

SOUTH AFRICA / JUDGMENT

Mthatha Mall (Pty) Ltd v Tititi Boutique (Pty) Ltd (In Liquidation) (521/2020) [2020] ZAECGHC 75 (30 June 2020) [2020] ZAECGHC 75

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

521/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. 521/2020

In

the matter between:

MTHATHA
MALL (PTY)
LTD
Applicant
and
TITITI
BOUTIQUE (PTY) LTD (IN
LIQUIDATION)
Respondent

JUDGMENT

Bloem J :

1. This is an application for the eviction of the respondent from the applicant's property. The applicant is the Mthatha Mall (Pty) Ltd, a private company which is the owner of a shopping centre known as BT Ngebs Mall, situated at Mthatha. The respondent is Tititi Boutique (Pty) Ltd (in liquidation) t/a Tititi Boutique, a private company which was placed under final winding-up by order of court on 12 November 2019.
2. The only issue to be determined at this stage is whether this court can consider the applicant's claim for eviction against the respondent. At the hearing of the matter the applicant was given an opportunity to supplement its heads of argument to deal with this aspect. Mr Miller, counsel for the applicant, has drafted supplementary heads of argument with which I shall deal later in this judgment.
3. The set of facts against which this aspect must be decided is that the applicant and the respondent entered into a lease agreement during November 2016 in terms whereof the applicant let to the respondent a property situated at Shop 4 in the aforesaid shopping centre (the premises) for a period of 5 years commencing on 1 January 2017 and terminating on 31 December 2021. The respondent took occupation of the premises shortly after the conclusion of the lease agreement and is, according to the founding affidavit, still in occupation thereof. The respondent failed to make payment in terms of the lease agreement. The applicant cancelled the agreement on 30 May 2018. The respondent was placed under final winding-up by order of court on 12 November 2019. On 2 March 2020 the applicant instituted the present application seeking the eviction of "the Respondent and all those holding occupation through or under it" from the premises and ancillary relief.
4. Section 224(1) of the Companies Act[1] (the Companies Act of 2008) repealed the Companies Act[2] (the Companies Act of 1973), subject to sub-section 3. Section 224(3) provides that the repeal of the Companies Act of 1973 does not affect the transitional arrangements in Schedule 5 the Companies Act of 2008. Item 9 of Schedule 5[3] provides for the continued application of the Companies Act of 1973 to winding-up and liquidation proceedings. Item 9(1)

provides that despite the repeal of the Companies Act of 1973, until the date determined in terms of item 9(4), Chapter 14 of the

Companies Act of 1973 continues to apply with respect to the winding-up and liquidation of companies under the Companies Act of 2008, as if the Companies Act of 1973 had not been repealed, subject to sub-items (2) and (3). Those two sub-items

are, however, not relevant to the issue under consideration. Item 9(4)(a) provides that the relevant Minister, by notice in the Gazette, may determine a date on which item 9 ceases to have effect. The Minister has, to date, not given notice that item 9 has ceased to have effect. The result is that Chapter 14 of the Companies Act of 1973 continues to apply with respect to the winding-up and liquidation under the Companies Act of 2008.

5. Chapter 14 of the Companies Act of 1973 provides for the winding up of companies. Section 359, which falls under Chapter 14, deals with the institution of legal proceedings by or against a company against which a court has made a winding-up order or in respect whereof a special resolution for the voluntary winding-up of a company has been registered. That section reads as follows:

“(1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200 -

5.1. all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and

5.2. any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.

(2)(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.” (own underlining)

6. In *Umbogintwini Land and Investment Co (Pty) Ltd (in liquidation) v Barclays National Bank Ltd* and another^[4] it was held that a creditor who has at least a liquidated claim against a company in liquidation has two courses open to him.

He can submit a claim for proof in the estate or he can proceed in terms of section 359(2)(a) to enforce his claim against the company. The applicant has not endeavoured to prove its claim in terms of section 366 of the Companies Act of 1973, primarily because the Master of the High Court has not yet appointed a liquidator. The applicant has elected to institute legal proceedings in this court to enforce its claim for the respondent's eviction.

7. A person who intends to institute legal proceedings to enforce his or her claim against a company in liquidation is under a statutory

obligation to give notice, within a period of four weeks after the appointment of the liquidator, to the liquidator not less than three weeks' notice in writing before commencing the proceedings. In my view there are three jurisdictional facts that must be present before a person, who has

elected to institute legal proceedings to enforce his or her claim against a company in respect of which a court has made a winding-up order, can commence such legal proceedings. They are: (i) that the person's claim must have arisen before the commencement of the winding-up;^[5] (ii) that a liquidator must have been appointed by the Master to conduct the winding-up of the company; and (iii) that, within four weeks after the liquidator's appointment, the person shall give the liquidator at least three weeks' written notice of his or her intention to institute legal proceedings to enforce his or her claim.

8. Because a liquidator has not yet been appointed in the present matter, the applicant could not give notice as required by section 359(2)(a). In the circumstances, although the applicant's claim arose before the commencement of the winding-up, two of the jurisdictional facts have not been complied with. In my view the execution of an order of eviction that the applicant sought from this court against the respondent would, in terms of section 359(1)(b), be void.
9. Mr Miller seemed to have accepted that, ordinarily, an eviction order would under the above situation be incompetent. In his supplementary heads of argument counsel submitted:
"It is submitted that based upon the above, in the ordinary course, where proceedings are brought against a company in liquidation, prior to the appointment of a liquidator, and without giving notice to a liquidator such proceedings would not be competent and that the proceedings would need to be stayed pending the appointment of a liquidator and for notice to have to be given to the appointed liquidator in terms of section 359(2)(a) of the Act."
10. However, Mr Miller submitted that in this application the applicant is in effect not seeking the respondent's eviction, but rather the ejectment of Lornaweb (Pty) Ltd, being a party "holding occupation through or under" the respondent, as identified in prayer 2 of the notice of motion. That submission cannot be sustained. In its founding affidavit the applicant stated that it was informed by Bulelwa Paledi on 10 February 2020 that the respondent had "ceded all its rights and claims in respect of the pending High Court legal action and counterclaim respectively to its sister company, Lornaweb (Pty) Ltd also trading as Tititi Boutique" and that it was Lornaweb (Pty) Ltd which was trading as Tititi Boutique from the premises. The applicant ought to have joined Lornaweb (Pty) Ltd in these proceedings for an order that it be evicted from the premises or it ought to have instituted legal proceedings against Lornaweb (Pty) Ltd alone when it instituted these proceedings on 2 March 2020. It failed to do so. It cannot obtain relief against Lornaweb (Pty) Ltd through the respondent, since they are distinct legal entities.
11. In the circumstances, the relief sought by the applicant cannot be granted. In terms of section 359(1)(a) this application must be suspended until the appointment of a liquidator. There having been no opposition, there shall be no order as to the costs of the application.
12. This application was postponed on 31 March 2020 and 2 June 2020, with the costs occasioned by the postponement having been reserved on each occasion. Mr Miller submitted that I should order Ms Paledi to pay those reserved costs. I am unable to make an order in respect

of the costs which were reserved on 31 March 2020, certainly not against Ms Paledi because she has not been given an opportunity to state why she should not pay those costs. Secondly, I am unaware of the full facts which necessitated the postponement of the application of 31 March 2020. The situation regarding the costs which were reserved on 2 June 2020 is different.

13. On 31 March 2020 the application was postponed sine die. It was ordered that the respondent should deliver its answering affidavits on 17 April 2020 and that, in the event of the lockdown period being extended, the answering affidavit be delivered on a day following the termination of the extended lockdown period. The lockdown was extended and the respondent did not deliver answering affidavits. Unsurprisingly, the applicant's attorney caused the matter to be set down for hearing on the opposed uncontested roll on 2 June 2020. The notice of set down was served on the respondent's local correspondent attorneys on 26 May 2020. On 2 June 2020 my secretary alerted me to an email that she received from Ms Paledi at 08h34 wherein she confirmed that the matter was on the unopposed roll and that it "was set down without any proper service and knowledge as our offices are still under lockdown and we are based in Durban". Ms Paledi requested "an appearance today before court via virtual connection in order to place the facts as contained in [an] attached affidavit for

postponement on record" and requested my secretary to bring the affidavit to my attention. I refused to hear the matter other than in open court.

14. In that affidavit Ms Paledi stated that the lockdown interrupted the consultation with counsel and the preparation of the answering

affidavits, that she assumed that, after the delivery of the notice of intention to oppose, the "matter would simply be adjourned sine die", and that it would be in the interest of justice for the matter to be adjourned to enable the respondent to deliver its answering affidavit.

15. When the matter was called on 2 June 2020 the respondent was represented by the local attorney who had no instructions from Ms Paledi, his instructing attorney. Despite submissions on behalf of the applicant, that the application be finalised, I postponed it to the opposed roll on 18 June 2020, ordered the respondent to deliver its answering affidavits, if any, by 10 June 2020 and called upon Ms Paledi to deliver an affidavit on or before 10 June 2020 to explain why she should not pay the costs occasioned by the postponement. Neither the respondent nor Ms Paledi delivered any affidavits, as ordered. On 18 June 2020 Ms Paledi made an appearance, first in her capacity as the respondent's director. When it was pointed out that she could not appear in that capacity as a result of the respondent's winding-up, she claimed to appear in her capacity as the sole director of Ndamase Inc, the applicant in the application for the winding-up of the respondent. She claimed that she appeared as an interested creditor despite the fact that there was no application for Ndamase Inc to intervene as an interested party in these proceedings. Ms Paledi, a practising attorney, is also the sole director of Lornaweb (Pty) Ltd. After hearing the applicant's submissions, Ms

Paledi was afforded an opportunity to explain why she personally should not pay the costs occasioned by the postponement on 2 June 2020. She did so. With absolute disregard for the rules of the court on 26 June 2020 Ms Paledi filed heads of argument purportedly dealing with why she should not pay the costs occasioned by the postponement on 2 June 2020, but effectively giving evidence and making submissions on the merits of the application. Those heads of argument concluded with the prayer that the application be “dismissed with punitive costs de bonis propriis”.

16. Ms Paledi was the cause of the postponement on 2 June 2020. Had she, in her capacity as sole director of Ndamase Inc or Lornaweb (Pty) Ltd, caused answering affidavits to be delivered timeously, the application would in all probability have been finalised on that day. It would, under the circumstances, be appropriate to order her, in her personal capacity, to pay the costs occasioned by that postponement.

17. In the result, it is ordered that:

17.1. the application be and is hereby suspended until the appointment of a liquidator;

17.2. Bulelwa Paledi shall pay the wasted costs occasioned by the postponement on 2 June 2020, such costs:

17.2.1. to include the costs of an opposed application for a postponement;

17.2.2. to be on the scale as between party and party.

G H BLOEM

Judge of the High Court

APPEARANCE:

For the applicant: Mr T Miller, instructed by GVS Law, Durbanville and Wheeldon Rushmere & Cole, Grahamstown.

For the respondent: No appearance, although Ms B Paledi was in attendance. She is a practising attorney, the sole director of the respondent and the sole director of Ndamase Inc, the company which applied for the respondent’s liquidation.

Date of hearing: 18 June 2020. Date of delivery of judgment: 30 June 2020.

[1] Companies Act, 2008 (Act 71 of 2008).

[2] Companies Act, 1973 (Act 61 of 1973).

[3] Item 9 of Schedule 5 of the Companies Act of 2008 reads as follows: “9 Continued application of previous Act to winding-up and liquidation (1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not

been repealed subject to sub-items (2) and (3). (2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2. (3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails. (4) The Minister, by notice in the Gazette, may- (a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and (b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a)."

[3] Item 9 of Schedule 5 of the Companies Act of 2008 reads as follows:

"9 Continued application of previous Act to winding-up and liquidation

- (1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).
- (2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.
- (3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.
- (4) The Minister, by notice in the Gazette, may-
 - (a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and
 - (b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a)."

[4] Umbogintwini Land and Investment Co (Pty) Ltd (in liquidation) v Barclays National Bank Ltd and another 1987

(4) SA 894 (AD).

[5] Barlows Tractor Co (Pty) Ltd v Townsend

[1996] ZASCA 3; 1996

(2) SA 869 (AD) at 879C-D).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2020/75.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mthatha-mall-pty-ltd-v-tititi-unknown-topic-aecghc-2020>

Prepared on 12 October 2026 · Esheria