

SOUTH AFRICA / JUDGMENT

Kruger v Mothapo and Another (82907/2014) [2015] ZAGPPHC 984 (11 December 2015)

[2015] ZAGPPHC 984**COURT**

North Gauteng High Court, Pretoria

BEFORE

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CASE / FILE NUMBER

82907/2014

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**IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)**

Case number: 82907/2014**DATE: 11 DECEMBER 2015**

In the matter between:

JOHANNES GEORGE

KRUGERAPPLICANT

And

NGAKA JOHANNES

MOTHAPO.....1ST

RESPONDENT

MMATAPA JOHANNA

MOTHAPO.....2ND

RESPONDENT

JUDGMENT

[1] On 29 May 2015 a final order was granted by me confirming an extended rule nisi in this case. The order is as follows:

1 The rule nisi dated 18 November 2014 is confirmed save for paragraph 2.1,

2 The respondents shall pay the applicants' costs including costs of two counsel.

- [2] These are the reasons which were reserved. The respondents opposed the confirmation of the rule nisi. The second respondent was cited as the spouse married in community of property to the first respondent. The applicant brought these proceedings in his capacity as a repayment administrator appointed in terms of section 84(1) read with section 83(1) of the Banks Act, Act No 94 of 1990 (the Banks Act). A rule nisi was granted by way of urgency on 23 November 2014 authorizing him to take into his possession all the assets of the First Respondent according to the provisions of section 84(1A)(b)(i) of the Banks Act. An Audi motor vehicle registration [C.....] [6.....] L was itemized as part of the assets to be taken into possession of the applicant in paragraph 2.1 of the said order.
- [3] The application emanated from an international marketing scheme operating in South Africa called TVI or TVI Express which the Registrar of Banks (the Registrar) investigated, it is regarded as a pyramid scheme and has been outlawed in several countries. More than 150 distributors under this scheme were inspected of which the applicant was one. On 17 September 2014 the Registrar issued a directive in terms of section 83(1) and section 84 of the Banks Act declaring that the first respondent who participated in this scheme, was conducting the business of a bank without being registered or authorized in terms of the Banks Act. The directive also appointed the Applicant to recover monies which the Registrar called upon the first respondent to repay in a directive (Annexure A) . It was conceded by the applicant that Annexure A was not served on the first respondent until service of the application and order of court on 27 November 2014.
- [4] This application is extraordinary in several respects. Firstly the applicant is empowered to perform his duties under section 84(1A)(b)(i) which are to recover and take possession of all the assets of the respondents without being required to obtain an order of court. The applicant however approaches the court in order to confirm his powers and assist him if necessary in exercising his duties, should the first respondent refuse to comply with his instructions. This is a prudent measure and the court can exercise its inherent jurisdiction in the interests of the administration of justice. Although uncommon, applications of this nature were granted in the following unreported cases: JG Kruger v FA Khambufe and two others (KNHC case no 2672/2012 judgment dated 12 November 2012); JG Kruger v M M M Bailey and two others (WCHC case no 1912/2014 judgment dated 9 June 2014).
- [5] The application was brought ex parte in the sense that no prior service on the respondents was given and the case was heard in camera in terms of the provisions of section 32 of the Superior Courts act no 10 of 2013. These steps were criticised by the first respondent as an abuse of court. While the courts are vigilant against such incursions into the well-established rules of procedure, the applicant provided justification. In his past dealings with TV1 distributors he has found that they and their attorneys are interlinked and there was a risk of prejudice by the first applicant being forewarned and dissipating the assets.
- [6] The case, in my view, is akin to an Anton Piller procedure. Universal Studios Inc v Network Video [1986] ZASCA 3; 1986

- [2] SA 734 (A). Thus the applicant was entitled to obtain a *njfe nisi* by initially proceeding *ex parte*. A court has a discretion to hold a

dosed hearing in special circumstances. The proper administration of justice is the overriding consideration. *Cerebos Food Corporation v Diverse Foods SA (Pty) Ltd* 1984 (4) SA 149 (T). The public interest in this case lies in ensuring the integrity of the applicant's public duties under the Banks Act in protecting depositors.

- [7] Three points in limine were raised by the first respondent. Firstly it was contended that as a jurisdictional pre-requisite for the applicant to exercise his powers under section 83, the Registrar of Banks, in addition to establishing that the person collected monies in contravention of the Banks Act, must establish that such monies have not been repaid to the depositors and are still outstanding. This submission is incorrect. There is no such requirement in the Banks Act. What is provided in section 83(1) is that the Registrar may direct a person in writing to repay such money not yet repaid.

This point is not upheld.

- [8] Secondly it was submitted that each claim should be itemised with sufficient particularity and the first respondent was unable to respond to the generalised allegation of monies received. It was argued that the identity of each claimant who had deposited money should be specified. This is not the methodology contemplated by section 84. On the contrary section 84(4A)(i) and (ii) require the repayment administrator to conduct further investigation into the affairs of the person subject to the directive to ascertain these very facts. This is also set out in Annexure A to the directive issued by the Registrar detailing the applicant's duties. There is no substance in this point.
- [9] Thirdly prescription of the claims against the first respondent was raised. It was argued that in October 2011 the operations of TV) Express were shut down and this application was only instituted in November 2014. This submission is misconceived. This application is not brought on behalf of the depositors or creditors and is not vindicatory in nature. It is brought in the exercise of the statutory powers vested in the applicant in terms of the Banks Act and prescription is not applicable. The same argument was rejected in *JG Kruger v M M M Bailey and two others* (supra). This point too has no merit.
- [10] The first respondent denied he was carrying on the business of a bank as contemplated by the Banks Act and the court should scrutinize the legal requirements in this regard. The applicant submitted that this issue is not properly before the court. It is the Registrar who issued the repayment directive under the Banks Act and it is he who considered the first respondent to be conducting the business of a bank without being registered. The registrar is not a party to this application and it was submitted no relief can be sought against him on the papers before me. This is indeed so.

- [11] The applicant submitted that the challenge to the registrar's finding in regard to the first respondent carrying on the business of a bank is a public administrative decision under the Banks Act which must be accepted as valid on face value in accordance with the maxim *omnia praesumuntur rite esse acta*. An administrative act which is challenged as unlawful cannot simply be disregarded. There must be legal proceedings to set it aside. Reliance was placed on *Oudekraat Estates (Pty) (Ltd) v City of Cape Town and Others* 2004 (6) SA 222 (SCA). This is the correct position. For purposes of the present application the registrar's decision is valid and remains so until set aside by a competent court. There are no review proceedings pending in this case unlike case 83137/14 which was on the roll together with this one.
- [12] The ownership of the Audi motor vehicle [C.....] [6.....] L was challenged. The first respondent stated that the vehicle was purchased under a credit agreement financed by ABSA Bank and he denied he was the owner. The vehicle has been repossessed by the bank and the Applicant abandoned relief in respect of this vehicle.
- [13] The complexity and gravity of this case warranted in my view the utilization of senior and junior counsel and costs of two counsel were granted.

NOWOSENETZ L, AJ

IN-THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA'S

CASE NO: 82907/2014

In the ex parte application of:

JOHANNES GEORGE KRUGERApplicant

AND

NGAKA JOHANNES MOTHAPO.....First Respondent

MMATAPA JOHANNAH MOTHAPO.....Second Respondent

BY ORDER OF THE COURT ORDER

HAVING heard the legal representatives of the Applicant and the First and Second Respondents,

IT IS ORDERED THAT:

1. The matter is postponed to the opposed motion roll of the day of May 2015.
2. The rule nisi is hereby extended to the day of May 2015.
3. Cost to be cost in the cause.

BY ORDER OF THE COURT

THE REGISTRAR

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Prepared on 12 October 2026 · Esheria