

SOUTH AFRICA / JUDGMENT

Nkosi v Van's Auctioneer and Another (9725/2017) [2017] ZAGPPHC 367 (21 June 2017) [2017] ZAGPPHC 367

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo

CASE / FILE NUMBER

9725/2017

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IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO:9725/2017

Not reportable

Not of interest to other judges

21/6/2017

GODFREY M NKOSI APPLICANT

and

VAN'S AUCTIONEER FIRST RESPONDENT

TUTOR TRUST SECOND RESPONDENT

JUDGMENT

KHUMALO J

INTRODUCTION

- [1] The Applicant is an unrehabilitated insolvent, who has in persona , launched this application seeking an order interdicting Van's Auctioneer and Tutor Trust, the 1st and 2nd Respondent, respectively, from proceeding with the sale of his properties out of the insolvent estate pending his application for leave to appeal to the Supreme court of Appeal

and for the court to also confirm that the leave to appeal effectively suspends the operation and execution of the decision he is applying to appeal against. He is also seeking costs on a punitive scale.

- [2] Van's Auctioneer ("Van") is an auction house. The Applicant alleges to have cited Van as the auctioneer appointed by 2nd Respondent, Tutor Trust ("Tutor") to sell all his immovable properties. Acting as an agent of Tutor, Van had advertised the auction of the insolvent estate's immovable properties from 14 to 16 February 2016. Applicant has further cited Tutor allegedly as an agent or associate company owned by the trustees in his insolvent estate on whose authority Van is conducting the auction.
- [3] The 1st Respondent is not opposing the Application and is to abide by the decision of the court.
- [4] The Applicant has filed two more set of papers besides a Supplementary and Replying Affidavits. One is an Amended Notice of

Motion and the other an Application in terms of Rule 23 (1) of the Uniform Rules of Court, High Court (11Rules").

- [5] In the Amended Notice of Motion the Applicant all of a sudden cites five Respondents, having added to the two entities already cited the names of the three trustees J F Fourie ("Fourie"), K Van der Westhuizen ("Van der Westhuizen") and M S Yeun ("Yeun") as the 3rd, 4th and 5th Respondents, respectively. He therein seeks that an interdict be granted against the Respondents pending finalisation of all the Applications for leave to appeal he has launched against the orders empowering such sales and any other pending Application he has brought against the Respondents. He also seeks that the Respondents be ordered to answer the pending Applications directly and a declaratory order be made that the launched leave to appeal effectively suspends the operation and execution of the decisions he is appealing against.
- [6] In the Rule 23 (1) Notice, he only cites four Respondents. Van remains the 1st Respondent, however Fourie is now cited as the 2nd Respondent instead of Tutor, Van der Westhuizen as the 3rd Respondent and Yeun as the 4th Respondent, creating a confusion. Both the mentioned Notices together with the amended heads of argument, the Replying and a Supplementary Affidavits were attached to the index notice and served at once as a bundle upon Johan Crouse Incorporated who are the attorneys for Tutor and filed a day before the hearing. In the Replying Affidavit the Applicant alleges to have now joined all the trustees when none of the documents have been served on Yeun, the trustee not connected to Tutor.
- [7] The Applicant has furthermore in the Rule 23 (1) Notice objected to the Respondent setting out in their answering affidavits the historical background of the disputes between the parties, arguing that the disputes has no merit in this Application. He accordingly

called upon the Respondents to remove their opposing affidavit alleging it to be vague and embarrassing.

[8] In adjudicating on the Rule 23 (1) Notice, I found that the Applicant had actually intended to bring an objection under Rule 6 (11). Nevertheless the state of his papers which he drafted himself leave more than a lot to be desired. They are incomprehensible and evince a complete incapacity to formulate averments in a manner that remotely resembles the requirements stipulated either in Rule 6 (1) with regard to Applications or 23 (1) applicable. The facts are supposed to be set out in the affidavits in support of the notice of motion simply, clearly and in a chronological sequence, and without argumentative matter. A significant fact which cannot be overlooked is that in an Application the Affidavits constitute both the pleadings and the evidence. Taking into account the state of Applicant's papers, the objection he raised with regard to the history as set out by the Respondent is therefore lacking in substance. The background facts have been so eloquently set out in the Respondent's answering affidavit that it was through reading those papers that the court was able to discern clearly the contentions raised by the Applicant. The Applicant's exception therefore had to fail.

[9] In *Viljoen v Federated Trust Ltd* 1971

(1) SA 750 at 759 even though the court was dealing with documents of a lay Respondent to an exception instead of a lay excipient as in *casu*, the court stated the following when it had to deal with documents of that nature that:

"where the pleadings to which an exception is taken are drawn by a lay litigant in person, a Court will make an allowance for that fact that such a person cannot be expected to display the same ability of draughtmanship and precision of language as is expected by a legally trained and experienced pleader. On the other hand the court will not ignore the interests of the excipient and will not allow the mere inexperience in matters of pleading to excuse serious non-compliance with the requirements of the Rules of Court which are, after all, based on notions of justice and fair play to both sides in litigation.

[10] As already stated the Applicant has failed in his Founding Affidavit to set out the relevant averments that expressively lay a proper base or to establish facts that would enlighten the court as to how the issues between the parties arose, which would then include the conduct of the parties leading to the Applicant launching an urgent application and revealing the nature of the pending dispute between them. These are important dynamics which form an integral part of the Application, since the Applicant is seeking an interdict pendente lite. He begs that until the finalisation of such issues the operations of orders or judgments including the order declaring him an insolvent are to be suspended. Respondents have raised a few points in limine.

FACTUAL

BACKGROUND

[11] Tutor is a company that employs liquidators who practice in their personal capacities as liquidators and or trustees of insolvent

estates through their appointment by the Master of the High Court. The directors of Tutor, according to the company resolution dated 13 February 2017, are A Strydom, van der Westhuizen, and Fourie. The two latter directors, Van der Westhuizen and Fourie, together with Yeun are in their individual capacities appointed as trustees in the insolvent estate of the Applicant. The three trustees who are now vested with the property are not cited in the main Application.

[12] The Applicant was declared an insolvent and placed under final sequestration by Southwood J on 21 December 2011, whereupon the three trustees were appointed by the Master to sequester the insolvent estate. On 21 October 2014, nearly three years thereafter the Applicant launched an Application for rescission of the sequestration order which was dismissed by Lazarus AJ. Applicant subsequently took the dismissal of the rescission application on review and Olivier AJ on 3 December 2015 dismissed the review, upholding a Rule 30 Application by the trustees that the review is irregular as it was not competent in law against the decision of the High Court.

[13] Olivier AJ then correctly refused the Applicant leave to appeal the dismissal of the review Application. Applicant then proceeded to launch an Application for leave to appeal the dismissal of the rescission application by Lazarus J. Due to Applicant's failure to give proper notice to the parties, the Application was on 9 December 2015 dismissed.

[14] On 9 February 2017 the Applicant served this Application for an interdict to be heard in the urgent court on 16 February 2017

intending to stop the auction that was to take place from 14 to 17 February 2017, on the basis that he has on 8 February 2017 lodged an Application for leave to appeal at the Supreme Court of Appeal which he alleges to have served on all the parties sighted as Respondents in this Application. He argues that they now have a duty to answer to his Application. He further argued that pending finalisation of the lodged application for leave to appeal, the execution of the sequestration order is suspended. The Notice for leave to appeal was served on Tutor as agents of the trustees on 6 February 2017.

[15] In his Notice to the Supreme Court of Appeal Applicant has applied for condonation for the late filing of his Application for leave to appeal against Olivier AJ's refusal on 3 December 2015 to grant him leave to appeal on the ground that a review of the Judgment of the High court is irregular.

[16] In his Supplementary Affidavit filed on 15th February 2017, a day before the hearing of this Application he pointed out that in terms of s 18 (3) of the Superior Court Act ("the Act") the launching of an Application for leave to appeal automatically

suspends the execution of the order or judgment.

- [17] In response to the Application, Tutor, in its Answering Affidavit deposed to by K van der Westhuizen in his capacity as the director of Tutor not as trustee as he is not cited or sued in that capacity in this matter, raised a number of points in limine, foremost of which is the locus standi of the Applicant to bring up the Application, then the misjoinder of the cited Respondents, specifically Tutor whom they allege lacks the locus standi to be sued and finally that of non-joinder of the trustees.
- [18] It was in an attempt to address the 2nd Respondent's points in limine on locus standi that the Applicant filed an Amendment to the Notice of Motion, the Replying and Supplementary Affidavit. Which explains the confusion in the documents. I will deal with the points in limine which will determine if it will be necessary to proceed with the merits of the Application.

Locus Standi

- [19] It is the Respondent's contention that the Applicant as an unrehabilitated insolvent is divested of his estate and as a result he has no property to protect. The insolvent's assets were vested on the three trustees on their appointment by the Master. It is the three trustees who, being vested with the insolvent estate, have an interest in the property and therefore have the locus standi to sue or be sued on behalf of the insolvent estate. They have not been cited therefore not made party to the proceedings.
- [20] The Applicant on the other hand contends that since he is in various applications challenging the managing of his assets by the trustees and also appealing against the refusal by the court to rescind the final sequestration order, the trustees are therefore not allowed to deal with the property without his consent, and he accordingly has a locus standi. He alleges also to have brought a separate Application challenging the trustees' bona fides and alleging maladministration in dealing with his sequestration. He accuses them of being involved in collusive dealings that led to him lose against Lazarus J. He has also referred to the trustees as a criminal gang.
- [21] An interdict can only be brought upon by a person with a locus standi to sue in that he has an interest in the subject matter of the interdict; see *Jacobs v Waks* [1991] ZASCA 152; 1992 (1) SA 521 (A) at 533J- 54E.
- [22] In terms of the Insolvency s 20 of the Insolvency Act 24 Of 1936 ("The Insolvency Act") the capacity of the insolvent to sue or be sued is curtailed on appointment of the trustee by the master with whom the insolvent estate is then vested. According to the provisions of s 25 of the Insolvency Act that the 2nd Respondent is reliant upon, an insolvent does not regain his full persona standi until he is rehabilitated. He however is not absolutely barred from bringing or defending actions. He as an insolvent can sue or be sued in the exceptional instances that are provided for under s 23 of the Insolvency Act. In *Grevler v Landsdown en n' Ander NNO* 1991 (3) SA 450 (E) 175 (T) at 177H it was confirmed that in principle an insolvent's locus standi is not affected by his sequestration. The court continued to state

that:

Wat wel aangetas word is sy vermoë om te aansien van die bates van die boedelte litigeer."

- [23] The instances of locus standi of the insolvent that are enumerated in s 23 of the Insolvency Act have been found not to be exhaustive by the court in *Marais v Engler Earthworks (Pty) Ltd* 1998 (2) SA 450 (E). It further propagated that the Act nowhere deprives the insolvent of locus standi, confirming that his disability is confined to the legal consequences arising from the fact that his estate vests in his trustee who then has an exclusive authority to exercise all rights in respect of the property comprising the estate. The insolvent nevertheless has a real reversionary interest regarding the estate right. In terms thereof the insolvent can, inter alia, bring actions to recover for his estate, assets that vest in the trustee if the trustee fails or refuses to do so, in which case the insolvent must join the trustee either as co-applicant or as co-defendant if the trustee is unwilling. He need not obtain the leave of the court to do so; see *M ears v Rissik* 1905 TS 303.
- [24] The Applicant alleges that he is trying to preserve the property that is comprised of the insolvent estate against the actions of the trustees who want to sell the assets and on that basis has locus standi. He also alleges that his challenge of the refusal of his application for rescission of the sequestration order for which he has petitioned the Supreme Court of Appeal confers on him a prima facie right, thus the locus standi to bring the interdict.
- [25] Since the Applicant is alleging to be challenging the proper administration of his estate or alleged abuse of the process of his sequestration and his sequestration order he has established a locus standi. He cannot be deprived of a right to correct what he perceives as an unlawful act committed against him.
- [26] However as it is clear that the trustees have an unequivocal vested interest in the insolvent estate, the Applicant was supposed to cite as co-Respondents all three trustees in their representative capacity as such and effect service on each of the trustees seeing that the insolvent estate vests jointly upon them. The relief he is seeking will not be able to be implemented or executed against the trustees jointly if not all of them are before court, as they are not party to the proceedings. They will therefore not be bound by any order made by the court. Such failure is fatal.
- [27] The Respondents in argument have appropriately referred to the principle expressed in *Goldseller v Hi*/1908 T.S 822 by INNIS J at 827 that:

"But if they elect two trustees, then the assets of the estate vest in those trustees jointly, and the assets include books ... The law, where two trustees have been appointed, gives them an equal right to the books, as to all the other assets of the estate. They are in law only one person. They jointly represent the estate, and together they are the channel through which the estate can sue and be sued."

- [28] The citation of the Tutor is a misjoinder. It is not the company but its two directors in their individual capacities who are the appointed trustees of the Applicant's insolvent estate. Besides not all the trustees in the Applicant's insolvent estate are directors or employed by Tutor. Tutor as it has been clearly indicated is not an appointed trustee company and consequently its directors are not acting as nominees of Tutor.
- [29] The property of the estate vests in the trustees jointly and their rights of administration are equal, therefore they have to exercise their powers jointly (s56 (4) of the Insolvency Act). Each trustee is under a duty to the beneficiary to participate in the administration of the trust and to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust. They are liable jointly.
- [30] In his attempt to cure the defect of having not cited all the trustees, the Applicant has without applying for the relief to join the trustees just added their names as 3rd to 5th Respondents on its Amendment to the Notice of Motion and as 2^d to 4th Respondent in the Affidavits delivered therewith on the purported Rule 23 Notice, Tutor Trust is substituted for Fourie as 2nd Respondent resulting in a different sequence as well. Still there is no proper joinder or application for the addition of the names of the trustees to the Application with the required notices properly served upon them.
- [31] The Applicant has further purported to serve the documents on Crouse Incorporated as the 1st to 4th Respondents' attorney of record which service is not on behalf of Yeun. Service on Yeun referred to as either the 4th and 5th Respondent on the various documents cannot be effected in such a manner. Yeun is not a director of Tutor and also does not operate under the name of that company. Therefore service effected on Tutor or its attorneys of record cannot be imputed to be proper service upon Yeun.
- [32] The property is jointly vested on the individual trustees and proper service is when its effected on each individual trustee. Since Yeun still has to be served with documents in the Application, no order can be effected without him being made part of the proceedings as he is a joint or co-owner of the insolvent estate. The joint trustees are selling the properties in the insolvent estate and on whose instruction the 1st Respondent is acting. The Master was also supposed to have been served with the documentation.
- [33] The Applicant is aware that he should have cited the three trustees and the master as in his application to this court to disqualify the trustees and Application for leave to appeal he has cited all three and the master, although service is effected upon Tutor purportedly on behalf of all three trustees.
- [34] The Application was also brought on an urgent basis, set down two days after the date of the auction. If the order was granted it would not have had any effect on the sale that was to have taken place on the 14th to the 16th February 2017. The court could not grant an interdict to apply retrospectively. No ground or case was made to justify such an order. However the order sought was couched in such a way that it was to interdict, generally the sale of any property in the insolvent estate pending finalisation of the Applicant's Application for leave

to appeal which was subsequently amended to be pending finalisation of all Applications launched by the Applicant against the trustees. The Application to that extent was still alive, not moot.

[35] Notwithstanding all the flaws in the Applicant's attempt to join the trustees, it was indicated on behalf of the Respondents that they were prepared, in the interest of finalisation of litigation, to waive the shortcomings. They agreed that the two remaining issues of whether or not the sequestration order against the Applicant is suspended by his application for leave to appeal to the Supreme Court of Appeal and justify the granting of an interdict should be proceeded with. The Respondents' counsel confirmed that all the trustees can be added and will be bound by the order of the court. Since there is no representation of the third trustee, Yeun, to confirm the waiver of service on him and his willingness to be bound by the order of the court, the waiver cannot be accepted. Yeun is not part of or associated with the cited Tutor. The waiver by only two of the trustees who came before court as directors of Tutor is not sufficient as they hold the property together as a unit and cannot without written authority from Yeun act on behalf of the third trustee. I am not satisfied that he has waived his right to be joined or consented to be bound by the judgment.

[36] In addition the Master is responsible for the appointment of trustees and in control of the entire process of administration and liquidation of insolvent estates, an important part of which consists of the oversight she or he exercises over the trustees in the performance of their functions as mandated by the insolvency Act. He has a direct interest if an appointment or the performance of the trustees' functions is challenged. He gives directions for the sale of immovable property (section 82). He has however not been cited and no service has been effected upon him. The Application must be dismissed for failure to join the Master as well.

[37] The Applicant also rely on s 150 (3) of the Insolvency Act that reads:

"When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal has been noted: Provided that no property belonging to the sequestrated estate shall be realised without the written consent of the insolvent concerned."

("my emphasis")

[38] The Applicant's notice of an Application for leave to appeal to the Supreme Court was only issued on 8 February 2017 and preceded by an Application for the Condonation of the late filing of the Notice of leave to appeal the judgment I order of Olivier AJ delivered on 3 December 2015 and 18 November 2016. Olivier AJ's order dismisses the Applicant's Application for leave to appeal the dismissal of his review application. The submission will be assessed in relation to the order sought for a general interdict.

[39] In *Panayiotou,v Shoprite Checkers {Pty} Ltd* (2014/26048)

[2015] ZAGPJHC 292; 2016 (3) SA 110 (GJ) (17 December 2015) it was indicated that 'the failure to serve an application for leave to appeal within the prescribed time resulted in the lapsing of the right to apply for leave to appeal, and only on the granting of condonation would it be revived.' An application for condonation to serve a petition late was therefore said not to have the effect of suspending the operation of a judgment as that does not constitute the lodging of a petition to the Supreme Court of Appeal. The court found that as a matter of fact and of law, there was no present petition filed with the registrar of the Supreme Court of Appeal as is required in terms of s 18 (5) of the Act which provides that:

"For the purpose of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the Registrar in terms of the rules."

[40] The Respondents were in that case correct to argue that only when the condonation is granted can the petition be lodged. Prior thereto all that is before the court of appeal is an application for condonation whose fate is uncertain. Therefore as at this moment the operation of the judgment or sequestration order is not suspended, the Applicant has no prima facie right to stop the trustees from proceeding with the process of sequestration.

[41] The lodging of an Application for leave to appeal is what is referred to in s 150 of the Insolvency Act by an appeal that has been noted. Section 150 (2) thereof provides that such appeal shall be noted and prosecuted as if it were an appeal from a judgment or order in a civil suit given by the court which made such final order or set aside such provisional order, and all rules applicable to such last mentioned appeal must mutatis mutandis but subject to the provisions of subsection (3), apply to an appeal under this section.

[42] In the Rule 23 (1) Application, the uninformed Applicant contends that the Respondent failed to address the issues that he has brought up in his Application and also to justify why they should be allowed to proceed with the sale of the insolvent assets whilst there are still appeal processes against their empowering orders.

[43] What is before the Supreme Court of Appeal is not an Application for leave to appeal the sequestration order as envisaged by s 150 (3) of the Act or refusal to rescind the sequestration by Lazarus J but the Applicants want to bring the sequestration order on review which is incompetent in law and therefore the Application for leave to appeal has no prospects of success anyway, there being no possibility that another court may arrive at a different conclusion.

[44] As it has been indicated the Applicant's Applications are lifeless on different levels. The 4 day auction sale that the Applicant intended to urgently stop was coming to an end a day following his urgent application. The Applications for leave to appeal are not alive until condonation of their late filing is granted.

[45] Under the circumstances the following order is made:

1. The Application is dismissed with costs.

NV KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

On behalf of the Applicant: In person

On behalf of the Respondent: J CROUSE

Instructed by: CROUSE INC ATTORNEY

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