

SOUTH AFRICA / JUDGMENT

Essack v Resfam Investments CC (In Liquidation) and Others (81703/2019) [2019] ZAGPPHC 575 (7 November 2019) [2019] ZAGPPHC 575

COURT

North Gauteng High Court, Pretoria

BEFORE

Ranchod

CASE / FILE NUMBER

81703/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

(1)

REPORTABLE:

YES

/ NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE NO: 81703/2019

7/11/2019

In the matter between:-

ISMAIL

SULIMAN

ESSACK

Applicant

And

RESFAM

INVESTMENTS CC (IN LIQUIDATION)

1st

Respondent

(REG NO.

1993/027798/23)

MOHOMMED
MAHIER TAYOB N.O
2nd
Respondent
JACQUES
FISHER
N.O
3rd
Respondent
NOMVUYO
YVONNE SERITI
N.O
4th
Respondent
THE
STANDARD BANK OF SOUTH AFRICA LIMITED
5th
Respondent
THE
COMPANIES AND INTELLECTUAL COMMISSION
6th
Respondent
THE
MASTER OF THE HIGH COURT JOHANNESBURG
7th
Respondent
JACK
KLAFF INVESTMENTS (PTY) LTD
8th
Respondent

JUDGMENT

RANCHOD J

- [1] In this matter the applicant seeks, on an urgent basis, the relief sought in part A of the application, namely, and interdict restraining the third, fourth and eighth respondents from auctioning certain immovable property known as PTN 4 of Erf 166, registration division KR, local authority Modimolle, Limpopo Province, in extent 3898 m², held by Deed of Transfer No. T56149/1992, situate at 123 Nelson Mandela St., Modimolle pending the determination of the relief sought in part B.
- [2] The applicant also seeks that the costs of part A of the application be reserved for determination when the merits of the application are dealt with.
- [3] In part B the applicant intends to seek relief in the following terms (I paraphrase the relief sought):

- That a business rescue order granted by the Companies and Intellectual Property Commission (the sixth respondent) be rescinded;
 - That the final liquidation order pertaining to the first respondent that was granted Gauteng Local Division on 14 May 2019 be rescinded;
 - That the appointment of the liquidators (the third and fourth respondents) be set aside;
 - That certain court orders granted in the Limpopo High Court dated 20 June 2017 and 8 January 2018 respectively be rescinded;
 - That the second respondent, who was the appointed business rescue practitioner of the first respondent, be disqualified from being paid any claim for his fees and disbursements incurred during his tenure as the business rescue practitioner; and
 - An order for costs only in the event that any of the respondents oppose the application.
- [4] The auction of the property belonging to the first respondent is scheduled to take place at 11 a.m. on 7 November 2019.
- [5] I determined that the matter is indeed urgent in the circumstances and proceeded to hear it on the merits.
- [6] Very briefly, the background facts as set out by the applicant are that as the sole member of the first respondent he caused a resolution to be passed in terms of which it was placed under business rescue in terms of s129(3)(b) of the Companies Act 71 of 2008 (the Act) on 9 July 2015. The first respondent had until 16 July 2015 to appoint a business rescue practitioner (the BRP) who satisfied the requirements of s138 of the Act. Thereafter, in terms of s129(4)(a) of the Act it had two business days within which to file a notice of appointment of the BRP with the sixth respondent. The applicant says none of these mandatory requirements were met.
- [7] On 26 August 2015 the second respondent received a conditional licence to practice as a BRP which was thirty-three business days after the business rescue of the first respondent began and twenty-five business days after it filed the notice of appointment of the BRP with the sixth respondent. The applicant says that the BRP (the second respondent) did not comply with the requirements of s138(1)(b) of the Act at the time of his nomination and appointment during July 2015. The applicant also alleges that there are a number of other statutory requirements that the BRP had failed to comply
- with. (I should mention that the second respondent did not enter an appearance although he was served with the papers.)

- [8] The applicant launched an application in the Gauteng Local Division for the removal of the BRP who in turn launched a counter-application to have the business rescue proceedings terminated and sought a final liquidation of the first respondent. The counter-application was granted with the consent of the applicant and the main application dismissed. The applicant says he was 'misadvised' by his legal representatives at the time into consenting to the liquidation order being granted.
- [9] Much was said during the submissions made for and against the order sought, but in essence the issues that have crystallized and which will have a bearing on whether the liquidation proceedings can continue, including the auctioning of the property, is whether the appointment of the BRP was invalid ab initio and therefore a nullity and whether consequently the BRP's counter-application in terms of which the first respondent was placed in final liquidation should also be set aside.
- [10] Insofar as the appointment of the BRP is concerned, the applicant's challenge thereto will be the subject of the application to be launched in terms of part B. In the circumstances, I will not deal with that issue at length. For present purposes what I have before me on the papers is the allegation by the applicant that the reason for his challenge of the appointment of the BRP, inter alia, is that he was not a licensed BRP at the time his appointment was made. The BRP was licensed some six weeks after his appointment, and therefore says the applicant, his appointment was a nullity. If that is indeed the case, then it follows that the final order of liquidation that was granted may well fall to be set aside.
- [11] In those circumstances to allow the auction of the property would, in my view, cause irreparable harm to the first respondent and therefore the relief sought in part A should be granted.
- [12] However, I am of the view that the relief sought in part B should be determined as speedily as possible. In the circumstances, in the order that I intend to make I will make provision for certain time limits within which the application in part B should proceed.
- [13] During oral arguments an issue that arose was the admission by the applicant in the papers that he had been collecting rental income paid by tenants of the first respondent since the business rescue proceedings commenced but he did not pay it over to the BRP nor, later, to the liquidators. He seemed to be of the view that he can withhold payment of the monies until such time as his disputes with the BRP and the liquidators was resolved. Counsel for the applicant stated that going forward, the applicant is prepared to pay over all rentals collected and will be paid over by the applicant into the trust account of the appointed liquidators until part B is finalized. Accordingly, I intend to make provision for that in the order as well.
- [14] Insofar as costs are concerned, it seems to me an appropriate order would be to let costs be cost in the cause subject to paragraph 2 of the order.
- [15] I accordingly make the following order.

The third, fourth and eighth respondents are hereby interdicted and restrained from auctioning the property more fully described as PTN 4 of Erf 166, registration division KR local authority, Modimolle, Limpopo Province, in extent 3898 m², held by Deed of Transfer No. T56149/1992, situate at 123 Nelson Mandela St., Modimolle, pending the determination and final outcome of the relief sought in part B be of this application.

The applicant shall, by no later than 12 p.m. on 21st November 2019 take the required steps to enroll the matter for hearing relating to the relief sought in Part B of the Notice of Motion failing which the application shall be ipso facto dismissed with costs without further intervention by the Court.

The applicant shall pay over into the trust account of the joint liquidators all rental income received by him as from the date of this order from the letting of the property of the first respondent referred to in paragraph 1 of this Order pending the determination of the application

Costs of this application are to be costs in the cause.

RANCHO, J

JUDGE OF THE HIGH COURT

Appearances

Appearance for the Applicant

:Adv JK Berlowitz

Instructed by Mohamed Seedat Attorneys

466 Himalaya Street

Laudium, Pretoria

Appearance for the 3rd, 4th and 5th Respondents :Adv Y Coertzen

Instructed by Newtons Inc

377 Veale Street

Brooklyn, Pretoria

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