

SOUTH AFRICA / JUDGMENT

Strydom v Additional Magistrate Kempton Park and Others (9208/08) [2010] ZAGPPHC 32 (16 April 2010) [2010] ZAGPPHC 32

COURT

North Gauteng High Court, Pretoria

BEFORE

Makgoba

CASE / FILE NUMBER

9208/08

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IN

THE HIGH COURT OF SOUTH AFRICA

/ES

(NORTH

GAUTENG HIGH COURT. PRETORIA)

CASE

NO: 9208/08

DATE:

16/04/2010

IN

THE MATTER BETWEEN

JUAN

LATEGAN STRYDOM APPLICANT

AND

ADDITIONAL

MAGISTRATE KEMPTON PARK 1stRESPONDENT

PETRUS

JACOBUS MARYN VAN STADEN N.O. 2nd

RESPONDENT

NAKEDI

MATHEWS PHOSA N.O. 3rd

RESPONDENT

THE

MASTER OF THE HIGH COURT 4Tii

RESPONDENT

GERINGS

ATTORNEYS 5th

RESPONDENT

JUDGMENT

MAKGOBA. J

[1] The applicant is an unrehabilitated insolvent. The second and third respondents are the appointed trustees in the applicant's insolvent estate. The second and third respondents requested the fourth respondent to authorise the holding of an enquiry in terms of section 152 of the Insolvency Act no 24 of 1936 for investigation of certain affairs of the insolvent estate. The fourth respondent did authorise and in fact held the said insolvency enquiry. However, at a certain stage the fourth respondent ordered that the enquiry should proceed before the first respondent, a magistrate of Kempton Park.

[2] The present application is aimed at reviewing and setting aside the decision of the fourth respondent in authorising the insolvency

enquiry to proceed before the first respondent. The applicant calls for a review and setting aside of the following:

the order by the fourth respondent in terms whereof an insolvency enquiry-is to proceed before the first respondent;

the whole of the proceedings of the insolvency enquiry which proceeded before the first respondent; all witness subpoenas issued by the first respondent;

all directions given by the first respondent pursuant to the subpoenas issued as well as the evidence given in terms thereof:

the warrants for arrest pursuant to the alleged non-compliance with the aforesaid directions;

in addition hereto the applicant claims costs de bonis propriis against the second, third and fifth respondents.

[3] The fifth respondent is the second and third respondents' attorneys of record. It is not understood why the applicant chose to cite the fifth respondent in these proceedings and more so why a special order of costs is sought against the fifth respondent. In my view the circumstances of this case do not justify the inclusion of the fifth respondent as a party to these proceedings.

[4] As pointed out above the nature of the proceedings are to review and set aside the decision of the Master of the High Court (fourth respondent) to order that the insolvency enquiry be proceeded with before the magistrate of Kempton Park (first respondent). The legal question which immediately comes to mind is whether such a decision of the Master is reviewable or not. Counsel for the applicant, apparently realising the difficulty he is facing as to whether the decision is reviewable, argued that the decision to be reviewed is not the decision to hold an enquiry simpliciter, but the review of the decision to hold the enquiry in a particular manner, ie before the first respondent.

[5] The relevant portion of section 152(2) of the Insolvency Act, no 24 of 1936, reads as follows:

"If at any time after the sequestration of the estate of a debtor ... the Master is of the opinion that the insolvent ... is able to give any information which the Master considers desirable to obtain ... he may by notice in writing delivered to the insolvent ... summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice ... and to furnish the Master or the officer before whom he is summoned to appear with all the information within his knowledge concerning the insolvent or considering the insolvent's estate or the administration of the estate."

[6] It has been held that the decision to make enquiries (or to hold an enquiry) is simply an investigative procedure and therefore not an "administrative act" which affects the rights of parties and which is therefore, not reviewable. See *Nedbank Ltd v The Master of the High Court, Wirwatersrand Local Division, and Others* 2009 3 SA 403 (WLD).

In *Roux v Die Meester en 'n Ander* 1997 1 SA 815 (T) at 824B-C the court reiterated that an enquiry under section 152 of the Insolvency Act, 1936 was purely investigative in nature and did not envisage a finding determining or detrimentally affecting a person's rights and consequently a constitutional principle providing for the right to procedurally fair administrative action where a person's rights or legitimate expectations were affected or threatened, could not be applicable and thus could not help the applicant.

[7] In *Podlas v Cohen & Bryden NNO and Others* 1994 4 SA 662 (T) SPOELSTRA, J. in dealing with the issue of constitutionality of an enquiry stated the following:

"The Master's decision to hold an enquiry and to issue the notices to persons who might be called to testify did not prejudicially affect the witnesses' liberty or property or any other existing right that would require the Master to apply the audi alteram partem rule. This notices are simply subpoenas. A person who is subpoenaed to give evidence before any legally constituted tribunal empowered to subpoena witnesses is, generally speaking, obliged to obey it. This seems to be so because he or she is called upon to perform what may be described as a public duty [*Van Aswegen v Lombard* 1965 3 SA 613 (A) at 623E].

Personal freedom, therefore, becomes subordinate to the public interest."

[8] Counsel for the applicant argued further that the present case is to be distinguished from the abovementioned cases in that, in the present case, the decision which the applicant seeks to attack, goes beyond the mere decision to hold an enquiry. That it is a decision to transfer an enquiry from where it had begun before the Master to the first respondent, being a magistrate in a different magisterial jurisdiction. I shall provide an answer to this argument when I later deal with the question as to whether the applicant was prejudiced by the transfer and subsequent holding of the insolvency enquiry in *Kempton Park*.

[9] The Master has an unfettered discretion to order an enquiry in terms of section 152(2) of the Insolvency Act to be held either before himself or a magistrate or an officer in the public service. No particular circumstances are required to exist for an enquiry to be held before a

magistrate or officer in the Public Service as opposed to an enquiry to be held before the Master. The witnesses have no right to claim that the enquiry should be held before the Master and not before a magistrate or any other officer in the Public Service. In my view no rights of any of the witnesses including that of the applicant have been prejudicially affected by the Master's decision to hold the enquiry before a magistrate. See *Roux v Die Meester en 'n Ander*, supra.

- [10] The applicant goes further to attack the Master's decision to hold the enquiry before a magistrate on a point of jurisdiction. Counsel argues that the decision resulted in the "transfer" of a previously closed enquiry to a magistrate in a jurisdiction where the insolvent was not residing, neither at the time nor at the time of the sequestration and to a district from which none of the witnesses were from. That it involved costs, inconvenience, the difficulty in obtaining legal representation and the whole of the disputes regarding the issues of subpoenas.
- [11] This ground of objection based on jurisdiction is ill-founded. The insolvency proceedings before a magistrate are not held in terms of the Magistrates' Courts Act or the Rules of that court. It is proceedings in terms of section 152(2) of the Insolvency Act. No witness and neither the insolvent can object to a particular magistrate conducting the enquiry on the grounds that he is not resident within the jurisdiction of that magistrates court.
- [12] An important consideration that may play a role is whether the location where the enquiry is to be held will impose undue inconvenience on the witness summoned to appear before the magistrate. In my view no undue inconvenience will be caused by holding the enquiry in Kempton Park taking into account the distance between Kempton Park and Pretoria and/or Johannesburg. If for instance the Master ordered the enquiry to be held before a magistrate in Durban, it will be a clear case where witnesses and the insolvent will be unduly inconvenienced and required to incur unnecessary additional costs to attend the enquiry.
- [13] In casu the magistrate's court in Pretoria was not available to hold the enquiry. The nearest magistrate's court to where the applicant was resident and which was prepared to accommodate the insolvency enquiry was magistrate's court of Kempton Park.
- [14] It should be pointed out that the best opportunity for the applicant to have brought the present review proceedings was before the enquiry commenced before the first respondent. It is common cause that the applicant has already attended the enquiry on several occasions, allowed the enquiry to be conducted and gave evidence at the enquiry. Only when the shoe starts to pinch because there are orders made against him (amongst others, order to produce documents and warrant of arrest) the applicant now turns around and object to the enquiry being continued with.
- [15] It is common cause that the first respondent issued a subpoena for the applicant's initial appearance before him. Section 152(2) requires any subpoena to be issued by the Master. The second and third respondents concede that the first respondent had no authority

to issue a subpoena. Counsel for the respondents argued that the fact that the subpoena to secure the applicant's attendance at the enquiry by the first respondent is a formal defect or irregularity does not taint the legality of the proceedings already held thus far. He further submitted that the applicant has failed to show that he has suffered substantial injustice thereby and accordingly has not shown why the subpoena should be set aside.

[16] I agree with counsel's above submission. The applicant has complied with the subpoena and has attended the enquiry. On subsequent

sittings of the enquiry he was warned to appear and he complied. The applicant cannot after he has attended the enquiry pursuant to the irregular subpoena apply for the subpoena to be set aside. The question whether the subpoena was validly issued has now become academic and of no consequence. In any event the time to object to an invalid subpoena is before you comply with it and not after you have complied with it.

[17] It is only the initial subpoena issued in terms of section 152(2) of the Insolvency Act that is required to be issued by the Master. In terms of section 152(3) the first respondent had the authority to issue a written notice to the applicant to appear before him again and require him to submit any further information or any book or documents specified in such notice.

[18] The orders and directions given to the applicant to produce documents at the enquiry were given by a validly constituted tribunal in the applicant's presence. The applicant has not complied with the orders and has not provided an acceptable excuse for his failure to do so. The first respondent was accordingly entitled to issue a warrant of arrest for the applicant.

[19] It is regrettable to note that the applicant has steadfastly refused to comply with the orders and directions of the first respondent. All that the applicant has to do to escape his arrest and incarceration is to comply with the orders. The choice is his. The present application by the applicant is clearly just an effort to delay and frustrate the second and third respondents in the execution of their duties as trustees of the applicant's insolvent estate.

[20] The application is accordingly dismissed with costs.

EMMAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 29 MARCH 2010 FOR APPLICANT: N DAVIS SC

INSTRUCTED BY: STRYDOM & BREDENKAMP ATTORNEYS FOR 2nd, 3rd AND 5th

RESPONDENTS: J F STEYN INSTRUCTED BY: GERINGS ATTORNEYS

c/o HENDRIETTE MULLER ATTORNEYS

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