

SOUTH AFRICA / JUDGMENT

Theba and Others; Bhana and Others; Essay and Others; Bhana and Others v Aurora Empowerment Systems (Pty) Ltd and Others (73173/2014; 73174/2014; 73175/2014; 73763/2014) [2015] ZAGPPHC 695 (7 September 2015) [2015] ZAGPPHC 695

COURT

North Gauteng High Court, Pretoria

BEFORE

E Bertelsmann

CASE / FILE NUMBER

73173/2014;73174/2014;73175/2014;73763/2014

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IN THE HIGH COURT OF
SOUTH AFRICA
(NORTH GAUTENG
DIVISION, PRETORIA)

Case

Numbers: 73173/2014;73174/2014;73175/2014 and 73763/2014

Date: 8/9/2015

In the matters between: YASEEN ASHRAF
THEBA
First Applicant
FAZEL SULIMAN
BHANA
Second Applicant
SSULIMAN AHMED
BHANA
Third Applicant
(Case No 73173/2014)
and
FEROSA SULIMAN
BHANA
First
Applicant
FAZEL SULIMAN

BHANA
Second
Applicant
SULIMAN AHMED
BHANA
Third Applicant
(Case No 73174/2014)
SHAMILA SULIMAN
ESSAY
First
Applicant
FAZEL SULIMAN
BHANA
Second Applicant
SULIMAN AHMED
BHANA
Third
Applicant
(Case No 73175/2014)
ZOBIDA
BHANA
First
Applicant
FAZEL SULIMAN
BHANA
Second
Applicant
SULIMAN AHMED
BHANA
Third
Applicant
(Case No 73763/2014)
AURORA EMPOWERMENT
SYSTEMS (PTY) LTD
First
Respondent
(In liquidation)
CHRISTIAAN FREDERIK DE
WET
Second Respondent
IRENE SUSAN
PONNEN
Third
Respondent
PAMODZI GOLD EAST RAND
(PTY) LTD
Fourth
Respondent
(In provisional
liquidation)
NIGEL GOLD MINING CO

(PTY) LTD
Fifth
Respondent
CONSOLIDATED
MODDERFONTEIN MINES LTD
Sixth
Respondent
CONSOLIDATED
MODDERFONTEIN
MINES 1979 (PTY)
LTD
Seventh Respondent
GROOTVLEI PROPRIETARY
MINES (PTY) LTD
Eighth
Respondent
PAMODZI GOLD ORKNEY
(PTY) LTD
Ninth
Respondent
SOLIDARITY
Tenth
Respondent
NATIONAL UNION OF
MINEWORKERS
Eleventh
Respondent
UNITED ASSOCIATION OF
SOUTH AFRICA
Twelfth
Respondent
THE MASTER OF THE HIGH
COURT OF SOUTH AFRICA,
GAUTENG LOCAL
DIVISION, JOHANNESBURG
Thirteenth
Respondent
GAUTENG PROVINCIAL
DIVISION, PRETORIA
Fourteenth
Respondent
THE SHERIFF OF THE
HIGH COURT OF SOUTH AFRICA
FOR
THE DISTRICT OF JOHANNESBURG NORTH
Fifteenth
Respondent
SIMONE LIESEL
MAGARDIE
Sixteenth Respondent
(In all four matters

set out above)

JUDGMENT

1. The Applicants in the four matters that are dealt with in this one judgment all were respondents in the principal applications brought

against them by the liquidators of the first respondent, who have been cited as the second, third and sixteenth respondents respectively ('the liquidators'). They were ordered to repay large sums they received or collected from the first respondent while the latter was already insolvent, according to the liquidators' case.

2. The payments were set aside as:

- a) Dispositions without value as contemplated in section 26 of the Insolvency Act 24 of 1936 (as amended), read with section 340 of the (old) Companies Act 51 of 1873 and section 9 of Schedule 5 to the Companies Act 71 of 2008; alternatively as:
- b) Undue preferences in terms of section 30 (1) of the Insolvency Act read with section 540 of the (old) Companies Act and read with section 9 of Schedule 5 of the Companies Act 51 of 2008. As a further alternative the payments were set aside as:
- c) Collusive dealings contemplated in section 31 of the Insolvency Act read with the same statutory provisions referred to already.
- d) Another alternative upon which judgment was granted against the applicants jointly and severally, the one to pay, the other to be absolved, was common law fraud upon the creditors of the first respondent, which payments fell to be set aside in terms of the common law.

3. The applicants were not the only respondents in the principal applications. Mr Firoze Limbada and his wife, Zeenat Laher, found

themselves in the same boat with them. Although they were represented by the same attorney and counsel at the hearing of the principal

applications, Limbada and Laher have since broken rank and instructed their own attorney for purposes of their own rescission application.

Still the background facts leading to the granting of judgment against the applicants in all the rescission applications are the

same and are recorded below in the same terms as in the application of Limbada and Laher.

4. The above applications were instituted against the applicants as part of the litigation that followed the collapse of the applicant in the principal applications, Aurora Empowerment Systems (Pty) Ltd (in liquidation) ("Aurora"), after the ill-fated acquisition of the Pamodzi East Rand Mines and the insolvency enquiry launched in the mines' insolvent estates. Aurora's liquidators alleged that the payments made to the applicants were made to them when Aurora was insolvent.
5. The granting of the judgment against the respondent parties in the principal applications was preceded by forensic skirmishes prior to the enrolment of the applications. On the morning the matter was called the present applicants' then attorneys of record

instructed counsel to apply for the postponement of the matter in the light of the fact that they had failed to file any answering

affidavits. They sought condonation for this failure on the basis that they had not been able to put their original attorneys in funds, who withdrew when the date upon which answering affidavits had to be filed loomed. New attorneys were appointed who first threatened to raise certain points in limine before seeking an extension of the proceedings to give them an opportunity to file their clients' answers.

6. This application was refused as the reasons advanced for the failure to file affidavits timeously were palpably insufficient to constitute a basis upon which the indulgence belatedly sought could be granted. Neither the counsel nor the attorneys for the respondents in the principal matter withdrew when the application for condonation and a postponement was dismissed. They were not in the position to advance any grounds upon which judgment against their clients must be refused. The judgment referred to above was granted as a consequence.
7. Counsel for the respondents in the principal applications then rose to apply for leave to appeal against the judgments granted in the absence of any opposing papers or argument. The application was refused. The present applications for the rescission of the judgments followed. Following the pattern of the previous litigation they were only enrolled for hearing after a considerable lapse of time.
8. The applicants in the present applications did not only seek a rescission of the judgment against them, but also certain other relief against the Master of the High Court as well as certain declaratory orders concerning the status of the work force of the Pamodzi Mines as actual or potential creditors of Aurora's insolvent estate. The prayers relating to the latter relief were wisely abandoned and the applications against the Master were dismissed with costs at the hearing of the present applications.

9. Before the commencement of the hearing proper the question needed to be addressed whether the Judge presiding should hear the applications in the light of the fact that he had made adverse findings against some of the present applicants in a related matter, in which the judge had also been the case manager. The parties informed the Court that there was no objection to the presiding judge finalising the present applications.
10. In their applications for rescission the applicants did not expressly rely on either Rule 31 (1) (b) or Rule 43 (1) (a). They offered no explanation for their failure to file opposing affidavits in the principal applications. Instead, they attacked the liquidators' standing and the cause of action upon which the latter relied.
11. The applicants raised a welter of defences and technical objections to the C case the liquidators had successfully advanced to obtain the judgments now sought to be rescinded. It is necessary to deal with only one of them, as all the others were not persisted in during argument. The only issue that was pursued was the allegation that there was no acceptable proof that the first respondent was insolvent at the time the payments to the applicants were made.
12. Consideration first had to be given to the question whether this dispute could be resolved on the papers. Should this have been impossible the matter might have had to be referred for oral evidence to establish whether the applicants had made out a cause of action. It was argued on behalf of all the applicants that the factual dispute was of such a nature that it was impossible to determine without trial proceedings involving discovery and the calling of essential witnesses. Although the argument might at first blush have appeared attractive, a moment's reflection revealed that there was no factual dispute at all. It was at all times common cause that the first respondent had no capital of its own and had to borrow money from the applicants to enable it to conduct business. There is no evidence, and none was presented or referred to by the applicants, that might suggest that first respondent had made any profit out of which lawful payments could have been made to the applicants
13. The essential averments made by the first respondent's liquidators in support of the submission that the first respondent was insolvent at all relevant times were not seriously challenged. It is common cause that the applicants had advanced funds to the first respondent to enable it to commence business. There is no suggestion at all in the affidavits sworn to in all these rescission applications that the first respondent ever achieved the status of a profitable business and the factual assertions made by the liquidators to the contrary could not be seriously disputed. In addition, the liquidators relied on certain portions of the evidence adduced before a commissioner in terms of an insolvency inquiry pursuant to section 417 and 418 of the old Companies Act in the principal applications. This evidence was admissible against the respective deponents only, but was incontrovertible in those instances in which it could be relied upon.

14. The applicants' assertions that there was no proof of insolvency upon the strength which judgments could be granted against them can therefore not hold water. It is common cause that they received payments of substantial amounts, whether as purported repayments of their loans or otherwise. Once it is clear that Aurora was insolvent when these payments were made the judgments cannot be assailed.
15. In the light of these findings the applicants have failed to establish that they are entitled to rescission of the judgment or judgments

granted against them.

Each and every application is dismissed with costs, such costs to be paid by the relevant applicants jointly and severally, the one to pay, the other to be absolved. The costs are to include the costs consequent upon the employment of two counsel.

Signed at Pretoria on this day of December 2015.

E BERTELSMANN

Judge of the High Court.

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