

SOUTH AFRICA / JUDGMENT

Investec Bank v Strydom and Others (45664/2012) [2013]

ZAGPJHC 59 (28 March 2013)

[2013] ZAGPJHC 59

COURT

South Gauteng High Court, Johannesburg

BEFORE

C G Lamont

CASE / FILE NUMBER

45664/2012

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 45664/2012

DATE:28/03/2013

In the matter between:

INVESTEC BANK.....Applicant

and

STRYDOM, LEONARDUS JOHANNES N.O.First Respondent

ROERING, LEIGH WILLIAM N.O.Second Respondent

MATIKINCA, VUSUMI N.O.Third Respondent

THE MASTER OF THE HIGH COURT

JOHANNESBURGFourth Respondent

TRI-STAR HOUSING (PTY) LTDFifth Respondent

J U D G M E N T

LAMONT, J:

- [1] The applicant brings an application seeking to review the confirmation by the Master of a liquidation and distribution account

in the fifth respondent alternatively for leave to re-open the account and for relief consequent upon the re-opening.

- [2] The fifth respondent performed work for the insolvent. Pursuant to that work it acquired a builder's lien over the improvements it had brought to several immovable properties known as Venice Village. The applicant had lent and advanced money to the insolvent and pursuant to those loans mortgage bonds were passed over the immovable properties known as Venice Village and two additional properties ("the other properties").
- [3] Subsequent to the liquidation of the insolvent all the properties were sold. The Venice Village Properties sale realised an amount less than the debt which was due to the fifth respondent and which was secured by its lien. The other properties realised certain monies which under and in terms of the preferential rights of the applicant under the bonds were to be paid to the applicant. The applicant and the fifth respondent agreed that the correct basis for the framing of the account was that fifth respondent would be paid the yield of the Venice Village Properties and that to the extent the applicant held security over the other properties the monies realised would be paid to the applicant.
- [4] The liquidation and distribution account was drawn and reflected an amount due to the fifth respondent out of the proceeds of the sale of both the Venice Villager Properties and the other properties. This was not only in breach of the agreement but also failed to recognise the preferential rights of the applicant to payment ahead of the fifth respondent whose claim was not secured in respect of the other properties as it had no lien to exercise in respect of them.
- [5] The consequence of the account is that an amount of some R2 million was to be paid to the fifth respondent over and above the amount which it should have been paid had the agreement been implemented and the preferential rights of the applicant been recognised. The liquidation and distribution account was confirmed and the amounts paid in terms thereof were due by the liquidators.
- [6] The applicant lodged no objection to the account.
- [7] During March 2012 a circular dated 6 March 2012 notifying the applicant as a proved creditor of the insolvent that the liquidation

and distribution account had been lodged with the Master of the Supreme Court and that the account lay for inspection by creditors at both the Johannesburg and Boksburg Magistrate's Court for 14 days from 16 March 2012. There is no evidence of when precisely the circular was posted.

- [8] The applicant did not receive the circular, did not read the notice boards where the circulars were posted in the Magistrate's

Courts and did not see the notice in the Government Gazette. It received no notification, hence its failure to object. The question

to be answered is whether it can do anything presently in the light of the confirmation of the liquidation and distribution account and the payment of the claims made pursuant to the account.

[9] Under and in terms of section 406(1)(b) of the Companies Act 61 of 1973 (“the Act”) the account was inter alia to lie for inspection at the office of the magistrate of the district in which the registered office of the insolvent is situated. That registered office was situated in Randburg. The account lay for inspection at Boksburg. This is a procedural defect.

[10] It was submitted by the applicant that at least the following additional procedural defects exist:

The liquidator failed to give the notice required by section 406(3) in that the liquidator transmitted the circular referred to above by post. The submission was that ordinary posting was insufficient and that registered post at the very least was required by the Act.

The liquidator had failed to establish that the circular had been posted timeously.

[11] Under section 339 of the Act the laws of insolvency are to be applied mutatis mutandis. The relevant section reads as follows:-

S339 “In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act.”

[12] S151 of the Insolvency Act No 24 of 1936 provides for a review:-

S151 “Subject to the provisions of section fifty-seven any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one hundred and twelve”

[13] Procedural irregularities which do not result in a substantial injustice do not render acts which otherwise may be invalid. The relevant section is 157 of the Insolvency Act which provides: S157

“(1) Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court.

(2) No defect or irregularity in the election or appointment of a trustee shall vitiate anything done by him in good faith.”

[14] It is necessary for me to decide whether or not there are procedural defects and whether such defects resulted in a substantial injustice. Only in those circumstances can the review succeed.

[15] The procedure is set out in Section 406 of the Act. The relevant portion of section 406 of the Act provides as follows: S 406

Every liquidator's account shall lie open for inspection for such period, not being less than fourteen days, as the Master may determine-

at the office of the Master; and

(b) if the office of the Master and the registered office of the company are not situated in the same district-

at the office of the magistrate of the district in which such registered office is situated; or

if such registered office is situated in a portion of such district in respect of which an additional or assistant magistrate permanently performs the functions of the magistrate of the district at a place other than the seat of magistracy of that district, at the office of such additional or assistant magistrate; and

(c) if the company also carried on business at any other place, then also at the office of the magistrate (including any additional or assistant magistrate) of the district or the portion thereof in which any such other place is situate, as may be determined by the liquidator with the approval of the Master.

The liquidator shall lodge a copy of the account with every magistrate, additional magistrate or assistant magistrate in whose offices the account is to lie open for inspection.

The liquidator shall give due notice in the Gazette of the places at which any such account will lie open for inspection and shall in that notice state the period during which the account will lie open for inspection and shall transmit by post or deliver a similar notice to every creditor who has proved a claim against the company.

(4) The magistrate shall cause to be affixed in some public place in or about his office a list of all such accounts as have been lodged in his office, showing the respective periods during which they will lie open for inspection, and shall upon the expiry of any such period endorse on the account in question his certificate that the account has lain open at his office for inspection in terms of this section and transmit the account to the Master.”

[16] It is conceded by the respondent that the account lay for inspection at the incorrect venue and that this constitutes a procedural

irregularity.

- [17] There is a dispute as to whether or not the posting by ordinary post constitutes a procedural irregularity. Section 406 of the Act provides for places where the account may be inspected and manners in which a creditor can be made aware of the publication of the account. An account of which the creditor has not been given notice may be stumbled upon by the creditor in the magistrate's court where it is on show.
- [18] It is more likely to be seen by a creditor if it is published in the court which has jurisdiction over the registrar's office. There is certainty provided in this requirement. This certainty provides comfort to the creditor, who knows of the place where the account will definitely be found. The liquidator is required to bring to the attention of the creditor that the notice is at the places it is required to be by way of publishing in the Gazette where such places are and by way of transmission by post or delivery to the creditor the same information in a similar notice.
- [19] It is a matter of extreme importance to a creditor that he receive notice. If he wishes to object, but fails to do so he may be left without remedy. The section, once extraneous portions are removed requires the liquidator to transmit by post or deliver a notice to every creditor. The issue is what the word "post" requires. It is ambiguous in that it does not define the type of post namely registered or ordinary.
- [20] It was submitted that in the process of interpretation I should have regard to other sections in the Act in which it is specifically
- stated that the posting of a document is to be by way of registered letter. (See for example sections 46(1), 73(1), 73(3), 192(2), and 332(2) of the Act). The submission was that the failure of the legislature to insert the word "registered" into the section in question was intentional and that on a proper interpretation transmission by registered post is not required.
- [21] I decline to approach the interpretation of the section in that way. In my view the proper approach to the section is first to seek to ascertain what it in itself requires by reading the words, applying a purposive approach to the process of interpreting and also to have regards to look to the relevant Regulation dealing with posting. There is a Regulation dealing with posting which is contained within Appendix III of the Act in Regulation 20 dealing with the regulations for the winding-up and judicial management of companies. Regulation 20(1) provides that whenever any notice is to be sent to a creditor of a company it may be sent by registered post. It appears to me that the regulation was not simply inserted; accept as procedurally acceptable to a posting by way of registered post as opposed to a posting by ordinary post. It appears to me that the regulation was intended to indicate albeit in permissive terms a preferable mechanism by which posting should take place.
- [22] A transmission by registered post has two distinctive advantages over ordinary post:
- The date when the posting took place is readily ascertainable.
- What happened to the document posted is readily ascertainable.

[23] The date of posting is relevant as due notice is required to be given. Whether or not due notice has been given can only be determined by reference to the date of posting in relation to the date of occurrence of the event in respect of which notice is being given. The failure of the liquidators to use registered post in the present matter has resulted in the date of posting being unascertainable before me. The person posting does not identify it and there is no document to identify it.

[24] The purpose of giving notice is that the notice should reach the creditor either actually or constructively. To require proof of actual receipt by the creditor would be to overburden a liquidator who will find it virtually impossible save in the case where delivery is manually effected to establish that fact. On a purposive approach to construe “post” as meaning registered post would meet the liquidator’s need to have a practical manner of bringing notices to the attention of a creditor and would meet the need of a creditor to receive the communication.

It would also solve the problem of establishing the date of posting. As to this approach see : Roux v Health Professions Council of SA (786/10) [2011] ZASCA 135 para 19

[25] It was submitted on the authority of Sebola v Standard Bank 2012

(5) SA 142 (CC) that where an act provided for a person to get notice that registered post was an appropriate method. That matter dealt with the National Credit Act which provides for notice to be given to debtors in certain circumstances. If debtors do not react to the

notices there are serious consequences for them. A similar balancing of rights and obligations was undertaken in that matter as the balancing process I am required to undertake in the present matter.

[26] The main objective of the section is to protect creditors who are entitled to be pertinently advised of when and where the liquidation and distribution account is open for inspection so that they can determine its impact upon them. The need for the liquidators to wind-up the insolvent as efficiently and cheaply as possible must be balanced with the interests to be protected, namely, the right of creditors to receive notice. Applying these principles the proper interpretation of the Act within its context requires that there be posting of the notice to creditors by way of registered post. Registered post is relatively inexpensive. It creates certainty as to when posting was effected, to whom and also what happened to the letter posted. It conveniently provides a mechanism for proving notice to creditors.

[27] No such delivery took place.

[28] In the circumstances there is a second procedural defect.

[29] A substantial injustice has resulted in that the account was in due course confirmed and distribution has taken place without the creditor being afforded an opportunity to object.

[30] In my view accordingly the decision of the Master is reviewable and falls to be set aside.

[31] This finding makes it unnecessary to consider the application.

[32] I accordingly make the following order:

The confirmation by the Master, Johannesburg dated 3 April 2012 of the first and final liquidation and distribution account in the liquidation of Tropical Paradise Trading 181 (Pty) Ltd (in liquidation) is reviewed and set aside.

The fifth respondent is directed to pay the costs of the application.

C G LAMONT

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

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APPLICANT'S ATTORNEYS: Blakes Maphanga Inc

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5th RESPONDENT/S ATTORNEYS: Wertheim Becker Inc

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