REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

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

14/12/2022

CASE NO: 4937/2021

In the matter between:

MICHAEL RALF THEKO	First Applicant
NELISIWE SEGAGE	Second Applicant
SIMPHIWE MKHABELA	Third Applicant
and	
SINOKUHLE DEVELOPMENTS CONSULTANTS (PTY) LTD	First Respondent

MBOMBELA HOUSING ASSOCIATION Second Respondent

MASTER OF THE HIGH COURT: MBOMBELA Third Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This is an urgent application to stay the order of this Court dated 24 October 2022 ("the order") finally liquidating the Second Respondent ("the Company"). The application comprises two parts, "A" and "B". Part "A", brought in terms of the provisions of Section 354(1) of the companies Act, 61 of 1973 ("Companies Act"), concerns the staying of the order while Part "B" will, depending on the outcome of this judgment, deal with the setting aside of the order as intended in Uniform Rule of Court 42(1) and/or Section 354 of the Companies Act, 61 of 1973.

[2] The three Applicants are the employees of the Company currently suspended from work as a result of the operations of the provisions of Section 38(1) of the Insolvency Act, 34 of 1936 ("the Insolvency Act"). It was contended on their behalf that in consequence of their employment with the Company, they have acquired *locus standi,* which derives from their being preferent creditors of the Company, now in liquidation. The application is opposed and two points *in limine* relating to lack of *locus standi* of the Applicants and non-joinder of liquidators have been raised.

FACTUAL MATRIX

[3] The facts leading to this matter are largely common cause and as such, their elaborate description is not warranted. A terse background has been furnished in the founding affidavit. Consequently, and instead of reinventing the wheel, I proceed to borrow extensively from the founding affidavit.

[4] The First Respondent ("Sinokuhle") instituted an application for the provisional liquidation of the company on 30 November 2021. The company opposed the application. The application for the provisional liquidation was heard by this Court on 11 August 2022. On 25 August 2022, this Court granted the order provisionally liquidating the Company. Pursuant to granting the provisional order the Court issued a *rule nisi*, returnable on 24 October 2022 on which date the order was made final.

[5] Before traversing the merits of this case, it will be convenient to delve into the two points *in limine* to which I have alluded above because if found to be valid they could be dispositive of this whole matter. Since this application is founded on the provisions of various statutes, it could be instructive to first canvass the relevant sections of those different legislations. The starting point is undoubtedly Section 354(1) of the Companies Act, which provides that:

> *"The Court may at any time* after the commencement of a winding-up*, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all* proceedings *in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the* proceedings *or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit."*

[6] Section 41(2) of the Basic Conditions of Employment Act of 1997, as amended by Act 11 of 2002 lays down that an employer must pay an employee whose contract of employment has been terminated in terms of Section 38 of the Insolvency Act severance pay equal to at least one (1) week remuneration for each completed continuous year of service to the employer, as calculated in terms of Section 35 of the Act.

[7] Section 38(1) of the Insolvency Act provides that the contracts of service of employees whose employer has been sequestrated are <u>suspended</u> with effect from the date of the granting of the sequestration order. Section 38(5)(d) provides that a trustee may not <u>terminate</u> a contract of service unless the trustee has consulted with the employees whose contracts of service were <u>suspended</u>. In terms of subsection 1 and who are likely to be affected by the termination of the contract of service or their representatives nominated for that purpose.

[8] Section 38(9) states that unless the trustee or liquidator and the employer agreed on continued employment of the employee in view of measures contemplated in subsection (6), all suspended contracts of service shall terminate 45 days after (b) the date of the appointment of a liquidator in terms of Section 375 of the Companies Act. Lastly, Section 38(11) stipulates that an employee whose contract of service <u>terminates</u> or has been <u>terminated</u> in terms of this section is entitled to claim severance benefits from the estate of the insolvent employer in accordance with Section 41 of the Basic Conditions of Employment Act, Act 75 of 1997. The various legislative provisions behind us, I turn to the preliminary points below.

<u>LOCUS STANDI</u>

[9] Here the argument of the Applicants is that they have respectively completed nine, ten and two years of continuous service with the Company. Given that the First Applicant earned a monthly salary of **R9 462.25**, the Second, an amount of **R6 000.00** and the Third, an amount of **R9 462.25**, so continues the argument, they are each owed amounts of **R21 304.80**, **R15 000.00** and **R4 734.40** respectively. These amounts, the Applicants assert, began accruing from the first year of their relevant employment with the Company. Accordingly, conclude the Applicants, upon the granting of the order, the money became owing, due and payable.

[10] Section 354(1) specifically sets out who would have the *locus standi* to launch an application to stay and. The party launching the application must either be a creditor or

member or liquidator. As such, it must be critical to establish what the meaning of the word, creditor is because it is their contention that they are the creditors contemplated in Section 354(1) of the Companies Act. The word, creditor, is not defined under Section 1 of the Companies Act. The ordinary meaning of the word, creditor, is a person to whom money is owed. Are the Applicants creditors of the Company?

[11] The provisions of Section 41(2) of the Basic Conditions of Employment Act is unambiguous – an employer must pay an employee whose employment has been terminated in terms of section 38 of the Insolvency Act severance pay equal to at least one (1) week remuneration for each completed year of service. The trustee has not consulted with the Applicants, as envisaged in Section 38(5)(d) of the insolvency Act. Moreover, the Company having been finally liquidated on 24 October 2022, by the time this matter served before Court on 6 December 2022 the fourty-five-day period for which the Applicants have been suspended had not even come to an end rendering the launching of this application premature.

[12] What then does all this mean? Section 41(2) of the Basic Conditions of Employment Act will only be triggered by termination of the employees' employment. For as long as that has not happened, as is the case here, the Applicants cannot be regarded as creditors as intended in Section 354(1) of the Companies Act. Since the Applicants are neither liquidators nor members of the Company, they do not have *locus standi* to claim what they allege is due. The prematurity of this application becomes more palpable when one considers that it is still unknown whether or not the employment of the Applicants will be terminated or not. Against that background, I have no option but to agree that the Applicants have failed to demonstrate that they have *locus standi.*

[13] In view of the conclusion of this Court on the issue of *locus standi*, it will serve no purpose to explore the non-joinder question nor will it assist either party to consider the merits. The issues of *locus standi* and non-joinder have always been independently dispositive of the matter. Thus, the Applicants' failure to show *locus standi* spells the end of the matter. Needless to state that while this is the end for the Applicants, it is

momentary as their employment might subsequently be terminated. Upon that happening, they will become creditors and acquire *locus standi* to bring the same application.

[14] In the result, the application fails and I make the following order:

The application is dismissed with costs.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 14 December 2022 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv T S Ngwenya**
Instructed by:	**JF Shabangu Attorneys**
Counsel for the Respondent:	**Adv H F Forie**
Instructed by:	**Cronje De Waal – Skhosana Inc**
Date of Judgment:	**December 2022**