

SOUTH AFRICA / JUDGMENT

Prudential Authority v Mayongo and Another (21547/2020) [2022] ZAGPJHC 38 (26 January 2022) [2022] ZAGPJHC 38

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Mahomed

CASE / FILE NUMBER

21547/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case

No. 21547/2020

REPORTABLE: NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

Date: 26/01/2022
In
the matter between
THE
PRUDENTIAL
AUTHORITY
Applicant
and
E
S MAYONGO
First Respondent
(Identity
Number [....])
V
N
MAYONGO
Second Respondent

JUDGMENT

MAHOMED, AJ

INTRODUCTION

1. This is an application for the sequestration of the joint estate of the respondents. The respondents participated in a deposit taking business, without the necessary authorisation, which falls within the definition of “the business of a bank,” and as part of a pyramid scheme.
2. The applicant, “the Prudential Authority,” established in terms of s32 of the Financial Sector Regulation Act 9 of 2017 has assumed the roles and responsibilities which were previously assigned to the Registrar of Banks and has powers and obligations to act in terms of the provision of the Banks Act 94 of 1990 (“the Banks Act”). It brings this application in terms of s83(1) read with s 84 of the Banks Act. The respondents failed to repay the monies they received and are therefore deemed to be unable to pay their debts. In terms of the provisions of the Act the applicant is then entitled to apply for the sequestration of their estate.
3. On 21 August 2020, Pillay AJ, granted a provisional order in this matter. The applicant applies for the final order for sequestration.

THE FACTS

4. The first respondent represented himself and applied for a postponement. He advised the court that he will require the services of a legal representative but is unable to afford one currently. He alleged that he is a pensioner and that he needs about three to four months to save enough from his pension monies to pay for those services. He applied for a postponement for three to four months.
5. He submitted that “a lot is wrong in this matter and that he wanted to further argue this matter.” The main thrust of his argument was that although, he accepted payments from various persons, who of their own free will wanted to purchase certain “vouchers” which would entitle the holder of a voucher discounted rates on travel and hotel bookings anywhere in the world, he transferred them over to a third party.
6. He proffered that when he received payments he handed them over to an international company based in London, which issued the vouchers. He alleged there is no proof that he kept any of the monies he received.
7. In his view, the Registrar of Banks is incorrect in looking to him for the monies and that it should look to the company who accepted the monies from him and issued the vouchers. His dealings with that company were exclusively online and that he only received discounts on hotel and travel rates for his work.
8. This court attempted to explain to the first respondent that it is his act of accepting the deposits from the public, holding same in his bank account and thereafter handing over to a third party, which was “the offending act.”
9. Counsel for the applicant, Ms Mokale, reminded the court that the first respondent in his answering papers, admitted to accepting monies from the public and that he had actively marketed the business of this scheme. She submitted that the postponement for legal representation would be futile. He admitted to accepting the monies from the public, he has not paid back the monies and in that instance, the Act permits the applicant to apply for the sequestration of his estate.
10. She further submitted that no further legal representation could “bolster” the first respondent’s case.
11. Counsel submitted that the respondents accepted monies from the public over a period of three years.
12. She further submitted that the first respondent furthermore, has failed to use the remedies that he is afforded in the Act, to take the Registrar’s decision on review. She submitted that he was informed in the statutory notice in terms of s83 of the Banks Act, of his right to review the decision of the Registrar of Banks, if he disagreed with that decision.
13. He signed and acknowledged receipt of this notice.

14. Counsel argued that he failed to comply with the notice to repay the monies, and that in terms of section 83(3)(b) of the Act this failure, constitutes “an act of insolvency, in that the respondents are “deemed to be unable to pay their debts.”
15. It was submitted further that the first respondent is factually insolvent when upon investigation by the applicant, it found that their liabilities exceeded their assets. Counsel informed this Court that there is still likely to be an advantage to creditors, at this stage, if the estate is sequestrated.

THE LAW

16. Section 83 (1) provides:

“if as a result of an inspection conductedthe Registrar is satisfied that a person has obtained money by carrying on the

business of a bank without being registered as a bank or without being authorised, in terms of the provisions of section 18A(1) to carry on the business of a bank, the Registrar may in writing direct that person to repay, ... all money so obtained by that person in so far as such money has not yet been repaid, including interest or any other amounts owing by that person in respect of such money.

(2)

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

- (a) shall be guilty of an offence, and
- (b) shall for the purposes of any law relating to the winding up of juristic persons of the sequestration of insolvent estates, be deemed not to be able to pay the debts owed by such person 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 juristic person or for the sequestration of the estate of such a person, as the case may be, to any court having jurisdiction.”

17. The respondent has not paid over the monies nor taken any steps to review the decision by the Registrar.
18. The respondent has not been able to pay over the monies. He informed the court that he relied on his pension only to sustain himself. He did not have the money to repay the “investors.”
19. I agree with Ms Mokale and am of the view that in the light of the admissions the first respondent has no prospects of success at a hearing in the future and a postponement will simply delay the inevitable. If investors still have an opportunity to recover some monies, they must be protected.

20. The first respondent has been aware of the notice issued for over 5 years now and has done nothing in that time to challenge the Registrar's decision.
21. The decision of the Registrar and issue of the notice is a public administrative decision.
22. In OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS 2004 (6) SA 222 (SCA), the court was to determine whether the respondent was entitled to disregard an administrative decision merely because it believed the decision was invalid. The court held at (26)

“until the administrative approval (and thus also the consequences of approval) is set aside by a court, in proceedings for judicial review it exists in fact, and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for as long as the unlawful act is not set aside.”

Emphasis added.

23. The first respondent has done nothing to challenge this decision. He has been complacent for five years since the notice was issued and has only reacted when the application for sequestration was launched.
24. The first respondent has not paid over the monies. The applicant's investigations have revealed that his liabilities exceed his assets and that there is a possibility that there could be an advantage to creditors if the order for sequestration is granted.
25. In REGISTRAR OF BANKS v KHAMBULE, unreported 16/04/2016 Windell J stated that
“there are two main advantages that the sequestration of the respondents will bring. It will enable investigations to be conducted to determine what has been done by the respondents with the funds appropriated by them and it will enable unidentified investors to come forward and stake a claim for repayment.”
26. This court was advised that the investors are not all identified and that the amounts claimed are estimates. The respondents' estate after liabilities will likely be able to realise some monies to repay creditors, many of whom were from rural areas without access to computers and internet facilities, to even enquire about their investments.
27. At the date of this hearing the first respondent informed the court that his financial circumstances were dire and that even if this matter is postponed for three months, he did not think that he would have saved enough to pay for his legal services. The respondent is unable to pay the debts, he may not even secure legal services in three or four months' time.
28. I am of the view that the postponement will serve no purpose and simply delay the inevitable. Accordingly, the application for postponement must fail.

29. The applicant has met the procedural requirements for the granting of the final order and accordingly the final order for sequestration must succeed.

I make the following Order:

1. The application for postponement is refused.
2. The joint estate of the Eric Sonwabo Mayongo (identity number: [...]) and Victoria Nomvuyo Mayongo (identity number: [...]) is hereby placed under final sequestration.
3. Costs to be in the administration of the respondents' joint insolvent estate.

S MAHOMED

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 26 January 2022.

Date of hearing: 19 January 2022

Date of Judgment: 26 January 2022

Appearances:

For Applicant: Adv Mokale

Instructed by: ENS Africa Inc

Tel: 011 269 7600

For Respondents. Mr Mayongo

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