

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No.: 12867/2017

In the matter between:

GOVINDARAJALOO NARASIMOOLOO

APPLICANT

and

NEDBANK LIMITED

FIRST RESPONDENT

LIBERTY LIFE

SECOND RESPONDENT

A VENGADESAN N.O.

THIRD RESPONDENT

ORDER

1. The security cessions granted by the applicant in favour of the first respondent in respect of the policies-

(a) 15834567000; and

(b) 15834927000,

security for the payments of the debts owed to the first respondent by C&R Contractors - KwaZulu-Natal CC (in business rescue) are declared to be cancelled;

2. The second respondent is directed to amend its record to reflect that the ownership of the policies has reverted to the applicant.

3. Each party to pay its own costs incurred after 16 November 2021.

JUDGMENT

HARRISON AJ

[1] The application which presents before me is one in which the applicant seeks (to use the colloquial term) recession of two insurance policies from the first respondent, such policies being policies issued by the second respondent.

[2] The history of this matter is long and chequered. There already is a judgment by Balton J ("the judgment") in this matter.

[3] That judgment sets out the history and background to the matter and, for that reason, I do not repeat the history and background in this judgment.

[4] During the course of argument, both parties sought to refer me to the judgment and it is for that reason that I quote hereunder the final five paragraphs of the judgment.

'[56] The BRP has not indicated that he intends abandoning any claim for the money paid to the first respondent, in fact, in the affidavit he states that:

"The reason for C and R Contractors requesting the payment of the funds is that we believed at that stage that the funds deposited and returned by the First Respondent after date of business rescue amounted to an undue preference."³⁷

[57] The BRP has not unequivocally confirmed that he does not intend demanding that the money paid to the first respondent be returned to C & R. This undoubtedly leaves the first respondent in an uncertain position. If it releases the security to the applicant and the BRP demands money [sic] be paid to the first respondent, then the

first respondent would not have any security for the money owed to it by C & R. The BRP anticipates that the business rescue proceedings should be concluded by October 2022. I am of the view that the application should be adjourned sine die to enable either the finalization of the business rescue proceedings or until there is an unambiguous undertaking that the BRP does not intend instituting proceedings or seeking a refund of the money [sic] paid the first respondent.

[58] The applicant has failed to satisfy this court that he is entitled to the relief sought.

[59] The applicant should pay the first respondent's costs of this application due to the fact that he was not candid with the first respondent on 3 May 2017 when he failed to disclose, despite being asked, that business rescue proceedings had not yet commenced whereas they had commenced on 27 April 2017. The court accepts the BRP's explanation for the late filing of the affidavit and he is accordingly absolved from paying the costs of 4 May 2021.

[60] The following order is made:

(1) The application is adjourned pending the final determination (including the determination of all appeals permissible in law) of any action which may be instituted by the third respondent against the first respondent arising from the payments of R3 183 737.40 on 3 May 2017 and R300 000.00 on 4 May 2017 into the account of C & R Contractors - KwaZulu CC, under account number 1[...], held with the first respondent.

(2) The third respondent shall institute such action on or before 31 October 2022 failing which it is barred from doing so.

(3) The applicant is directed to pay the first respondent's costs of this application.

(4) The BRP is absolved from paying the costs of the proceedings on 4 May 2021.'

[5] Pursuant to that order, supplementary affidavits have been filed and it is pursuant to those affidavits that the matter now presents before me.

[6] During the course of argument, counsel for both parties acknowledged and recognised that the issue before me is only in respect of the two payments of R3 183 737.40 and R300 000, as identified in paragraph 1 of the order of Balton J. My concern which I had raised with both the applicant's and the first respondent's counsel, Mr *Collins* and Mr *Thatcher* respectively, that the cession and pledge at pages 144 to 149 of the original indexed papers was for all debts owing by the applicant and was not simply confined to being security in respect of the debts of C & R Contractors CC (in business rescue) ("C&R").

[7] It was in light of these concessions that the issues have been narrowed to simply that which has transpired since Balton J handed down her judgment in November 2021.

[8] Mr *Collins* submitted, very correctly in my view, that what motivated Balton J to make the comments in paragraph 57 of her judgment, was that she had a very real concern that there is a risk to the first respondent.

[9] Mr *Collins* then pointed out that at the time that the application was argued before Balton J on 4 May 2021, and by the time that it was argued on 26 May 2021, the previous action instituted by the BRP under Case No. 0445/2019 had already been withdrawn.

[10] Mr *Collins* submitted further that between 16 December 2021 and October 2022, nothing had happened and no action has been instituted by the BRP. (The date of October 2022 is the date by which the third respondent had indicated that the business rescue would be terminated).

[11] By virtue of the failure of the BRP to institute any action by October 2022, Mr *Collins* submitted that it is logical that the applicant is now entitled to the relief sought.

[12] Mr *Collins* further referred me to the passage in the supplementary affidavit deposed to by Pratima Ishwarlall of the first respondent, at paragraph 53, where it was specifically stated:

'Nedbank will return the security when C&R is liquidated and a liquidator advises that they do not intend to seek to recover the payments made to Nedbank on the 3rd and 4th May 2017.'

[13] In highlighting this passage, Mr Collins submitted that the first respondent was not entitled to force the applicant to seek the liquidation of C&R, nor was the applicant obliged to do so.

[14] As a Parthian shot Mr Collins likened paragraph 57 of the judgment of Balton J to a '*suspensive condition*' and as such, as no action has been instituted or taken by the liquidator by this time, the applicant is entitled to the relief in paragraphs 1.3 and 1.4 of the notice of motion, together with costs.

[15] As an aside, I must point out that both parties have sought to motivate for punitive costs orders on various grounds. I mention this as there has been an increasing tendency in recent times to see a certain degree of vitriol creeping into both the affidavits of parties as well as the arguments which are presented in court. I do not find resorting to such language to be persuasive, and I mention it specifically as Balton J specifically mentions the applicant's lack of candour in paragraph 59 of her judgment and correctly only awards costs of the application, not even on a punitive scale. I am disinclined to make any punitive costs order in this matter. It is a purely commercial matter which requires decision on its merits.

[16] Mr *Thatcher*, for the first respondent, submitted and drew my attention to the history of the matter and particularly that a lot has happened since the instituting of the application in 2017.

[17] When the application was first presented, the threat of the recovery of the two disputed payments was very much alive and it was accordingly to be expected that

the first respondent would resist the return of any policies in circumstances where its security could be compromised.

[18] Mr *Thatcher* submitted that the approach by the first respondent has been consistent throughout this matter, namely that the first respondent is prepared to release the security once it is out of jeopardy.

[19] Mr *Thatcher* submits that at the time when the application was instituted, there was a substantial threat and the first respondent was facing possible litigation for the return of payments to C&R and, hence, it was disinclined to release any security which it had.

[20] Mr *Thatcher* specifically referred me to paragraph 36 of the supplementary affidavit in which the first respondent has indicated unequivocally that it will return the security against assurances that no action will be instituted against the first respondent.

[21] In reply, Mr *Collins* submitted that any concerns which the first respondent had ought to be taken up with the BRP and that the applicant is now entitled to receive the return of its money.

[22] As part of his final submissions, Mr *Collins* further indicated that the first respondent is '*contending for a string without an end*'.

[23] The problem I have with this submission, as well as the argument that paragraph 57 of the judgment of Balton J created a 'suspensive condition' is that it ignores what has been said by Balton J in that paragraph. I emphasise that Balton J said- ·

'I am of the view that the application should be adjourned sine die to enable either the finalization of the business rescue proceedings or until there is an unambiguous undertaking that the BRP does not intend instituting proceedings or seeking a refund of the money paid [sic] the first respondent.'

[24] Whilst I appreciate that Mr *Collins* was likening her words to a suspensive condition, Balton J's words are clear that she identifies that there must either be-

- (a) a finalisation of the business rescue proceedings; or
- (b) there is an unambiguous undertaking by the BRP that he does not intend instituting proceedings; or
- (c) a seeking of a refund of the money paid to the first respondent.

[25] What is clear to me is that neither of those three events have occurred.

(a) Firstly, the business rescue proceedings have not been finalised. The operation of C&R has, accordingly, never been returned to the hands of the applicant as its member, a circumstance which would revert the applicant with control of C&R and he would hardly be likely to seek to institute any action against the first respondent in circumstances where his very own securities would be called up to cover that debt.

(b) Secondly, there is no unambiguous undertaking from the BRP before me. He had already withdrawn the action under Case No. D445/2019 on 4 May 2021. Clearly, what was being contemplated was a new undertaking considering that the matter was argued on 26 May 2020. There is no such unambiguous undertaking from the third respondent.

(c) Thirdly, there is no undertaking given that there would be no seeking of the refund.

[26] It is not for me to sit in appeal of Balton J's judgment, but it is clear that there has neither been a finalisation of the business rescue, nor has there been an unequivocal undertaking given. The matter does not end there as the nature and effect of Balton J's order needs to be given effect.

[27] The second prayer in Balton J's order specifically reads-

'(2) The third respondent shall institute such action on or before 31 October 2022 failing which it is barred from doing so.'

[28] Wallis JA, in the often-quoted case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹ has set out the grounds of interpretation. Relevant for this matter is the final sentence of paragraph 18 of Wallis JA's judgment, where he states:

'The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Footnote omitted.)

[29] The background to that order is to be found in the previous heads of argument of Mr *Thatcher* and the proposed draft order, which he annexed to his heads of argument. The reason I mention this is to put in context the issue and the effect of the requirement that the action be instituted before a specific date and the effect of the barring thereafter.

[30] The very wording indicates the intention that there be certainty as regards whether there could be any claim against Nedbank by the BRP for indeed, if there was no such claim and there was certainty that there never would be any such claim, then, the need for security and the need for the cession of the policies would fall away.

[31] As has been set out above, it is now common cause between the parties that it is only the two disputed transactions which are in dispute.

[32] Balton J, by crafting an order that there would be a barring against the BRP after 31 October 2022, was clearly seeking to bring finality to the situation and by setting such a date, with business rescue still being in place at the time, any possible

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

claim by the BRP for recovery of the monies from the transactions which were 3 and 4 May 2017, would clearly have prescribed.

[33] With that barring in mind, Balton J was seeking to bring finality to the matter.

[34] That date has come and gone without the actions having ever been instituted and the effect is that the barring must now operate against the BRP.

[35] Mr *Thatcher* has warned and cautioned that there are still potential claims that the first respondent may face and, in this regard, he refers to the probability that a claim in terms of s 30 of the Insolvency Act 24 of 1936, may ensue.

[36] Mr *Collins*, in reply, submitted that motion proceedings are not concerned with probabilities and specifically referred me to paragraph 26 of Harms DP's judgment in *National Director of Public Prosecutions v Zuma*.²

[37] The issue of a potential liquidation and liquidation claim does not arise on the facts of the matter but, in any event, not only were the payments received by the first respondent in the ordinary course of their business, but were also received into the very bank account into which the creditors would ordinarily have been obliged to pay. I cannot see how such payment could ever be categorised by a liquidator as being a '*collusive deal*' or a claim in terms of s 30 of the Insolvency Act.

[38] Balton J, having set a date of 31 October 2022 for the barring to take place, has effectively ensured that there is no danger of a claim from the BRP for the recoveries of the money and, accordingly, it is not proper for the first respondent to insist on a further term, as set out in paragraph 53 of the supplementary affidavit, that:

'Nedbank will return the security when C&R is liquidated and a liquidator advises that they do not intend to seek to recover the payments made to Nedbank on 3rd and 4th May 2017.'

² *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

[39] Balton J, having set a date in stone of 31 October 2022, has created the necessary certainty, in my view, for the first respondent to be satisfied that there is no danger of a claim and, accordingly, there is no basis for the retention of the security and a case is made out for paragraphs 1.3 and 1.4 of the Notice of Motion.

[40] Mr Thatcher has specifically referred me to the matter of *Aussenkehr Farms (Pty) Ltd v Trio Transport CC*,³ and, more specifically, to paragraphs 20 and 21.

[41] That matter is specific authority for the proposition that security can only be receded unless both parties intend that the rights formerly reposed should revert to the cedent. In present circumstances, and in light of what is said in paragraph 53 of the supplementary affidavit deposed to by the first respondent, it is clear that the parties intend to recede the policies once there is certainty or, as Mr *Thatcher* put it, no jeopardy.

[42] That event has now occurred through the barring of the BRP through paragraph 2 of the judgment of Balton J.

[43] As regards costs, as raised with counsel, Balton J has already made an order for costs in this matter and has awarded costs in favour of the first respondent, specifically in light of the applicant's conduct in the meeting on 3 May 2017.

[44] Balton J, in crafting her order and setting a date in the future for the barring of the BRP to institute proceedings, recognised the need for the return of the security, the return of which has been conceded by the first respondent both in the affidavits and in argument, that once there is no jeopardy, the security will be returned. This would appear to make the applicant successful however, in addition to the disquiet which was expressed in the judgment of Balton J regarding the conduct of the applicant, there is a further issue which I raised with counsel, namely, that the applicant would have been responsible for the appointment of the third respondent

³ *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA).

as BRP in terms of s129 of the Companies Act 71 of 2008, when the necessary resolutions were adopted to commence business rescue proceedings.

[45] I raised this with Mr *Collins*, who submitted that it was not an issue I had to concern myself, however, I specifically raised the disquiet as the applicant, who now describes himself as being retired, cannot wash his hands of his obligations to deal with the affairs of the close corporation in terms of s 137(2)(a) of the Companies Act. This provision specifically provides that a director of the company 'must continue to exercise the functions of a director subject to the authority of the practitioner'.

[46] Obviously, the language of the Companies Act refers to a director, but *mutatis mutandis* this applies to a member of a close corporation.

[47] As has specifically been submitted by Mr *Thatcher*, the court is left guessing as to what has transpired between the granting of the order of Balton J in November 2021 and the hearing of this matter, some nearly two years later. This is a silence or inaction which I believe needs to be satisfactorily explained and the failure to do so is disquieting. In the circumstances, whilst I am predisposed to granting the release of the security, I exercise my discretion not to award any costs.

[48] In light of the previous order granted in the judgment of Balton J awarding costs to the applicant, the costs order which I make only relates to the costs incurred from 16 November 2021.

[49] I accordingly make an order in the following terms:

1. The security cessions granted by the applicant in favour of the first respondent in respect of the policies-

(a) 15834567000;and

(b) 15834927000,

security for the payments of the debts owed to the first respondent by C&R Contractors- KwaZulu-Natal CC (in business rescue) are declared to be cancelled;

2. The second respondent is directed to amend its record to reflect that the ownership of the policies has reverted to the applicant.

3. Each party is to pay its own costs incurred after 16 November 2021.

G M HARRISON AJ

Appearances

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