THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1223/2021

In the matter between:

JAMES WILLIAM THOMAS **FIRST APPELLANT**

MIDDELPLAAS-SUID LANDGOED (EDMS) BPK **SECOND APPELLANT**

and

BAREND JOHANNES THOMAS **RESPONDENT**

Neutral citation: *Thomas and Another v Thomas* (1223/2021) [2023] ZASCA 36 (31 March 2023)

Coram: VAN DER MERWE, MOCUMIE, NICHOLLS, MOTHLE and MATOJANE JJA

Heard: 24 February 2023

Delivered: 31 March 2023

Summary: Insolvency law – Insolvency Act 24 of 1936 – sequestration of insolvent estate – nature of a right, title and interest in an action (right of action) – incorporeal right – personal right – right formed part of an insolvent estate – trustees abandoned/waived right of action – right of action extinguished.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Mamosebo J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and substituted with the following:
'The application is dismissed with costs.'

JUDGMENT

Mocumie JA (Van Der Merwe, Nicholls, Mothle and Matojane JJA concurring):

[1] It is an unfortunate, albeit it not uncommon occurrence in the farming community, to find sibling rivalry brewing and escalating over decades, to the point that it reaches this Court at exorbitant litigation costs and with familial ties irretrievably broken down, as this appeal reveals.

[2] Mr James William Thomas (the first appellant) and Mr Barend Johannes Thomas (the respondent) are brothers who owned farms adjacent to each other. The respondent owned two farms. Around 1999, the respondent encountered financial difficulties and consequently ended up selling his two farms to settle his debts. On 13 March 2000, Middelplaas-Suid Landgoed (Edms) Bpk (the second appellant), which is co-owned by the first appellant and his son, bought one of the respondent's farms, namely Middelplaats-South, No. 104 (Middelplaats). However, after the signing of the purchase agreement, dispute after dispute arose between the first appellant and the respondent with the inevitable result of them suing each other in various actions, including the one which is central to the appeal.

[3] Following the sale of Middelplaats, the respondent refused to vacate its premises. The appellants sought an order to evict the respondent and succeeded with costs. The respondent failed to pay the costs in relation to the eviction judgment.

Consequently, the appellants sought an order for his sequestration from the Northern Cape Division of the High Court, Kimberley (the high court).

[4] As I have indicated, various disputes arose between the two brothers, leading to litigation. For present purposes it is only necessary to refer to the action that the respondent instituted against the appellants in the high court during 2003. In that action, the respondent initially claimed the delivery of certain livestock, alternatively payment of the alleged value thereof in the amount of R663 111, as well as damages in the amount of R800 000.The appellants defended the action and it was enrolled for trial on 23 November 2004. At the commencement of the hearing, the respondent amended his particulars of claim. As a result, his claim was limited to the delivery of certain livestock, alternatively payment of the alleged value thereof in the amount of R327 400. This led to a postponement of the action.

[5] Whilst this action was pending, the estate of the respondent was sequestrated upon the application of the first appellant. The final sequestration order was granted on 17 March 2006. Only the first appellant proved a claim in the estate in the amount of R97 483.05 (based on a judgment debt). He, however, had to pay a contribution in the amount of R42 457.89. On 28 May 2010, the respondent was rehabilitated.

[6] Eight years later, on 15 November 2018, the respondent brought an application before the high court seeking relief in the following terms:

‘1.1 That it be declared that:

1.1.1 the applicant’s right, title and interest in the action that the (as plaintiff) had instituted against the James William Thomas (as first defendant) and Middel-Plaas Suid Landgoed (Pty) Ltd (as second defendant) under case number 202/2003, in the Northern Cape Division, Kimberley of the High Court of South Africa [‘the court case’], be deemed not to form part of his insolvent estate;

1.1.2 The applicant’s creditors and the trustees of his insolvent estate have, by not laying claim thereto, waived all rights that they may have had in the applicant’s right, title and interest in the said action.

1.2 The trustees be authorised to relinquish on behalf of the insolvent estate and in favour of the applicant, all claims to the applicant’s right, title and interest in the action;

1.3 The applicant be authorised to pursue and enforce the applicant's right, title and interest in the action for his own benefit…'

[7] In his founding affidavit, and as the basis of the application, the respondent alleged that:

'It follows that the trustees (and my creditors) abandoned my right, title and interest in the court case, which was an asset in my estate by failing to lay claim thereto…As the trustees and my creditors have abandoned my right, title and interest in the court case due to the failure to lay claim, thereto, I am entitled, even after my rehabilitation, to apply for a declaratory order that, amongst others, my right, title and interest should not be deemed to form part of a portion of my insolvent estate, because my creditors and the trustees of my insolvent estate have waived all the rights that they may have had in it by not laying claim thereto.'

[8] The respondent also stated that the creditors, in the second creditors' meeting held on 30 August 2006, resolved to accept the trustees' report and to authorise the trustees, in their sole discretion, to abandon any asset which could not be monetised. As a result, his right, title and interest in the action was not monetised.

[9] The respondent submitted that the right, title and interest in the action (the right of action) was a personal right which became an asset and formed part of the insolvent estate. When the trustees and the appellants did not lay claim, they effectively abandoned it. By so doing they waived the right. Thus, the respondent was entitled to pursue it. The respondent submitted with reliance on *Van Der Merwe, Ex Parte (Van Der Merwe)*[1] that when the trustees abandoned the claim, it remained alive; it did not perish and could still be pursued if not by the trustees, then by the respondent.

[10] The appellants admitted that the trustees had abandoned the right of action. Due to its nature (a claim for the delivery of movable property alternatively for payment of the value thereof), so they contended, the right necessarily perished when the trustees of the insolvent estate waived such right and elected not to pursue the litigation to its full conclusion.

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[1] *Van Der Merwe, Ex Parte* [2008] ZAGPHC 88; 2008 (6) SA 451 (W).

[11] The high court found in favour of the respondent. It found (at para 23 of the judgment), that 'it is apparent that the judgment creditor, the respondents in this instance, did not attach the applicant's right, title and interest [in the action] and thereby monetizing the claim'. Furthermore, it found at para 27:

'As the applicant is now rehabilitated therefore pre-sequestration debts should be extinguished…Regard being had to the absence of opposition at rehabilitation stage of all debts afforded to a rehabilitated insolvent based on s 129(1)(b) of the Act, the application [for a declaratory] stands to succeed.'

[12] The parties used the concepts of waiver and abandonment interchangeably. In this present context these concepts (waiver and abandonment) are essentially the same. It is trite that a party to a contract cannot waive an obligation but can waive a right. *Christie's Law of Contract in South Africa*, puts it thus:

'Waiver of a right conferred by the terms of a contract is itself a contract, but waiver of a right conferred by law, even in a contractual context, is not.'[1]

[13] Van Huyssteen et al, explain that:

'…a waiver may be effected by a unilateral act [though the general principle is that a release from an obligation is a bilateral juristic act requiring the co-operation of both creditor and the debtor], for example where a party who has an election between inconsistent alternative remedies abandons or 'waives' one of the alternatives by deciding on the other, or where the benefit of a contractual provision – such as a condition – intended to operate for the exclusive benefit of a particular contractant, is unilaterally abandoned by that contractant.'[3]

[14] The general principles in South African insolvency law, as encapsulated in the Insolvency Act 24 of 1936 (the Insolvency Act), are that upon a declaration of insolvency by a court of law, an insolvent is divested of their estate, the estate vests in the Master and upon their appointment, the trustee(s).[4] In *De Villiers NO Delta Cables (Pty) Ltd* this Court held that:

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[1] RH Christie, GB Bradfield *The Law of Contract in South Africa* 8 ed (2022) at 532; see also *Bester v Sol Plaatjie Municipality* [2004] 2 All SA 31 (NC) at 43.
[3] Van Huyssteen et al *Contract: General Principles* 6 ed (2020) at 578.
[4] Section 20(1)*(a)* of the Insolvency Act 24 of 1936.

'It has always been accepted that a trustee becomes the owner of the property of the insolvent. The Legislature did not say so in so many words, but a transfer of dominium is clearly inherent in the terminology employed in s 20(1)*(a)* which provides that a sequestration order shall divest the insolvent of his estate and vest it first in the Master and later in the trustee…It also provides for a vesting in the trustee. True, the subsection does not speak of a divesting but it goes on to provide that the property so vests "as if it were property of the sequestrated estate". This can only mean that the property of the solvent spouse vests in the trustee to the same extent as does the property of the insolvent.'[5] (Original emphasis.)

[15] The Insolvency Act defines both 'immovable property' and 'movable property.'[6] Immovable property means in essence, rights to land and minerals that are registrable in the Deeds Office. Movable property means 'every kind of property and every right or interest which is not immovable property.' According to *Silberberg and Schoeman's The Law of Property*,[7] a contractual claim, like the one in issue, is an incorporeal thing. It is trite that an action is a procedural vehicle to enforce that personal right.[8] This Court, in *Stratgro Capital (SA) Ltd v Lombard NO and Others* confirmed that the right of action 'constitutes incorporeal property which may be attached at the instance of a judgment creditor and sold in execution'.[9]

[16] The right of action in issue clearly falls within the meaning of 'movable property' as defined in the Insolvency Act. Thus, it became vested in the trustees. By operation of law, the trustees became the owners/holders of the right of action. They had a duty, not the right, to deal with the right of action as an asset in terms of the Insolvency Act, unless, of course, they had been authorised otherwise.

[17] As I have demonstrated, it was common cause that the trustees had abandoned the right of action as they had been authorised to do. Thus, the question is: what was the effect of the abandonment of the right of action in the circumstances?

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[5] *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (AD); [1992] 1 All SA 192 (A) at 17-18.
[6] Section 2 of the Insolvency Act 24 of 1936.
[7] Muller et al *Silberberg and Schoeman's The Law of Property* 6 ed (2019) at 17.
[8] In Afrikaans commonly known as 'vorderingsreg.'
[9] *Stratgro Capital (SA) Ltd v Theodorus NO and Others* [2009] ZASCA 142; 2010 (2) SA 530 (SCA); [2010] 3 All SA 27 (SCA) para 16; see also *Marais v Aldridge* 1976 (1) SA 746 (T) at 750A-C and *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA).

[18] In my view, the abandonment by its holders (the trustees) extinguished the right of action. If a legal representative informs a court or the other party that a right of action is abandoned, no one would dispute that that signifies the end of the right of action. The position is similar to a compromise (transactio) in respect of a right of action that is the subject of pending litigation. Our law is clear that the compromise extinguishes that right of action and in that case, replaces it with new rights and obligations. Thus, the right of action in issue had been extinguished long before the rehabilitation of the respondent.

[19] It follows, that the matter is distinguishable from *Van Der Merwe*. There, the trustee abandoned rights to immovable property. After his rehabilitation, the insolvent applied for, and obtained, an order that the immovable property be re-vested in him. When an owner abandons or waives rights to a corporeal thing, that thing is obviously not destroyed, but becomes *res nullius* (a form of *res derelicta*),[10] which *Silberberg and Schoeman's The Law of Property* define as things 'although susceptible to private ownership, do not belong to anyone at a particular point in time'.[11] On this basis, an insolvent could reclaim a tangible thing after rehabilitation.

[20] In conclusion, once it was established that the right of action had been abandoned by the trustees, as was common cause between the parties, the real question was the effect of that abandonment and not the effect that the order of rehabilitation had on the insolvent, as the high court postulated. The effect must be that the alleged right of action was extinguished when the trustees as the owners of the asset, abandoned it. The fact that the trustees abandoned the action did not entitle the respondent (a rehabilitated insolvent) to lay claim on it. On these facts, s 129 of the Insolvency Act which speaks to the effect of rehabilitation on an insolvent, does not come into the equation at all.

[21] In the light of the conclusion that I have reached, it is unnecessary to deal with the alternative arguments raised by the appellants.

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[10] Van der Merwe *Sakereg* 2 ed (1989) at 224.
[11] Muller et al *Silberberg and Schoeman's The Law of Property* 6 ed (2019) at 38.

[22] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and substituted with the following:

‘The application is dismissed with costs.’

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B C MOCUMIE

JUDGE OF APPEAL

APPEARANCES

For appellant:	DJ van der Walt SC
Instructed by:	Duncan & Rothman Inc., Kimberley
	McIntyre van der Post, Bloemfontein
For first respondent:	DB du Preez SC
Instructed by:	Engelsman Magabane Inc., Kimberley
	Kramer Weihmann Inc., Bloemfontein