

SOUTH AFRICA / JUDGMENT

Nedbank v Afro Renaissance Investments (Pty) Ltd (62435/2019) [2020] ZAGPPHC 168 (21 April 2020) [2020] ZAGPPHC 168

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi

CASE / FILE NUMBER

62435/2019

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

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

Case Number:

62435/2019

21/4/2020

In the

matter between:

NEDBANK LIMITED

APPLICANT

and

AFRO RENNAISENCE

INVESTMENTS (PTY) LTD

RESPONDENT

(Reg.

No: 1996/011305/07)

JUDGMENT**KUBUSHI J**

- [1] The applicant, Nedbank Limited, approached court in terms of sections 344 and 345 of the Companies Act 61 of 1973 (" the Act") for an order to have the respondent, Afro Renaissance Investments (Pty) Ltd, placed In final liquidation.
- [2] The application for the liquidation of the respondent is pursuant to a judgment debt in the amount of R466 048.60 (Four Hundred and Sixty Six Thousand Forty Eight Rand Sixty Cents) obtained by the applicant against the respondent and its sole director Mr Simon Thabo Ramosa ("Mr Ramosa"), jointly and severally the one paying the other to be absolved. The proceedings herein are however. against the respondent only.
- [3] It is the applicant's case that the respondent is unable to pay Its debts and/or that it would be just and equitable that the respondent be wound up and is in any event commercially and de facto insolvent. In support of these ground for liquidation the applicant relies on a nulla bona return of service furnished by the sheriff.
- [4] The respondent Is opposing the application and contends that the applicant has failed to make out a case for Its liquidation. Of significance the respondent has raised a point in limine contending that the sheriff's nulla bona return, which, it alleges, was not properly served, is fatally defective to such an extent that no reliance can be placed on it. The argument Is that the improper service of the writ of execution on the respondent renders the liquidation application completely immature, defective and should as such, be dismissed.
- [5] On the merits part of the matter the respondent contends that he has a bona fide defence In that it is not Insolvent and has the means to pay off the debt and that should the winding up application be grant ed the respondent, In particular, Its employees and director, will suffer prejudice.
- [6] In response there to, the applicant's contention Is that the respondent has failed to make payment and/or settlement to date of the hearing and relies upon outstanding Invoices, which is mere spes In the financial statement, due to the respondent by the municipality of Lephalale.
- [7] The provisions of the relevant sections of the Act stipulate that a company may be w o un d up by the court if the company is unable to pay its debts as described in section 345 or If it appears to the court that it is just and equitable that the company should be wound up.[1]

[8] A company or body corporate shall, amongst others, be deemed to be unable to pay its debts if any process issued on a judgment, decree or order of any court In favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order that any disposable property found did not up on sale satisfy such process; or it is proved to the satisfaction of the

court that the company is unable to pay its debts.[2]

POINT IN LIMINE

[9] In an attempt to satisfy the judgment debt, the applicant issued a writ of attachment against the movable assets of the respondent. The writ of attachment was couched in the following manner:

"You are hereby directed to attach and take into execution the movable goods of Afro Renaissance Investments (Pty) Ltd, the abovementioned First Defendant, at its business address at 2 Pennyquick, Blue value Golf Estate, St Andrews Boulevard, Midrand, and same to cause to be realised by public auction the sum of R466 048.60..."

[10] The Sheriff in execution of the judgment attempted to execute the writ of attachment at the address stipulated in the writ of attachment and a nulla bona return was furnished.

[11] According to the sheriff's return of service payment of the judgment debt together with the sheriff's costs plus VAT was demanded from Ms Keke Ramosa ("Ms Ramosa"), the daughter of the owner of the respondent who is also an employee of the respondent. The return of service certify that Ms Ramosa declared that she has no money, moveable or disposable property wherewith to satisfy the said warrant. No movable or disposable property was pointed out to the sheriff, or could after a diligent search and enquiry be found at the given address. The return further certified that Ms Ramosawa was requested to declare whether she owns any immovable property which is executable, on which the reply was, no.

[12] In terms of Uniform rule 45 (3) whenever by any process of the court the sheriff is commanded to levy and raise any sum of money upon the goods of any person, . he shall forthwith proceed to the dwelling -house or place of employment or business of such person and there demand satisfaction of the writ, and failing satisfaction demand that so much movable and disposable property be pointed as he may deem sufficient to satisfy the writ and failing such pointing out search for such property.

[13] The respondent in this matter being a juristic person, service of the writ would have to be made at its place of business or at the very least its registered address. The writ of attachment, In this Instance, dearly stipulates the business address of the respondent as 2 Pennyquick, Blue Value Golf Estate, St Andrews Boulevard, Midrand and it is the address where the writ of attachment was served.

- [14] It is the respondent's case that the writ has been improperly served in that 2 Pennyquick, Blue Value Golf Estate, St Andrews Boulevard, Midrand, is neither its registered office nor its principal place of business but its sole directors' place of residence. According to the respondent its principal place of business which is also Its registered office is 249 Basden Avenue, Die Hoewes. Kosmosdal, Centurion and that is where it also carries on its business that is, its main place of business.
- [15] For the reasons that follow hereunder, I am in agreement with the respondent's argument that the return of service rendered by the sheriff in respect of the writ of attachment is defective. Firstly, on reading the return of service the sense that one gets is that the sheriff demanded satisfaction of the judgment debt from Ms Ramosa In her personal capacity. The return of service certify that Ms Ramosa was requested to declare whether she; had any money, movable or disposable property to certify the judgment debt. It does not appear as if she was requested to declare whether the respondent has any money, movable or disposable property to satisfy the judgment debt. It could not have been expected of Ms Ramosa, in her personal capacity, to satisfy the debts of the respondent. What ought to have happened is for the sheriff to enquire from Ms Ramosa whether the res po n den t has any money, movable or disposable property to satisfy its debt. The sheriffs' failure to make the correct enquiry renders the nullo bono return of service defective for want of proper service.
- [16] This finding sustains the respondent's argument that if the writ was properly served , as i have indicated above, it would have come to the sheriffs attention that the respondent has movable or disposable property.
- [17] Secondly , the applicant in its founding papers stat es that the respondent's principal place of business is 2 Pennyquick, Blue Value Golf Estate, St Andrews Boulevard, Midrand, which is denied by the respondent. The alleged address of the respondent's place of business does not appear from the company report attached to the founding affidavit. The company report only states the register ed address and postal address, which is 249 Basden Avenue, Die Hoewes, Kosmosdal,. Centurion.
- [18] The applicant, in argument, relies on the sheriff's return of service, which states that the writ was served at the respondent' s place of business. This argument is not sustainable because the address of service was provided by the applicant in the writ of attachment as the place of business of the respondent. Besides what is endorsed in the sheriff's return of service, it is not clear from the papers on what basis the applicant contends that the residential address of the respondent's sole director is the respondent's place of business. It is required that the sheriff adheres strictly to the provisions of subrule 45 (3), for, unless this is done, there is no valid attachment.[3]
- [19] On the papers as they stand, the applicant makes no other case against the respondent as to the respondent's insolvency, except its reliance on the nulla bona return. Having found the return of service defective for want of proper service, the application ought, on this point alone, to fail.

[20] In the circumstances, the application is dismissed with costs.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

Appearance

Applicant's Counsel

: Adv. W. Steyn.

Applicant's Attorneys

: Baloyi Swart & Associates Incorporated.

Respondent's Counsel

: Adv. M. Rakgoale

Respondent's Attorneys

: Gwebu Incorporated Attorneys.

Date of hearing

: 06 February 2020 .

Date of

judgment

: 21 April 2020

[1] Section 344 (f) and (h) of the Act .

[2] Section 345 (b) and (c) of the Act.

[3] See *Reichenberg v Deputy Sheriff Johannesburg: In re Reichenberg v Joel Melemed & Hurwitz* 1992 (2) SA 381 (W) at 383F.

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