

SOUTH AFRICA / JUDGMENT

Prinsloo NO and Another v Nayager and Others (45330/2016) [2017] ZAGPPHC 728 (20 November 2017) [2017] ZAGPPHC 728

COURT

North Gauteng High Court, Pretoria

BEFORE

Tuchten

CASE / FILE NUMBER

45330/2016

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HIGH

COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

20/11/2017

CASE

NO: 45330/2016

Reportable:

No
Of
interest to other judges: No
In

the matter between:

ELIZABETH
WILANDA PRINSLOO
NO First
Applicant
MOTSHWANA
GRACE LUKHELE
NO Second
Applicant
and
RATHA
KRISHNAN
NAYAGER First
Respondent
ALBERTUS
WILTZ Second

Respondent
MASTER
OF THE NORTH GAUTENG HIGH COURT Third
Respondent

JUDGMENT

Tuchten J:

1 The first respondent's estate was sequestrated by order of this court on 14 November 2012. The applicants were appointed the trustees in the insolvent estate. At the time of sequestration, the first respondent's liability as surety to the petitioning creditor was some R65 million. Creditors proved claims in insolvency for more than R65 million. On the version of the first respondent, the assets in the estate were worth R5,3 million.

2 The trustees drew a first liquidation and distribution account, reflecting a contribution of over R200 000 as payable. At that stage a number of important matters remained to be resolved, including the registration of a property into the name of the estate, the submission of claims by a bank and the sale of a property. Provision was made for amounts to be transferred to an anticipated second such account.

3 The first respondent made application to this court for his rehabilitation. The second respondent, an attorney, was his attorney

of record in this application. The rehabilitation application was made on 14 August 2015. The rehabilitation application was granted by this court on 9 October 2015.

4 The applicants now apply under rule 42 and the common law for the rescission of the rehabilitation order. The application is opposed

only by the first respondent.

5 The applicants contend that the rehabilitation order was procured by forgery and fraud. They rely on a number of grounds for this

contention but I need mention only one: there was before the court in the rehabilitation application a letter dated 18 September 2015, purportedly written by Ms Cornelia Carolina Mienie on behalf of the trustees, confirming that the trustees had received notice of the application for rehabilitation, that the trustees had dealt with the whole of the estate, that the contribution had been repaid and that she, Ms Mienie, was not aware of any facts on the strength of which the court should refuse, extend or qualify the rehabilitation of the first respondent.

6 None of this, as I have shown, in relation to the administration of the estate, was true. In addition, the trustees' account was

described in the rehabilitation application as a first and final account, which it manifestly was not because there was still much work to be done in the estate for which the trustees would have to account and for which the trustees would probably receive additional remuneration. But it gets worse. Ms Mienie deposed to an affidavit which is before me. She says that the letter itself is a forgery. She explains that at the time the letter was allegedly written, she was not at work because she was off work from 27 August 2015 until 5 October 2015, receiving treatment for cancer.

7 No affidavit was filed disputing anything Ms Mienie said. But counsel for the first respondent pointed to the fact that the doctor's note, which Ms Mienie submitted in support of what she had deposed to, referred not to Miss Mienie but to "Mrs CC Viljoen". This was not addressed in the papers and there was no request for leave to cross-examine Ms Mienie.

8 I can see no merit in this belated criticism. Ms Mienie was not given an opportunity to respond to it and it is still today a common occurrence that women, entirely legitimately, use their given surnames for professional purposes and use their husbands' surnames for other purposes. The surrounding probabilities establish the extreme improbability that Ms Mienie would have signed a letter so at variance with the facts and her employer's interests. I find the forgery and fraud established on the papers.

9 The first respondent blames the second respondent for the fraud and other shortcomings in the rehabilitation application. The second respondent has provided no explanations at all. Whether or not the first respondent was a party to the fraud is for present purposes of no moment: a fraud was perpetrated on the court in an application made by the first respondent.

10 The papers establish that no notice of the application was given to the trustees as required by s124 of the Insolvency Act. The notice relied upon was not addressed to the applicants but to Bureau Trustees, a form of the name of the business through which the first applicant conducted the administration of her trustee practice, and was sent to an incorrect postal box number.

11 There is a final point which is decisive of this application: section 124(2) of the Insolvency Act provides that no application for rehabilitation may be granted before the expiration of a period of four years from the date of sequestration except upon the recommendation of the Master.^[1] Counsel for the applicant submitted that there had been no recommendation by the Master and, uncontroversially, that the rehabilitation application had been made less than three years after sequestration.

12 Counsel for the first respondent argued that the Master had made the required recommendation. The report of the Master, bearing the date stamp 5 October 2015 is before me. The report merely reports facts. It concludes with the statement that the Master can be of no further assistance and abides by the decision of the court. It does not contain a recommendation.

13 Kruger v The Master and Another NO; ex parte Kruger[2] is authority for the proposition that the absence of a recommendation where one is required removes the jurisdiction of the court even to consider an application. Whether one considers the absence of jurisdiction as producing a nullity or merely a ground setting aside the order made,[3] the fact remains that the rehabilitation order could not competently have been granted.

14 Counsel for the first respondent argued that the Master's recommendation point had not been taken by the trustees in their founding affidavit. But it was: the trustees alleged in paragraph 15.1 of their founding affidavit that there had been "severe non-compliance with the requirements prescribed in section 124 of the Insolvency Act". Furthermore, the point is one of law. Counsel did not suggest that he needed more time to respond to the point. It was therefore open to the trustees to argue the point.

15 Rule 42 provides that an order which was erroneously granted may be set aside. It is inconceivable that an order would have been granted if the court had been informed of the matters to which I have referred. I have found that the order was procured by fraud.

16 It was submitted that there is no proof that a rescission would benefit creditors. I doubt that benefit to creditors is relevant to the present enquiry but it is manifestly to the benefit of creditors that the administration of the insolvent estate proceed to completion and that steps be taken to recover the contribution.

17 The application must succeed. As fraud has been proved and the creditors should not be prejudiced, I shall grant punitive costs

orders against both the first and second respondent. The first respondent blames the second respondent for the shortcomings in the rehabilitation application. The second respondent has provided no explanation at all for what happened.

18 I make the following order:

1 The rehabilitation order granted by this court under case no. 64841/2015 on 9 October 2015 in terms of which the applicant was rehabilitated is hereby set aside.

2 The final sequestration order granted by this court under case no. 77057/2009 on 14 November 2012, in terms of which the first respondent's estate was finally sequestrated, is revived and it is declared that the first and second applicants must continue to wind up the first respondent's insolvent estate.

3 The first and second respondents, jointly and severally, must pay the applicants' costs on the scale as between attorney and client.

NB Tuchten

Judge of the High Court

20 November 2017

- [1] Except in a case falling under s 124(1), which is not suggested to be applicable in the present case.
- [2] 1982 1 SA 754 W 757
- [3] As to which see MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 3 SA 481 CC para 99

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Prepared on 13 October 2026 · Esheria