

SOUTH AFRICA / JUDGMENT

Prudential Authority v Jafta (1219/2018) [2023] ZAECQBHC 4 (31 January 2023)

[2023] ZAECQBHC 4

COURT

Eastern Cape High Court, Gqeberha

BEFORE

V P Noncembu

CASE / FILE NUMBER

1219/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GQEBERHA)

CASE

NO: 1219/2018

(1)

REPORTABLE: YES/ NO

(2)

OF INTEREST TO OTHER JUDGES: YES/ NO

(3)

REVISED

DATE:

SIGNATURE:

In

the matter between:

THE

PRUDENTIAL AUTHORITY

Applicant

And

VUYOKAZI

CONFIDENCE JAFTA

Respondent

JUDGMENT

NONCEMBU J:

- [1] This is an application for the final sequestration of the respondent brought in terms of section 83(3)(b) of the Banks Act.[1] The order for provisional sequestration was granted by Revelas J of this division on 24 March 2022. The applicant is now seeking the final sequestration of the respondent.
- [2] Following upon a suspicion that the respondent was involved in a Pyramid Scheme known as Travel Venture Institution (TVI), which had been the subject of various previous litigation, Mr Johannes George Kruger was appointed to conduct an inspection into the business practices of TVI in order to establish whether TVI and its associates were conducting the business of a bank without being registered as a bank. During the inspection it was established that the respondent was an advanced member and a distributor at TVI.
- [3] As a result of the above inspection, the Registrar of Banks (now replaced by the Prudential Authority), was satisfied that the respondent had obtained money by conducting the business of a bank without being registered as a bank in terms of section 17 of the Banks Act, or without being authorised in terms of the provisions of section 18A (1) of the said Act to conduct a bank.
- [4] Consequent upon this, a repayment directive was issued against the respondent in terms of section 83(1) of the Banks Act, and was served on her on 5 May 2014. The respondent failed to repay the amount she was directed to pay in terms of the directive, or to respond to the directive. As a result thereof, after a successful application for the attachment of the respondent's immovable assets was moved by Mr Kruger, the applicant lodged an application for her to be provisionally sequestrated in terms of section 83(3) (b) of the Banks Act. The application was granted on 24 March 2022.
- [5] In terms of section 83(3)(b) of the Act, failure to comply with the aforementioned directive is deemed to be an act of insolvency. This provision serves as the basis for the current application. It provides as follows:

‘Any person who refuses or fails to comply with a direction under subsection (1) -

Shall for the purposes of any law relating to the winding-up of juristic persons or to the sequestration of insolvent estates, be deemed not to be able to pay his debts or to have committed an act of insolvency, as the case may be, and the registrar shall, notwithstanding anything to the contrary contained in any law, be competent to apply for the winding-up of such a juristic person or for the sequestration of the estate of such a person, as the case may be, to any court having jurisdiction.’

- [6] In resisting the application, the respondent mounted a series of points in limine, which were initially raised in the provisional sequestration application and apparently dismissed therein. Citing the reason that no reasons were furnished for their dismissal in the provisional sequestration application, the respondent sought to raise these again in the current proceedings.
- [7] No reasons were advanced before me as to why the reasons for the provisional sequestration order were never pursued with the court that granted same. I however deal with these as they have been raised in the answering affidavit. At the onset I must state that I agree with the finding of the court in the provisional sequestration in this regard for the reasons that follow.

Prescription

- [8] The respondent contends that the payments which the Registrar of Banks sought to secure on behalf of creditors prescribed on 18 March 2017 in terms of section 11(d) of the Prescription Act[2] and therefore unenforceable as the application was only instituted on 4 April 2018. This contention is misplaced. Firstly, the application in casu is not brought on behalf of the investors or creditors of the TVI scheme, but by the applicant in exercising its statutory powers in terms of the Banks Act.[3] The directive to repay does not give rise to a debt as understood in the Prescription Act, and therefore prescription does not apply in the matter.
- [9] Secondly, sequestration proceedings are not civil proceedings for the enforcement of a debt. Authority for this view is found in *Collet v Priest*[4] where De Villiers CJ stated the following:

‘The order placing a person’s estate under sequestration cannot fittingly be described as an order for a debt due by the 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 of giving or of 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. No doubt before an order so serious in its consequences to the debtor is given the court satisfies itself as to the correctness of the allegations in the petition. It may for example have to determine whether the debtor owes the money as alleged in the petition. But while the court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the court asked to give any judgment decree or order upon any such claim.’

- [10] In *Prudential Shippers SA Limited v Tempest Clothing Co. (PTY) Limited* Mc Ewan J[5] held that an application for the winding up of a debtor’s estate did not constitute proceedings ‘for the recovery of a debt’.

- [11] Section 9(2) of the Insolvency Act also lends support to the above position in that according to this section, the sequestrating creditor's claim need not even be due, that is, it need not yet be enforceable. The requirement for a liquidated claim is not because the claim is for the enforcement of the claim, but merely to ensure that applications are brought by creditors with a sufficient interest in the sequestration.
- [12] From the above it is clear that sequestration proceedings are not civil proceedings for the enforcement of a debt and therefore not subject to prescription.[6] This point therefore cannot be sustained and is accordingly dismissed.

Locus Standi

- [13] The grounds raised as a basis for this point are two-fold. The respondent alleges, in the first instance, that the applicant is not a creditor with a liquidated claim as contemplated in section 9 (1) of the Insolvency Act, and therefore cannot bring this application. In the second instance it is contended that the applicant deposed to the founding affidavit in his capacity as the Deputy Registrar of Banks, and therefore does not have equal powers with the Registrar of Banks (section 4(2) of the Banks Act, and thus in the absence of a directive from the Registrar, he has no authority or competence to

initiate these proceedings.

- [14] A further aspect raised by the respondent in this regard was that the later substitution of the Registrar of Banks by the Prudential Authority as the applicant in the matter, which allegedly was intended to circumvent the lack of authority by the Deputy Registrar, could not avail the applicant as it was only raised in the replying affidavit which was not properly placed before the court.
- [15] I can find no merit to this point. The Deputy Registrar is empowered by section 4(2) of the Banks Act which gives him powers to perform the functions of the Registrar. I am of the view that the averments made in the founding affidavit by the Deputy Registrar in this regard are sufficient for the purpose of establishing his competency to bring this application.
- [16] The substitution of the Registrar by the Prudential Authority is provided for by section 300 (2) of the Financial Sector Regulation Act[7] (FSR Act) which provides:

‘The Prudential Authority must be substituted as a party in any proceedings, whether in a court, tribunal or before an arbitrator or any other person or body, that have been commenced but not finally determined immediately before the date on which this section comes into effect, for the Reserve Bank or a Registrar in terms of the Banks Act, the Mutual Banks Act, 1993 (Act No.124 of 1993), the Co-operative Banks Act (Act No. 40 of 2007), the Short Term Insurance Act or the Long Term Insurance Act.’

[17] This section is instructive; I can therefore find nothing untoward in the conduct of the applicant in following the letter of the law. This point therefore cannot be upheld.

Failure to disclose a cause of action

[18] The respondent does not dispute that she was served with the directive and that she failed to comply with it. She contends, however, that she was entitled to ignore the directive as it did not meet the prescripts of the law, and was thus rendered a nullity. In amplification of this she contends that the directive was not authorised by the Registrar of Banks as required by section 83(1) of the Banks Act and did not comply with section 84(4) (a) as the true amount of money unlawfully obtained was not stipulated.

[19] This point cannot be sustained. Annexure 'FA4' to the founding affidavit clearly shows that the directive served on the respondent was issued from the office of the Registrar of Banks. I have already dealt with the competency of the Deputy Registrar in paragraph 15 above.

[20] Section 84(4) (a) explicitly states that simultaneously or soon after the issuing of the directive in terms of section 83(1), a repayment administrator (manager) shall be appointed whose functions shall include conducting further investigations in order to establish, inter alia, the true amount of the money unlawfully obtained. It is therefore not a requirement in terms of section 83(1) that the true amount be reflected in the directive because it is one of the aspects to be investigated by the repayment administrator. There is therefore no substance to this point.

[21] Having been established that the respondent was served with a payment directive, which she failed/refused to comply with, nothing more needs to be proved to establish a cause of action. The Act makes it clear that failure to comply with a payment directive is deemed to be an act of insolvency. For purposes of these proceedings therefore, a cause of action has been established.

[22] Whilst the solvency report indicates that the respondent is factually solvent, it states that she is legally insolvent as she is deemed to have committed an act of insolvency by failing/refusing to comply with the payment directive. The act is instructive in this regard.

[23] The report further indicates that sequestration of the estate of the respondent will be to the benefit of the victims of the TVI scheme as there are sufficient assets to cover the total amount of the deposits which is stated to be R1 405 519.17.

[24] The applicant has met all the requirements for final sequestration. The order for provisional sequestration was properly served in terms of the court order. None of the defences raised by the respondent are valid in law. There is therefore no reason why the order for final sequestration should not be granted.

ORDER

[25] In the premises, the following order is made:

24.1 THE ORDER OF PROVISIONAL SEQUESTRATION GRANTED BY REVELAS J ON 24 MARCH 2022 IS HEREBY MADE FINAL.

24.2 COSTS OF THE APPLICATION SHALL BE COSTS IN THE INSOLVENT ESTATE.

V P NONCEMBU

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Applicant

: E Theron

Instructed by

: Gildenhuys Malatji Inc

C/O Strauss Daly Attorneys,

Port Elizabeth

Counsel for the 2nd Respondent : M P G Notyawa

Instructed by

: Simphiwe Jacobs &

Associates

Date of hearing

: 08 September 2022

Date judgment delivered :

31 January 2023

[1] Act 94 of 1990.

[2] Act 68 of 1968.

[3] See *Kruger v Mothapo and Another* (82907/2014) [2015] ZAGPPHC 984 (11 December 2015).

[4] 1931 AD 290 at 299.

[5] 1976 (2) SA 856 (W) at 863D- 865A.

[6] *Collet v Priest* supra.

[7] Act 9 of 2017.

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