

SOUTH AFRICA / JUDGMENT

Unemployment Insurance Fund and Another v Johnson and Others (134443/2023) [2024] ZAGPPHC 765 (30 July 2024)

[2024] ZAGPPHC 765**COURT**

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

134443/2023

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Source record**HIGH****COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE****NO: 134443/2023****(1)****REPORTABLE:NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED****DATE:**

30 JULY 2024

SIGNATURE:

In

the matter between:

UNEMPLOYMENT
INSURANCE FUND
First
Applicant
PUBLIC
INVESTMENT CORPORATION
SOC
LTD
Second
Applicant
and
PATRICIA
CATHERINE JOHNSON
First
Respondent
HOMII
LIFESTYLE (PTY) LIMITED
Second
Respondent
URBAN
LIFESTYLE INVESTMENT
HOLDINGS
(PTY) LIMITED
Third
Respondent

Summary:

Steps taken by the Public Investment Corporation Soc Ltd (PIC) to secure the recovery of more than R649 million lent and advanced by the Unemployment Insurance Fund (UIF) to a private company sanctioned – over the years numerous defaults of obligations by the debtor and its guarantors - not a cent repaid – no defence on the merits but numerous points in limine taken - debtors having previously successfully taken a point that jurisdiction of the court not sufficiently pleaded in founding papers – founding papers subsequently supplemented – finding that the previous point not res judicata – jurisdiction assumed - other points dismissed - order enabling securitisation granted as provided for in a deed of cession and pledge of shares of the debtor by its holding company.

ORDER

1.

It is declared that the Unemployment Insurance Fund is entitled to exercise all voting rights attached to the shares held by Urban Lifestyle Investment Holdings (Pty) Limited in Homii Lifestyle (Pty) Limited, for so long as the latter remains in default

of its obligations under and in terms of the Mezzanine Facility Agreement concluded with the Unemployment Insurance Fund on 7 March 2019.

2.

The first respondent is directed to comply with the demand in terms of section 61(3) of the Companies Act 71 of 2008, to convene a general meeting of the shareholders of Homii Lifestyle (Pty) Limited, which is to be held within 14 days of the grating of

this application, for inter alia the purpose of appointing new directors to the company.

3.

The respondents are jointly and severally ordered to pay the costs of the application on a scale as between attorney and client, such costs to include the costs of two counsel.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically with the effective date thereof being 30 July 2024.

DAVIS, J

Introduction

[1] The Unemployment Insurance Fund^[1] (UIF), through representation by the Public Investment Corporation Soc Ltd (PIC), lent and advanced R410 million to a private property

holding company, Homii Lifestyle (Pty) Ltd (Homii). Homii was obliged to make regular interest payments and to provide details of its business and, in particular, to make full and regular disclosure of relevant rental and other particulars of certain specified immovable properties owned or operated by it.

[2] Homii defaulted in both its interest payment and its disclosure obligations and the UIF sought to enforce rights ceded to it in securitatem debiti in respect of voting rights vested in the shares of Homii, held by its holding company.

[3] The above resulted in the present litigation where the UIF was the first applicant, the PIC the second applicant and Homii the second respondent. The first respondent was the sole director of Homii. The holding company, Urban Lifestyle Investment Holdings (Pty) Ltd (Urban) featured as the third respondent. The first respondent is also a non-executive director of Urban.

The contractual context

- [4] The UIF as lender entered into an extensive written agreement titled a Mezzanine Facility Agreement (the Agreement) with Homii as borrower. The principal sum advanced by the lender to the borrower in terms of this agreement was R410 million.
- [5] The Agreement was concluded in Pretoria on the signature date[2] thereof, being 7 March 2019.
- [6] In terms of the Agreement Homii had become obliged to make six-monthly interest payments. It is common cause that not a cent had been paid by Homii in respect of these payment obligations. This led the UIF to calculate the total outstanding amount to have escalated to R649 134 295, 81 as of 30 October 2023.
- [7] The Agreement contemplated that the amount lent had to be utilised by Homii as a property holding company for “designated transactions” and “transaction costs”. The designated transactions were the acquisition by Homii of “additional secured properties” or the development of such properties. Homii, at the time of the conclusion of the Agreement, already owned or had rights to some 11 properties, scattered over South African in, inter alia, Durban, Pietermaritzburg, Cape town, Johannesburg and Pretoria.
- [8] For purposes of the above the UIF and Homii had expressly agreed in clause 18 of the Agreement that Homii would supply the UIF with its financial statements from time to time[3] as well as “each approved budget”, not only of Homii, but also of the group of companies it formed part of. The obligation to provide financial statements also included that of Homii’s “guarantors”.
- [9] In addition to the non-payment of interest, Homii was also in breach of its abovementioned disclosure obligations (also referred to in the correspondence between the parties as its “information undertakings”).
- [10] As security for Homii’s obligations, its holding company, Urban furnished the UIF with a “Cession and Pledge Agreement” (the Cession). This was a separate written agreement between Urban as cedent and the UIF as cessionary.
- [11] In terms of the Cession, all of Urban’s rights to and interest in its shares, shareholders’ claims and “Related Rights” in Homii were ceded as “continuing general covering collateral security”[4] and as a pledge[5] to the UIF.
- [12] It was also expressly agreed that in the Cession that it was “... intended to secure the entire indebtedness”, including interest and/or fees or costs[6].
- [13] The rights so ceded and pledged by Urban included the right to attend every general meeting of the shareholders and to exercise the votes attached to the shares. These rights were to be exercised by the UIF and “put into force and effect”[7] in an event of default by Homii of its obligations in terms of the Agreement.

- [14] Pursuant to Homii's defaults, Urban was informed in writing on 30 October 2023 that the UIF perfected the Cession and demanded a hand-over of the shares and to be provided with particulars of all shareholders' claims and related rights.
- [15] The perfection of the Cession meant that the UIF stepped into Urban's shoes as the sole shareholder of Homii. As such, it sent a demand to the first respondent as sole director, in term of section 61(3) of the Companies Act[8], calling upon her to convene a general meeting of shareholders for inter alia the purpose of appointing new directors for Homii.
- [16] Due to non-compliance by the first respondent and Homii, the UIF resorted to this court, as contemplated in section 61(12) of the Companies Act.
- [18] In addition to the above defaults and what initially prompted the UIF to approach the court on an urgent basis, was a combination of facts which the UIF says raised concerns about the ability of its debtor to repay the loan. The first of these facts was that the UIF had, at the same time of the Agreement acquired 42% of the shareholding in Urban. The remainder of the shares are held by A1 Capital (Pty) Ltd. The A1 Group of Companies, through various transactions, owes entities in a similar position as the UIF and all represented by the PIC (including the Government Employees Pension Fund) debts in excess of R2 trillion. The majority of the companies in the A1 Group of Companies have since placed themselves in voluntary liquidation.
- [19] Another aspect of concern was that a Ms Louise Nair, who had signed the Agreement on behalf of Homii and who had been its sole director at the time, has since been replaced by the first respondent, Ms P L Johnson. She was the one who had signed the resolution authorizing Ms Nair to represent Homii during negotiations, but has been unresponsive to the requests by the UIF and the PIC's Portfolio Management & Value Team (PMVT) to provide insight into Homii's ability to meet its obligations.
- [20] In summary then, the contractual position in this: the UIF, represented by the PIC has lent vast sums of public funds to Homii. Homii is in default of its obligations and its holding company is avoiding its security obligations. On the face of it, the UIF is entitled to the relief claimed in the notice of motion.

The respondents' opposition

- [21] It is an unsurprising event in litigation that when a debtor with little or no prospects of success on the merits is faced with the final day of reckoning pursuant to a breach of its obligations, that such debtor resorts to all kinds of desperate measures, often more technical and ostensible than substantive. In my view, this is such a case.

- [22] An illustration of this was the argument by Adv Pelser SC on behalf of the first respondent that, from the correspondence addressed to her by the applicants' attorneys, she could not fathom what default events the respondents were accused of. The Agreement provides for nineteen possible instances of default while the final letters whereby the Cession was called upon to be perfected, did not mention any specific one of these defaults.
- [23] The argument is without a factual basis. The letter calling up the Cession was preceded by numerous demands to make good the interest payment defaults as well as the disclosure defaults. Demands had been made in writing on 17 June 2021 and 11 July 2022 already and in them the instances of default were mentioned. The notices of perfection were hand-delivered on 31 October 2023 (Homii and Urban share the same address) and the demands in terms of section 61(3) of the Companies Act were hand delivered on 4 December 2023.
- [24] The argument also loses sight of prior engagement on the issue of defaults, primarily conducted by the various officials of the UIF and the PIC's PMVT. These meetings, both internal, and external, were listed in a spreadsheet, indicating the parties to the meeting, the subject matter, the date and time of each meeting and some comments. Twenty four such meetings were listed. The most significant of those meetings, relating to the knowledge of the issue of default, was one dated 7 May 2022. It was an hour long meeting. The subject of the meeting was recorded as "ULI /PIC Management Meeting" and the comments read as follows: "External discussion with the Acting CEO (A1 Capital Employee Vithia Reddy): 1. The current unremedied default and plans to remedy.
2. Management instability. 3. Governance concerns. 4. Others. A strong message was sent to ULI [Urban] of their unacceptable non-compliance". "ULI" was a reference to Urban.
- [25] As if the above meeting with Urban, who is the cedent of the shares in respect of which the UIF now claims voting rights and who is the holding company of the defaulting company, Homii, whose lack of disclosure of financial statements and budgets confirms the existence of governance concerns, was not sufficient confirmation of knowledge of defaults, Homii's own prior letter of 19 November 2020 confirms its own acknowledgement of its interest payment defaults. This letter concludes as follows: "As a result of the reduced cashflow against the budget, we have approached all the lenders for payment holdings on our mortgages and facilities which have been agreed to and are implemented to ease the cashflow pressure. We therefore request the Public Investment Corporation SOC Ltd, who is also our Equity partner, to grant a moratorium for the 31 December 2020 and June 2021 interest payments when they fall due ..." (my emphasis).
- [26] Another argument in similar vein was that the litigation was "unauthorized". The allegation was made that there was "no direct or indirect evidence" that the UIF has authorised the proceedings or "even know of these proceedings". For this purpose the first respondent relied on a special power of attorney annexed to the supplementary founding affidavit and pointed out that the document was a general one issued by the UIF to the PIC, which pre-dates the appointment of the PIC's current CEO.

- [27] This argument also has insufficient legs to run the race. There is no dispute amongst the parties that the PIC at all relevant times represented the UIF during the negotiations and conclusion of the Agreement and the Cession.
- [28] Both the UIF and PIC had at all relevant times, also during the issuing of demands used the same attorneys. Of the twenty four meetings referred to above, the PIC's legal department featured in five of the last ten meetings. There can be no doubt that the UIF was aware of the proceedings launched to exercise its rights.
- [29] The founding affidavit was deposed to by the CEO of the PIC. He stated that, by virtue of that position and the power of attorney issued by the UIF to the PIC, he was authorised to commence proceedings. Confirmatory affidavits have been deposed to at various stages of the litigation by the applicants' attorney, a "turnaround specialist" of the PIC and a legal advisor of the PIC.
- [30] There was no challenge to the attorneys' authority to represent the UIF, being the creditor and the principal of its agent, the PIC, as the first and second applicants. Despite this, the bald assertion was that because the power of attorney relied on by the PIC's CEO did not mention his position or his name, the court must, despite the conspectus of evidence, non-suit the UIF. The respondents' argument, as I understand it is that the UIF had authorised the PIC but no-one had authorised the PIC's CEO.
- [31] There can be no doubt that the UIF has authorised the PIC to represent it in all aspects regarding the lending and the recovering of the monies so advanced. This can be the only sensible inference from the wording of the power of attorney being attacked by the respondents. The relevant parts thereof read as follows: "I, Tebogo Maruping [The Commissioner of the UIF] do hereby nominate, constitute and appoint [the PIC] to be our lawful attorney and agent to manage and transact all out investment affairs ... and for such purposes ... to collect ... all interests and repayment of capital ... to take up and exercise any rights and privileges ... Generally for effecting the purposes above, to do or to cause to be done whatsoever shall be requisite as fully and effectually, to all intents and purposes as the [UIF] may or could do if personally present and acting herein – hereby ratifying, allowing and confirming ... whatsoever the [UIF's] said attorney and agent shall lawfully do or cause to be done by virtue of this Power of Attorney".
- [32] Once the PIC has been authorised to launch proceedings of this nature, no further authorisation is needed in respect of whatever witnesses it might utilise to fulfill its mandate. In this instance the witness was its CEO.
- [33] This type of issue has already definitively been dealt with by the Supreme Court of Appeal which had previously held that "The deponent in motion proceedings need not be authorised by the party concerned to depose to the affidavit, it is the institution of the proceedings [itself] and the prosecution thereof which must be authorised"[9].

- [34] A last desperation attempt to stall the litigation against the respondents was their jurisdiction point. This point succeeded before Strydom J when the matter came before him in the Urgent court on 24 January 2024. This court was favoured with a copy of Strydom J's judgment of 5 February 2024 and the transcript of the proceedings before him. His orders were as follows: "1. The point in limine on jurisdiction was upheld. 2. The matter was struck off the roll with costs on a party and party scale pertaining to this application".
- [35] The reason why the orders contained in the judgment were couched in the past tense was because Strydom J had already, when he heard the matter, gave his ruling and only handed down judgment later. My learned brother explained it thus in his judgment: "3. On 24 January 2024 the first point in limine (jurisdiction) was argued before me. I ruled that the applicants have failed to allege and prove the facts necessary to establish that this Court has jurisdiction in the matter and over the persons of the respondents. I reserved the reasons for my ruling and now turn to the reasons".
- [36] When the matter came before me, the respondents claimed that the issue of a lack of jurisdiction was *res judicata*.
- [37] For the doctrine of *res judicata* to apply, the finding of a court must be in respect of a dispute between the same parties, on same cause of action and for the dispositive determination of the same relief[10].
- [38] The doctrine is not immutable and may be relaxed in circumstances where a substantial injustice would result from its application[11].
- [39] The respondents argued that, although no new point in limine in respect of jurisdiction had been raised by them, the mere fact that the applicants wished to proceed with their application on the basis that they allege that this court indeed has jurisdiction, raises the same dispute which the respondents say had already been decided.
- [40] The question of the similarity of the dispute is however not that simple. It is clear from a reading of the transcript and the judgment of Strydom J that the point raised before him was of a technical rather than a substantive nature. The point of alleged absence of jurisdiction was not raised on the basis of an actual lack of jurisdiction but on the basis that the allegations regarding jurisdiction had not been sufficiently "pleaded" in the initial founding affidavit.
- [41] The fact that the point has been raised in the nature of an exception appears from the following: Strydom J referred to the fact that the applicants only in their replying affidavit referred to clause 41 of the Agreement in order to establish jurisdiction (this is the clause where the parties had consented to this court's jurisdiction). My learned brother then continued in his judgment as follows: "the underlying facts establishing jurisdiction must appear from the pleadings and cannot be supplemented in reply ... A party that relies upon a

contract is bound by the requirements of Rule 18(6) to plead the precise terms. The applicants have failed to plead the conclusion of the contract to establish jurisdiction”.

- [42] The above treatment of the point in limine was clearly a response to how the first respondent and Homii had raised the point in their papers: “The applicants failed to address the issue of jurisdiction in the founding papers. They are limited to the presentation of their case in what is stated in the founding papers and cannot advance any argument outside the contents thereof”.
- [43] After having dealt with this point in limine as if an exception, Strydom J declined to make an order that the matter may not be re-enrolled. The matter was simply struck off the roll.
- [44] Pursuant to the above, the applicants applied to have their notice of motion amended and their founding affidavit supplemented, this time expressly relying on the consent to jurisdiction contained in the Agreement. A full set of answering and replying affidavits were delivered in respect of these supplemented papers. The status of the papers were then procedurally (once the necessary leave to supplement had been granted), in the same position as what would customarily have been the situation where an exception had been upheld in action proceedings and leave to amend (or supplement) had been granted to a plaintiff.
- [45] The matter, as supplemented, then came before Collis J on 12 March 2024. She declined to hear the matter and directed that the Deputy Judge President may be approached for the expedited hearing thereof by way of an allocation as a third court motion, which is how the matter ended up before me. It was not clear whether this enrollment was prompted or not by yet another point in limine raised by the defendants, namely that the extent of the papers exceeded 500 pages, which would then in any event have necessitated an enrollment as a special motion in the third court.
- [46] What is clear through, both from the manner in which the point in limine had been raised and been dealt with by my colleagues, was that they both contemplated that the matter might be re-enrolled and proceeded with. The point was therefore not definitive of the dispute between the parties and the order of Strydom J was clearly limited to the papers as they featured before him. The order therefore lacks the finality required by the doctrine of *res judicata*.
- [47] In any event, once the supplementary papers have been allowed, which was done during the hearing of the matter on 15 May 2024, the issue of jurisdiction with reliance on the Agreement had squarely been “pleaded”. The respondents had a full opportunity to deal therewith and the previous order did not constitute *res judicata* in respect of the substantive nature of the issue of jurisdiction. And even if the doctrine might be applicable, this is an appropriate case where such application should be relaxed.

[48] On 15 May 2024 this court found that it had the requisite jurisdiction to entertain the matter. At the time of that finding, it was indicated that the reasons therefor would be contained in this judgment.

[49] The incidences of jurisdiction present in the matter are the following: The Agreement was concluded in this court's area of

jurisdiction. In addition, in that agreement the parties agreed to the non-exclusive jurisdiction of this court[12]. The Agreement provided for a "Cession in Security"[13]. In the Cession in Security agreement Homii consented to the jurisdiction of the Johannesburg Division of this court[14]. The Agreement also made provision for "Finance Documents"[15]. These included each "Security Document" which was in turn defined as including the "ULI Pledge and Cession agreement"[16]. Both "Security Documents" were entered into in Pretoria in this Court's area of jurisdiction.

[50] There is, due to the concurrence of jurisdiction between the Pretoria and Johannesburg Divisions of this Court, no distinction to be made between the two divisions for purposes of jurisdiction. The consent to jurisdiction of the one would therefore amount to a consent of jurisdiction of the other[17].

[51] I therefore find that this court has jurisdiction to entertain disputes arising from the principal agreement which has been concluded in its area of jurisdiction. The principal debtor, Homii has further consented to this court's jurisdiction in the Agreement and the first of its "Security Documents"[18]. In respect of the Cession agreement, Urban also falls under the jurisdiction of this court by virtue of the *causa continentia* rule enshrined in Section 21(2) of the Superior Courts Act[19]. This section provides that a "Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court had jurisdiction ...". Urban has been so cited as a second respondent.

[52] It was for these reasons that the order of 15 May 2024 has been granted.

[53] In heads of argument delivered on behalf of Homii and Urban, the applicants were accused of playing a litigation game[20]. When one considers that Homii and Urban, as principal debtor and its guarantor and holding company respectively, have elevated their arguments dealt with earlier in this judgment to no less than eight points in limine, without a shred of evidence of any defence on the merits, the accusation of playing a litigation game is more applicable to the

respondents. I include the first respondent as sole director of Homii in this comment as she was either the controlling mind or had made common cause with the conduct of the other two respondents.

Conclusion

[54] I am therefore satisfied that the applicants have, on a balance of probabilities, proven their entitlement to the relief sought. This amounts to an attempt by an organ of state to exercise its rights to secure repayment of public funds loaned and advanced to a subsequently delinquent debtor. I find no reason why costs should not follow the event and, having regard to the prior comments regarding playing litigation games, such costs should be on a punitive scale.

Order

[55] Consequently, the following order is made:

1. It is declared that the Unemployment Insurance Fund is entitled to exercise all voting rights attached to the shares held by Urban Lifestyle Investment Holdings (Pty) Limited in Homii Lifestyle (Pty) Limited, for so long as the latter remains in default of its obligations under and in terms of the Mezzanine Facility Agreement, it concluded with the Unemployment Insurance Fund on 7 March 2019.
2. The first respondent is directed to comply with the demand in terms of section 61(3) of the Companies Act 71 2008, to convene a general meeting of the shareholders of Homii Lifestyle (Pty) Limited, which is to be held within 14 days of the grating of this application, for inter alia the purpose of appointing new directors to the company.
3. The respondents are jointly and severally ordered to pay the costs of the application on a scale as between attorney and client, such costs to include the costs of two counsel.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 15 May 2024

Judgment

delivered: 30 July 2024 APPEARANCES: For the Applicants: Advocate J Wasserman SC together with Adv M Msomi Attorney for the Applicants: Lusenga Attorneys Inc., Pretoria. For the 1st Respondent: Adv Q Pelser SC Attorney for the 1st Respondent: Shepstone & Wylie Attorneys, Umhlanga Rocks c/o Stegmanns Inc., Pretoria For the 2nd & 3rd Respondents: Adv J de Beer SC together with Adv F van der Merwe Attorney for the 2nd & 3rd Respondents: Mooney Ford Attorneys, Umhlanga c/o Damelin Menlyn, Pretoria

[1] A fund established in terms of Section 4 of the Unemployment Insurance Fund Act 63 of 2001.

- [2] Clause 1.1.93 of the Agreement stipulated that the signature date was the “date of the signature of the party last signing this Agreement”. That party was the UIF who signed the agreement on 7 March 2019 in Pretoria (Homii had signed the agreement on 27 February 2019).
- [3] The relevant clause reads: “The Borrower shall supply to the Lender as soon as some become available, but in any event within 120 days after the end of each financial year ... its audited consolidated financial statements ...”.
- [4] Clause 2.1 of the Cession.
- [5] Clause 2.3 of the Cession.
- [6] Clause 2.5 of the Cession.
- [7] Clause 8.1 of the Cession.
- [8] 71 of 2008. Section 61(3) provides that “... the board of a company ... must call a shareholders meeting if ... a written demand for such a meeting is delivered to the company”.
- [9] Ganes and Another v Telecom Namibia Ltd 2004
- (3) SA 615 (SCA) at 624F – H.
- [10] Prinsloo NO & Others v Goldex 15 (Pty) Ltd and Another 2014 (5) SA 297 (SCA) para [10] and the authorities referred to therein.
- [11] FirstRand Bank Ltd v Fondse & Another [2017] ZAGPJHC 184 (23 June 2017).
- [12] Clause 41.1.1. of the Agreement.
- [13] Clause 1.1.13 of the Agreement.
- [14] Clause 30.1 of the Cession in Security Agreement.
- [15] Clause 1.1.44 of the Agreement.
- [16] Clause 1.1.92.3 of the Agreement.
- [17] Isibonelo Property Services (Pty) Ltd v Uchemek World Cargo Link Freight CC t/a The Fish and Chips Co and Another [2023] JOL 57953 (GJ).
- [18] A non-exclusive contractual consent to jurisdiction is treated on the same footing as the submission by a peregrinus to the jurisdiction of a particular court. See Hay Management Consultants (Pty)Ltd v P3 Management Consultants (Pty)Ltd 2005(2)SA 522(SCA)
- [19] 10 of 2013
- [20] Reference was made in this regard to BEE v RAF 2018

(4) SA 366 (SCA).

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