

SOUTH AFRICA / JUDGMENT

Khambule and Another v Registrar of Banks In re: Registrar of Banks v Khambule and Others (256009/14) [2017] ZAGPJHC 414 (17 November 2017)

[2017] ZAGPJHC 414

COURT

South Gauteng High Court, Johannesburg

BEFORE

L.T. Modiba

CASE / FILE NUMBER

256009/14

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 256009/14

Not reportable

Not of interest to other judges

Revised.

17/11/2017

KHAMBULE,

FUDI

ABRAM First

Applicant

KHAMBULE,

HAPPY

NOMBULELE Second

Applicant

and

REGISTRAR

OF

BANKS Respondent**In**

re: REGISTRAR
OF
BANKS Applicant
KHAMBULE,
FUDI
ABRAM First
Respondent
KHAMBULE,
HAPPY
NOMBULELE Second
Respondent
TVI
TRAVEL AND MARKETING AGENCY CC
(Registration)

Number: 2010/068628/23) Third
Respondent

JUDGMENT**MODIBA, J:**

- [1] Fudi Abram Khambule (Khambule) seeks the rescission of a final order granted by Msimang AJ on 18 October 2016 placing his joint marital estate with Happy Nombulele Khambule (Ms Khambule) under final sequestration. The final order was taken in the opposed motion court but in their absence when they failed to appear. A provisional order of sequestration (rule nisi) had been granted against them by Windell J, on an opposed basis on 24 March 2016.
- [2] Khambule and Ms Khambule were divorced on 27 March 2015. For that reason he has no authority to bring this application on behalf of Ms Khambule. I therefore only consider the application to the extent that it relates to his estate.
- [3] He brings the application in terms of "section 49 of the High Court Rules" and "section 42(1) of the Rules of Court". The rules of court do not contain sections. I therefore assume that he intends referring to rule 49 and rule 42
- (1) of the Uniform Rules of Court. He alleges that the order "was taken in error". Rule 49 provides for applications for leave to appeal. It bears no relevance to the relief that Khambule seeks.
- [4] Rule 42 (1) provides for the variation of a judgment taken under certain prescribed circumstances, including a judgment taken in error. The error pleaded is that when the final sequestration order was granted, Khambule and his counsel were not in court. Their counsel had withdrawn on the eve of the hearing, affording his attorney insufficient time to replace him. The Registrar was not willing to indulge the Khambules further. The rule nisi

had been extended three times to afford them an opportunity to oppose its confirmation. It was ultimately enrolled in the opposed motion court on 18 October 2016. Although their counsel had failed to file a practice note and heads of argument, Khambule had filed opposing papers. Therefore both the rule nisi order and the final sequestration order were dealt with on an opposed basis. The latter order was granted in default of the parties' appearance. Therefore it was not granted by default. There was no error as envisaged by rule 42 (1) in the manner in which Msimang AJ dealt with the confirmation of the rule nisi.

- [5] The other basis on which a party may bring a rescission application is rule 31 (2) (b) and the common law. They are both not applicable in these circumstances because as already mentioned, the rule nisi was not granted by default. In terms of rule 31 (2) (b), the court may rescind a judgment granted by default due to failure to enter an appearance to defend or a plea in action proceedings or a notice of intention to defend or an answering affidavit in motion proceedings. The application also falls outside the ambit of this rule.
- [6] In the premises, the order by Msimango AJ is not rescindable. The application stands to be dismissed with costs.
- [7] The Registrar seeks punitive costs *de bonis popriis* against Khambule's attorney of record. He was given notice of this request in the Registrar's answering affidavit where the reasons for this request are also set out. I am satisfied that the current circumstances warrant the granting of such an order.
- [8] The rescission application was brought four months after the rule nisi was granted. Khambule signed the founding affidavit on 6 December 2016. However, the application was only issued on 10 February 2016 and only served on the Registrar's attorneys on 24 February 2016. The only reason for the delay, presented in a condonation application, is the bare statement that Khambule attorney of record was sick. The statement is neither substantiated nor corroborated with a medical certificate.
- [9] The orders for the provisional and final sequestration of the applicants were granted at the instance of the Registrar in terms of section 9 of the Insolvency Act 24 of 1936 ("the Insolvency Act"), read with sections 83(3)(b)[1] and 84(1A)(c)[2] of the Banks Act 94 of 1990 on the basis that Khambule together with others, conducted an unlawful deposit-taking pyramid scheme known as the Travel Venture International scheme (the scheme). As part of the scheme they took over R54, 8 million from members of the public. Approximately R1, 6 billion was taken by the operators of the greater TVI scheme investors in South Africa. The Khambules are obliged to repay it pursuant to a direction issued by the Registrar on 6 March 2012 in terms of section 83(1)[3]. They have not complied with this directive.

- [10] They opposed the rule nisi and the final sequestration order on various spurious grounds, one of which is that the scheme is not unlawful. They rely on the same ground for their bona fide defence in the rescission application. In addition, they contend that they wanted to review the directive that the Registrar issued in March 2012 with the internal board of review. They only filed the latter application with the board of review on 12 October 2016. The final sequestration order was granted on 18 October 2016. On 25 October 2016, the board of review delivered a written ruling that the review application was brought out of time and that it had no power to condone its late submission. In terms of Regulation[4] 54(1)[5] of the Banks Act, Khambule had to bring it within 30 days of the issue of a directive.
- [11] It is common cause that Khambule's attorneys were aware that the Registrar would be proceeding to seek the grant of the final

orders

on 18 October 2016, and that the Registrar was not agreeable to a postponement. The applicants' attorney, who practices from Newcastle, was expressly informed by the Registrar's attorney on 17 October 2016 that the applicants should instruct local Johannesburg correspondents to protect the applicants' interests as the Registrar could not be expected to do so. Similar sentiments were expressed by the Registrar's counsel to the applicants' counsel a day or two before 18 October 2016. Notwithstanding the applicants' legal representatives having been specifically forewarned to instruct someone to protect their interests, the applicants did not do so and were absent from court on 18 October 2016.

- [12] These gimmicks were repeated in the present application. Khambule's counsel did not file a practice note and heads of argument. On 17 October 2017, I addressed a directive to Khambule's attorney of record calling on him to ensure that this instance of non-compliance with the practice directive is remedied by 23 October 2017. The directive was not complied with. On the date I heard the matter,

Khambule's attorney did not attend court. He sent a brief by email to Mr Sithole to request a postponement because he had been sick and could not prepare for the rescission hearing. Mr Sithole submitted on his behalf that he also needed to file a reply to the Registrar's answering affidavit. This could not be the reason for the postponement because the Registrar filed his answering affidavit in March 2017. The dies for filing a reply expired more than six month ago. Mr Sithole was not even aware of this fact as he did not have a proper brief and had no papers filed in this matter.

- [13] I refused to entertain a request for a postponement from the bar, on unattested averments, on the day the application was enrolled for hearing in circumstances where the Registrar's attorney of record was given no prior communication of this request.

[14] The rescission application was not only brought out of time, it is incompetent. In these circumstances, the probable motive for the rescission application is to frustrate the Registrar and the victims of the unlawful pyramid scheme. Further the flagrant disregard for the rules of court by Khambule's attorney of record warrants the strictest censure from this court. There is no reason why his sequestrated estate should be saddled with these costs to the disadvantage of creditors.

[15] In the premises, the following order is made:

ORDER

1. The application is dismissed with costs de bonis popriis against the applicant's attorneys of record on the attorney and client scale. The costs shall include the costs of two counsel where so employed.

MS. L.T.MODIBA

JUDGE OF THE HIGH COURT

APPEARENCES:

Applicant's Counsel: B.M Gilbert with Ms I Phalane.

Instructed by: Baker Mckenzie

Respondent's Counsel: E. Sithole (only for the postponement application)

Instructed by: T. Ngcobo Attorneys

Date heard: 30 October 2017

Date delivered: 13 November 2017

[1]

83. Repayment of money unlawfully obtained (3) Any person who refuses or fails to comply with a direction under subsection (1)- (b) shall for the purposes of any law relating to the winding-up of juristic persons or to the sequestration of insolvent estates, be deemed not to be able to pay the debts owed by such person or to have committed an act of insolvency, as the case may be, and the Registrar shall, notwithstanding anything to the contrary contained in any law, be competent to apply for the winding-up of such a juristic person or for the sequestration of the estate of such a person, as the case may be, to any court having jurisdiction.

[1]

83. Repayment of money unlawfully obtained

- (3) Any person who refuses or fails to comply with a direction under subsection (1)-

- (b) shall for the purposes of any law relating to the winding-up of juristic persons or to the sequestration of insolvent estates, be deemed not to be able to pay the debts owed by such person or to have committed an act of insolvency, as the case may be, and the Registrar shall, notwithstanding anything to the contrary contained in any law, be competent to apply for the winding-up of such a juristic person or for the sequestration of the estate of such a person, as the case may be, to any court having jurisdiction.

[2]

64. Management and control of repayment of money unlawfully obtained (1A) (c) If the report referred to in paragraph (a) concludes that the person subject to the directive is insolvent, the Registrar may, notwithstanding anything contrary contained in any law relating to liquidation or insolvency apply to a competent court for the winding-up in terms of the Companies Act or the sequestration in terms of the Insolvency Act, 1936 (Act No. 24 of 1936), as the case may be, of the person subject to the directive, and the Registrar shall have the right to oppose any such application made by any other person.

[2]

64. Management and control of repayment of money unlawfully obtained

(1A)

- (c) If the report referred to in paragraph (a) concludes that the person subject to the directive is insolvent, the Registrar may, notwithstanding anything contrary contained in any law relating to liquidation or insolvency apply to a competent court for the winding-up in terms of the Companies Act or the sequestration in terms of the Insolvency Act, 1936 (Act No. 24 of 1936), as the case may be, of the person subject to the directive, and the Registrar shall have the right to oppose any such application made by any other person.

[3]

83. Repayment of money unlawfully obtained (1) If as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Registrar is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank or without being authorized, in terms of the provisions of section 18A(1), to carry on the business of a bank, the Registrar may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements

and within such period as may be specified in the direction, all money so obtained by that person in so far as such money has not yet been repaid, including any interest or any other amounts owing by that person in respect of such money.

[3]

83. Repayment of money unlawfully obtained

- (1) If as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Registrar is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank or without being authorized, in terms of the provisions of section 18A(1), to carry on the business of a bank, the Registrar may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements

and within such period as may be specified in the direction, all money so obtained by that person in so far as such money has not yet been repaid, including any interest or any other amounts owing by that person in respect of such money.

[4] Issued under Government Gazette 35950 of 12 December 2012.

[5]

54. Review procedure (1) Any person desiring to submit a matter pertaining to a decision of the Registrar for review, in terms of section 9 (1) of the Act, to the board of review shall within 30 days after the pronouncement of the decision in question lodge with the chairperson of the board of review a notice of review on form BA 001.

[5]

54. Review procedure

- (1) Any person desiring to submit a matter pertaining to a decision of the Registrar for review, in terms of section 9 (1) of the Act, to the board of review shall within 30 days after the pronouncement of the decision in question lodge with the chairperson of the board of review a notice of review on form BA 001.

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