

SOUTH AFRICA / JUDGMENT

Dibe and Another v Standard Bank of South Africa Ltd and Another (147/2024)

[2024] ZAFSHC 318 (17 October 2024)

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COURT

Free State High Court, Bloemfontein

BEFORE

Daffue

CASE / FILE NUMBER

147/2024

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:

NO

Of interest to other Judges: NO

Circulate to Magistrates: NO

Case no: 147/2024

In the matter between: SECHOGO MOSES DIBE 1st Applicant (Identity Number: 82[...] Born on 2[...] N[...] 1982 Married in community of property to Dieketseng Nathalie Dibe, with identity number 85[...]) DIEKETSENG NATHALIE DIBE 2nd Applicant (Identity Number: 85[...] Born on [...] J[...] 1985 Married in community of property to Sechogo Moses Dibe, with identity number 82[...]) And THE STANDARD BANK OF SOUTH AFRICA LTD 1st Respondent (Registration Number: 1962/000738/06) SB GUARANTEE COMPANY (RF) (PTY) LTD 2nd Respondent (Registration Number: 2006/021576/07) In re: Case no: 147/2024 THE STANDARD BANK OF SOUTH AFRICA LTD 1st Applicant (Registration Number: 1962/000738/06) SB GUARANTEE COMPANY (RF) (PTY) LTD 2nd Applicant (Registration Number: 2006/021576/07) and SECHOGO MOSES DIBE 1st Respondent (Identity Number: 82[...] Born on 2[...] N[...] 1982 Married in community of property to Dieketseng Nathalie Dibe, with identity number 85[...]) DIEKETSENG NATHALIE DIBE 2nd Respondent (Identity Number: 85[...] Born on [...] J[...] 1985 Married in community of property to Sechogo Moses Dibe, with identity number 82[...])

Coram: DAFFUE J

Heard: 17 OCTOBER 2024

Delivered: 17 OCTOBER 2024

REASONS

Daffue J

Introduction

- [1] On 18 April 2024 the joint estate of a husband and wife married in community of property was provisionally sequestrated with return date 23 May 2024. On the return date the rule nisi was again extended and the matter finally postponed to 13 June 2024, the respondents in the sequestration proceedings to pay the costs occasioned by the postponement. On 13 June 2024 a final sequestration order was issued.
- [2] On 2 July 2024 the sequestrated married couple, Mr and Mrs Dibe, filed an application to rescind the order of 13 June 2024. Answering and replying affidavits were filed. They did nothing to set the matter down for hearing. On 11 September 2024 the Standard Bank of South Africa Ltd and SB Guarantee Company (RF) (Pty) Ltd, the applicants in the sequestration application and the respondents in this application, enrolled the matter for hearing on 17 October 2024. Two days later the applicants' new attorney, who came on board after the final sequestration order, Mr Bertus Maritz of Maritz-Willemse, withdrew as attorney of record. I shall forthwith refer to Mr and Mrs Dibe as the applicants and to Standard Bank of South Africa Ltd and SB Guarantee Company (RF) (Pty) Ltd as the respondents.
- [3] On 17 October 2024 the applicants appeared in person seeking a postponement of two weeks. Adv JH Els, counsel for the respondents, who earlier filed heads of argument in the rescission application, vehemently opposed the application for postponement and submitted that the rescission application should be dismissed with costs. After allowing oral submissions I granted the following order:
- '1. The application for postponement is dismissed.
 2. The application for rescission of the final sequestration order is dismissed with costs.
 3. Reasons shall be circulated to the parties electronically this afternoon, confirming that Mr Dibe presented his email address as mos[...].gmail.com.'

These are my reasons.

The application for postponement

- [4] No formal application for postponement was prepared. Mr Dibe addressed me from the floor. These were his reasons for postponement:

- a. as their lawyer, Mr Bertus Maritz of Maritz-Willemse, Welkom, failed to honour his obligations towards them, they were now cancelling his mandate;
- b. Mr Dibe has spoken to Mrs Bomela of Bomela Attorneys, Bloemfontein on Monday, 14 October 2024 who indicated that she would represent them in future on condition that Mr Maritz' mandate was terminated;
- c. they had a financial arrangement with Mr Maritz in terms whereof they would receive money on 15 October 2024 to enable them to settle his account by the next day, to wit 16 October 2024;
- d. they needed a postponement to get their invoices issued to clients in order to enable them to sit down with the respondents and to settle the claims against them;
- e. he conceded that respondents' claims for which judgment had been granted on 11 May 2023 were not in dispute and that they wanted to pay what was due to the respondents;
- f. monies due to them will be paid by the end of October 2024, inter alia from clients such as the Department of Education, Matjhabeng Municipality and PRASA;
- g. he accepted that Maritz-Willemse Attorneys withdrew as attorneys of record, but on his version, he had discussions thereafter with Mr Maritz for him to continue assisting them;
- h. save for the two respondents, they did not have any other creditors, although he later conceded that they did employ several subcontractors pertaining to the projects completed by them who were still owed money;
- i. on questions by the court as to why the final sequestration order should be rescinded, he merely confirmed that Mr Kruger, an attorney of Kruger Venter, Welkom 'did not represent them well', as he kept saying that the sequestering creditors were prepared to wait for payment;
- j. according to his viva voce version, they have six immovable properties and 30 vehicles on their books and are indeed solvent, although not a word was said in this regard in either the answering affidavit in the sequestration proceedings, or the two affidavits in the rescission application.

The opposition

- [5] Mr Els emphasised that the applicants were kicking for touch all the time. They requested an extension of the rule nisi in order to settle their debt which did not eventuate. On 13 June 2024, the date to which the sequestration application was finally postponed, neither they, nor their attorney at that stage, Mr Kruger, attended court to either argue the matter, or request a further postponement. The purpose of seeking postponement was merely to obtain an opportunity to pay the outstanding debt, but in the meantime five months have lapsed and no payment had been forthcoming. Consequently, a postponement would serve no purpose.

- [6] Mr Els informed the court that Mrs Deborah Joubert of De Jager Lorden Attorneys had been appointed as provisional trustee (he could not say whether she received a final appointment). As a result, the parties hereto cannot enter into any settlement negotiations in these circumstances without the intervention of the trustee, representing the body of creditors. It is also the trustee's prerogative to claim whatever is due to the applicants.
- [7] Mr Els submitted that the applicants merely seek a rehearing of the sequestration application and failed to comply with the requirements for rescission.

Evaluation of the submissions and the evidence presented

- [8] According to the applicants, Mr Kruger, their former attorney, did not properly deal with their matter insofar as the sequestration application was concerned. Their second attorney, Mr Maritz, failed to comply with his obligations towards them and did not answer Mr Dibe's phone calls during the last few days. Finally, Mrs Bomela who was allegedly prepared to accept instructions, did not contact Mr Maritz to ascertain the true position and also did not officially come on record as attorney for the applicants. If Mr Dibe is to be believed, Mrs Bomela advised them to come to court on their own to seek a postponement. I find it extremely difficult to accept that an attorney would act accordingly.
- [9] Postponements are not there for the taking. Applications in this regard shall be made timeously and it is expected of the applicant for postponement to explain their predicament fully and satisfactorily. The Constitutional Court held as follows in *Lekolwane and Another v Minister of Justice (Lekolwane)*:^[1]

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application.'

- [10] In *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as amici curiae)*^[2] the Constitutional Court referred to *Lekolwane* with approval in the following words:

'In *Lekolwane and Another v Minister of Justice and Constitutional Development* this Court added the following factors to be considered in granting a postponement: (1) the broader public interest; and (2) the prospects of success on the merits. The following factors could non-exhaustively be added to the above: the reason for the

lateness of the application if not timeously made; the conduct of counsel; the costs involved in the postponement; the potential

prejudice to other interested parties; the consequences of not granting a postponement; and the scope of the issues that ultimately

must be decided. In balancing these factors it is of vital importance to keep in mind that –

'(w)hat is in the interests of justice will . . . be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this Court finalised without undue delay.' (footnotes omitted)

[11] This is a typical case that all too often surfaces in our courts. I do not have to say more, than to refer with respect to the observations of the Supreme Court of Appeal in *Magistrate Pangarker v Botha and Another*.^[3]

[12] In *National Police Service Union and Others v Minister of Safety and Security and Others*^[4] the Constitutional Court stated:

'Ordinarily ... if an application for a postponement is to be made on the day of the hearing of a case, the legal representatives ... must appear and be ready to assist the Court both in regard to the application for the postponement itself and, if the application is refused, the consequences that would follow.'

Clearly, if Mr Dibe is to be believed, Mrs Bomela did not act as could have been expected of her, bearing in mind the view point of the Constitutional Court.

[13] Insofar as it is necessary to consider the facts presented by Mr Dibe from the floor, obviously not under oath, and bearing in mind the principles applicable to applications for postponement, I refer to

some aspects that played a role in the exercise of my discretion.

[14] No reason has been advanced why the application for postponement was not timeously made. Mr Maritz withdrew on 13 September 2024, but according to Mr Dibe there were further negotiations between them thereafter, wherein Mr Dibe undertook that payment would be forthcoming by 16 October 2024. Surely, if these facts were provided to Mr Maritz and he was still prepared to act as attorney, he would have filed the necessary application to seek a postponement at an early stage. The facts are clear: he never came on record again after withdrawing as attorney of record on 13 September 2024.

[15] If Mrs Bomela was informed about the facts provided by Mr Dibe this morning, she, as could have been expected of any reasonable attorney, would surely immediately prepare an application for postponement to

be served and filed. Obviously, nothing was forthcoming from her office. An attorney must either accept instructions from a client and thereafter act in the best interest of the client, or refuse the instructions.

[16] It is difficult to blame any of the three legal representatives at this stage of the proceedings without having heard their versions. However, on condition that either Mr Maritz, or Mrs Bomela was placed in sufficient funds to appear on behalf of the applicants, and had received proper instructions, they failed their duties towards their

clients. Again, it is emphasised that the court cannot make such a finding, especially insofar as Mr Dibe did not testify under oath and allowed the legal representatives to respond thereto.

[17] In my view there is a cost factor that cannot be disregarded if a postponement is granted. This matter had been delayed over the course of several months. There is clearly a potential prejudice, not only to the respondents, but also to other creditors and/or interested parties. The broader public interest also comes into play. Mr Els

submitted that a two-week postponement would probably be in vain, bearing in mind the promises to pay over a period of more than a year. I agree.

[18] The prospect of success was a factor to be considered as well. The applicants filed a detailed answering affidavit during the sequestration proceedings and presented proper argument by their counsel at the time. I considered the application for sequestration as well as the parties' heads of argument. Adv I Sander's heads of argument on behalf of the present applicants were thoroughly prepared and she considered all aspects that could be submitted on behalf of her clients. Notwithstanding all efforts, a provisional sequestration order was granted and in the absence of any further affidavits by the applicants, a final sequestration order was eventually granted. The promise of payment of R100 million allegedly due by the Matjhabeng Municipality has not been forthcoming, notwithstanding the expiry of several months. This appears to be a pie in the sky.

[19] The application for rescission is stillborn. It has not been served on any of the other creditors, or the trustee, or the Master. Such service is a trite requirement. The applicants also dismally failed to present any reasons for the court to exercise its discretion in terms of s 149(2) of the Insolvency Act 24 of 1936. In terms of this section 'the Court may rescind or vary any order made by it under the provisions of this Act'. No grounds are set out in this section and therefore the court must exercise its discretion in the light of the circumstances disclosed to it.[5]

[20] Clearly, s 149(2) cannot be utilised in order to have a rehearing of the merits of the sequestration proceedings. Also, unusual, special, or exceptional circumstances must exist to justify the relief. Although the order may be set aside based on common law requirements, the following essential elements need to be proven:

- a. a reasonable and acceptable explanation must be given for the default;

- b. that the application is bona fide; and
- c. that the party has a bona fide defence which prima facie carries some prospect of success.
[6]

[21] Insofar as the applicants tried to rely on rule 42(1) of the Uniform Rules of Court, there is absolutely no justification in this regard. Clearly, the previous attorney was informed in no uncertain terms

that the rule nisi was extended finally to 13 June 2024 and that no further postponement would be provided.

Conclusion

[22] In conclusion, the applicants dismally failed to comply with the requirements to successfully apply for postponement. Secondly, their application for rescission of the final sequestration order is stillborn for failing to comply with the trite formalities. Also, it should be dismissed on the merits insofar as no exception circumstances have been proven in order for the court to exercise its discretion in their favour.

DAFFUE J

Appearances For Applicants: Mr & Mrs Dibe Instructed by: In Person For Respondents: Adv JH Els Instructed by: Phatshoane Henney Inc Bloemfontein.

[1]

[2006] ZACC 19; 2007 (3) BCLR 280 (CC) para 17.

[2]

[2007] ZACC 14; 2007 (5) SA 620 para 11.

[3] 2015 (1) SA 503 (SCA) paras 22 to 38.

[4] 2000 (4) SA 1110 (CC) at 111D; dictum referred to with approval in *Shilubana and Others v Nwamitwa* loc cit para 15.

[5] *Naidoo and Another v Matlala NO and Others* 2012

(1) SA 143 (GNP) para 4; see also *Ex parte Van der Merwe* 1962

(4) SA 71 (O) at p 72; and *Storti v Nugent and Others* 2001

(3) SA 783 (W) at pp 806 & 807.

[6] *Naidoo* loc cit para 5 and authorities quoted.

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