

SOUTH AFRICA / JUDGMENT

ABSA Bank Limited v Phiri N.O. and Others (3881/2022) [2022] ZAFSHC 365 (28 October 2022) [2022] ZAFSHC 365

COURT

Free State High Court, Bloemfontein

BEFORE

L L E R POHL

CASE / FILE NUMBER

3881/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(FREE STATE DIVISION, BLOEMFONTEIN)

Case no. 3881/2022

Reportable: Yes / No

Of Interest To Other Judges: Yes / No

Circulate To Magistrates: Yes / No

In the matter between:

ABSA BANK LIMITED Applicant

and

CHARLES PHIRI N.O. First

Respondent

LEBOGANE GRACE MPAKATI N.O. Second

Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION ("CIPC") Third

Respondent

CORAM:

POHL,AJ

HEARD ON:

20 OCTOBER 2022

DELIVERED ON: 28 OCTOBER 2022

INTRODUCTION:

- [1] The Applicant, ABSA Bank Ltd, as creditor of New Beginnings Projects CC (in voluntary business rescue and supervision) in the alleged amount of R23 796 525.97, moves for interim relief in terms of which it is, inter alia, placed in possession of certain movable assets in respect of which assets, it asserts to be owner. The relief which the Applicant seeks is interim to the institution and finalisation of declaratory proceedings to be instituted by ASSA by way of action or application proceedings, as the case may be, against the First and Second Respondents, being the business rescue practitioners, duly appointed as such for the firm known as New Beginnings Projects CC (in voluntary business rescue and supervision), within thirty (30) days from the finalisation of this application before Court. No relief is claimed against the Third Respondent and the Third Respondent also did not oppose the application. The Third Respondent was merely cited because it has a direct, substantial and statutory entrenched right and interest in the outcome of this application.
- [2] The prospective declaratory relief is relevant to the aspect of the Applicant's alleged ownership of the sixty seven (67) movable assets which the Applicant has financed. The particularity of the sixty seven (67) movable assets, which form the subject matter of the present application are more fully evident from annexure "X" affixed to the Notice of Motion which serves before this Court.
- [3] It is evident from the papers before the Court that the Applicant has historically financed the movable assets at issue at the special instance and request of New Beginnings Projects CC, long prior to New Beginnings being placed in business rescue.
- [4] The business rescue practitioners, who are cited in their nominal capacities as duly appointed business rescue practitioners of New Beginnings, have elected to resist the present application on several grounds, which will be dealt with below.

THE NOTICE OF MOTION:

- [5] In the Applicant's Notice of Motion the Applicant prays for an order in the following terms:

"1. That condonation be granted to the Applicant in respect of the form, service, process and prescribed time limits pertaining to the exchange of pleadings in accordance with the provisions of Uniform Rule of Court 6(12) and that this application be enrolled and heard on an urgent basis;

2. That leave be granted in terms of Section 133(1)(b) of the Companies Act, 71 of 2008, as amended, to the Applicant to commence and proceed with the relief sought in paragraph 3 (inclusive of the subparagraphs thereto);

3. Pursuant to granting of the relief sought in prayers 1 and 2 above, a rule nisi be issued in the following terms:

3.1 pending the final determination of an action or application as the case may be, to be instituted by the Applicant against inter alia, the First and Second Respondents for an order declaring that the Applicant is the owner of 67 (sixty seven) movable assets, the particularity of which are as evident from annexure "X" affixed to this Notice of Motion ("the movable assets"), within thirty (30) days from date of finalisation of this application, the following interim interdict is issued:

3.1.1 the First and Second Respondents are ordered to return to the Applicant the movable assets forthwith;

3.1.2 that in the event of the First and Second Respondents failing and/or refusing to return the movable assets to the Applicant forthwith, the Sheriff with Jurisdiction as well as the South African Police Services be are hereby authorised to enter into and upon the various premises and building construction sites of New Beginnings CC (in voluntary business rescue and supervision) or wherever same may be found, to attach the movable assets and to return such movable assets to the Applicant forthwith;

3.1.3 that the Applicant is ordered to attend upon the safekeeping and storage of the movable assets pending the finalisation of the action to be instituted in terms of paragraph 3.1 above;

3.1.4 that in the event of opposition, the First and Second Respondents are ordered to pay the costs of this application on the scale as between attorney and own client, including the costs consequent upon the employment of two (2) counsel when used."

OWNERSHIP OF THE MOVABLE ASSETS:

[6] From the papers before Court it is clear that the Applicant claims ownership of the respective movable assets as a result of Instalment Sale Agreements in terms whereof the Applicant financed these movable assets.

[7] The standard terms of the respective Instalment Sale Agreements bear the following clause 2:

"2. OWNERSHIP:

Under this agreement:

- The asset purchased with the loan belongs to us until you have paid all your financial obligations;
- Provided you are not in default, you are entitled to possession and use of the assets; and

- When you have paid all your financial obligations we will transfer ownership of the asset to you."
- [8] From the Applicant's papers it is evident that twenty four (24) of the sixty seven (67) movable assets have already been paid off by the time the papers were filed. Forty three (43) of the movable assets have balances outstanding. At the conclusion of the argument before Court I requested Counsel for the Applicant and the First and Second Respondents to submit Heads of Argument to the Court identifying the said movable assets with outstanding balances and the movable assets which have been paid off. The Applicant indeed filed such additional heads of argument identifying these assets. The First and Second Respondents, also filed additional heads of argument. In these heads of argument, counsel for the First and Second Respondents confirm the assets that have been paid off or settled as indicated by the Applicant in its additional heads of argument. He however goes further and submits that there were "further payments in respect to some assets and further that others have been settled". He then submits that the list of assets with outstanding balances (the
- 43) are in dispute. What counsel for the Respondents however did not do, is to identify any of the "further assets allegedly paid off". The Court will therefore decide this aspect on the papers and in particular on the affidavit by Mr Gerri! Stephanus Gouws, filed as annexure "AB5" to the founding affidavit.
- [9] In the premises, the movable assets which have not been paid off and still has outstanding balances, are reflected on annexure "X" to the Notice of Motion as item no. 1, 5, 7, 12 to 16, 18, 22 to 36, 38 to 40, 43 to 53, 55 to 58 and 63.
- [10] Adv van der Merwe SC, who appeared with Mr Tsangarakis on behalf of the Applicant, submitted that the proper interpretation of the above mentioned ownership clause is that as long as any of the assets thus furnished by the Applicant still have outstanding balances, the Applicant retains ownership, of all sixty seven (67) assets, even though some of them may have been paid off.
- [11] I disagree with this interpretation. The language of clause 2 dealing with the retention of ownership, clearly refers only to that particular agreement being "this agreement in the singular. The first, second and third bullet points also refer to the asset and not assets. It clearly does not refer to all sixty seven (67) assets. The normal interpretation to be afforded to this clause and the wording used therein is that once an asset has been paid off, the ownership of that asset will be transferred to New Beginnings Projects CC.
- [12] I find the interpretation of the clause to be unambiguous and clear. If I am however wrong in this regard, I find guidance in the decision of Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999 (1) SA 982 (SCA), at p 989 H, where the Supreme Court of Appeal dealt with the language of a disclaimer or exemption clause as follows:

"Against this background it is convenient to consider first the proper construction to be placed on the disclaimer. The correct approach is well established. If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the proferens. ... but the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be fanciful or remote."

[13] In the premises, it follows that even if the clause appears to be ambiguous, it should be interpreted contra proferentem, and thus against the Applicant.

[14] I therefore find that in respect of the twenty four (24) movable assets that have been paid off, the Applicant did not retain ownership. Insofar as delivery of the movable assets were required upon the payment in full of such an asset to transfer ownership, I find that this occurred in the form of traditio brevi manu, because the close corporation, New Beginnings Projects CC, were at all relevant times hereto in the bona fide possession of these assets and after payment, it held same as owner.

[15] Section 128 of the Companies Act, Act 71 of 2008, inter alia has the following description of business rescue:

"Business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

(ii) A temporary moratorium on the rights of claimants against the company or in respect of property in its possession;"

[16] Section 133 of the Companies Act inter alia, provides as follows:

"133. MORATORIUM ON LEGAL PROCEEDINGS AGAINST COMPANY:-

(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum"

[17] Section 134 of the Companies Act, inter alia, provides as follows:

"134. PROTECTION OF PROPERTY INTERESTS:

(c) Despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing."

[18] It is therefore to my mind abundantly clear, that the movable assets that were settled or paid off by the close corporation, had the effect that these assets were in the lawful possession of the close corporation. On a proper interpretation of the abovementioned

sections in the Companies Act, Act 71 of 2008, referred to in paragraphs [16] and [17], these assets, are protected against the vindicatory or quasi vindicatory action of the Applicant in this application. It thus applies to the abovementioned 24 assets which can be identified in annexure "X" to the notice of motion as item numbers 2, 3, 4, 6, 8, 9, 10, 11, 17, 19, 20, 21, 37, 41, 42, 54, 59, 60, 61, 62, 64, 65, 66 and 67.

THE LEGAL REQUIREMENTS:

- [19] By way of this application, the Applicant requires the business rescue practitioners to do some positive act (i.e. they must return the movable assets to ABSA) in order to remedy a wrongful state of affairs (i.e. the continued unlawful possession of the movable assets by the business rescue practitioners over which ABSA is the owner) pending the finalisation of the declaratory proceedings already alluded to above.
- [20] As far back as 2014, the Appellate Division, in the matter of *Setlogelo v Setlogelo* 1914 AD 221 at 227, set out the requirements for an interim interdict. The law relevant to interdicts is trite and well settled.
- [21] It is clear from the papers that the Applicant, long before the business rescue proceedings commenced, validly cancelled the agreements because the close corporation fell in arrears with the payments in respect of at least, the abovementioned forty three (43) movable assets. After the said lawful cancellation of the contracts, the close corporation could never be in lawful possession of those assets and therefore, Section 134(1)(c) does not apply to the said forty three (43) movable assets. If this was not so, the owner, being the Applicant, cannot vindicate the property from the unlawful possessor and the latter cannot use it as it would be unlawful. See in this regard: *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and others* 2016 (6) SA 501 (WCC) at para [33].
- [22] In the premises, I find that the Applicant has proven that it has a prima facie right in respect of the relief which it seeks by way of this application, but limited to the forty three (43) assets which are not paid off.
- [23] An Applicant for an interdict, relying upon vindicatory action, such as the present Applicant, to recover that which it alleges is its own property, need not show that it will suffer irreparable loss if the interdict is not granted. There is a presumption, which may be rebutted by a Respondent, that the injury is irreparable. See in this regard: *SA Securitisation (Pty) Ltd v Chesane* 2010 (6) SA 577 (GSJ) at 563 I - 564 D
- [24] Nor need such an Applicant show that it had no other satisfactory remedy at its disposal- a person who is entitled to vindicate property in the hands of another cannot be forced by action of that person to accept merely the value of the property. See in this regard: *Fedsure Life Assurance Life Company Limited v Worldwide Africa Investment Holdings (Pty) Ltd* 2003 (3) SA 268 (W) at 278 E-F

[25] Insofar as the balance of convenience is concerned, the same favours the Applicant in this case. The reasons for this is quite simply that the Respondents, as a matter of law, have no right of continued possession of the forty three (43) movable assets referred to above. The continued use of the forty three (43) movable assets unavoidably results in the assets' deterioration in value. It is also important to have regard to the fact that the Applicant does not intend to sell or alienate the forty three

(43) assets. The relief, formulated in paragraph 3.1.3 of the Notice of Motion, clearly and in terms provides that:

"The Applicant is ordered to attend upon the safekeeping and storage of the movable assets pending the finalisation of the action to be instituted in terms of paragraph 3.1 above."

RESPONDENTS DEFENCES:

[26] Mr Moloi, who appeared for the First and Second Respondents in this matter, strenuously argued that the application ought to be dismissed for lack of urgency, alternatively for self-created urgency. I disagree with this contention. -On 15- September 2022, whilst all the parties were duly represented, -the application was postponed to the opposed roll of 20 October

2022. It was further ordered that the Applicant must deliver its replying affidavit on or before 28 September 2022 and the Court further issued orders with regards to the times upon which Heads of Argument were to be delivered. All this was done and all the issues have now been ventilated. The issue of urgency was not reserved by the First and Second Respondents. It is furthermore abundantly clear from the papers that there were protracted negotiations between the parties before this application was brought by the Applicant. This puts paid to the Respondents' submission of self-created urgency and in view of the above, I find that urgency has become moot.

[27] The First and Second Respondents also raised the Court's alleged lack of jurisdiction as a defence. I disagree with this contention. Section 21(1) of the Superior Courts Act, Act 10 of 2013, reads as follows:

"A Division has jurisdiction over all persons residing or being in, or in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to Jaw take cognisance, ..."

[28] It must furthermore be remembered that this case involves assets in the possession of a close corporation under business rescue. Section 7 of the Close Corporations Act, Act 69 of 1984, provides that, for purposes of that Act, any High Court and any Magistrate's Court within whose area of jurisdiction the registered office or main place of business of a Close Corporation is situated, shall have jurisdiction. In this particular case before this Court, the Close Corporation under business rescue had its principal place of business in Bloemfontein. It is furthermore abundantly clear that the relevant Instalment Sale Agreements attached to the Applicant's founding affidavit, were concluded in Bloemfontein.

It is also clear from the papers that a number of the movable assets that form the subject matter of this application are in the Free State. A number of the incidents of jurisdiction thus "occurred" within the jurisdictional area of this Court. In the premises I find that this Court indeed has the necessary - jurisdiction to entertain this matter.

[29] The First and Second Respondents also submitted that the Applicant should have joined the Close Corporation New Beginnings Projects CC (in voluntary business rescue supervision), as a party. The submission was further that because this was not done, the application stands to be dismissed for non-joinder. I find that this submission also holds no water. It is important to have regard to the fact that the business rescue practitioners are before Court in their representative capacities as representatives of the said Close Corporation. They are not before Court in their personal capacities. By citing the business rescue practitioners in their aforesaid representative capacities, it is in fact New Beginnings Projects CC (in voluntary business rescue supervision) that is before Court. It is furthermore abundantly clear that the business rescue practitioners which may represent the interests of the Close Corporation with reference to the relief requested by way of this present application, indeed did represent its interests. The position relevant to the citation of companies under liquidation was decided in the matter of Gainsford and others N.N.O. v Tanzer Transport (Pty) Ltd 2014 (3) SA 468 (SCA). In that matter the Supreme Court of Appeal held that the liquidators engaged in legal proceedings for the recovery of debts owed to companies in liquidation may sue in their own names *nomine officio* or in the name of the company concerned. The same applies to the business rescue practitioners in their official capacities and in my judgment and there is thus no merit in this submission on behalf of the First and Second Respondents.

[30] It was furthermore submitted on behalf of the business rescue practitioners that the Applicant was obliged to notify the creditors of the Close Corporation under business rescue as they had a substantial interest in the outcome of the proceedings and that the failure to notify these affected persons robs them of the opportunity to enable them to participate in the present application. I find that there is also no merit in this contention. This point of view has authoritatively been considered, dealt with and rejected by the Supreme Court of Appeal in the matter of Timasani (Pty) Ltd and another v Afrimat Iron Ore (Pty) Ltd [2021] 3 All SA 843 (SCA) by way of *inter alia* paragraphs [14], [15], [16], [17], [19] and [20] of the said decision.

[31] This Court's view that the Applicant is entitled to 43 of the 67 assets has the nett result that the Applicant was substantially

successful with this application and therefore the Applicant is entitled to the normal order as to costs, namely that costs follow

the successful party.

ORDER:

In the premises I make the following order:

1. Prayer 1 and 2 of the Notice of Motion is granted;
2. A rule nisi is issued in the following terms:
3. Pending the final determination of an action or application, as the case may be, to be instituted by the Applicant against the First and Second Respondents for an order declaring that the Applicant is the owner of the forty three (43) movable assets, which assets can be identified on annexure "X" to the notice of motion as item numbers 1, 5, 7, 12, 13, 14, 15, 16, 18, 22 to 36, 38 to 40, 43 to 53, 55 to 58 and 63, within thirty (30) days from date of finalisation of this application, the following interim interdict is issued:

3.1.2 the First and Second Respondents are ordered to return to the Applicant the said movable assets referred to in paragraph 3, supra, forthwith;

3.1.3 that in the event of the First and Second Respondents failing and/or refusing to return the movable assets to the Applicant forthwith, the Sheriff with jurisdiction as well as the South African Police services be and are hereby authorised to enter into and upon the various premises and building construction sites of New Beginnings CC (in voluntary business rescue and supervision) or wherever same may be found, to attach the movable assets referred to in paragraph 3, supra, and to return such movable assets to the Applicant forthwith;

3.1.4 that the Applicant is ordered to attend upon the safekeeping and storage of the movable assets pending the finalisation of the application or action to be instituted in terms of paragraph 3 above;

3.1.4 the First and Second Respondents are ordered to pay the costs of this application on the scale as between party and party including the costs consequent upon the employment of two (2) counsel when used.

L LE R POHL AJ

ON BEHALF OF THE APPLICANT: ADV M P VAN DER MERWE SC

AND

ADV S TSANGARAKIS

INSTRUCTED BY: SYMINGTON

& DE KOK BLOEMFONTEIN

ON BEHALF OF THE FIRST

AND SECOND RESPONDENTS: ADV T MOLOI

INSTRUCTED BY:

RAMS ATTORNEYS

- SANDTON

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Prepared on 10 October 2026 · Esheria