

SOUTH AFRICA / JUDGMENT

Pieters NO v Absa Bank Ltd (50865/2010) [2018] ZAGPJHC 711 (22 May 2018)

[2018] ZAGPJHC 711

COURT

South Gauteng High Court, Johannesburg

BEFORE

WHG van der Linde

CASE / FILE NUMBER

50865/2010

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no 50865/2010

In the matter between

Pieters, R N.O. Plaintiff

and

ABSA BANK Ltd Defendant

Judgment

on first special plea

Van der Linde, J:

Introduction

- [1] The litigation between these parties is being case managed by me in terms of the local case management system. That implies amongst others that I hear interlocutory applications and pursuant thereto, I gave a judgment last year wherein I separated for initial determination the defendant's first special plea. This is now the hearing of the defendant's first special plea pursuant to that judgment, and takes the form of an agreed stated case.

- [2] The fuller background to the litigation is set out in the earlier judgment and is unnecessary to repeat here. The plaintiff sues as liquidator of an insolvent company; the special plea is that the plaintiff has no locus standi, since some five years earlier on 14 August 2003 the Master had certified, in terms of s.419(1) of the Companies Act 61 of 1973 (“the Act”), that the company had been “completely wound up.” The Master is said to be functus officio.
- [3] The plaintiff’s retort is that the company was never actually dissolved, since there is no evidence that the Registrar had recorded the dissolution and had published this fact in the prescribed manner, being the Government Gazette, all as required in terms of s.419(2) of the Act. The Master was therefore within her rights to “re-instate” the plaintiff on 5 March 2008, pursuant to the plaintiff’s request on 30 January 2008 for the Master to “re-issue the certificate of appointment to take the matter further and to investigate the rights that accrue to the company in terms of this contract.”
- [4] The issue therefore turns, as I see it, on whether the plaintiff’s power to act as liquidator had ceased, and if it did, whether the Master had the power later to “re-instate” the plaintiff as liquidator.

Background

- [5] The essential timeline, as appears from the stated case, is that the Master appointed the plaintiff as liquidator on 7 March 2002 of Cell f Services (Pty) Ltd (in liquidation). On 2 July 2002 the plaintiff reported that there were no assets in the insolvent estate. Later that year movable assets were sold for R15 000. On 24 March 2003 the plaintiff sent the amended first and final liquidation and distribution account to the Master. This account, having been advertised as lying for inspection, was confirmed by the Master on 3 July 2003, and this fact was published in the Government Gazette on 18 July 2003.
- [6] On 14 August 2003 the Master certified in a letter to the Registrar of Close Corporations and Companies that in terms of s.419
- (1) of the Act, the affairs of the company had been completely wound up. The Master also wrote to the plaintiff’s office on that day, advising that since all her requirements had been met, the final liquidation and distribution account had been filed of record. The Master also certified that the plaintiff’s bond of security could be reduced to nil. The Master’s filing slip was dated 15 August 2003.
- [7] On 30 January 2008 the plaintiff wrote to the Master, advising that a “there might be a further asset in the form of contract (sic) that the company entered into”, and requesting the Master to “re-issue the certificate of appointment to enable me to take the matter further ...”. She tendered a bond of security of R40 000 which amount the Master requested on 15 February 2008. On 5 March 2008 the Master issued a certificate whereby the plaintiff was “re-instated” as liquidator.

Discussion

[8] S. 419 of the Act provides as follows:

“419 Dissolution of companies and other bodies corporate

- (1) In any winding-up, when the affairs of a company have been completely wound up, the Master shall transmit to the Registrar a certificate to that effect and send a copy thereof to the liquidator.
- (2) The Registrar shall record the dissolution of the company and shall publish notice thereof in the prescribed manner.

[Sub-s. (2) substituted by s. 49 of Act 24 of 2006.]

- (3) The date of dissolution of the company shall be the date of recording referred to in subsection (2).
- (4) In the case of any other body corporate the certificate of the Master under subsection (1) shall constitute its dissolution.”

[9] The appointment of a liquidator takes place in terms of s.375 (1) of the Act. The liquidator ends her appointment when she has performed all the duties prescribed by the Act and has complied with all of the requirements of the Master. S.385 of the Act provides as follows:

“385 Certificate of completion of duties by liquidator and cancellation of security

- (1) When a liquidator of a company has performed all the duties prescribed by this Act and complied with all the requirements of the Master, he may apply in writing to the Master for a certificate to that effect.
- (2) The Master shall, when he issues the said certificate, additionally state therein that he consents to the reduction of the security given by the liquidator to a stated amount or to its cancellation.”

[10] The Master’s certificate of 14 August 2003 was expressly issued in terms of s.385 (2) of the Act. That sub-section refers back to a certificate in terms of s.385 (1). That sub-section in turn envisages a certificate that confirms that the liquidator has performed all the duties prescribed by the Act, and confirms too that all the Master’s requirements have been met. In the certificate that was actually issued, the Master said that all her requirements had been complied with, and that in terms of s.385 (2) the bond of security may be reduced to nil. She did not also certify expressly that the liquidator has performed all the duties prescribed by the Act.

[11] There are duties in terms of the Act that rest on a liquidator after the Master’s s.419 (1) certificate will have been issued, after dissolution of a company. The liquidator must, in terms of s.421 (2), send to the Registrar within fourteen days of the certificate date prescribed particulars of directors, identifying those whom in the liquidator’s opinion were the effective cause of the company being unable to pay its debts. And in terms of s.420 a

liquidator has the power to apply to court for an order declaring the dissolution of the company to have been void.

- [12] These provisions notwithstanding, the scheme of the Act is certainly that there is a process of winding up of the affairs of an insolvent company which is performed by the liquidator under the supervision of the Master, culminating in the confirmation^[1] of the final liquidation and distribution account and, pursuant thereto, the “complete” winding up of the company. S.391 provides as follows:

“391 General duties

A liquidator in any winding-up shall proceed forthwith to recover and to reduce into possession all the assets and property of the company, movable and immovable, and shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance owing among those who are entitled thereto.”

- [13] After the Master will have certified the complete winding-up of the company, there are in principle no duties any longer resting on the liquidator relative to the recovery of assets of the company for the benefit of the creditors; the assets will all have been recovered, and accounted for in the account.

- [14] In this context it seems to me that the winding-up of the company referred to in s.419 (1) of the Act, and its dissolution referred to in s.419 (2) of the Act are, if not in form then in substance synonymous mainly for these reasons. First, the Master is the functionary under whose statutory supervision the winding-up process takes place. She, not the Registrar, is thus the functionary

substantively indicated to assess, decide, and certify, that the company has been “completely” wound up.

- [15] Second, the Registrar’s function leaves no scope for the exercise of judgment; she “shall” record the dissolution of the company, once the Master will have certified the “complete” winding-up of the company. Third, there is no indication in the Act that any event is expected to occur or intervene between the complete winding-up of a company and the publication of its “dissolution”. And fourth, in the case of any body corporate other than a company, the Master’s certificate “shall constitute its dissolution.”

- [16] No doubt the act of publication under s.419 (2) serves as formal and definitive communication to the public that the winding-up process will have been completed, and that the company has thus been dissolved. But in the context of the powers of the liquidator

relative to the recovery of assets of the company, these will have been exercised and the duties discharged once the winding-up was complete and the Master had so certified.

- [17] If as I conclude the Liquidator had discharged her statutory duties of recovery of assets by the time the Master’s certificate

under s.419 (1) was issued, did the Master have the power afresh to clothe the liquidator with such statutory powers?

- [18] There is certainly no express provision in the Act that could justify a positive answer to this question. Could it be argued that the Master has the implicit power to revoke her decision to certify that the company had been “completely” wound up, and would consequently by necessary implication assume the power to “re-instate” the liquidator with the latter’s initial powers?
- [19] In my view not; and I conclude that the defendant’s reliance on the *functus officio* doctrine is, with respect, appropriate and sound in this regard. The first observation here is that, as it happens, the Master did not actually purport to revoke her s.419(1) certificate at all. But even if she did, the power of the Master to certify complete winding-up involves her in an assessment function; she has to consider her record and has to arrive at a judgment which implies that she will have resolved that nothing further is to be done in the winding-up process. Usually, when such a decision will have been taken, it is final and conclusive.[2] The requirement for finality of publication[3] is satisfied by the Master’s publication of her certificate to the Registrar.
- [20] Having arrived at her decision, and having published her decision in terms of her certificate, the Master has discharged her statutory function and cannot revoke it. Consequently, she will not have acquired, in this matter, any implied statutory power afresh to confer upon the plaintiff liquidator the power to recover assets of the company.
- [21] The plaintiff argued that until the Master’s re-instatement of the liquidator will have been set aside by a court, on the *Oudekraal*[4] principle, it stands and the defendant cannot attack it. I do not agree, with respect. It has always been inherent in the principle

that administrative acts stand until they have been set aside by a court, that a collateral challenge is permitted.

- [22] The rationale for that exception is put thus in *Oudekraal* (I regret the lengthy quote):

*“[32] But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a ‘defensive’ or a ‘collateral’ challenge to the validity of the administrative act.[22] Such a challenge was allowed, for example, in *Boddington v British Transport Police*,[23] in which the defendant was charged with smoking a cigarette in a railway carriage in contravention of a prohibitory notice posted in the carriage pursuant to a byelaw. The House of Lords held that the defendant was entitled to seek to raise the defence that the decision to post the notice (which activated the prohibition in the byelaw) was*

invalid because the validity of the decision was essential to the existence of the offence. (It happened that the decision to post the notice was held to be valid but that is not material for present purposes). At 153H-154A Lord Irvine LC said the following:

‘It would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a court as unlawful. Suppose an individual is charged before one court with breach of a byelaw and the next day another court quashes that byelaw – for example, because it was promulgated by a public body which did not take account of a relevant consideration. Any system of law under which the individual was convicted and made subject to a criminal penalty for breach of an unlawful byelaw would be inconsistent with the rule of law.’

And at 160 and 161 he went on to say the following:

‘[160C-G] However, in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely ... [161C-D] However, in approaching the issue of statutory construction the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings.’

As Lord Steyn pointed out at 173A-B:

‘Provided that the invalidity of the byelaw is or may be a defence to the charge a criminal case must be the paradigm of collateral or defensive challenge.’

Dealing with an earlier decision of the Divisional Court that precluded a collateral challenge to the procedural validity of subordinate legislation in criminal proceedings [24] he went on to say the following at 173E-G:

‘My Lords, with the utmost deference to eminent judges sitting in the Divisional Court I have to say the consequences of Bugg’s case are too austere and indeed too authoritarian to be compatible with the traditions of the common law. In *Eshugbayi Eleko v Government of Nigeria* [1931] A.C. 662, a habeas corpus case, Lord Atkin observed, at p 670, that “no member of the executive can interfere with the liberty or property of a British subject except on condition that he can support the legality of his action before a court of justice.” There is no reason why a defendant in a criminal trial should be in a worse position. And that seems to me to reflect the spirit of the common law.’

[33] So, too, is it implicit in the decision in *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and Others* [25] that the coercive powers that the industrial council purported to assert were dependent for their validity upon the lawful establishment of the council and hence were subject to collateral challenge when they were sought to be enforced. [26]

[34] Forsyth explains it as follows: [27]

‘... only where an individual is required by an administrative authority to do or not to do a particular thing, may that individual, if he doubts the lawfulness of the administrative act in question, choose to treat it as void and await developments. Enforcement proceedings will have to be brought by the administrative authority involved; and the individual will be able to raise the voidness of the underlying administrative act as a defence.’

[35] It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only ‘if the right remedy is sought by the right person in the right proceedings’.[28] Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law.”

[23] The collateral challenge exception applies in this case. The plaintiff asserts a statutory power that entitles her to institute an action in the High Court against the defendant to recover assets of the company for the benefit of the company’s creditors. Her case, according to the agreed statement, is that she derives those powers from her having been re-instated by the Master. The defendant challenges her locus standi, and thus the power of the Master to have re-instated the plaintiff; the defendant argues that the Master had no such power, since the company had been completely wound up, and the Master cannot go back on that decision. That is a collateral challenge to the Master’s power to have clothed the plaintiff with liquidator’s powers afresh.

Conclusion

[24] To conclude: upon the Master issuing her certificate in terms of s.419(1) of the Act, the company was completely wound up, and the plaintiff had by then, by definition, exercised and discharged her statutory powers and duties relative to the recovery of assets of the company. The Master’s certificate in terms of s.385 (2) confirmed that the plaintiff had performed all her duties in terms of the Act, and had complied with all of the requirements of the Master. In consequence the plaintiff no longer had any power to recover any assets of the company and, therefore, did not have any power to institute the present action.

[25] The Master could also not subsequently derive any power to re-instate the plaintiff afresh with the statutory powers of a liquidator,

because the Master could not, by dint of the functus officio doctrine, revoke her decision and certificate that the company had

been completely wound up. Since that decision and certificate stands, there was no statutory provision that empowered the plaintiff to recover assets of the company.

[26] In the result the first special plea is upheld, and I make the following order:

- (a) The defendant's first special plea is upheld.
- (b) The plaintiff's action is dismissed with costs, including the costs consequent upon the employment of two counsel.

22 May 2018

WHG van der Linde

Judge, High Court

Johannesburg

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Date argued: 18 May 2018

Date judgment: 22 May 2018

[1] S.408 of the Act.

[2] DM Pretorius, “The origins of the functus officio doctrine, with specific reference to its application in administrative law”,

(2005) 122 SALJ 832, at 833.

[3] Cora Hoexter, Administrative Law, 2nd ed, 2012, p278.

[4] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others (41/2003)

[2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (28 May 2004) at [26].

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