

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 35593/2018

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

6 MARCH 2019

  
MODIBA J

In the matter between:

THE BODY CORPORATE OF THE SANTA FE  
SECTIONAL TITLE SCHEME, NO. 61/1994

Applicant

and

BASSONIA FOUR ZERO SEVEN CC  
(REGISTRATION NUMBER: 2007/125058/23)

Respondent

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J U D G M E N T

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**MODIBA J:**

[1] Before me are two applications. The first is for the final winding up of Bassonia Four Zero Seven CC (“Bassonia”) brought by the Body Corporate of the Santa Fe Sectional Title Scheme (“Santa Fe”). The second is an application to set aside Santa Fe’s application for the allocation of the winding up application for hearing on the opposed motion roll in terms of Rule 30 (1) of the Uniform Rules of Court.

[2] I deal with the second application first for two reasons. It is interlocutory by nature. It is also dispositive of the winding up application in the event that I find for Bassonia.

**RULE 30 (1) APPLICATION**

[3] The facts relevant to this application are largely common cause. On 14 May 2018, Windell J extended an order for the provisional winding up of Bassonia, returnable on 6 August 2018. On the latter date, the matter served before Ismail J under circumstances where it was not on the roll. He stood it down until 8 August 2018 to allow Santa Fe’s attorney to file an affidavit explaining why the matter was not on the roll. The said affidavit was duly filed. It appears that Ismail J accepted the explanation because on 8 August 2018, he extended the rule *nisi*.

[4] Bassonia contends that the purported extension of the rule *nisi* is a nullity because:

[4.1] The matter was not on the roll of 6 August 2018. Santa Fe was in default of appearance, therefore the rule *nisi* lapsed. Hence its extension under these circumstances is a nullity.

[4.2] If the matter was on the roll on 6 August 2018, it was enrolled clandestinely, denying Bassonia the opportunity to oppose the extension of the rule *nisi*.

[5] *Tshiyombo v Refugee Appeal Board and Others*<sup>1</sup>, relied on by counsel for Bassonia, is not authority for the proposition that an attorney who has not placed himself on the record may not appear on behalf of a litigant. Neither is it authority for the proposition that an order granted under such circumstances is a nullity. In *Tshiyombo*, the State Attorney and Tshiyombo's legal representatives agreed to an order in terms of Part A of the notice of motion. Their agreement included timelines for certain procedural steps to ripen the matter for hearing. At the time, no intention to oppose had been filed on behalf of the respondents. Further, the State Attorney had not placed himself on record on behalf of the respondents. At the hearing in respect of Part B of the application, the State Attorney had still not placed himself on record. Further, the respondents had not filed papers, including a Rule 53 (1) record in compliance with the order granted in respect of Part A. To add salt to injury, the State Attorney did not appear.

[6] The conduct of the respondents and the State Attorney as set out above attracted the wrath of the presiding Judge. He stood the matter down for the State Attorney to be called to explain his conduct to the court. He subsequently appeared

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<sup>1</sup> 2016 (4) SA 469 (WCC)

and explained that he had not filed papers in compliance with the earlier court order because the respondents had not given him instructions. However, he could not explain why he had not withdrawn as their attorney. The court noted prejudice this caused the applicant because his attorneys did not know who to engage with in relation to non-compliance with the Part A order. However, the court never considered the order granted in terms of Part A void *ab origine*.

[7] The circumstances in *casu* are entirely different. Santa Fe was initially represented by Alan Levy, who did not place the matter on the roll on the return day of 6 August 2018, purportedly because he had no instructions. Santa Fe's unassailable version is that it had appointed Karnavos Attorneys who appeared on its behalf on the said date. Alan Levy had not withdrawn as Santa Fe's attorney of record. Karnavos Attorneys had not placed themselves on record as attorneys for Santa Fe.

[8] Be that as it may, Ismail J took no issue with Santa Fe's legal representation on that day. All he required was an explanation why the matter had not been enrolled. It was furnished. He accepted it and extended the rule *nisi*. That he exercised his discretion to deal with the matter in this manner does not render his order a nullity. *Tshiyombo* is not authority for such a proposition. In *Tshiyombo*, as already stated, the presiding Judge did not disregard the order granted in respect of Part A because the State Attorney was not on record when that order was granted.

[9] The purported prejudice Bassonia complains of does not arise. It could not have argued against the extension of the rule *nisi* before Ismail J because he dealt with the matter in the unopposed motion court. On the said day, even if Bassonia was in

attendance when the matter was dealt with, what would have probably occurred was a postponement of the matter to the opposed motion court roll for the issues to be properly ventilated. That is precisely how Ismail J dealt with the matter.

[10] Therefore I find that:

[10.1] when Ismail J stood the matter down on 6 August 2018 to give Santa Fe's attorney an opportunity to file an explanatory affidavit, the rule *nisi* did not lapse.

[10.2] the extension of the rule *nisi* on 8 August 2018 is valid.

[10.3] the enrolment of this matter on the opposed motion roll of 4 February 2019 is not an irregular step.

[11] Be that as it may, Rule 30 (1) is not available to a party to remedy a step taken by the Registrar as the Registrar is not a party to the proceedings. The rule provides:

**"30 Irregular proceedings**

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside."

[12] In the premises, the Rule 30(1) application is dismissed with costs.

**APPLICATION FOR FINAL WINDING UP**

[13] Santa Fe issued this application on 26 November 2015. It derives its *locus standi* from section 69 of the Close Corporations Act<sup>2</sup> read with section 345 (1) (b) of the Companies Act<sup>3</sup> and as read with the Companies Act 71 of 2008. The underlying debt is two amounts R300, 135.39 and R221, 799.63 allegedly owed by the respondent for levies for units 15 and 13 respectively, which Bassonia is liable for, to fund Santa Fe as determined by its trustees in terms of section 37 of the Sectional Titles Act.<sup>4</sup>

[14] Bassonia has failed to make payment despite a section 69 (1) (c) demand.

[15] The application was served on Bassonia on 1 December 2015. It entered an appearance to oppose on 10 December 2015. It appears that Santa Fe only enrolled the application on the unopposed roll of 30 May 2016, Bassonia having failed to file an answering affidavit.

[16] It is unclear when the answering affidavit was ultimately filed. It is incorrectly headed 'Respondent's Replying Affidavit'. It was deposed to on 14 February 2016. A confirmatory affidavit by Tyron Azar is dated 15 February 2016. However, a City of Johannesburg invoice in respect of unit 13, dated 2 March 2016 is attached to the affidavit as an annexure. Therefore it could not have been served prior to that date. It does not have a court date stamp. Therefore it does not seem to have been filed with the Registrar of this court. Santa Fe raises no complaint in this regard. Rightly so because it subsequently filed a replying affidavit.

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<sup>2</sup> 69 of 1984

<sup>3</sup> 61 of 1973

<sup>4</sup> 95 of 1986

[17] In the answering affidavit, Bassonia raised a number of technical and substantive defences. I do not deem it necessary to delve on these because this matter stands to be determined on a dispositive issue raised cursorily in the answering affidavit but dealt with extensively in both written and oral submissions by counsel for Bassonia. He sought a discharge of the provisional liquidation order on the basis that the underlying debt had become prescribed. He relied in this regard on *Misnun's Heilbron Roller Mills Holdings (Pty) Ltd v Nobel Street Central Investments (Pty) Ltd*,<sup>5</sup> where the court held that winding up proceedings are not proceedings relating to the enforcement of a right relating to a creditor's debt and therefore not a process for claiming the payment thereof. Thus, such proceedings do not interrupt prescription in terms of section 15 (1) of Act 68 of 1969. On whether the court may exercise a discretion to wind up a corporation on the basis of a debt which has prescribed, he relied on *Nicholl v Nicholl*<sup>6</sup>, where the court per Mason J refused to exercise its discretion in the applicant's favour. It held that:

*"To hold otherwise would produce the remarkable result that the estate of a debtor might be sequestrated upon a claim which could not be proved in insolvency."*

[18] In paragraph 23 to 26 of the answering affidavit, Bassonia denies that it is indebted to Santa Fe. It points to discrepancies in the amounts allegedly owed as set out in these proceedings and those hitherto instituted by Santa Fe in the Magistrate's Court. Bassonia defended the relevant actions. Further, the alleged debt is the subject of pending arbitration proceedings. In reply, Santa Fe barely denies that there are discrepancies between the amounts in these proceedings and in the Magistrate's

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<sup>5</sup> 1979 (2) SA 1127 (W)

<sup>6</sup> 1916 WLD 10 at 13

Court proceedings. It contends that the Magistrate's Court proceedings were withdrawn because the claims were resolved in its favour in arbitration proceedings. To its replying affidavit, Santa Fe attached an arbitration award made on 13 December 2011, for the payment to it by Bassonia of R63, 167.17 plus interest and punitive costs.

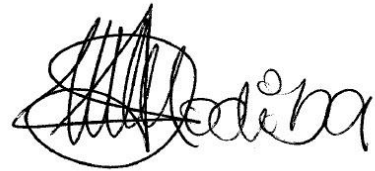
[19] Santa Fe denies the rest of the allegations leaving the court in the dark as to how it arrives at the amounts it seeks to base its *locus standi* on. Astonishingly, Bassonia's averment that it settled the arbitration award is also met with a bare denial. Its invitation to Santa Fe to show how the settlement relates to the alleged debts is ignored. From the statements of accounts Santa Fe filed, it appears that the substantial amounts it claims relate to historical debt that arose prior to March 2015. The statements reflects additional amounts levied between then and September 2015. The balance allegedly owed is derived from these statements.

[20] From the papers filed and on the authority of *Misnun's Heilbron Roller Mills Holdings*, I find that the underlying debt prescribed in September 2018. These proceedings have not interrupted prescription. Therefore I find that Santa Fe has not made out a case for the winding up of Bassonia. To hold otherwise would have the effect of winding up Bassonia upon a claim which could not be proved in insolvency.

[21] In the premises, the following order is made:

**ORDER**

1. The rule *nisi* is discharged.
2. The application is dismissed with costs.



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**MADAM JUSTICE L T MODIBA  
JUDGE OF THE HIGH COURT  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**APPEARENCES**

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|--------------------------|-----------------------|
| Applicant:               | Advocate K Lavine     |
| Attorney for applicant:  | Karnavos Attorneys    |
| Counsel for respondent:  | Advocate J M Hoffman  |
| Attorney for respondent: | Gary Seagle Attorneys |
| Date of hearing:         | 04 February 2019      |
| Date of Judgment:        | 06 March 2019         |