

SOUTH AFRICA / JUDGMENT

Multipro Investments v EB Diamonds CC (238/2019) [2020] ZANCHC 1 (17 January 2020) [2020] ZANCHC 1

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

238/2019

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IN

THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case

Number: 238/2019

Heard

on: 11/10/2019

Delivered on 17/01/2020

In

the matter between:

MULTIPRO
INVESTMENTS APPLICANT
and
EB
DIAMONDS
CC RESPONDENT

JUDGMENT

MAMOSEBO J

[1] The applicant, Multipro Investments (Pty) Ltd, is seeking the following relief:

1.1 That the respondent, EB Diamonds CC, be placed under provisional liquidation in the hands of the Master of the High Court, Kimberley;

1.2 A provisional order issue calling upon EB Diamonds CC to show cause on a date to be determined by this court why a final liquidation order should not be granted against it;

1.3 A copy of the provisional liquidation order be served on:

1.3.1 EB Diamonds CC's registered address;

1.3.2 Any registered trade union that, as far as the sheriff can reasonably ascertain, represented any of the employees of EB Diamonds CC; and

1.3.3 EB Diamonds CC's employees, if any, by affixing a copy of the order and application to any notice board to which the employees have access inside EB Diamonds CC's premises; or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which EB Diamonds CC conducted any business at the time of the presentation of the application papers.

1.4 A copy of the provisional liquidation be delivered on:

1.4.1 The South African Revenue Services; and

1.4.2 The Master of the High Court.

1.5 The costs of this application be costs in the winding-up of EB Diamonds CC.

For convenience the parties will be referred to as they are cited.

Locus Standi

[2] EB Diamonds claims that Multipro Investments lacks the necessary locus standi to bring this application and it has further failed to show evidence that it is a party to the agreement. Mindful of the fact that EB Diamonds has not filed any answering affidavit before me that substantiates its reasons for the contention that Multipro Investments lacks the necessary locus standi, the Memorandum of Agreement shows the partner represented by the deponent in this application as Iweka Gabriel Achebe. In the minutes of the general meeting on 15 and 16 April 2015, Annexure "FA4", the following was captured:

"It was noted on this meeting that

- a. Multipro Investments (Pty) Ltd (Reg. No. 2014/218591/07) is the nominated entity holding Gabriel Achebe Iweka's interest in the shareholding.

b. That this meeting was called for in line with the signed agreement to this transaction."

As correctly submitted by Mr Eillert, this Court has already ruled on the indebtedness application in favour of Multipro Investments as a party. I cannot discern any basis to support the contention that Multipro Investments is not a party to the agreement and therefore lacks the required locus standi. I am therefore not persuaded by the argument in respect of locus standi and this contention stands to fail.

[3] The Notice of Motion was accompanied by the Founding Affidavit of Gabriel Achebe Iweka, a director of Multipro Investments. Of importance in the Notice of Motion are the dates provided to EB Diamonds CC in the event of opposition. EB Diamonds CC had five days to file a Notice of its Intention to Oppose and fifteen days to file its Answering Affidavit. Further, EB Diamonds CC was informed of the date of 15 March 2019 as the date when the application will be heard. The Notice of Motion together with all the

annexures were personally served on Mrs J Brits, the wife of the owner of EB Diamonds CC, on 28 February 2019. EB Diamonds CC served

its Notice of Intention to Oppose the application dated 27 March 2019 on Multipro Investments on 28 March 2019 and filed it with the Registrar of this court on the same date.

[4] As at the date of hearing the Notice of Intention to Oppose that was in the file did not bear the Registrar's stamp; there was also no formal condonation application by EB Diamonds CC for the late filing of the Answering Affidavit and EB Diamonds CC's

answering affidavit was not contained in the court file either. Multipro Investments' Opposing Affidavit to the condonation

application was served on EB Diamonds CC but was unsigned and not filed with the Registrar. Mr Olivier, counsel for EB Diamonds

CC, urged me to accept and hear the application for condonation in that form. There was no objection by counsel for Multipro Investments, Mr Eillert, I allowed Mr Olivier to hand up the condonation papers and Mr Eillert also to hand up the Answering Affidavit thereto for consideration. Having considered the condonation application I refused condonation and reserved my reasons, which now follow.

[5] The application on the merits, including the condonation application, was heard on 11 October 2019 in respect of which judgment was reserved. Surprisingly on 15 October 2019, four days later, I received correspondence from EB Diamonds CC's instructing

attorneys, Ettienne Naude Attorneys, already requesting reasons for the refusal of the condonation application. This request for

reasons

was unwarranted since it was part and parcel of the composite

judgment.

[6] Condonation is not to be had merely for the asking[1]. The test for condonation is well known but worth repeating. In *Melane v Santam Insurance Co Ltd*[2] the following was said:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interests in finality must not be overlooked.”

The Supreme Court of Appeal reiterated the principle in *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited*.[3]

[7] EB Diamonds CC’s Answering Affidavit was out of time by 7 months. The reasons furnished for the delay in filing it were:

7.1 Multipro Investments had launched proceedings against EB Diamonds and other parties for the repayment of R7.5 million for which an order was granted in its favour on 26 May 2017.

7.2 Notwithstanding that an application for the rescission of the said judgment was lodged by EB Diamonds and an Answering Affidavit served thereto, the matter was never enrolled for hearing. EB Diamonds claims that by initiating the rescission application it placed its indebtedness in dispute in June 2017.

7.3 There were several other litigation proceedings that EB Diamonds had to fend off to avoid being liquidated or sequestrated. EB Diamonds had already spent most of its available capital and time fending them off and blames Multipro Investments for its financial plight by its overzealous litigation.

7.4 Multipro Investments have not abandoned or enforced the judgment of 26 May 2016 and, based on the *Badenhorst* principle, cannot rely on the same cause of action to pursue liquidation proceedings.

7.5 EB Diamonds further questions Multipro Investments’ locus standi in the main application.

[8] In its Answering Affidavit deposed to by Johannes Gerhardus Van Buuren Multipro Investments explains that its locus standi arises from having been party to the main agreement with two other entities, Sparax Trading CC and Rauties Diamonds (Pty) Ltd which were both placed under liquidation without EB Diamonds opposing the liquidation. Multipro Investments concedes that a rescission

application was launched but contends that EB Diamonds failed to take any steps to pursue the matter after filing its founding papers. Multipro Investments submit that the delay by EB Diamonds in filing its Answering Affidavit was used as a tactic to obtain a further postponement.

[9] As early as 11 September 2019, exactly a month before the application could be heard on 11 October 2019, Mr A Botha of Duncan & Rothman Attorneys, acting for Multipro Investments, addressed a letter to Engelsman Magabane Attorneys which was emailed on the same day at 11:42 am stating that:

“1. We refer to the abovementioned matter and noted that the application serves on the opposed roll on 11 October 2019.

2. We furthermore note that we have not yet received an opposing affidavit in this regard.
3. Kindly obtain instructions from your instructing attorney, Messrs Ettiene Naude Attorneys, in order to clarify the delay.
4. Our clients’ rights remain reserved.

[10] A follow up letter from Duncan & Rothman Attorneys dated 26 September 2019 addressed to Engelsman Magabane which was emailed on the same day at 02:58 pm reads:

“We refer to the above matter as well as telephonic conversation between writer and yourself on 25 September 2019.

We shall be pleased if you could confirm whether you have received any feedback from your instructing attorneys regarding the aforementioned matter which serves on the opposed roll of 11 October 2019.”

[11] A third letter, emailed on the same day at 12:14 pm, was addressed to Engelsman and Magabane dated 30 September 2019 reads:

“We refer to the abovementioned matter as well as the telephonic conversation between yourself and writer hereof on even date.

We confirm that you are still awaiting instructions from your instructing attorney regarding the filing of an answering affidavit if any.

We furthermore confirm that your instructing attorney is well aware that the matter serves on the opposed roll on the 11th of October 2019, and that we are of the intention to proceed in moving for the relief as prayed for.

We furthermore confirm that we will serve the necessary heads of argument on your offices on/ or before 07 October 2019.”

[12] Engelsman and Magabane only responded on 01 October 2019 by letter addressed to Duncan & Rothman Attorneys to this effect:

“Your letter dated 25 September 2019 refers.

Kindly note that we had provided your correspondence to the respondent.

We had also telephoned the correspondent and do not have any instructions at this juncture.”

[13] In an effort to demonstrate a pattern by EB Diamonds to seek a postponement on the day of trial, having failed to file an Answering Affidavit timeously, Multipro Investments attached a copy of the judgment dated 06 June 2017 wherein this court refused to grant EB Diamonds CC and others a postponement. Para 12 of the judgment needs repetition:

“[12] The respondents have not been deprived of their constitutional right of access to the court. The manner in which the respondents have dealt with this litigation amounts to an abuse of court process. In my view the respondents should have filed a substantive application timeously as soon as they became aware of circumstances that prevented them from complying with the rules of court. As stated hereinbefore, they already served and filed their notice of intention to oppose by 30 January 2017 and until 26 May 2017 no opposing papers were in the court file; this clearly shows some tactical manoeuvre by the respondents for the purpose of obtaining an advantage to which they were not legitimately entitled. This is a nonchalant approach which seems to be overlooking the interests of the other party. The respondents’ application has fallen woefully short of what is required of an application for a postponement. It is for these reasons that I refused to grant the application for the postponement and made the orders as set out in paragraph 3 of this judgment.”

[14] EB Diamonds’ explanation fails to deal with the full, detailed and accurate account of the causes of the delay and their effects notwithstanding the repeated reminders from the offices of Duncan & Rothman on the outstanding Answering Affidavit. The explanation is silent when it comes to the prejudice to Multipro Investments if the matter were not to be heard on 11 October

2019. EB Diamonds does not indicate its interest in the finality of the judgment. The pattern of dilatoriness by EB

Diamonds in filing its papers timeously is manifest. The test to be met in condonation applications has not been met. In any event,

prospects of success by EB Diamonds in the application are bleak. It is for the above reasons that the application for condonation failed.

Doctrine of estoppel/res judicata

[15] On this doctrine counsel for EB Diamonds, Mr Olivier, maintained that since this Court had granted judgment in favour of Multipro

Investments premised upon the same cause of action, which has not been executed or set aside, that judgment stands; that there should be an end to litigation and EB Diamonds should not be vexed twice for the same cause; that Multipro Investments be estopped from proceeding with the liquidation application until such time as it abandoned the judgment or attempts to execute the judgment but failed to find sufficient property to satisfy the judgment.

[16] Mr Eillert, for Multipro Investments, submitted that the two applications were distinct from each other; that the judgment

referred to by EB Diamonds [Case No 2751/16] dealt with the respondents' indebtedness to Multipro Investments in the amount

of R7.5 million and the current application [Case No 238/19] is aimed at liquidating EB Diamonds. In as far as the rescission

application is concerned, submitted counsel, notwithstanding that papers were filed in 2017, EB Diamonds has not taken any steps to have the rescission application adjudicated upon. EB Diamonds owes Multipro Investments in excess of R200.00 and its onus is to satisfy the court that it is the creditor of the amount in excess of R200.00 which is due.

[17] The submission that Multipro Investments must be estopped because its action amounts to vexed litigation cannot be correct. The cause of action which resulted in the order made in 2017 and the current application are not the same. My view is supported by the pronouncements:

17.1 Trengove AJ in Investec Bank Ltd and Another v Mutemeri and Another[4] in which the following was said:

"While the creditor's underlying motive may be to obtain payment of his debt, an application for sequestration in fact does not constitute proceedings for the recovery of a debt, but rather its purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally. An applicant for sequestration must have a liquidated claim against the respondent, not because the application is one for the enforcement of the claim, but merely to ensure that applications for sequestration are only brought by creditors with a sufficient interest in the sequestration. Once the sequestration order is granted, the enforcement of the sequestrating creditor's claim is governed by the same rules that apply to the claims of all the other creditors in the estate. The order for the sequestration of the debtor's estate is thus not an order for the enforcement of the sequestrating creditor's claim."

17.2 In endorsing the pronouncements by Trengove AJ (above), the Supreme Court of Appeal held in Naidoo v Absa Bank Ltd[5]:

"This reasoning accords with this court's description of a sequestration order as a species of execution, affecting not only the rights of the two litigants, but also of third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent –

it is not an ordinary judgment entitling a creditor to execute against a debtor."

17.3 In Collier v Priest[6] the Appellate Division held: "[t]he order placing a person's estate under sequestration cannot fittingly be described as an order for a debt due by a debtor to the creditor. Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in

motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. The order sequestrating his estate affects the civil status of the debtor and results in vesting his estate in the Master.”

[18] Regard being had to the aforementioned precedents, the submissions by Mr Olivier in this regard pertaining to estoppel cannot stand.

I therefore find that EB Diamonds has not made out its case for Multipro Investments to be estopped in this application.

[19] Essentially, in as far as the argument by EB Diamonds is concerned pertaining to res judicata, it is alleging or claiming the following: That the claim before me has already or could have been litigated, and therefore, should not be litigated again. When addressing a res judicata argument a court will usually consider three factors. First, whether there was previous litigation in which identical claims were raised, or in which identical claims could have been raised. Secondly, that the parties must be the same as those who litigated the original action; and thirdly, that the original action must have received final judgment on the merits.

[20] It is common cause that the relief sought by Multipro Investments is a provisional liquidation of EB Diamonds which had not been adjudicated before. Redress is sought only against EB Diamonds as the other parties were liquidated in separate proceedings. The claim against EB Diamonds in the other matter was for its indebtedness whereas the current application is for provisional liquidation. The defence of res judicata is, in my view, unsubstantiated.

The Badenhorst principle

[21] Mr Olivier, relying on the principle in *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[7], submitted that liquidation proceedings should not be used as the correct mechanism to enforce payment of a debt which has been

disputed by the debtor in good faith. Before dealing with this principle I must reiterate that nowhere in the papers, based on the failure by EB Diamonds to file opposing papers, in the 2017 judgment and in the application before me, was the alleged dispute of a debt discernible. The application, in casu, deals with provisional liquidation of EB Diamonds and not its indebtedness.

[22] The Supreme Court of Appeal made the following remarks in *Exploitatien v Beleggingsmaatschappij v Honig*[8] addressing the Badenhorst principle:

*“[11] ...Sequestration proceedings are designed to bring about a concursus creditorem to ensure an equal distribution between creditors, and are inappropriate to resolve a dispute as to the existence or otherwise of a debt. Consequently, where there is a genuine and bona fide dispute as to whether a respondent in sequestration proceedings is indebted to the applicant (as in this case), the court should as a general rule dismiss the application. This is the so-called ‘Badenhorst rule’. Named after the decision in *Badenhorst v Northern Construction Enterprises Ltd*, this principle was reaffirmed by this court in *Kalil v Decotex (Pty) Ltd & another* and applies equally in both winding up and sequestration*

proceedings.”

At the cost repetition, the matter before me is not to determine indebtedness which was already determined in earlier proceeding by this Court. I have already dealt with Investec Bank Ltd and Another v Mutemeri and Another, Naidoo v Absa Bank Ltd and Collier v Priest above and the reasoning requires no repetition. Reliance by EB Diamonds on the Badenhorst principle is therefore unsubstantiated and stands to be dismissed.

Has Multipro Investments met the requirements for provisional liquidation?

[23] Multipro Investments is a creditor to EB Diamonds in the amount of R 7 500 000.00 (R7.5M) as a result of a written agreement entered into on 10 October 2014 towards two mining projects. On 04 September 2017 a letter of demand from Senekal Simmonds Attorneys on instructions of Multipro Investments was served by the sheriff in terms of s 69(1)(A) of the Close Corporations Act[9] read with Schedule 5, s 9(2) and s 344(F) of the Companies Act,[10] demanding payment in the sum of R7.5 million within a period of 21 days from date of service. EB Diamonds has not paid the said debt.

[24] Sufficient security was furnished to the Master of the High Court, Kimberley, for the payment of all the necessary fees and

disbursements for the winding up until the appointment of a provisional liquidator. None of the parties have raised as an issue

that this Court lacks jurisdiction to hear this application. It has already been alleged and ordered that EB Diamonds owes Multipro

Investments, the creditor in this case, an amount of R7,5 M which is due and payable but remains unpaid. Multipro Investments does not hold any security for EB Diamonds' indebtedness to it. Multipro Investments has further effected service of the application in terms of sections 346(4) and 346(4A) of the Companies Act[11].

[25] In *Kyle and Others v Maritz and Pieterse Inc*[12] the Court held that in applications for provisional winding up of a company the onus is on the applicant to establish that he or she or it is a creditor with the requisite locus standi to apply for the winding up of a respondent. It must establish that it is first entitled to a provisional order on a prima facie basis. It must further show on affidavit that the balance of probabilities are in its favour.

[26] The Court in *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another*[13] pronounced that even if the applicant establishes its claim on a prima facie basis, the Court will refuse the application if the claim is disputed in good faith and on reasonable grounds. It was further stated that where the applicant has shown the debt exists prima facie, the onus is on the respondent to show that it is bona fide disputed on reasonable grounds. See also *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[14]. I have already stated earlier that the dispute was not raised before me but in the abandoned rescission application.

[27] The papers show that there is an agreement between the parties. Initially, instead of Multipro Investments' name reflected as a partner the deponent to the founding affidavit's name was inserted in lieu of a company still to be formed. This was later confirmed to be so in the minutes of their meeting. I have already dealt with the issue of the locus standi of Multipro Investments. This Court has already ordered that the respondents, of which EB Diamonds is the fifth respondent, pay the R7.5 M jointly and severally, the one paying the other to be absolved. Multipro Investments is not seeking payment of this debt but brought this liquidation proceedings for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent.

[28] All the defences raised by EB Diamonds to disqualify Multipro Investments from succeeding with the winding up application have been unsuccessful. I could not discern in the papers before me that EB Diamonds were genuine in disputing the claim and did so on reasonable grounds. EB Diamonds, in my view, seeks to create a dispute merely to avoid being wound up. I have also not been

persuaded that it will not be just and equitable to wind up EB Diamonds.

[29] Multipro Investments has accordingly made out a proper case to persuade me to exercise my discretion in its favour by granting the relief sought.

[30] In the result, the following order is made:

1. Condonation for the late filing of the Respondent's (EB Diamonds CC) answering affidavit is refused.
2. The Respondent is placed under provisional liquidation in the hands of the Master of the High Court, Kimberley.
3. A Rule Nisi is issued calling upon the Respondent and any other interested parties to show cause to this Court, if any, on Friday 14 February 2020 why a final order of liquidation should not be granted against the Respondent.

4. This order should be served forthwith on:

4.1 The Respondent's registered address;

4.2 Any registered trade union that, as far as the sheriff can reasonably ascertain, represented any of the employees of the respondent; and

4.3 The Respondent's employees, if any, by affixing a copy of the order and application to any notice board to which the employees have access inside the Respondent's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable; failing which to the front door of the premises from which the respondent conducted any business at the time of the presentation of the application papers.

5. A copy of this order should be delivered on :

5.1 The South African Revenue Services; and

5.2 The Master of the High Court.

6. The costs of this application be costs in the winding-up of the Respondent.

MAMOSEBO J

NORTHERN CAPE DIVISION

For the Applicant: Adv A Eillert

Instructed by: Senekal Simmonds Attorneys

C/O Duncan & Rothman

For the Respondent: Adv AD Olivier

Instructed by: Etienne Naude Attorneys

C/O Engelsman Magabane Inc

[1] Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) at para 6

[2] 1962 (4) SA 531 (A) at 532B - E

[3] 2017 (6) SA 90 (SCA) at para26

[4] 2010 (1) SA 265 (GSJ) at 274 - 275

[5] 2010 (4) SA 597 (SCA) at para 4

[6] 1931 AD 290 at 299

[7] 1956 (2) SA 347 (T) at 348

[8] (649/2010) [2011] ZASCA 182 (30 September 2011)

[9] 69 of 1984

[10] 61 of 1973

[11] 61 of 1973

[12] 2002 (3) All SA 223 (T) at para 12

[13] 2015 (4) SA 449 (WCC) at para 8

[14] 1956 (2) SA 346 (T) at 347H – 348C

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Prepared on 11 October 2026 · Esheria