SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 624/2016

In the matter between:

KRANSFONTEIN BELEGGINGS (PTY) LTD **APPLICANT**

and

CORLINK TWENTY FIVE (PTY) LTD **FIRST RESPONDENT**

JOHANNES FREDERICK KLOPPER NO **SECOND RESPONDENT**

ANTHONY NORMAN FLYNN NO **THIRD RESPONDENT**

WEISS & PARTNERS INCORPORATED **FOURTH RESPONDENT**

ABSA BANK LTD **FIFTH RESPONDENT**

GRIEKWALAND WES KORPORATIEF BPK **SIXTH RESPONDENT**

GERT VAN DER WALT JOUBERT NO

SANDRA ANN JOUBERT NO

HENDRIK JOHAN JOUBERT NO

In their capacities as trustees for the time being of

THE GERT TRUST **SEVENTH RESPONDENT**

REGISTRAR OF DEEDS, BLOEMFONTEIN **EIGHTH RESPONDENT**

Neutral citation: *Kransfontein Beleggings (Pty) Ltd* v *Corlink Twenty Five (Pty) Ltd*, (624/2016) [2017] ZASCA 131 (29 September 2017)

Coram: Lewis, Bosielo and Saldulker JJA and Mokgohloa and Rogers AJJA

Heard: 07 September 2017

Delivered: 29 September 2017

Summary: Application to set aside business rescue proceedings – creditors have direct and substantial interests – non-joinder of creditors is fatal to the relief sought in the application.

ORDER

Application for leave to appeal referred in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013:

The application for leave to appeal is dismissed with costs.

JUDGMENT

Mokgohloa AJA (Lewis, Bosielo and Saldulker JJA and Rogers AJA concurring):

[1] The application for leave to appeal in this matter was referred by the direction of this court for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act.[1] The parties were forewarned that they should be prepared, if called upon, to address this court on the merits. As a result, arguments were heard on both the application for leave to appeal and the merits of the matter.

[2] The applicant is the registered bondholder of a general and special notarial bond (the notarial bond) in terms of the Security by Means of Movable Property Act[2] registered over certain movable property owned by the first respondent (Corlink). Rights under the bond were ceded to the applicant and the cession registered at the Deeds Office on 19 November 2014. The movable property specially pledged in terms of the notarial bond comprised assets listed in annexures to the bond, including

[1] 10 of 2013
[2] 57 of 1993

irrigation and other farming equipment, livestock and, purportedly, water rights pertaining to three farms. The water rights were rights in terms of s 21(*a*) of the National Water Act.[3] I say these rights were 'purportedly' pledged because it was accepted at the hearing of the application before us that the water rights were incorporeal property and thus not capable of being pledged by way of the notarial

[3] As a result of the dire financial position in which Corlink found itself, three farms registered in its name and some of its movables were sold by public auction to the seventh respondent (the Gert Trust) on 28 August 2014. Deeds of sale between Corlink and the Gert Trust were subsequently executed on 1 October 2014. The farming operations were sold as going concerns, the sales including, so it appears, some of the movable items that had been pledged to the applicant. The water rights supposedly pledged to the applicant pertained to these three farms. The fifth respondent (Absa) and sixth respondent (GWK) held first and second mortgage bonds respectively over the farms. They consented to the sales.

[4] On 30 October 2014, Corlink's sole director passed a resolution placing it in business rescue proceedings in terms of s 129(1)(*b*) of the Companies Act,[4] on the basis that it was financially distressed. Pursuant to this, the second and third respondents were appointed as business rescue practitioners (the practitioners). The applicant's attorney informed the practitioners on 20 January 2015 that the applicant was a secured creditor of Corlink by virtue of the notarial bond. They were requested to include the applicant as such in the business rescue plan.

[3] 36 of 1998
[4] 71 of 2008

[5] In the meanwhile, the practitioners had prepared a business rescue plan which was considered at a creditors' meeting on 30 January 2015. We may infer that the applicant's claim was not reflected in this plan. The creditors resolved to adjourn the meeting. They also resolved that the practitioners should implement the sale of the farms to the Gert Trust. On 13 March 2015 the practitioners published a revised plan (the plan). This plan did not reflect the applicant as a creditor, secured or otherwise. The plan was approved and adopted on 22 April 2015 at the creditors' meeting. The applicant attended the meeting and its representative voted against the acceptance of the plan.

[6] In terms of the plan as adopted, the lion's share of the proceeds of Corlink's assets was to go to Absa and GWK as secured creditors – R46 265 000 and R24 236 100 respectively. Their concurrent shortfall was calculated at R3 637 360 and R4 281 365 respectively. The claims of concurrent creditors, including Absa and GWK, totaled R35 401 876. The plan stated that if there were a liquidation, the concurrent creditors would receive nothing. In terms of the plan they were offered a 'sweetener' of 1.58 cents in the rand. The total amount available for division among concurrent creditors was R560 000.

[7] On 9 June 2015, the applicant launched an urgent application in the Free State Division of the High Court, Bloemfontein to interdict the transfer of Corlink's immovable properties and the implementation of the business rescue plan pending determination of a rule nisi to have the plan declared invalid. The only creditors cited as respondents were Absa and GWK, both of whom opposed the application. GWK delivered a notice of opposition in terms of Uniform Rule 6(5)(*d*)(iii) and raised, among other

points, the non-joinder of Corlink's other creditors.

[8] At the hearing on 10 June 2015, the parties reached an agreement which was recorded in a court order as follows (the formatting is not reproduced here):

'By agreement between the applicant, the fifth and sixth respondents:

1. The applicant's application for and insofar as it pertains to final relief ('the main application') is postponed sine die.
2. Further affidavits in the main application shall be delivered by the above parties in terms of the Rules of Court, as if notice(s) of opposition had been delivered on 10 June 2015.
3. The applicant shall pay the fifth and sixth respondents' taxed party and party costs of the proceedings on 10 June 2015.
4. It is recorded that:

   4.1 The sixth respondent and its attorneys have given an undertaking to, pending the final adjudication of the main application, hold in trust the sum of R7 217 500.00 being the portion of the proceeds of the sales of the three immovable properties referred to in the founding affidavit and to which the applicant lays claim on the strength of the Notarial Bond upon which it relies.

   4.2 This undertaking does not constitute or imply an admission or a concession that such amount or any part thereof is due or owing to the applicant and that the applicant has any rights thereto (which aspect shall be determined in the adjudication of the main application).
5. The second and third respondents, not having entered appearance to oppose the relief sought, are ordered to provide details to the applicant as to the whereabouts of the proceeds of the movable assets sold by public auction on 28 August 2014 and 24 September 2014 respectively, insofar as those assets are included in the Special Notarial Bond BN 8134/2011 dated 1 December 2011, within ten (10) days of the date of service of this order."

[9] The amount of R7 217 500 (the ringfenced amount) was the maximum amount at which the applicant valued its security under the notarial bond. As a result of the agreement incorporated in the court order, transfer of the three farms to the Gert Trust was registered and Absa received the full amount to which it was entitled in terms of the plan (this was less than its full legal entitlement).

[10] The postponed application was heard on 22 October 2015. On the day of the hearing, the applicant's counsel handed up a draft order which modified the relief sought in the notice of motion by asking (i) that the plan be set aside only to the extent that it failed to reflect the applicant as a secured creditor of Corlink; (ii) that the plan be amended by reflecting the applicant as a creditor in an amount not exceeding R7 217 500 in respect of specified movable property including the water rights; and (iii) that the ringfenced amount remain in trust pending the final determination of the amount payable to the applicant under the notarial bond.

[11] The court a quo dismissed the application with costs on the basis that the applicant had failed to join the other creditors of Corlink.

[12] The test whether there has been a non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.[5]

[13] The applicant submitted that the issue of joinder was considered prior to the hearing on 22 October 2015, and that its legal team concluded that it was not necessary to join any other creditors because the amended

[5] *Absa Bank Limited v Naude NO & others* [2015] ZASCA 97; 2016 (6) SA 540 (SCA) para 10; *Golden Dividend 399 (Pty) Ltd & another v Absa Bank Ltd (*569/2015*)* ZASCA 78 (30 May 2016)

relief which the applicant sought did not affect any creditor except GWK.

[14] If the applicant had persisted in the relief set out in the notice of motion, that is, interdicting the implementation of the plan and having it set aside as invalid, there is no doubt that it would have been necessary to join all the creditors.[6] However by 22 October 2015, the applicant had abandoned that relief and confined itself to the amended relief reflected in the draft order. By design the amended relief was intended to affect only GWK.

[15] However, the amendment to the plan which the applicant sought would inevitably have affected concurrent creditors. If GWK's secured entitlement under the plan were reduced by R7 217 500, its concurrent claim would increase by the same amount. Since the applicant did not allege any basis on which GWK could be required to forfeit this concurrent claim, the dividend payable to concurrent creditors out of the surplus of R560 000 would have reduced from 1.58 cents to 1.31 cents. While one may speculate that this modest reduction would not have affected how creditors voted, the fact remains that the amendment did affect their rights under the plan.

[16] As stated in *Absa v Naude*, if the creditors who voted for the business rescue plan are not joined, their position would be prejudicially affected in that a business rescue plan would be set aside, money that they had anticipated they would receive would not be paid and the money that they had received would have to be repaid. It thus follow that the non-joinder of Corlink's other creditors was fatal to the amended relief sought by the applicant for non-joinder. Since the question of joinder had been

[6] Above

raised at the previous hearing and since the applicant had taken a deliberate decision not to join other creditors, I do not think that the court a quo was required to afford the applicant a further opportunity to join the other creditors.

[17] However, and even if non-joinder was not a sufficient basis for dismissing the application, the application was in any event doomed to fail for the reasons elaborated below. Because the applicant did not persist in the relief originally claimed, it is unnecessary to investigate on what grounds a court may set aside an adopted business rescue plan and whether such relief ceases to be competent once the plan has been implemented. The question is whether a court can partially set aside and amend an adopted plan so as to alter its operation in relation to one or more of the creditors. In my view the answer is no.

[18] A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of s 152 of the Companies Act. The court has no power to foist on creditors a plan which they have not discussed and voted on at such a meeting. This is what the applicant was asking the court a quo to do. The plan which the creditors discussed and voted on was one in terms of which the applicant was not reflected as a creditor and a specified amount from the proceeds of the farms was to be paid to GWK in settlement of its secured claims. If the applicant was granted the relief it seeks, the plan would become one in which the applicant receives its full secured claim up to a maximum of the ringfenced amount while GWK receives proportionately less. And as I have explained, concurrent creditors would also receive slightly less than the plan promised them. The creditors have not discussed or voted on such a plan. Quite conceivably GWK would have voted against it.

Creditors may have taken the view that the plan could not be finalized and put to a vote until the value of the applicant's secured claim was established.

[19] We do not have enough information to determine whether GWK on its own could have defeated the plan or whether other creditors might have voted differently and in any event I do not think it matters. A court cannot be asked to delve into these matters. The simple point is that the only plan which practitioners can implement is one adopted by creditors in accordance with s 152 of the Companies Act.

[20] The applicant's counsel submitted that, by consenting to the order of 10 June 2015, GWK had agreed that the applicant, if it proved the existence and value of its security, would be entitled to receive such value from the ringfenced amount, in which event GWK would receive proportionately less. No such case was made out on the papers. As at 10 June 2015, the applicant was seeking to have the entire plan set aside. This is the case which Absa and GWK proceeded to answer. It was only on 22 October 2015 that the applicant changed course. Even then, the applicant did not claim that GWK had agreed to a two-way fight in which the ringfenced amount would either go to the applicant or to GWK depending on an adjudication of the applicant's legal rights. The applicant's modified case was that it was entitled to a partial setting aside and amendment of the plan.

[21~~2~~] I therefore find that the court a quo was correct in dismissing the application. The applicant has failed to show that there are prospects of success in the appeal.

[223] In the circumstances, the following order is made:

The application for leave to appeal is dismissed with costs.

FE MOKGOHLOA

ACTING JUDGE OF APPEAL

APPEARANCES

For the Applicant:	J H Roux SC (with him P S Van Zyl)
Instructed by:	Bill Tolken Hendrikse Incorporated, Belville
	Matsepe Inc, Bloemfontein
For the Respondent:	M H Wessels SC (with him S Tsangarakis)
Instructed by:	Symington & De Kok, Bloemfontein
	Phatshoane Henney Attorney, Bloemfontein