

SOUTH AFRICA / JUDGMENT

Smith N.O and Others v Van Der Ryst (1316/2023) [2024] ZANCHC 11 (9 February 2024) [2024] ZANCHC 11

COURT

Northern Cape High Court, Kimberley

BEFORE

A.D Olivier

CASE / FILE NUMBER

1316/2023

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IN THE HIGH COURT OF

SOUTH AFRICA

(NORTHERN CAPE

DIVISION, KIMBERLEY)

CASE

NUMBER: 1316/2023

DATE

HEARD: 13 October 2023

DATE

DELIVERED: 9 February 2024

Reportable:

YES / NO

Circulate to Judges: YES

/ NO

Circulate to Regional

Magistrates:

YES / NO

Circulate to

Magistrates: YES / NO

In

the matter between: ELRICH
RUWAYNE SMITH
N.O.
1ST APPLICANT
ELNA
ELSA POHL
N.O.
2ND APPLICANT
LIZANNE
CHANTAL MULLER N.O.
3RD APPLICANT
(In
their capacities as trustees of the Insolvent Estate
Jacobus
Coenraad Van Der Ryst, Master Reference
K21/2021)
and
JACOBUS
COENRAAD VAN DER RYST
RESPONDENT
(Identity
Number: 6[...])
In

re: In

the application of: JACOBUS
COENRAAD VAN DER
RYST
APPLICANT
THE
MASTER OF THE HIGH COURT, NORTHERN CAPE
1ST RESPONDENT
DIVISION
THE
STANDARD BANK OF SOUTH AFRICA LTD
2ND RESPONDENT
NATIONAL
CREDIT
REGULATOR
3RD RESPONDENT
ELRICH
RUWAYNE SMITH
N.O.
4TH RESPONDENT
ELNA
ELSA POHL
N.O.
5TH RESPONDENT
LIZANNE
CHANTAL MULLER
N.O.

6TH RESPONDENT
NATIONAL
CONSUMER TRIBUNAL
7TH RESPONDENT

JUDGMENT

Olivier AJ

INTRODUCTION:

1. The 1st to 3rd Applicants (herein after jointly referred to as “the Trustees”) lodged a semi-urgent interlocutory application on 15 September 2023 in terms whereof the Trustees moved for an order in essentially the following terms:

1.1 That the Respondent (herein after referred to as “Van Der Ryst”) would have to furnish security to the satisfaction of the Trustees in the amount of R 250 000,00 (Two Hundred and Fifty Thousand Rand) for the costs of the Trustees in their opposition of the Main Application under the above case number; and

1.2 That the Trustees would be granted leave to approach this Court, on the same papers duly supplemented, for an order dismissing the afore-said Main Application, in the event of Van Der Ryst failing to

furnish the security mentioned above within 10 (ten) days from date of this order.

2. The Trustees also moved for an order to the effect that Van Der Ryst was to pay the costs of this application to which I will henceforth refer as “the Security Application”).

BACKGROUND:

3. It is common cause and should be mentioned that the Main Application referred to herein above, is an application brought by Van Der Ryst against inter alia the Trustees in terms whereof Van Der Ryst approaches the Court for an order:

3.1 For the review and possible setting aside of the decision of the Master of the Northern Cape High Court (the 1st Respondent in the Main Application and herein after, where and if necessary referred to simply as “the Master”) to admit certain claims submitted to proof by the Standard Bank of South Africa (the 2nd Respondent in the Main Application and herein after where and if necessary referred to simply as “the Bank”) at the first meeting of creditors in the insolvent estate of Van Der Ryst;

3.2 For the referral of the matter to the National Consumer Tribunal (the 5th Respondent in the Main Application and herein after referred to where and if necessary simply as “the NCT”) for consideration

and determination in terms of Section 136 read with Section 137 of the National Credit Act^[1] (herein after “the NCA”), alternatively referring the matter directly to a Debt Counsellor in terms of the provisions of Section 85(a) of the NCA; alternatively

3.2.1 Directing the Trustees to examine the claims submitted by the Bank and to report to the Master and to Van Der Ryst as envisaged in Section 45 of the Insolvency Act^[2] (“the Insolvency Act”); and

3.2.2 Directing the Master to submit the Bank to interrogation in terms of the provisions of Section 44(7) of the Insolvency Act.

4. I was informed by the representatives of both parties to the Security Application that the Main Application is still pending and, importantly for purposes hereof, is not yet ripe for hearing, alternatively has not been enrolled for argument and hearing as of yet.
5. In his Answering Affidavit in this Security Application, Van Der Ryst raised the issue of urgency as a point in limine averring that the Security Application was not urgent as any urgency that might have existed, was self-created and I was consequently required to hear argument on the issue of urgency and to determine the said point in limine before dealing with the merits of the Security Application.

AD URGENCY:

6. It is common cause and warrants very little discussion that it is expected of any Applicant to make out a case for the relief sought by such Applicant in such Applicant’s Founding Affidavit.^[3]
7. The above holds equally true in the case of applications brought on an urgent basis where the Uniform Rules of Court (herein after only referred to as “the Rules”) provide that in every application brought on an urgent basis, an Applicant, in his/her Founding Affidavit “... must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.”^[4]
8. Mr. Zietsman SC who appeared on behalf of the Trustees in the Security Application impressed on this Court that the Security Application was brought on a semi-urgent basis only.

I hold the view however that even semi-urgent applications should still be measured against the requirements of the above Rule 6(12) of the Rules and that an Applicant in a semi-urgent application is still expected to make out a case for urgency and to indicate why he/she will not be able to obtain substantial redress in due course.

9. In their Founding Affidavit, the Trustees set out the grounds for urgency in paragraph 7 of said Founding Affidavit and avers as follows:

“7.1 This application is urgent in the sense that the Applicant[5] should be ordered to put up security as soon as possible. The Applicants have already disbursed the fees of an attorney and counsel

to consult and to prepare opposing affidavits and annexures in the main application, and will in due course have further disbursements

in the opposing of the main application.

7.2 ... the Honourable Court would note that the Applicants ask the Honourable Court for the necessary condonation to deviate from the normal Rules relating to timeframes for the filing of opposing and replying affidavits.

7.3 The reason being that if the Applicants followed the Rule 6(11) route in the normal course, the Respondent might as well a day or two before the application is heard in the Motion Court, file a notice of opposition and apply for the matter to be postponed in order for him to file the necessary opposing affidavits.

7.4 If an eventual allocation is made to the opposed roll, well knowing how full the rolls are in the Kimberley High Court, another 6-8 months will have to be awaited for a hearing date of only the security application.

7.5 This will cause the application to set security to become an academic exercise, especially if the Applicant (Respondent herein)[6] is not able to put up security in the process.” (My omissions)

10. It is clear (in my view) that the Trustees, based on the contents of their Founding Affidavit, rely primarily on the period of time that it would take for the Security Application to be enrolled, argued and determined as grounds for bringing this Security Application on an urgent or at least on a semi-urgent basis.
11. In as far as the above-stated paragraphs 7.3 and 7.4 of the Trustees’ Founding Affidavit is concerned, it is common cause that the Security Application had been opposed by Van Der Ryst and also that Answering and Replying Affidavits had been filed.

The parties were also ad idem that the Security Application was ripe for argument and

determination.

The Trustees’ argument in this regard and as set out in the afore-said paragraphs 7.3 and 7.4 of the Founding Affidavit, in my view, has therefore become moot.

12. It is common cause and also appears clearly from the papers in the Security Application that the application itself was brought on 10 October 2023.
13. The salient background events leading up to the lodging of the Security Application as it appears from the papers at hand, are as follows:

13.1 The Main Application was issued on 19 July 2023;

13.2 The Main Application was served on the 1st and 2nd Applicants in the Security Application by Sheriff on 26 July 2023 and on the 3rd Applicant (also by Sheriff) on 21 August 2023;

13.3 The Trustees required Van Der Ryst to furnish the security as prayed for in the Security Application by way of a notice in terms of Rule 47(1) of the Rules dated 22 August 2023 (herein after referred to as “the Security Notice”);

13.4 The Security Notice was served on the Attorneys for Van Der Ryst on 22 August 2023 and in terms of said Security Notice, Van Der Ryst was afforded 10 (ten) days within which to either provide the necessary security alternatively to indicate whether he refuses to provide the security demanded or whether he contests his liability to provide said security;

13.5 The afore-said 10(ten) day period lapsed on 5 September 2023;

13.6 On 5 September 2023 Van Der Ryst filed and served a notice in terms of Rule 47(3) of the Rules in terms whereof he effectively contested his liability to provide security as requested; and

13.7 The Trustees’ Answering Affidavit in the Main Application was filed on 4 September 2023 already.[7]

14. Rule 47(1) of the Rules provides as follows:

“A party ... shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed ...” (My underlining and omissions)

15. In this instance the Trustees delivered their notice in terms of Rule 47(1) almost a month after the Main Application was served on the 1st and 2nd Applicants in this Security Application which prompted me to pose the question to Mr. Zietsman whether one can really say that the Security Notice was delivered as soon as practicable after the institution of the Main Application.

16. The argument of Mr. Zietsman in respect of the above question may be summarized as follows:

16.1 That the phrase “as soon as practicable” as it appears in Rule 47(1) does not refer to a specific time frame and that a decision as to what would qualify as “as soon as practicable” would depend on the circumstances;

16.2 That the Trustees could only decide on whether security should be demanded from Van Der Ryst after receipt of and consideration of the Main Application;

16.3 That the Trustees are expected to and should act together in dealing with and deciding on matters such as this;

16.4 That the question as to whether security should be demanded from Van Der Ryst could therefore only be considered after service of the Main Application on the 3RD Applicant (in this Security Application) on 21 August 2023;

16.5 That the Security Notice in terms of Rule 47(1) was therefore served as soon as practicable after the commencement of the Main Application seeing that same was served on 22 August 2023; and

16.6 That the Security Application is an interlocutory application in another pending application as opposed to a pending action, which means that the Security Application might very well be heard simultaneously with or even after the Main Application, if brought in due course, which would negate the Security Application altogether.

17. I have already set out my thoughts in respect of the last-mentioned argument by Mr. Zietsman and for the reasons set out above, this argument in my view does not hold water.
18. Further to the above and although I fully accept the arguments of Mr. Zietsman in respect of paragraphs 16.2 and 16.3 herein above, I can unfortunately not accept his arguments summarized in paragraphs 16.4 and 16.5 above.

For the simple reason that the appointed Trustees are expected to act jointly in respect of any matter pertaining to the estate of Van Der Ryst, one can reasonably accept, on the probabilities, that the Trustees would have and more importantly should have had contact with one another after service of the Main Application on the 1st and 2nd Applicants during July 2023.

I therefore have to agree in this regard with Mr. Visser who appeared on behalf of Van Der Ryst and it should also be mentioned that Mr. Zietsman, to his credit, did remark during his argument in reply, that the Trustees might have been responsible for some self-created urgency in this regard.

19. Further to the above and as was already pointed out, an Applicant in an urgent application should show that if the application is not heard on an urgent basis, he/she would not be afforded substantial redress at a hearing in due course.
20. It was held in the matter of East Rock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd & Others[8]:

“...the procedure set out in rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent ... is underpinned by the issue of absence of substantial redress in an application in due course. The Rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the Rules it will not obtain substantial redress.”[9] (My omissions and underlining)

21. In view again of the fact that the Main Application is still not ripe for hearing and, more importantly, have not been enrolled as of yet, I hold the view that the Trustees can hardly argue with conviction that they could not have been afforded substantial redress in a hearing in due course of the Security Application.

22. For the above reasons I hold the view that the Security Application is not urgent and that same should in fact be struck from the roll.

It should be mentioned that Mr. Visser on behalf of Van Der Ryst, attempted to raise further issues in limine which was not referred to in the Answering Affidavit of Van Der Ryst the most important of which was that Van Der Ryst was prejudiced in the sense that a Certificate of Urgency was filed belatedly and together with the Replying Affidavit;

I do not deem it necessary to deal with this issue in any sort of detail since the fact that such a certificate was filed after the fact, and specifically in view of what has been stated herein above, does not take the matter in respect of urgency any further.

23. I do however take the view, for the reasons set out below, that the Security Application, despite not being urgent, should in this instance not be removed from the roll simply due to a lack of urgency.
24. It has been confirmed recently that depending on the facts of each case, circumstances might exist where, notwithstanding material non-compliance with the Rules, a matter should be entertained where it would be in the interest of expediency.[10]

In the matter of Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd & Others[11] it was held by Brooks AJ[12]:

“... I am of the respectful view that the very practical considerations of factors such as the incurring of unnecessarily duplicated case preparation and presentation procedures, with their concomitant increase in already substantial legal costs, and the undesirable

duplication of the requirement of the attention and preparation of more than one court ... must be weighed against any apparent

prejudice to a respondent who has been brought to court on a truncated timeframe.”

25. In the present matter both parties have had the opportunity to file the necessary affidavits in the Security Application and both parties have also had the opportunity to file Heads of Argument in the matter, to properly prepare and to argue the matter properly.

The merits of the matter was furthermore also fully argued by both parties' representatives and I consequently deem it unnecessary to burden another Court with this Security Application in circumstances where practical considerations dictate that the matter be dispensed with at this point in time.

Mr. Visser did not take the point that Van Der Ryst was prejudiced by the truncated time periods set by the Trustees in the Security Application and he (Mr. Visser) certainly did not put up a vigorous argument when asked whether a determination of the Security Application at this point in time, would in any way be problematic.

26. I consequently hold the respectful view that it is in the interest of expediency for this Security Application to be dispensed with at this stage.

AD MERITS:

27. It is common cause that Van Der Ryst had been declared insolvent by this Court on or about 15 July 2022 and that the position in respect of his insolvency had not changed since then.
28. The mere fact however that Van Der Ryst is an insolvent, does not entitle the Trustees to an order that Van Der Ryst should set security as it has been held that an order as to the provision of security will, in such circumstances, only be granted if the Main Application was found to be reckless and vexatious.[13]

The above principle was actually established quite some time ago already where the Supreme Court of Appeal, in the matter of Ecker v Dean[14] confirmed same and added “... that every application for security must be decided on the merits of the particular case before the Court, bearing in mind that the basis of granting an order for security is that the action is reckless and vexatious.”[15]

29. Further to the above and in the same matter, the Court confirmed that the Court has an inherent discretion to order that security be provided in order to prevent the abuse of its own processes, but that this discretion should be “... sparingly exercised and only in very exceptional cases.”[16]
30. It is common cause and also stating the obvious that one of the ways in which to prevent the abuse of Court process, is to order that security for costs be provided and thereby effectively stay the proceedings up and until such time that security is indeed provided.[17]

It has also been held, with reference to the afore-said discretion of the Court to stay its proceedings in order to prevent the abuse of process that:

“Proceedings will be stayed when they are vexatious or frivolous or when their continuance, on all the circumstances of the case, is, or may prove to be, an injustice or serious embarrassment to one or other of the parties...”[18]

31. The terms “vexatious” and “abuse” in the legal sense, have been defined as “frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant ... Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; ‘abuse’ connotes a misuse, an improper use, a use mala fide, a use for an ulterior motive.”[19]

It has also been held that a matter will be deemed to be vexatious and an abuse of Court processes “...if it is obviously unsustainable.”[20]

31. In *Beinash v Wixley*[21] it was held that the question as to whether proceedings constitute an abuse of the processes of the Court, needs to be answered by taking cognizance of the circumstances of each case as “There can be no all-encompassing definition of the concept...”[22]
32. In this specific matter, Mr. Zietsman argued on behalf of the Trustees that the Main Application in effect constitutes an abuse of the Court process as it boils down to a vexatious application.

In an attempt to avoid clouding the issues unnecessarily, I will however start off by referring to the reasons advanced by Mr. Visser on behalf of Van Der Ryst as to why the Security Application should fail and more specifically why the Main Application is not vexatious and does not constitute an abuse of process.

33. Mr. Visser relied heavily on the provisions of specifically Section 151 of the Insolvency Act which states that “...any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court...”
34. Mr. Visser’s primary argument, if I understood him correctly, was that the Main Application and specifically the relief sought in terms thereof, cannot be viewed as being vexatious and/or an abuse of the Court processes because Section 151, in its effect, affords the right to Van Der Ryst to approach the Court for a review of the conduct of the Bank during the first meeting of creditors in his insolvent estate.

It appears that Van Der Ryst’s argument as to why the events during the first meeting of creditors stand to be reviewed, is based primarily on the fact that he (Van Der Ryst) did not receive notice of said meeting.

The further relief sought by Van Der Ryst is already set out in paragraphs 3.2.1 and 3.2.2 herein above and will not be repeated.

35. It is however evident from the way in which the relief sought in terms of the Notice of Motion in the Main Application is worded/structured, that what Van Der Ryst in effect wants from the Court after hearing argument in the Main Application, is an order in terms whereof “the matter” is reconsidered by either the NCT, or by a Debt Counsellor (in terms of the NCA) or by the Trustees (in terms of the Insolvency Act).

Although it is not clear precisely what is meant with the term “the matter” as it appears in prayer 2 of the Notice of Motion in the Main Application, it is my view that the logical inference that might be drawn in this instance, is that reference is being made to Van Der Ryst’s financial situation prior to his final liquidation.

36. Mr. Visser argued that the NCA might find application in this instance by virtue of the fact “... that there exists a harmonious inter-play and relation between the provisions of the National Credit Act (NCA) and the Insolvency

Act.”[23]

37. In answer to Mr. Visser’s argument in respect of Van Der Ryst’s right to have brought the Main Application in terms of Section 151 of the Insolvency Act, Mr. Zietsman admitted that the said Section 151 does indeed afford such a right to Van Der Ryst, but submitted that an application for review in terms of Section 151, should still be based on proper grounds.
38. I have to agree with the above submission made by Mr. Zietsman as I cannot believe that the Legislature, by enacting Section 151 of the Insolvency Act, intended that such a review may be brought on improper and/or unsustainable grounds and that a Court will be obligated to simply hear such improper and/or unsustainable matter.

If I may therefore add to the argument of Mr. Zietsman, I would say that the grounds upon which a review is brought in terms of Section 151 of the Insolvency Act should also be sustainable and I do so with reference to the above matter of African Farms & Townships Ltd.

39. Mr. Zietsman then proceeded to point out that Van Der Ryst’s primary ground for why he wants the conduct of the Bank reviewed, is the allegation that he was not present during the above-mentioned first meeting of creditors in his insolvent estate.

If regards are to be had to the contents of Van Der Ryst’s Answering Affidavit (herein after “the Answering Affidavit”) in the Security Application, this contention by Mr. Zietsman SC appears to be correct.

Van Der Ryst states in paragraph 13.4 of the Answering Affidavit as follows:

“Inasmuch as the applicants are implying that the main application was launched with some ulterior purpose, which suggestion is without merit and is also denied.”

In paragraph 13.5 of the Answering Affidavit, Van Der Ryst states:

“The main application is to facilitate the pursuit of the veracity of the claims lodged by Standard Bank.”

In paragraph 15.1 of the Answering Affidavit it is repeated that the Main Application was not lodged for an ulterior purpose and it is stated:

“The main application has merit and is not vexatious.”

In paragraphs 16.1 and 16.2 of the Answering Affidavit, Van Der Ryst intimates that he did not receive the notice of the first meeting of creditors and in paragraph 17.1 he states:

“I have already indicated that I did not receive any notification of the first meeting of creditors and also indicated the reasons therefore.”

40. If regards are to be had to the notice of the first meeting of creditors, it appears that a copy of said notice was sent to Van Der Ryst at the Farm Allendale, Barkly West.

It is this notice that Van Der Ryst denies receipt of, stating in paragraph 16.2 of the Answering Affidavit as follows:

“There is no postal delivery at this address and the letter would never have reached me.”

41. Mr. Zietsman argued that it was not necessary for Van Der Ryst to be present at the first meeting of creditors and amplified his argument by referring to inter alia Section 44(7) and Section 45 of the Insolvency Act which provides for a mechanism whereby the Master may interrogate any person present at a meeting of creditors who wishes to prove or has proven its claim against the estate as well as a mechanism whereby the trustees of an insolvent estate is obliged to “review” any and all claims proved during meetings of creditors.
42. Although Mr. Zietsman is correct in his contentions about the procedures as set out in the above Section 44(7) and Section 45 of the Insolvency Act, I can unfortunately not agree with his contention that the presence of Van Der Ryst at the first meeting of creditors was not necessary.
43. Section 64(1) of the Insolvency Act states as follows:

“An insolvent shall attend the first and second meetings of the creditors of his estate ... unless he has previously obtained the written permission of the officer who is to preside or who presides at such meeting granted after consultation with the trustee to absent himself. The insolvent shall also attend any subsequent meeting of creditors if required so to do by written notice of the trustee of his estate.” (My underlining and omissions)

I understand the above extract from Section 64(1) of the Insolvency Act to mean exactly what it says namely that an insolvent is obligated to attend the first and second meetings of creditors unless excused (in this case) by the Master after consultation with the Trustees.

The above is underlined, in my view, by the provisions of Section 66 of the Insolvency Act which provides therefore that an insolvent may effectively be imprisoned if he/she fails to attend the first and second meetings of creditors.

44. In view of the above therefore, I hold the respectful view that Van Der Ryst had the obligation to attend the first meeting of creditors which forms the subject of the Main Application and that this obligation was an absolute one.[24]
45. It does not appear from the papers that Van Der Ryst was given notice of the said first meeting of creditors in any other way than by way of notice in the Government Gazette and by way of the notice to Van Der Ryst referred to in paragraph 40 above.

It was certainly not argued to the contrary by any of the parties’ legal representatives.

46. The question that now arises is whether the above notice of the first meeting of creditors was sufficient or whether the Master had some or other obligation to ensure that Van Der Ryst’s attendance at the first meeting of creditors was ensured.

47. Section 40(1) of the Insolvency Act only requires notification of a first meeting of creditors by way of a publication in the Government Gazette as opposed to publication also in a local newspaper (in the district within which the insolvent resides) of a second meeting of creditors.[25]

In the matter of R v Mahomed Abbass[26] the Court held that notice by way of a publication in the Government Gazette was sufficient.[27]

The above was also confirmed in the matter of R v Parkar[28] where Gardiner J states:

“I would like to add, with regard to the first count, that although the law throws upon an insolvent an obligation to attend meetings after notice in the Gazette, in common fairness a trustee, in the case of an insolvent of the class of this man, ought to give him some verbal notice in addition to the notice in the Gazette. I state this, not as a matter of law, but as a matter of common fairness”.

48. It should be mentioned that, since the decision of Di Stefano mentioned herein above, I could find no authorities which specifically answers the question posed in paragraph 46 above, nor was I referred to any.

In the recent matter of Sithole NO & Others v Mulaudsi & Another[29] the learned Tlhapi J refrained from commenting on whether the Master had an obligation to invite an insolvent to a first meeting of creditors.[30]

49. The current legal position therefore appears to be that there is no obligation on the Master to give notice of a first meeting of creditors to an insolvent other than by way of publication in the Government Gazette and that the lack of individual/personal service of such notice on an insolvent, is not a defence.[31]

The argument of Van Der Ryst that the events during the first meeting of the creditors in his insolvent estate is reviewable by virtue of the fact that he did not attend said first meeting, therefore appears to be incapable of holding water.

50. The further argument on behalf of Van Der Ryst that the matter may be dealt with in terms of the NCA by virtue of the fact that there is “harmonious inter-play” between the provisions of the NCA and the Insolvency Act, similarly appears to be incapable of holding water.

Although it was admitted on behalf of the Trustees that a harmonious inter-play between the two sets of legislation might exist, it was vigorously denied on behalf of the Trustees that it will have any impact on this matter.

51. It appears from the papers that were placed at my disposal that the arguments that were raised by Mr. Visser on behalf of Van Der Ryst in respect of the possible extension of reckless credit to Van Der Ryst and the referral of the matter to debt review in terms of Section 85 of the NCA, had already been dealt with by the learned Erasmus AJ in the unreported matter of The Standard Bank of South Africa v Jacobus Coenraad Van Der Ryst. [32]

In dealing with a submission from Mr. Visser, who appeared for Van Der Ryst in that matter as well, to the effect that the Court should utilise the provisions of Section 85 of the NCA and refer the matter to debt review, Erasmus AJ held that it would not serve any purpose to do so.[33]

In coming to the above conclusion, Erasmus AJ held as follows:[34]

“43.1 In this instance the respondent has already utilised remedies available to him in terms of the NCA, The process failed.

43.2 The respondent did not make out a case in support of the contention that the applicant’s granting of the credit facilities amounted to reckless credit or that he was over-indebted. The respondent was privy to all agreements, his bank statements and financial

statements. If he required additional documents, after this application was lodged, he could have utilised the remedies provided

for in Rule 35(12) to inspect or make copies of documents.

43.3 Any repayment plan, of whatever nature, will in principle depend on the availability of regular income for the debtor in order to make the required payments. He has disposed of his livestock and farming operations. Based on the history of this matter, any repayment plans will in all likelihood not be acceptable options as creditors may refuse to grant the respondent a rescheduling of the debt.”

It should be mentioned that I could not find anything in the Founding Affidavit of Van Der Ryst in the Main Application, or in his Answering Affidavit in the Security Application to convince me that Van Der Ryst’s position, since the above judgment by Erasmus AJ, had changed to such an extent that he will now suddenly be successful with this argument in his plight in the Main Application.

It should be mentioned that the above decision by Erasmus AJ was upheld by the Supreme Court of Appeal and I could find no reason to differ from the above Courts.

52. In respect of the further relief sought by Van Der Ryst in the Main Application where he asks of the Court to direct the Trustees to examine the claims submitted by the Bank and to report to the Master and to Van Der Ryst as envisaged in Section 45 of the Insolvency Act or to direct the Master to submit the Bank to interrogation in terms of the provisions of Section 44(7) of the Insolvency Act, I have to also agree with Mr. Zietsman in the sense that the seeking of this relief seems to be premature and for that matter improper.
53. Section 45 of the Insolvency Act places an obligation on trustees to examine claims made against the insolvent estate and that in the event of any dispute in respect of any claim, the dispute should be referred to the Master to investigate and to determine.

There appears to be no case made out as to why the Court in the Main Application should order the Trustees to abide by the provisions of Section 45 of the Insolvency Act and it also does not appear from the papers in the Main Application why the Master should be ordered to conduct an interrogation in terms of Section 44(7) of the Insolvency Act.

The above are obligations placed on the Trustees and the Master by way of statute and I can find no reason why the review Court should be required to order the Trustees and the Master to do what they are supposed to do, unless good reason for such an order exists.

I could find no such good reason.

54. In view of all of the above, I am of the view that the relief sought by Van Der Ryst in the Main Application is *prima facie* unsustainable and that it appears that the Main Application was lodged with the sole purpose to annoy.
55. I consequently find the Main Application to be vexatious and I hold the view that an order to the effect that security should be provided by Van Der Ryst, will not be improper in the circumstances.

I am however not of the view that security in an amount of R 250 000,00 (Two Hundred and Fifty Thousand Rand) as prayed for would be pushing the envelope, seeing that the calculation of that amount as per the Founding Affidavit in the Security Application amounts to, at best, a thumb suck and also appears to be excessive and I find that an amount of R 150 000,00 (One Hundred and Fifty Thousand Rand) would be proper as it will at least be sufficient to serve as security for the Trustees' estimated future costs in opposing the Main Application.

56. In respect of the issue of costs of the Security Application, I hold the view that it would not be appropriate to make an order as to costs in the circumstances.

The reason for this is simply the fact that I found the Security Application to be not urgent which in effect means that Van Der Ryst could be deemed to have been substantially successful in that regard and I am of the view that, on this basis alone, it would not be just to mulct Van Der Ryst with the costs of the Security Application even though the Trustees were substantially successful in the remainder of the Security Application.

ORDER:

57. In view of all of the above, I make the following order:

57.1 That the Respondent be ordered to furnish security in the amount of R

150 000,00 (One Hundred and Fifty Thousand Rand) within 15 (fifteen) days of date of this order for the costs of the Applicants in prosecuting the opposition of the main application under case number 1316/2023;

57.2 That, in the event of the Respondent failing to furnish security in the amount of R 150 000,00 (One Hundred and Fifty Thousand Rand) within 15 (fifteen) days of date of this order, the Applicants are

afforded leave to approach this Court on the same papers, supplemented if and where necessary for an order dismissing the Respondent's application under case number 1316/2023; and

57.3 No order as to costs is made.

A.D OLIVIER

ACTING JUDGE

For 1ST to 3RD APPLICANTS: Adv. P. Zietsman SC o.i.o EG Cooper, Majiedt Inc. BLOEMFONTEIN c/o Van De Wall Inc. KIMBERLEY For RESPONDENT: Mr. E. Visser Etienne Visser Attorneys BLOEMFONTEIN c/o Van Den Heever Inc. KIMBERLEY

[1] Act 34 of 2005.

[2] Act 24 of 1936.

[3] Treasure Karoo Action Group & Another v Department of Mineral Resources & Others [2018] 3 All SA 896 (GP), par [10]. Also see Skjelbreds Rederi A/S & Others v Hartless (Pty) Ltd [1982] 1 All SA 1 (W), at page 3.

[3] Treasure Karoo Action Group & Another v Department of Mineral Resources & Others [2018] 3 All SA 896 (GP), par [10]. Also see Skjelbreds Rederi A/S & Others v Hartless (Pty) Ltd [1982] 1 All SA 1 (W), at page 3.

[4] See Rule 6(12)(b) of the Rules.

[5] I suspect that this is a typing error and that "Applicant" should in fact read "Respondent" with reference to Van Der Ryst.

[5] I suspect that this is a typing error and that "Applicant" should in fact read "Respondent" with reference to Van Der Ryst.

[6] Referring obviously to Van Der Ryst.

[7] The said Answering Affidavit was filed a few days out of time as it apparently had to be filed by 1 September 2023.

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[8] [2012] JOL 28244 (GSJ).

[9] East Rock Trading 7 (Pty) Ltd, supra at paragraph [6].

- [10] See *Magricor (Pty) Ltd v Border Seed Distributors CC: In re: Border Seed Distributors CC v Magricor (Pty) Ltd* [2020] ZAECGHC 103 (SAFLII Reference) at paragraph 38.
- [10] See *Magricor (Pty) Ltd v Border Seed Distributors CC: In re: Border Seed Distributors CC v Magricor (Pty) Ltd* [2020] ZAECGHC 103 (SAFLII Reference) at paragraph 38.
- [11] [2013] ZAECMHC 14 (SAFLII Reference).
- [12] *Supra*, at paragraph [10].
- [13] *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* [2008] 1 All SA 329 (SCA) at paragraph [15].
- [13] *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* [2008] 1 All SA 329 (SCA) at paragraph [15].
- [14] 1938 AD 102.
- [15] See *Ecker*, *supra* at page 110. Also see *Boost Sports Africa (Pty) Ltd v South Africa Breweries (Pty) Ltd* [2015] 3 All SA 255 (SCA) at paragraph [16].
- [15] See *Ecker*, *supra* at page 110. Also see *Boost Sports Africa (Pty) Ltd v South Africa Breweries (Pty) Ltd* [2015] 3 All SA 255 (SCA) at paragraph [16].
- [16] *Ecker*, *supra* at page 111. Also see *Ramsamy NO & Others v Maarman NO & Another* 2002 (6) SA 159 (C) at page 173.
- [16] *Ecker*, *supra* at page 111. Also see *Ramsamy NO & Others v Maarman NO & Another* 2002 (6) SA 159 (C) at page 173.
- [17] See *inter alia* *Fitchet v Fitchet* [1986] ZASCA 131; [1987] 4 All SA 14 (E) at page 17 as well as the matter of *Zietsman v Electronic Media Network & Others* [2008] ZASCA 4; [2008] 2 All SA 523 (SCA) at page 4.
- [17] See *inter alia* *Fitchet v Fitchet* [1986] ZASCA 131; [1987] 4 All SA 14 (E) at page 17 as well as the matter of *Zietsman v Electronic Media Network & Others* [2008] ZASCA 4; [2008] 2 All SA 523 (SCA) at page 4.
- [18] *Belmont House (Pty) Ltd v Gore & Another* NNO 2011 (6) SA 173 (WCC) at page 178.
- [18] *Belmont House (Pty) Ltd v Gore & Another* NNO 2011 (6) SA 173 (WCC) at page 178.

[19] Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others 1979 (3) SA 1331 (TPD) at page 1339.

[19] Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others 1979 (3) SA 1331 (TPD) at page 1339.

[20] See African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at page 565.

[20] See African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at page 565.

[21] [1997] 2 All SA 241 (A).

[22] See Beinash, *supra* at page 251.

[23] This is quoted from the Answering Affidavit in the Security Application and specifically paragraph 18.2 thereof.

[23] This is quoted from the Answering Affidavit in the Security Application and specifically paragraph 18.2 thereof.

[24] See R v Abbass 1916 AD 233 at page 235. See also the matter of S v Di Stefano [1977] 1 All SA 209 (C) at page 211.

[24] See R v Abbass 1916 AD 233 at page 235. See also the matter of S v Di Stefano

[1977] 1 All SA 209 (C) at page 211.

[25] See Section 40(3)(b) of the Insolvency Act.

[26] 1916 CPD 178 at page 185.

[27] This decision was confirmed on appeal in the matter of Abbass referred to in footnote 23 herein above. See also the matter of Di Stefano, *supra*.

[27] This decision was confirmed on appeal in the matter of Abbass referred to in footnote 23 herein above. See also the matter of Di Stefano, *supra*.

[28] 1916 CPD 692 at page 695.

[29] [2022] ZAGPPHC 476 (SAFLII Reference).

[30] See Sithole NO, *supra* at paragraph [21].

[31] See Di Stefano, *supra*.

[32] Northern Cape High Court Case Number 1294/2021. The matter was heard on 26 November 2021 and judgment was handed down on 14 January 2022.

[32] Northern Cape High Court Case Number 1294/2021. The matter was heard on 26 November 2021 and judgment was handed down on 14 January 2022.

[33] The Standard Bank of South Africa v Jacobus Coenraad Van Der Ryst, *supra*, paragraph [43].

[33] The Standard Bank of South Africa v Jacobus Coenraad Van Der Ryst, *supra*, paragraph [43].

[34] See The Standard Bank of South Africa v Jacobus Coenraad Van Der Ryst, *supra*, paragraphs 43.1 to 43.3.

[34] See The Standard Bank of South Africa v Jacobus Coenraad Van Der Ryst, *supra*, paragraphs 43.1 to 43.3.

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