



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No. 129789/23

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
.....	30 January 2024
SIGNATURE	DATE

In the matter between:

MARCHAND VAN ZYL

First Applicant

KOBUS STEYN

Second Applicant

ELMARIE DE BRUIN

Third Applicant

ALETTA THERON

Fourth Applicant

GERDA BECKER

Fifth Applicant

DANIEL LE ROUX VAN ZYL

Sixth Applicant

WILNA DE JAGER

Seventh Applicant

SIMON HARDING BOSMAN

Eight Applicant

LOUIS STEPHANUS VAN DER WALT

Ninth Applicant

HEINRICH DUVENHAGE

Tenth Applicant

CATHARINA ELIZABETH DUVENHAGE

Eleventh Applicant

AMANDA VAN ZYL

Twelve Applicant

ZACHARIAS BLOMERUS GROVE	Thirteenth Applicant
HENCO BURGER	Fourteenth Applicant
JOHANRÉ TERBLANCHE	fifteenth Applicant
CHESLYN CAMERON KRISHNA	Sixteenth Applicant
INDIRA KRISHNA	Seventeenth Applicant
TERRICK PAUL VORSTER	Eighteenth Applicant
MARCHELLE VAN ZYL	Nineteenth Applicant
HENDRIK JACOBUS VISSER	Twentieth Applicant
KERNKERK NPC	Twenty-first Applicant

And

NTC GLOBAL TRADE FUND (PTY) LTD	First Respondent
FINANCIAL SECTOR CONDUCT AUTHORITY	Second Respondent
THE SOUTH AFRICAN RESERVE BANK	Third Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fourth Respondent

EX TEMPORE JUDGMENT

Leso AJ,

INTRODUCTION

1. The applicant brought an urgent application seeking an order that the first respondent be provisionally liquidated with the *rule nisi* to be determined by the court and the costs of the application be in the administration of the first respondent. The second to the fourth respondents are joined in the proceedings as the interested parties and the third respondent has filed notice to abide. The applicants do not seek a cost order against these respondents.

In the motion, the applicant prays that the court should condone non-compliance with the uniform rules in respect of forms and services provided in Rule 6(5) of the Uniform Rules and to hear this matter on an urgent basis in terms of Rule 6(12) of the Uniform Rules.

On Condonation

2. I will first deal with the applicants' motion for condonation for non-compliance with the rules. The motion was filed on 07 December 2023 and the first respondent was to file the opposition on 08 December 2023 at 16h00 and to file the answering affidavit on 12 December 2023, the respondents had practically less than a day to file the opposing notice and four days to answer a 229 pages founding affidavit prepared by the applicants. At the beginning of the oral submission, the first respondent counsel contended that the application ought to be struck off due to non-compliance with section 346A of the Companies Act 61 of 1973 (the old Act) that requires service to every registered trade union as far as the applicant can reasonably ascertain represents any of the employees. Counsel argued that the return of service is defective because it was completed by the applicant's attorney and not by the sheriff.
3. The first respondent argued that the applicant's non-compliance with the Uniform Rules had disadvantaged the first applicant because it could not properly deal with the allegations and the issues raised by the applicants in their application.
4. This court will then deal with the grounds of urgency on this matter and the applicant's attorney argued as follows:
 - 4.1 that the application for liquidation or sequestration is inherently urgent;
 - 4.2 that there is a potential harm to be suffered by the creditors because the respondent is still opening bank accounts and the funds will be dissipated;

4.3 that there were still unlawful activities that might persist if this court order is not granted.

5. The applicants address urgency in paragraph 87 of the founding affidavit where they aver that the application is currently urgent because the business of the first respondent must be prevented without delay, secondly, that the funds held in the first respondent's account be preserved so that it can eventually be distributed among the general body of the creditors of the first respondent. The applicants indicated that the first respondent will have an opportunity to advance reasons why it should not be finally wound-up. During oral submissions counsel for the applicants submitted that the applicants will suffer because the hold on the account shows that the applicants will not be afforded substantial redress at the hearing in due course. The counsel argued further that no indication is given by the first respondent when the investigation will be finalized and the applicant will suffer irreparable harm waiting indefinitely, that the applicant requires access to the fund for their ordinary day-to-day business activities, that every day, week and month that passes place additional and unnecessary strain on the activities of the first to twenty-seventh applicants.
6. The first respondent urged that the application is not urgent and it stands to be dismissed because the grounds of urgency are based on the fear that the funds will be dissipated and secondly, that the first respondent will open the other bank accounts.
7. The applicants aver that on 08 November 2023 the first respondent had placed a hold on the applicants' account and on 09 November the account was still on hold despite the undertaking by the first respondent to release the applicants' monies. The applicants further stated that on 09 November 2023 the applicants became aware that the first respondent committed fraudulent activities on the accounts.
8. The applicants indicated that an application in terms of POCA was brought against the first respondent and the accounts to which the applicants seek to

place in the hands of the master are now restrained in terms of the Court Order of 13 December 2023.

Merits

9. During arguments the parties took the liberty to address me on the case. It became clear during submission that the case should proceed on merits, in any event, it was impossible to separate the condonation application from the merits of the case. I am of the view that both must be allowed an opportunity to be heard on the merits. I will later summarise the merits of the case after I have summarised common cause facts as follows:
 - 9.1 the applicants are all investors in this first respondent.
 - 9.2 the application relates to the general body of creditors of the applicants.
 - 9.3 FNB has frozen the bank accounts of the first respondent and the reserve bank has placed a hold on the said accounts.
 - 9.4 the first respondent together with the first applicant and other investors.
 - 9.5 as of the end of November 2024 the respondent has not paid the creditors.
 - 9.6 on 7 December 2023 the applicants launched an urgent application before the court and on 13 December 2023 the NPA lodged an *ex parte* application and obtained a preservation order against the first respondent.
 - 9.7 the applicants are aware of the preservation order as it was served on their attorney of record.

The merits are summarised as follows:

10. The applicant submits that the application is brought in terms of section 344(f) read with section 345 (1)(c) of the Companies Act, 61 of 1973 on the basis that the first respondent is unable to pay its debt. The counsel for the first respondent argued that the company accepted deposits, pulled those deposits and made investments and trades for the applicants. The applicants stated that they were innocent investors who were ignorant of the fact that the first respondent was trading illegally because the company has not registered with any entity and it trades in contravention of the legislation and regulation. The applicants submitted that they know that the NPA has since launched an application in terms of POCA and obtained an order to freeze some of the first respondents' accounts and there is no indication that the first respondent is going to stop trading *albeit* non-compliance with the laws. According to the applicants the only way that the first respondent is going to stop trading is the provisional order for its winding up.
14. At the end of the submission, the counsel referred to the authority of *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd 2017 ZASCA* which, according to the counsel states that a creditor who is not paid is entitled to its liquidation. The counsel submitted that this authority supports its case because the first applicant is unable to pay the creditors from the end of November. The counsel argued that there would be no protection for the applicants and other creditors if the order is not granted immediately because nothing is preventing the first respondent from withdrawing all funds that are in the bank accounts to the maximum amount and the first respondent must be immediately provisionally for a provisional liquidator to investigate the affairs of this company and the property of the respondent be placed in the hands of the master because there is nothing physically preventing the first respondent from conducting business fraudulently until order is granted.
11. On the other end the first respondent stated that the first applicant encountered difficulties with the withdrawal request by the applicant because FNB and SARB had placed a hold on the account. According to the first respondent, the applicant's claims do not exceed 9 million whilst the balance of the first respondent as of 21 November 2023 on the business account is the

amount of R57 465 908. 65. Another R58 548 243 was available in the call account and was not placed on hold by the FNB.

12. The respondent denies that its inability to pay its creditors is caused by lack of funds but the hold in the accounts. The first respondent argued that the first respondent along with all other applicants sought to force FNB to release those accounts held with FNB however, the first applicant did not proceed with that application and it was eventually from the roll. The respondent alleges that it gave the investors full information regarding the application involving FNB and in a letter addressed to the applicants' attorney, advised the applicants that their application was premature because there were pending proceedings dealing with the assets of the first respondents in terms of POCA and the accounts to which he seeks the order are now restrained in terms of the court order of 13 December 2023. In closing, the first respondent argued that the urgent application brought by the applicants while they were well aware that the accounts were on hold was an abuse of process.

Analysis

13. The first respondent's contention that the application ought to be struck off due to non-compliance with section 346A of the Companies Act 61 of 1973 is just technical and not applicable in this case because it is clear from the first respondents' submissions that the respondent has no employees.
14. It is worth noting that the applicants became suspicious of the activities and the non-compliance on 09 November 2023 and the applicants only filed the application on 07 December 2023 which was then set down to 19 December 2023. The fact that the applicants only approach the court after the first respondent withdrew the urgent application against FNB and not when it become aware of alleged criminal activities, non-compliance and the fact that the first respondent cannot pay its debts casts doubt in the court's mind on what the real intention of the plaintiff is with the order they sought. During the oral arguments, it turned out that the application for liquidation was triggered by the first respondent's withdrawal of an urgent application against FNB to

release the accounts that FNB had put on hold otherwise the applicant could have approached the court in November when the applicants could not withdraw funds from the accounts.

15. When the court enquired from the applicant's counsel when they did the applicant realize that the respondent was a Ponzi scheme or was conducting fraudulent activities and not complying with the laws, the counsel's response was "*shortly before the application*". The counsel's answer is open to many interpretations which the court is at no liberty to interrogate because of the nature of the proceeding.
16. The approach to urgent motions is set out in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977(4) SA 135(W) at 137F* and Rule 6(12) Uniform Rules. The rule requires the applicant to set forth explicitly the circumstances that render the application urgent and the reasons why the applicant claims that he could not be afforded substantial redress at the hearing in due course. In this case the applicants have a substantial redress is POCA proceedings which is not finalised. The preservation order was specific in that the first respondent, Edwin Letopa, and other 37 companies and clients represented by Willem Potgieter Babinski Incorporated and other interested parties are to be allowed to oppose the application for an order declaring the property forfeited to the state or to apply for an order excluding his or her interest from the forfeiture order in respect of the property. Having stated the above, I am of the view that the applicants are entitled to apply for an order to wind-up the first respondent under the new Act alternately the Old Act irrespective of whatever other causes of action may be available to it in due course. Accordingly, it is of no consequence that these other causes of action have not been invoked to date.
17. It is common cause that the first respondent entered an appearance to defend followed by answering after it was served with the application, albeit it was late. The first respondent is opposing the application and both the applicants and the first respondent's legal representative are before the court. The court was at pains to find where in the affidavit have the applicants dealt with the condonation as expected in practice. I have however in the interest of justice,

considered the degree of lateness, the nature of the application before me and the fact that the first respondent got an opportunity to present its case *albeit* the time constraints. Having stated the above, I am of the view that this matter does deserve the court's attention on an urgent basis. Consequently, the court condones non-compliance with the forms of service provided in the rules.

18. On merits, the facts presented by the applicants in support of the liquidation of the applicants are valid except that the applicants. The fact that the respondent is indebted to the creditors is not in dispute. Similar to the case of *Afgri*, the SCA found, with reference to the principles set out in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348 and *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 980D that once the respondent's indebtedness has *prima facie* has been established, the onus is on it to show that this indebtedness is disputed on bona fide and reasonable grounds and the discretion of a court not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide. In this case, the first respondent does not dispute indebtedness however it provides a sound explanation why the creditors cannot be paid.
19. In the *Commissioner for the South African Revenue Service v Nyhonyha and Others* (1150/2021) [2023] ZASCA 69 (18 May 2023) the SCA had to determine whether the setting aside of the winding-up order under section 354 of the Companies Act constitutes the exercise of a true discretion by the court *a quo* and whether, based on the available facts, Regiments was commercially solvent at the time of the hearing in the court *a quo*. In this case the National Department of Public Prosecutions (NDPP) obtained a provisional restraint order under the Prevention of Organised Crime Act 121 of 1998 (POCA) which related to Regiments' assets. In terms of the restraint order, Regiments was interdicted from participating in an unbundling transaction in respect of the shares it held in Capitec Bank Holdings Limited. Regiments was placed in final liquidation at the instance of an unpaid creditor before the restraint order was discharged.

20. This court relied on the principle that was applied in *Nyhonyha and Others* to consider on the available facts, whether the first respondent was commercially solvent at the time of the hearing. In their submission the applicants stated that they do not know whether the first respondent is factually or commercially solvent while on the other hand the first respondent indicated the applicant's claims do not exceed 9 million whilst the balance of the first respondent as of 21 November 2023 on the business account is the amount of R57 465 908. 65 and another R58 548 243 was available in the call account which was not placed on hold by the FNB. The first respondent submitted bank statements reflecting the above amounts although not confirmed under oath. Different from *Regiments* case, I cannot find from the above facts, that the first respondent is commercially or factually insolvent.
21. Section 26(1) of POCA provides that the NDPP may by way of an *ex parte* application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates. In this matter, I considered the fact that there is a preservation order that has not been discharged and the assets of the first respondent are still restrained. The fact that the accounts of the respondent has been restrained in terms of POCA should be simple logic to the applicants that their accounts or monies cannot be put in the hands of the master.
22. This court must protect all other investors who are unaware of the situation of the first respondent and who are at the risk of losing their monies if the allegations against the first respondents are true more so because the first respondent is still operating. I am however of the view that the fact that the first respondent is not insolvent should outweigh all the other allegations and the probability of irreparable harm befalling the unsuspecting creditors.
23. The applicant made allegations of fraud, pleaded ignorance in the operation of the investment and stated that he does not know whether the respondent was either factually or commercially solvent while the respondent denied that it was

either factually or commercially solvent or being a Ponzi scheme. While this court has a duty to protect the members of the public who might be ignorant, I can not order provisional liquidation of the respondent based on allegations and speculations which the first respondent vehemently denied. Consequently, the order for winding-up of the first respondent is unnecessary or undesirable

CONCLUSION

24. It is trite that insolvency matters are inherently urgent, consequently, this matter is heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court and there is no case made out for a provisional liquidation of the first respondent.
25. I do not accept that the urgent order for provisional liquidation sought by the applicants is justifiable considering the circumstances of this case.
26. On the issue of costs, the Constitutional Court has held in various cases, that the costs should follow the results in this case the applicants did not succeed in its application and it follows that they must pay the costs. On hindsight, the application contained more than 229 pages, with almost 178 pages dealing with the operations of the first respondent despite the court's directives relating to the proceedings in the urgent court. The oral submission by the first respondent's counsel took quite a considerable time dealing with the allegations of fraud and the operations of the first respondent. Under paragraph 10 of the Implementation of the Judge President's Practice Directive dated 11 June 2021 for the Urgent court of 17th December 2021 (16h00 to 24th December 2021, where the following directive stands noted: "*..urgent court is not intended to hear complex factual and/or legal issues scattered over hundreds of pages and which may take a long time to consider and finalize...Such complex cases may be removed from the roll and the parties may be referred to the Deputy Judge President to be allocated to a special court at some time in the future...*")

ORDER

Consequently, the following order be made:

1. The application is dismissed.
2. Plaintiff to pay costs on attorney and client scale.

A black rectangular box redacting the signature of the judge.

J.T LESO

ACTING JUDGE OF THE HIGH COURT

DATE OF THE HEARING: 21 December 2023

APPEARANCES

ON BEHALF OF THE APPLICANT: ADV RAUBERHEIMER

ON BEHALF OF THE RESPONDENT: ADV BRITS