

SOUTH AFRICA / JUDGMENT

Wilkinson v Magistrate Ramahanelo N.O and Others (14668/2021) [2021] ZAGPPHC 193 (6 April 2021)

[2021] ZAGPPHC 193

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

14668/2021

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 14668/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

JOSEPH JOSHUA WILKINSON

Applicant

and

MAGISTRATE RAMAHANELO N.O.

First Respondent

GERDA VAN TONDER N.O.

Second Respondent

WILLBO INVESTMENTS 4 (PTY) LTD

Third Respondent

MASTER OF THE HIGH COURT, PRETORIA

Fourth Respondent

J U D G M E N T

This urgent application was heard in open court and otherwise disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1]

Introduction

This is the judgment in a dispute regarding the continuation of an enquiry in terms of section 152 of the Insolvency Act, 24 of 1936, which dispute came before the urgent court last week. At the time of hearing the application, the parties were in agreement that the reservation of the judgment for the week would not prejudice any of them.

[2] The parties

2.1 The applicant is Mr Wilkinson. He is an esrtwhile attorney of this court and he was finally sequestered on 11 June 2018.

2.2 The Second respondent is the co-trustee of Mr Wilkinson's insolvent estate and she acted in the matter with the acquiescence of her co-trustee.

2.3 The first respondent is a magistrate before whom an insolvency enquiry in Mr Wilkinson's insolvent estate is pending.

2.4 The third respondent is Willbo Investments 4 (Pty) Ltd ("Willbo"). It is a company for which Mr Wilkinson has previously acted as an attorney when he was still practicing as Wilkinsons Attorneys. The business relationship between Willbo and Wilkinsons Attorneys extended beyond the mere attorney/client relationship and involved business dealings negotiated between Mr Wilkinson and Willbo's controlling mind, Mr Menno Parsons. It involved, inter alia, the purchase and subsequent selling of a farming property and various investments, which commenced more than a decade ago.

2.5 The fourth respondent is the Master of this Court.

[3] The relief claimed

Mr Wilkinson claims the following relief on an urgent basis:

3.1 That the magistrate and the trustees be interdicted and "prohibited"

from continuing with the enquiry in terms of Section 152 of the Insolvency Act, 24 of 1936, until such time as the trustees are "properly" authorized by the Master to do so.

3.2 That Willbo “be interdicted and prohibited from participating and being present” at the enquiry pending the delivery of the judgment under case number 26586/2013.

[4] History of litigation between Mr Wilkinson and Willbo

In order to understand the basis upon which Mr Wilkinson claims the relief mentioned in paragraph 3.2 above and to determine whether he is entitled to such relief, it is necessary to have regard to the litigation history between the said parties. This has been set out in the founding affidavit along the following terms:

4.1 In 2010, Mr Wilkinson, acting on instruction of Mr Parsons negotiated

the purchase of a farm in Zeerust which Absa Bank intended to sell in execution. The farm was purchased in the name of Willbo, of which Mr Parsons was the majority, but not sole, shareholder. He was the financier of prospective business ventures, including the purchase of the farm, for which he, through a company of which a trust under his control was the shareholder, provided bond cover to secure the financing of the purchase price.

4.2 The farm was subsequently sold to the Department of Rural Development

and Land Reform pursuant to a land claim, for a substantial profit. A dispute arose between the shareholders of Willbo and Mr Wilkinson regarding the distribution of the proceeds. Issues relating to shareholding percentages, loan accounts, distribution agreements, fees and costs abounded. On 20 August 2012 Mr Wilkinson rendered his version of the distribution account relating to the proceeds of the sale. This was followed by various meetings and auditors’ scrutiny, still resulting in a disputed claim in excess of R 4,6 million.

4.3 Pursuant to the above dispute, on 2 May 2013, Willbo launched an

application in this court in case no 26586/13 for urgent relief in camera against Mr Wilkinson and Wilkinsons Attorneys for payment into trust of the above amount pending a statement and debatement of accounts (the “debatement application”).

4.4 Pursuant to the in camera application, a provisional order was granted. At that time, an amount of R 481 658,91 was all that was left in Wilkinson Attorneys’ trust account in respect of the transaction in question. Willbo consequently launched a contempt application, which was dismissed with costs by Potterill, J on 30 May 2013.

4.5 Willbo also launched an application for discovery in terms of Rule 35(12) as well as an application to compel. Upon this becoming opposed, these applications were abandoned.

4.6 The debatement application was heavily contested before Preller J on 11 August 2014, during which the claim for payment of a specific amount also fell by the wayside pending finalisation of the

application. After having heard the debatement application, Preller J reserved judgment. To date hereof, some 6½ years

later, judgment still hasn't been delivered.

4.7 While judgment remained reserved, Willbo submitted a claim at the

Attorneys Fidelity Fund during 2016, to which Wilkinson Attorneys responded. Although there is no certainty as to what happened

with this claim, having regard to the further conduct of the parties, it appears in all probability, that it was unsuccessful.

[5] The section 152 enquiry

5.1 On 17 February 2020, the Master sent a letter in the following terms

to Rautenbach Attorneys regarding Mr Wilkinson's insolvent estate:

"Your letter of 29/11/2019 refers. Permission is granted to hold the enquiry in terms of section 152 of the Insolvency Act 24 of 1936. The enquiry to be conducted at the office of the Master of the High Court, Pretoria or the Magistrate Thabazimbi. The costs to be for the account of the creditor, Willbo Investments 4 (Pty) Ltd ...".

5.2 It is common cause that neither at the time of the aforementioned

authorisation, nor to date of the present application, has Willbo become a proven creditor of the insolvent estate. This has been confirmed by the trustee in writing to Mr Wilkinson.

5.3 The authorisation by the Master was apparently with the prior consent

of the trustees. This appears from the second respondent's confirmation as follows to Mr Wilkinson, upon a request from him for copies of certain documents: "Ek weet nie na watter kennisgewing jy verwys nie. Daar is korrespondensie tussen die prokureur van Willbo en Skrywer.

Skrywer het toestemming verleen aan die prokureur om voort te gaan met die belê van 'n Artikel 152 ondervraging" (I don't know to which correspondence you refer. There was correspondence between Willbo's attorney and Writer. Writer gave permission to the attorney to proceed with the constitution of a Section 152 enquiry).

5.4 More than a year later, on 15 February 2021 a summons addressed to Mr Wilkinson, was served on his then estranged wife, requiring him to appear before the Magistrate, Pretoria on 25 February 2021.

There is no dispute that, for practical purposes, the initial enquiry envisaged before the Magistrate, Thabazimbi has been substituted by an enquiry before the Magistrate, Pretoria. The master has also issued a separated authorisation in this regard.

5.5 The summons required Mr Wilkonson to bring with and produce at the

enquiry all documents relating to trade “or dealings” with Willbo, both between himself and between Wilkinson Attorneys as well as documents relating to “the trade, dealings or transactions” between Mr Wilkinson and Mr Parsons. Reference was also made to documents relating to the Department of Rural Development and Land Reform. In addition to a whole page of references to the “dealings” and “transactions” contained in the summons and made in general terms, descriptions of the required documents or sets of documents, listed in paragraphs (a)

to (w) followed. Paragraphs (a) to (n) referred to documents relating to Wilkinson Attorneys’ asset registers, insurance,

trust accounts, SARS statements and audit reports, all relating to transactions involving Willbo and Mr Parsons. From paragraphs

(o) to (q), documents relating to Mr Wilkinson’s bank statements, SARS documentation and the like were required, while from

paragraphs (r) to (u) reference was made to the Jamie Joseph Family Trust and its statements, trustee resolutions and the like. I interpose here to note that, in respect of the settlement of the bond passed in respect of the financing of the purchase of the farm referred to in paragraph 4.1 above, a payment of R 4,2 million is alleged to have emanated from the said trust. Paragraphs (v) and (w) of the summons, again refer to payments and transfers of assets between Mr Wilkinson, Wilkinson Attorneys and the trust in general terms.

5.6 The summons was signed by Rautenbach Attorneys as “attorney for proven creditor” and by the Magistrate, Pretoria.

5.7 The day before the scheduled enquiry, 24 February 2021, Mr Wilkinson

suffered from acute gastroenteritis and produced a medical certificate declaring him unfit until 26 February 2021. By agreement, the enquiry was postponed and Mr Wilkinson, through his attorneys, per email undertook to appear at any postponed date. Despite this, a warrant for his arrest was authorized, but apparently never issued, allegedly also by agreement. At the next date, being 25 March 2021 Mr Wilkonson contrived to have the enquiry postponed sine die.

5.8 In her answering affidavit, the second respondent stated that the

trustees have appointed their attorney to act as their agent “to interrogate witnesses who appear in response to summonses during the enquiry”. The trustees’ current attorney is Rautenbach attorneys who also acted for them in opposition to the urgent application. They have also accepted service of the application on behalf of Willbo, who did not file any affidavits and did not oppose the application.

5.9 The second respondent, in a later supplementary affidavit, inter

alia, stated the following: "... Wilkinson failed to demonstrate that his insolvent estate has any assets. Claims were proved against Wilkinson's insolvent estate, as he admits, and therefore investigation must follow. This is basically the purpose and working of the insolvency procedure and law".

5.10 Apart from the above, the second respondent argued that an interdict is not necessary as the presiding officer will determine who might be present at the enquiry and which questions or line of questions may be relevant and permissible. She further confirmed Rautenbach attorneys' mandate to act on behalf of the trustees in this litigation and denied that she was a mere puppet in the hands of Willbo. For the remainder, she opposed the request made in the replying affidavit that she be liable on a *de bonis propriis* basis for the costs of the application. This last contention was not pursued by the applicant at the hearing of the application.

5.11 Mr Wilkinson's main objection against the continuation of the enquiry is that it is a stratagem instigated and sponsored by Willbo to obtain documents and debatement thereof and thereby to pursue the litigation which is still pending in case no 26586/2013. This, Mr Wilkinson contends, amounts to an abuse of process

[6] Evaluation

6.1 The duties of trustees in insolvent estates are trite and prescribed

by the Insolvency Act. In short, the trustees, on their appointment, have the duty to establish what the assets of the estate are, as the estate from that date vests in the trustees. This includes establishing where the assets can be found and that they be properly secured, stored or insured, where applicable. See: Sections 19 and 20 of the Insolvency Act. The trustees also have the duty to call upon all the insolvent's debtors to pay their debts. In respect of claims against the insolvent's estate, in particular in respect of those sought to be proven at a meeting of creditors, the trustee has the duty to impartially inquire into the correctness and justice of such claims. Claims and the disputes as to their validity are regulated by Section 45 and Regulation 3 of the Regulations framed under the Insolvency Act.

6.3 Regarding the position of Willbo, its position in the circumstances

of this case fall neatly into the following description of circumstances contained in *Juta, Mars*: The Law of Insolvency in South Africa at 8.7 "Whenever the proceedings that have been stayed by a sequestration order are against the insolvent in respect of a liquidated claim, the plaintiff may tender proof of claim against the estate for the amount thereof, together with his costs to date of sequestration, which, if admitted, relieves him of the necessity of continuing the proceedings. But if his claim is not liquidated, he must continue the proceedings in order to have the amount thereof assessed by the court" (my underlining). In the present instance, not only is Willbo's claim against the insolvent estate not liquidated, it has not been otherwise proven as a claim in the estate. The litigation is therefore to continue. Its only delay or hold-up, is the currently outstanding reserved judgment.

6.4 On behalf of Mr Wilkinson, Adv. Hershensohn, who appeared together

with Adv De Leeuw, submitted that, barring any judgment in Willbo's favour, any claim which it may have had against Mr Wilkinson or Wilkinson's attorneys, would have been due and payable at the end of 2012 and according would by now long have become prescribed.

6.5 The further point made was that the documents listed in the witness

summons predominantly relate to aspects pertaining to Willbo's claim and are very similar to the list of documents which featured in the Rule 35(12) notice in the pending litigation, referred to in paragraph 4.5 above.

6.6 It is trite that, apart from the obvious differences between the

winding-up of companies in liquidation and the finalization of insolvent estates of natural persons, the principles in respect of enquiries under the two regimes are the same. See Mars (supra) at 452. These principles exclude the abuse of the enquiry for an ulterior purpose.

6.7 Such an abuse would occur, for example, where the trustee or liquidator, seeks to obtain an improper advantage over a litigant against which the estate is in litigation. A defendant cannot therefore, under the guise of an enquiry, be examined in order that the trustee thereby obtain information to which it would not otherwise be entitled. The learned authors of Henochsberg, Commentary on the Companies Act contend in this regard as follows:

"It is submitted that there is a limitation on the right to interrogate in relation to pending proceedings, namely that it may not be enforced where interrogation constitutes an abuse It is submitted that interrogation will be such an abuse where proceedings have reached such a stage that the purpose of the interrogation is no longer acquisition of information to enable the liquidator to determine his course of action about which he is ignorant, but simply to have, as it were, a pre-trial enquiry which will be duplicated in the trial itself. Depending on the facts of each particular case, it is submitted that e.g. where a liquidator has sued X who files a plea, interrogation of X on the content of the plea ... is an abuse ...".

6.8 It would become even more egregious if the intention of an intended

enquiry, was not to provide the trustee with information about assets (as the second respondent herein appears to contend), but to enable a litigant in pending litigation against the estate, to examine the estate's principal witness, the insolvent (as Mr Wilkinson contends is the situation here). Such conduct would clearly constitute an abuse and be "improper". It has been described as such by Wallis JA in Roering and Another NNO. V Mahlangu (581/2015) [2016] ZASCA 79 at paragraph [36]: "What constitutes an improper forensic advantage, will depend upon the circumstances of each case. Summoning a witness in order to benefit a third party, such as a creditor, in pursuing proceedings against that witness or an entity that they represent, would be such a case".

6.9 Of course, where the intended witness is the insolvent himself, the

second respondent as trustee may argue that examining a recalcitrant insolvent would not be an abuse, and she would be right, if those were the facts: “the first consideration is that the purpose of the provisions is to enable the liquidator to reconstitute the state of knowledge of the company in order to make informed decisions ...”. *Bernstein and Others v Bester and Others NNO*. [1996] ZACC 2; 1996 (2) SA 751 (CC) at 768E.

6.10 Such examination or interrogation is, however to be conducted by the Master, or the magistrate in this case or the trustee. There is no provision in section 152 for a creditor to interrogate the insolvent or other party subpoenaed to the enquiry. In fact, the private nature of such an enquiry would generally prohibit a creditor from being present. See: *Roux v The Master* 1997

(1) SA 815 (T), following *Appleson v Bosman NO. and Others* 1951 (3) SA 515 (W). This is in contrast with interrogations contemplated in section 65 at meetings of creditors.

6.11 In the present instance:

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Willbo is not a proven creditor of Mr Wilkinson's estate. The only two claims proven, are those of Mr Wilkinson's

ex-wife. There is no indication on the papers that the proven creditor has required the trustees to request the Master to authorize the enquiry.

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There is an absolute dearth of information from the second respondent (being the only one of the two co-trustees who had deposed to an affidavit) as to what information the trustees are looking for or seek to extract from the insolvent and even less information about what questions the insolvent refused to answer or in what respect he can be found to be recalcitrant.

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There is no information about the facts or circumstances upon which the Master has formed the opinion contemplated in section 152.

This is a jurisdictional requirement about which the second respondent, on her own version, should also have knowledge.

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Willbo's attorney has written to the second respondent (the contents of the correspondence have not been disclosed) and, based on this, the second respondent has given the attorney the go-ahead to approach the Master. If this has been done by the attorney as ostensibly representing a proven creditor in the insolvent estate, that representation would have been false.

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The Master has authorized Willbo's attorney to go ahead with the enquiry at its own costs and has signed the summons calling on Mr Wilkinson to appear, which summons has clearly been drafted by Willbo's attorney (this time not ostensibly, but expressly falsely claiming to represent a proven creditor in the estate).

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Willbo's aforementioned attorney now act for the trustees, represented by the second respondent.

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Mr Wilkinson seeks an interdict that Willbo not be present or participate in the enquiry pending finalization of the litigation

between Mr Wilkinson (and his insolvent estate) and Willbo. The estate's trustees, represented by the second respondent, in turn represented by Willbo's attorney, opposed this relief without a shred of evidence as to why this would be appropriate.

In fact, if Willbo's attorney acts as the trustees' "agent" at the enquiry, Willbo will by proxy and via the proverbial back door, in any event "participate" in the enquiry.

6.12 In view of the above, I find that, on a balance of probabilities, the section 152 enquiry, if it is to proceed with the intention to interrogate the documents listed in paragraphs (a) to (n) and (r) to

(u) and any aspect which form the subject matter of the litigation with Willbo, will constitute an abuse of process instigated by Willbo

as driving force. Having reached this conclusion, I need not determine whether the second respondent was a collusive or passive

participant. The abuse should simply be prevented and the trustees can proceed with the remainder of the enquiry for other

(legitimate and proper) purposes, for which they might be the driving force in the discharge of their statutory duties.

[7]

Conclusion

7.1 The section 152 enquiry has been authorized by the Master and the

relief claimed by Mr Wilkinson as referred to in paragraph 3.1 above cannot succeed. Counsel for the second respondent, Adv Kloppe, has stated that had Mr Wilkinson or his “very senior attorney” (being the description used by Adv Kloppe and by the second respondent, repetitively in her affidavits) simply picked up the telephone, this would easily have been established. At least, so they argue, this should have been clear after the delivery of the answering affidavit. I agree, but this does not detract from the remainder of the relief.

7.2 The remainder of the relief claimed by Mr Wilkinson is of a (hopefully) limited duration, that is, an interdict described in paragraph 3.2 above, until such time as retired judge Preller delivers the judgment in the “debatement application” in case no 26856/2013. I am of the view that, in order to prevent an abuse of the process envisaged by section 152 by Willbo, this relief should be granted.

7.3 Although costs *de bonis propriis* were no longer pursued against the second respondent, it was sought against her as opposing party. Even if the result of a costs order against her in her official capacity will have the result of the insolvent estate being liable, I find no reason to depart from the general rule that costs should follow the event. In the notice of motion, costs were only claimed against Willbo in the event of opposition. In its absence and, having not opposed the application, it would be improper to now grant a costs order against it, even if it was, as indicated above, the instigating party. Whether the costs should be awarded at a punitive scale is something else. In respect of the opposition to the issue of whether the enquiry had been authorized by the Master or not, the opposition was justified. In respect of the more important issue, namely that of abuse, not only was the opposition unreasonable, but there was an almost deliberate failure to furnish the court with any particularity as to the status of the estate and its administration, the nature of the outstanding information required, the extent of the trustees’

enquiries to date or whether and why they had been so hampered that an enquiry was needed. Large portions of the answering

affidavits are vague and purely argumentative. As far as the court has been informed, nothing of substance has been done since the first meeting of creditors in April 2019, save for correspondence with Willbo’s attorneys which led to the current application. These lapses, omissions or apparent lackadaisical approach to both the finalization of the estate or to litigation, justify, in my view, a punitive costs order.

[8] Order:

8.1 The Third Respondent is interdicted and prohibited from participating

in and being present at the enquiry in terms of Section 152 of the Insolvency Act, in the insolvent estate of J.J. Wilkinson T299/2017, pending the judgment in case no 26586/2013 in this court.

8.2 The Second Respondent is ordered to pay the costs of this application

on the scale as between attorney and client, including the costs of two counsel, where utilized.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 31 March 2021

Judgment

delivered: 6 April 2021

APPEARANCES:

For the Applicant:

Adv J Hershensohn together with

Adv R de Leeuw

Attorney for the Applicant: Snyman de Jager Attorneys, Pretoria

For the 2nd Respondent: Adv J C Klopper

Attorney for the 2nd Respondent: Rautenbach Attorneys, Pretoria

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