of two counsel.

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