

SOUTH AFRICA / JUDGMENT

Timana Properties (Pty) Ltd v Nedbank Limited and Another (683/20) [2021]

ZAGPPHC 274 (18 March 2021)

[2021] ZAGPPHC 274

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie

CASE / FILE NUMBER

683/20

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

(3)

REVISED:

yes
18
March 2021
CASE NO: 683/20
Hearing before Rabie J by way of
Zoom conference.
In

the matter between:

TIMANA PROPERTIES
(PTY)LTD
Applicant
and
NEDBANK LIMITED
First Respondent
LEX STAR
TRUSTEES
Second Respondent

JUDGMENT

1. According to the Notice of Motion this application is for the stay of proceedings pending an application for the review and setting aside of a judgement granted by the honourable Magistrate Engelbrecht in proceedings of 13 December 2019. In the founding affidavit the deponent, Mr M.P. Timana, refers to himself as "the applicant" although Timana Properties (Pty) Ltd was cited in the heading as the applicant.
2. In paragraph 6 of the founding affidavit reference is made to a judgement of Magistrate Engelbrecht on 13 December 2019 but the applicant failed to mention what the judgement and order were and also failed to attach a copy thereof to his affidavit. It serves no purpose to refer further to the allegations made in the founding affidavit. The facts that were mentioned were put forward in a totally haphazard fashion and crucial facts to enable one to understand what the application is about, what relief is sought and why such relief is sought, were simply not referred to. It will serve no purpose to refer to the facts referred to in the founding affidavit and suffice it to say that the facts bring no clarity to the matter and the applicant's application is lacking in so much relevant detail that it is impossible to understand what the application is about and on what basis the applicant would be entitled to the relief claimed. For this reason alone the application should be dismissed.
3. During argument by counsel appearing on behalf of the applicant at the hearing of the application, clarity could still not be obtained and counsel was constrained to admit that crucial evidence had not been placed before the court.
4. During argument on behalf of the two provisional joint liquidators and the second respondent, counsel departed from the papers before the court in an effort to explain the background and the probable nature and aim of the present application. That version was adopted by counsel for the applicant and I shall consequently briefly refer thereto in order to bring some finality to the present proceedings in order to avoid the further unnecessary prolonging of the matter.
5. The background is briefly the following. The company Timana Properties (Pty)Ltd ("the company") was placed in final winding up on 16 September 2019 due to monies owed in terms of a loan agreement with the first respondent. Mr MP Timana was a director of the company. Mr CA Starbuck and Me AK Bikani were appointed on 12 June 2019 as provisional joint liquidators in the liquidated estate of the company. The aforesaid joint liquidators are members of the second respondent which in reality is a close corporation with the name Lexstar Trustees Admin CC, although not cited as such in the present application.
6. The company instituted an appeal against the order of its liquidation.
7. The joint liquidators convened a confidential enquiry in terms of section 417 of the Companies Act and on 13 November 2019 Mr Timana was subpoenaed to attend the enquiry into the affairs of the company to be held on 13 December 2019. Mr Timana was further

requested to produce certain documents. The provisional joint liquidators submitted in the answering affidavit that the enquiries are of utmost importance in the liquidation proceedings and that it appears to them that Mr Timana would stop at nothing to avoid any interrogation and any consequences flowing from such interrogations.

8. The section 417 enquiry took place before Magistrate Engelbrecht on 13 December 2019. During the hearing Mr Timana apparently refused to answer any of the questions posed to him as a witness and he also refused to present any of the requested documents to the enquiry.
9. For his refusal Mr Timana apparently relied on the fact that the company had noted an appeal against the liquidation order. It was submitted on his behalf that pending an appeal the proceedings could not continue.
10. The provisional joint liquidators, inter alia, relied on the provisions of section 150 of the Insolvency Act, Act 34 of 1936 which provides as follows:

"150 Appeal

- (1) Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may, subject to the provisions of section 20 (4) and (5) of the Supreme Court Act, 1959 (Act 59 of 1959), appeal against such order.
- (2) Such appeal shall be noted and prosecuted as if it were an appeal from a judgement or order in a civil suit given by the court which made such final order or set aside such provisional order, and all

the rules applicable to such last mentioned appeal shall mutatis mutandis but subject to the provisions of subsection (3), apply to an appeal under this section.

- (2) When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestered estate shall be released without the written consent of the insolvent

concerned.

- (4) If an appeal against a final order of sequestration is allowed, the court allowing such appeal may order the respondent to pay the costs of sequestering and administering the estate.
- (5) There shall be no appeal against any Order made by the court in terms of this Act, except as provided in this section."
11. Magistrate Engelbrecht accepted the arguments on behalf of the provisional joint liquidators and decided that the appeal against the liquidation order does not suspend the provisions of the Insolvency Act and the Companies Act and that the enquiry should therefore proceed. At that point the proceedings were apparently adjourned.

12. It appears that subsequent to the aforesaid proceedings the applicant instituted two applications namely, firstly, an application to review, inter alia, the aforesaid findings by Magistrate Engelbrecht and, secondly, the present application to stay the proceedings before Magistrate Engelbrecht pending the finalisation of the aforesaid review application. This court is concerned with the application to stay proceedings.
13. On behalf of the joint liquidators it was submitted that a number of reasons exist why the application cannot succeed. I shall briefly refer to these reasons.
14. Firstly, the issue of non-joinder and mis-joinder. The second respondent is cited as "Lex Star Trustees". Such an entity does not exist. Furthermore, the two provisional joint trustees should have been joined as parties to the application for the reason that they, in their individual capacities, have been appointed as trustees of the company's insolvent estate and as such they have an interest in the present application.
15. Furthermore, the applicant failed to site the Presiding Officer as well as the Master of the High Court as parties to the application. Both these parties have a direct and substantial interest in the application.
16. I agree with the above submissions regarding the mis-joinder and non-joinder and the submission that such are fatal for the application. Consequently the application should be dismissed for these reasons.
17. Secondly, the issue of locus standi. It was submitted on behalf of the provisional joint trustees that Mr Timana has no locus standi to launch the current application on behalf of the applicant. It was submitted that it is trite that once a company has been placed in liquidation, the directors are divested of control and cease to be directors functionally, officially and nominally. A liquidation order automatically terminates a director's employment as such and/or operates to dismiss him. Consequently such directors would have no power to conduct proceedings on behalf of the company. It was further submitted that only the liquidators have the necessary locus standi to institute and defend legal proceedings on behalf of the liquidated company.
18. I agree with the aforesaid submissions on behalf of the provisional joint liquidators. Consequently the application should be dismissed for these reasons as well.
19. Thirdly, the issue of a pending appeal. It would be recalled that Mr Timana's whole case was based on the premise that the noting of an appeal against the liquidation order suspended the operation of the liquidation order with the further result that the insolvency enquiry could not take place pending the finalisation of the appeal. I agree, however, with the aforesaid submissions of the provisional joint liquidators that section 150 (3) is clear in its determination that the provisions of the Insolvency Act shall continue to apply as if no appeal had been noted. Mr Timana thus had no right to refuse to answer questions posed to him during the enquiry and to refuse to present the documents requested from him. The finding by Magistrate Engelbrecht was thus a valid finding which does not stand to be

reviewed and set aside. Consequently Mr Timana and/or the applicant had not made out a case that the enquiry proceedings should be stayed pending any review proceedings. The application should consequently be dismissed for this reason as well.

20. Fourthly, the issue regarding the dismissal of the application for leave to appeal. It would be recalled that the application for a stay of proceedings is based on the fact that an appeal against the liquidation order had been noted. During the hearing of this application the representatives of the parties were ad idem that the application for leave to appeal had been dismissed by the court who made the liquidation order. On behalf of the joint liquidators it was submitted that a petition to the Supreme Court of Appeal had been dismissed while it was submitted on behalf of Mr Timana that there had been no petition to the Supreme Court of Appeal.
21. Whatever the case, it would seem that there is no appeal pending at present. In these circumstances the substratum of the application for a stay had disappeared and the application should consequently be dismissed for that reason as well.
22. Regarding the issue of costs it is clear that Mr Timana had been the driving force behind the application. This is supported by the fact that despite the fact that he had cited the company as the applicant in the headings of the pleadings, he referred to himself as "the applicant" in the founding affidavit. Under these circumstances, and since he had failed to make out any case for relief, it should, in my mind, be Mr Timana in his personal capacity who should be ordered to pay the costs of the joint liquidators and insofar as may be relevant, the costs of Lexstar Trustees Admin CC. The costs of Senior Counsel should also be included in the award for costs.
23. In the result, the following order is made:
 1. The application is dismissed.
 2. Mr Mandla Peter Timana is ordered to pay the costs of the application of the provisional joint liquidators as well as the costs of Lexstar Trustees Admin CC, in so far as may be relevant, which costs shall

include the costs of Senior Counsel.

C.P. RABIE

JUDGE OF THE HIGH COURT

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