

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Indwe Project Managers CC and Others (CA128/2016) [2017] ZAECHGC 125 (12 December 2017) [2017] ZAECHGC 125

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering, N.P. Jaji

CASE / FILE NUMBER

CA128/2016

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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: CA128/2016

Date heard: 8 December 2017

Date delivered: 12 December 2017

In the matter between

ABSA BANK LIMITED

Appellant

and

INDWE PROJECT MANAGERS CC

First Respondent

SOUTHERN AMBITION 1019 CC

Second Respondent

THEMBISA KOSANI

Third Respondent

VULINDELA MAXWELL MTSHATSHA

Fourth Respondent

SHERIFF OF EAST LONDON

Fifth Respondent

JUDGMENT

PICKERING J:

[1] This is an appeal against the judgment and order of the magistrate, East London. Appellant is Absa Bank Limited (“Absa”).

First respondent is Indwe Project Managers CC (“Indwe”). Second respondent is Southern Ambition 1019 CC (“Southern

Ambition”). Third respondent is Thembisa Kosani (“Kosani”). Fourth respondent is Vulindela Maxwell

Mtshatsha (“Mtshatsha”). Fifth respondent is the Sheriff of East London (Sheriff”).

[2] On 8 October 2015 Indwe launched an application as a matter of urgency in the East London magistrate’s court for an order

staying a warrant of execution sued out by Absa as judgment creditor against the property of Southern Ambition as judgment debtor.

In the application for a stay of the warrant of execution Southern Ambition was cited as first respondent; Kosani as second respondent;

Mtshatsha as third respondent; Absa as fourth respondent and the Sheriff as fifth respondent. The relief sought in the notice of motion was in the following terms:

“Interdicting the fourth and fifth respondent from executing a warrant of execution obtained against the first, second and third respondent in this matter under case number 2033/09 which was issued out of this court on the 7th August 2013 pending the finalisation of the liquidation application against the first respondent in the High Court of South Africa Eastern Cape Division, East London.”

[3] The application was opposed by Absa, the fourth respondent. On 1 March 2016 the magistrate granted the relief sought. It is against this order that Absa appeals.

[4] It is necessary to have regard to the background of the matter. During February 2009 the present appellant, Absa, instituted action in the magistrate’s court, East London, against Southern Ambition, Kosani and Mtshatsha as first, second and third defendants respectively, alleging that Southern Ambition was indebted to it in the sum of R1 779 748,48 plus interest by virtue of a mortgage bond in terms whereof Southern Ambition specifically hypothecated as a first mortgage bond the property described, inter alia, as erf 6452, Beacon Bay. Absa alleged further that Kosani and Mtshatsha, having each signed a deed of surityship, were jointly and severally liable with Southern Ambition for payment of the said sum. Absa

sought too an order declaring the mortgage property to be executable.

- [5] The three defendants entered an appearance to defend the matter but summary judgment was granted against them on 9 April 2009.

Pursuant thereto the said property was attached. Various sales in execution were from time to time scheduled but cancelled.

Eventually a sale in execution was scheduled to take place on 9 September 2015. It was this scheduled sale which gave rise to the urgent application being launched on 8 October 2015.

- [6] It is common cause that the liquidation application referred to in the application for a stay of execution was launched by Indwe against Southern Ambition on 3 June 2013 in the East London High Court under case number EL712/53 in which Indwe alleged that Southern Ambition was indebted to it in the sum of R 210 000,00. It is also common cause that this application was postponed sine die on 7 August 2014 without any provisional or final order of liquidation having been granted and that since then Indwe has taken no further steps to obtain any such order. In this regard Indwe denies in its replying affidavit dated 22 September 2015 before the magistrate that it has been dilatory in pursuing the matter and alleges that it “is not a deep pocketed; it took the close corporation a number of months to meet up with the security requirements of the Master.” (sic) This is hardly a satisfactory explanation for a delay of nearly 28 months from the time of the launch of the liquidation application on 3 June 2013 until 22 September 2015. I may mention that up until today Indwe has taken no further steps in the matter.
- [7] In its founding affidavit in support of the stay in execution the sole member of Indwe, Mr. Madikizela, stated that “should the execution of the property be allowed it will be prejudicial to other debtors of the first respondent consequently it will be in the best interest to appoint a liquidator to wind-up first respondent’s estate.”
- [8] In granting the relief sought the magistrate stated, inter alia, as follows:

“It is trite law that, it is incumbent on the applicant to sufficiently state all the facts upon which it depends on which the court can exercise discretion. Applicant has to show on a balance of probabilities that:

It has a clearly established right; Its rights will be invaded, interfered or prejudiced and there is no other remedy available which will be able to protect it against such invasion, interference and or prejudice of its rights.

It is not in dispute that the applicant has an interest in the subject matter and therefore seeks protection against a threatened interference by the fourth respondent of its rights.

The court's discretion should be exercised judicially and upon consideration of all the facts: the applicant's prospects of success; the availability or not of an adequate ordinary remedy and the balance of convenience and the respective prejudice which would be suffered by each party as a result of the grant or refusal of the interdict.

[9] Assuming that the magistrate had the requisite jurisdiction to grant an interdict in the circumstances it is apparent that he has conflated the requirements for both a final and an interim interdict. His reasoning as set out above cannot be supported.

[10] The magistrate then continued as follows:

"The applicant has a definite clear right in these proceedings and will suffer prejudice if the current application is refused as it will not be treated fairly and in terms of the laws of insolvency during the execution proceedings. The respondent has not established any prejudice if the application for the interdict were to be granted – only that it is entitled to sell the said immovable property thus to protect their financial interests as a lending money business. There is further no other remedy available to the applicant for the protection of its rights and the balance of convenience favours the applicant." (sic)

[11] With respect to the magistrate his reasoning, as set out in this passage, is extremely difficult to understand. His conclusion

that applicant has "a definite clear right" is not in any way supported by any reasoning in his judgment nor, in my view, can that conclusion be supported. In my view applicant has established no such right. Similarly, the magistrate's conclusion that Absa will not suffer prejudice is clearly wrong. Its warrant of execution has been stayed pending the finalisation of a liquidation application launched by Indwe in 2013 and in respect of which at the time of the application for a stay no provisional order had been made, much less applied for. Indwe's explanation for the delay is, as I have stated above, completely unsatisfactory. Its conduct in this matter comes close, in my view, to being an abuse of the process of the court.

[12] Most importantly, however, is that the magistrate's finding that Indwe had no other satisfactory available remedy is also clearly wrong. It did have another satisfactory remedy. As was submitted by Ms. Zietsman, who appeared for the appellant, Indwe's remedy was to apply to the High Court, East London Circuit Local Division, for an order restraining further proceedings in the liquidation application before it with regard to the warrant of execution. In terms of item 9 of Schedule 5 to the Companies Act 71 of 2008, Chapter XIV of the Companies Act 61 of 1973 continues to apply with respect to the winding-up and liquidation of companies under Act 71 of 2008, as if Act 61 of 1973 had not been repealed. Accordingly the provisions of section 358 of Act 61 of 1973 have not been repealed by the later Act. Section 358 reads as follows:

"358 Stay of legal proceedings before winding-up order granted – At any time after the presentation of an application for winding-up and before a winding-up order has been made, the company

concerned or any creditor or member thereof may –

(a) ...

(b) Where any other action or proceeding is being or about to be instituted against the company, apply to the Court to which the application for winding-up has been presented, for an order restraining further proceedings in the action or proceeding,

and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.”

[13] As stated by the learned authors of Henochsberg on the Companies Act at page 756 “proceedings” in this context “includes execution under a judgment in an action i.e. attachment or sale of property in execution.” It is trite that the existence of a satisfactory remedy will preclude the grant of an interdict where the alternative remedy gives similar protection to that afforded by an interdict.

[14] As to the discretionary power of a Court to which an application in terms of s 358 (b) is made to grant a stay of execution the learned authors of Henochsberg point out at 755 that the Court’s discretion is a narrow one and that a stay or restraint should be granted only in special circumstances rendering its grant equitable. They point out further at 756, with reference to authority, that “there is no justification for stopping a secured creditor from executing against the hypothecated property merely because if it were to be sold in liquidation there might be a larger surplus available for payment to concurrent creditors.”

[15] Be that as it may it is clear that the magistrate erred in granting the order sought by Indwe. The appeal must therefore succeed.

[16] Accordingly the following order will issue:

1. The appeal succeeds.
2. The first respondent, Indwe Project Managers CC, is ordered to pay the costs of the appeal.
3. The order granted by the magistrate on 1 March 2016 is set aside and replaced by the following order:

“The application is dismissed with costs.”

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

N.P. JAJI

Appearing on behalf of Appellant: Adv. T. Zietsman

Instructed by: Huxtable Attorneys, Mr. Huxtable

Appearing on behalf of Respondent:

Instructed by:

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