

SOUTH AFRICA / JUDGMENT

Brown N.O and Another v MEC responsible for Transport Community Safety and Liason KwaZulu-Natal (2383/23P) [2023] ZAKZPHC 144 (27 November 2023)

[2023] ZAKZPHC 144

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mlotshwa AJ

CASE / FILE NUMBER

2383/23P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

Number: 2383/23P

In

the matter between:

JOELENE

BROWN N. O

FIRST APPLICANT

KURK

ROBERT KNOOP N. O

SECOND APPLICANT

In

their capacity as Joint Liquidators of

Ithuba

Agriculture (Pty) Ltd (in Liquidation)

and

THE

MEC RESPONSIBLE FOR TRANSPORT

RESPONDENT

COMMUNITY

SAFETY AND LIASON

KWAZULU-NATAL

Heard

on: 10 November 2023

Delivered:

27 November 2023

ORDER

1.

It is declared that the debt owing to the respondent by Ithuba Agriculture (Pty) Ltd as at 19 April 2021, forms part of a concursus creditorum and is not claimable from Ithuba Agriculture (Pty) Ltd (in Liquidation) unless the respondent follows the procedures set out in the Companies Act 61 of 1973 read with item 9 of schedule 5 of the Companies Act 71 of 2008 and the Insolvency Act 24 of 1936 for bringing such claim.

2.

The respondent is directed to accept payment by the applicants from Ithuba Agriculture (Pty) Ltd (in Liquidation)'s estate of all licence fees accruing in respect of Ithuba's vehicles after 19 April 2021, which payment is tendered, and to issue licences in respect of such vehicles.

3.

It is further recorded that the applicants intend claiming a refund from the respondent of any penalties paid under the preceding paragraph, where any penalties imposed due to non-payment or failure to renew the licences are solely due the respondent's refusal to renew the licences due to non-payment of debts owed as at 19 April 2021, and nothing in the previous orders should be read as precluding the applicants from bringing such claim.

4.

The respondent is ordered to pay the costs of the application.

JUDGMENT

Mlotshwa AJ

Introduction

[1] The applicant sought a declaratory order in the following terms that:[1]

'1. It is declared that the debt owing to the respondent by Ithuba Agriculture (Pty) Ltd as at 19 April 2021, forms part of a concursus creditorum and is not claimable from Ithuba Agriculture (Pty) Ltd (in Liquidation) unless the respondent follows the procedures set out in the Companies Act 1973 read with schedule 5 item 9 of the Companies Act 2008 and the Insolvency Act 1936 for bringing such claim.

3. It is further recorded that the applicants intend claiming a refund from the respondent of any penalties paid under the preceding paragraph, where any penalties imposed due to non-payment or failure to renew the licences due to non-payment of debts owed as 19 April 2021, and nothing in the previous orders should be read as precluding

the applicants from bringing such claim.

5. Further and / or alternative relief.’

- [2] The respondent opposed the application and launched a counter-application. In the counter-application the respondent sought a declaratory order that:[2]

‘1. It is declared that Regulation 25 (7) of the Road Traffic Regulations 2000 (GNR) 225 of 17 March 2000 made in terms of section 75 of the National Road Traffic Act 93 of 1996, has the effect of making the respondent a preferent creditor in respect of arrear motor licencing fees and penalties, and that the registering authority of the respondent is entitled to refuse to issue a licence disc in respect of a motor vehicle if all arrears and penalties are not paid in full, irrespective of the debtor being an insolvent or in liquidation.

2. The applicant is ordered to pay the costs of the counter-application.

3. Further and/ or alternative relief.’

- [3] The parties in this judgment would be referred to as applicants and respondent irrespective that judgment dealt with main and counter-applications.

The

facts

- [4] The material facts of this application are largely common cause and are as follows:

- [5] On 19 April 2021, a special resolution was passed placing Ithuba Agriculture (Pty) Ltd (Ithuba) in liquidation.[3]

- [6] Pursuant to notice given in the Government Gazette, the Master called a first meeting of creditors at 10h00 on 11 June 2021.[4]

- [7] On 14 June 2021, the two applicants (applicants) were appointed by the Master of the High Court, KwaZulu-Natal as joint liquidators of Ithuba,[5]

- [8] On 16 August 2021, the applicants obtained a Court order in terms of section 386(5) of the Companies Act 1973 extending their powers and authorising them to bring any action or other legal proceeding of a civil nature and to engage the services of attorneys and counsel in the name of Ithuba.

- [9] On 22 April 2022, a second meeting of creditors was called with notice being given in the Government Gazette.[6]

- [10] At the time Ithuba was placed in liquidation on 19 April 2021, it was already in arrears with paying licence fees and penalties for certain vehicles.[7]
- [11] The Amangcolosi Community Trust are owners of the land on which Ithuba is farming[8] and have brought an application in this court that is still pending under case number 10168/23P to judicially review and set aside the recognition of the winding up resolution[9] by the Master.
- [12] The applicants contended that they cannot lawfully pay any arrears owing as at 19 April 2021 save in the form of a distribution to the respondent on proof of a claim in the ordinary manner by the respondent.
- [13] It was submitted by Mr Christison, on behalf of the applicants, that:
- (a) The applicants as liquidators are facing a difficult situation whether to comply with Companies Act 61 of 1973 (1973 Companies Act) or regulation 25(7) of the National Road Traffic Regulations.[10] The respondent has claimed that the National Road Traffic Regulations accords the respondent preferential status as a creditor.
 - (b) The arrear licence fees and penalties are to be regarded as a debt.
 - (c) As a consequence of Ithuba being placed into liquidation, as explained in Muller NO v Community Medical Aid Scheme,[11] the effect of section 361 and 391 is to statutorily encapsulate the establishment of a concursus creditorum in relation to a company placed in liquidation.
 - (d) Innes J explained in Walker v Syfret NO[12] that the sequestration order crystallises the insolvent's position, the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.
- (e) Section 366(1) of the Companies Act states that:
- 'In the winding-up of a company by the Court and by a creditors' voluntary winding-up-
- (a) the claims against the company shall be proved at a meeting of creditors mutatis mutandis in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency;
 - (b) a secured creditor shall be under the same obligation to set a value upon his security as if he were proving his claim against an insolvent estate under the law relating to insolvency, and the value of his vote shall be determined in the same manner as is prescribed under that law;

- (c) a secured creditor and the liquidator shall, where the company is unable to pay its debts, have the same right respectively to take over the security as a secured creditor and a trustee would have under the law relating to insolvency.’

[14] It was submitted by Mr Snyman SC, on behalf of the respondent that:

- (a) As the applicants are asking for a declaratory order that the licensing fees for motor vehicles owned by Ithuba form part of a concursus creditorum, is not claimable from Ithuba unless the respondent follows the procedure set out in the 1973 Companies Act, read with item 9 of schedule 5 of the Companies Act 71 of 2008 (2008 Companies Act) and the Insolvency Act 24 of 1936, the respondent on the other hand argues that it is a preferent creditor, and does not form part of a concursus creditorum and is therefore asking for a declaratory order in this regard in the counter-application.

- (b) Regulation 25(7) of the National Road Traffic Regulations states that:

‘The registering authority may refuse to issue a licence disc in respect of a motor vehicle—

- (a) . . .
- (b) the owner of which owes any penalties or fees in terms of the provisions of this Act;
- (b) . . .
- (c) the owner of which is also the owner of another motor vehicle the licence of which has expired more than 23 days ago’.
- (c) The Amangcolosi Community Trust are the owners of the land on which Ithuba is farming, and they have brought an application under case number 10168/23P to review and set aside the winding up resolution by the Master and to restore Ithuba to its pre-liquidation status.

[15] There are significant factors that deserve consideration and appear to be militating against the respondent in the main application and applicant in the counter-application.

- (a) Though there is application of the Amangcolosi Community Trust, under case 10168/23P to review and set aside the recognition of special resolution by the Master, this application cannot be put on hold pending the determination of the judicial review on the basis that the applicants are currently facing a dilemma on whether to comply with regulation 25(7) by paying the fees and penalties due from Ithuba before liquidation in preference to other creditors or comply with sections 342 and 391 of the 1973 Companies Act and sections 95 to 104 of the Insolvency Act.
- (c) The applicants served a letter, annexure ‘KRK-F’, on the respondent on 20 October 2022 stating, amongst others, as follows:

‘7. The claim for arrear licence fees i.e. up to date of liquidation (19 April 2021) constitutes a claim against the insolvent estate of Ithuba and, as a matter of law, payment may only be made once a claim has been submitted to a meeting of creditors and in accordance with the concursus creditorum.

8. What this means is that the arrear licence fees cannot be claimed from Ithuba as a precondition for the renewal of the existing

licences.

9. Our clients tender payment of arrear licence fees from date of liquidation and we accordingly request that you please renew the

licences for all vehicles against payment of the arrear licence fees from date of liquidation together with the current licence fees.’

(d) The respondent unequivocally conceded that the claim for arrear licence fees up to the date of liquidation (19 April 2021), were never proved at either the first or the second meeting of creditors as this failure had no effect on the fact that the applicants have to pay the arrear licencing fees before new licences discs can be issued.[13]

[16] The respondent did not appear as having properly applied its mind to serious legal issues raised by the applicants in the letter annexure “KRK-F” nor did they dispute the correctness of the legal position referred to in the letter.

[17] The frustration of the applicants in relation to the dilemma is clearly captured in annexure “KRK-F” with paragraph 10 stating:

‘Should you refuse to issue licences for the vehicles against payment of the amounts tendered, our clients will have no option but to approach the High Court for an urgent order compelling you to issue the licences which we trust will not be necessary.’

[18] The applicants did not have any other satisfactory remedy available after the letter annexure “KRK-F” had been served on the respondent without favourable consideration.

[19] The applicants established that the claim for arrear licence fees up to the date of liquidation (19 April 2021) constitutes a claim against the insolvent estate of Ithuba and that as a matter of law, payment may only be made once a claim has been submitted to a meeting of creditors and in accordance with the concursus creditorum.

[20] The Constitutional Court held in *Public Protector v South African Reserve Bank*[14] that:

‘The legal principles that guide the grant of litigation costs have been refined over the years. Some costs are strictly outcome-specific. Others depend on the character of the case being prosecuted or the specific issues to be determined’.

[21] As a consequence thereof, exercise of discretion dictates in this application that costs must follow the result of the application.

[22] Accordingly, the main application must succeed and the counter-application must fail.

Order

[21] In the result, I make the following order:

1. It is declared that the debt owing to the respondent by Ithuba Agriculture (Pty) Ltd as at 19 April 2021, forms part of a concursus creditorum and is not claimable from Ithuba Agriculture (Pty) Ltd (in Liquidation) unless the respondent follows the procedures set out in the Companies Act 61 of 1973 read with item 9 of schedule 5 of the Companies Act 71 of 2008 and the Insolvency Act 24 of 1936 for bringing such claim.

MLOTSHWA AJ

APPEARANCES

For the Applicants: AL Christison Instructed by: Grant & Swanepoel Attorneys Suite 1, The Mews, Redland Estate George MacFarlane Lane Pietermaritzburg Ref: Mr R Mahabeer/tm/03M023721

For the Respondent: CJ Snyman SC / MSP Mdunge Instructed by: Mbili Attorneys The Mageza House 110 Oribi Road Pietermaritzburg Ref: BAM/ba/K042/23

- [1] Notice of Motion paras 1 to 5.
- [2] Notice of Motion-counter application paras 1 to 3.
- [3] Annexure “KRK-C” form CM26.
- [4] ‘Form/Vorm J29: First meetings of creditors, contributories, members or debenture holders of sequestrated estates, companies being wound-up or placed under provisional judicial management’, GG 44637 of 28 May 2021.
- [5] Annexure “KRK-A” certificate of appointment.
- [6] ‘Form/Vorm 1: Appointment of trustees and liquidators and proof of claims in sequestrated estates or companies being wound up’, GG 46052 of 18 March 2022.
- [7] Annexure ‘KRK-E’ a schedule of Ithuba vehicles with amounts the respondent considered to be due
- [8] Annexure ‘KRK-B’ agreement of lease between Amangcolosi Community Trust and Ithuba Agriculture (Pty) Ltd.
- [9] Annexure ‘KRK-A’ certificate of appointment of liquidators by special resolution registered on 19 April 2021.
- [10] National Road Traffic Regulations, 2000 GN R225 in GG 20963 of 17 March 2000.
- [11] Muller & another NNO v Community Medical Aid Scheme
- [2010] ZAGPJHC 31 paras 4 and 5.

[12] Walker v Syfret NO 1911 AD 141 at 166.

[13] Para 31 of answering affidavit.

[14] Public Protector v South African Reserve Bank (CCT107/18) [2019] ZACC 29, (9) BCLR 1113 (CC), 2019 (6) SA 253 (CC) (22 July 2019) at para 34

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