REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/9/2016

Reportable: No

Of interest to other judges: No

Revised.

Case no: 28220/2015; 28221/15

In the matter between:

NEDBANK LIMITED	Plaintiff
and	
LUVHOMBA LEGAL EDGE CC (Reg. No.: 2001/018852/23)	1st Defendant
MATTHEWS TUWANI MULAUDZI (ID No.: …)	2nd Defendant
MULAUDZI & ASSOCIATES CC (Reg. No.: 1997/062781/23)	3rd Defendant
GERENDRA CC (Reg. No.: 1995/038092/23)	4th Defendant
LUVHOMBA LEGAL CARE CC (Reg. No.: 2001/024948/23)	5th Defendant
LUVHOMBA COMMUNICATIONS & INFORMATION TECHNOLOGY CC (Reg. No.: 2008/235739/23)	6th Defendant
MZANTSI RESTUARANTS CC (Reg. No.: 2009/113294/23)	7th Defendant
LEGAE LE MONATE RESTAURANT CC (Reg. No.: 2008/235719/23)	8th Defendant
LUVHOMBA PROJECTS & CONSTRUCTION CC (Reg. No.: 2008/242842/23)	9th Defendant
LUVHOMBA SECURITY SERVICES & PATROL CC (Reg. No.: 2008/235729/23)	10th Defendant

LUVHOMBA LEGAL AXE CC (Reg. No.: 2001/030613/23) 11th Defendant
LUVHOMBA FINANCIAL SERVICES CC 12th defendant
(Reg. No.: 2003/048903/23)

Case no: 28221/2015

In the matter between:

NEDBANK LIMITED Plaintiff

and

MULAUDZI & ASSOCIATES CC (Reg. No.: 1997/062781/23) 1st Defendant
MATTHEWS TUWANI MULAUDZI (ID No.: …) 2nd Defendant
LUVHOMBA LEGAL EDGE CC (Reg. No.: 2001/018852/23) 3rd Defendant
LUVHOMBA LEGAL CARE CC (Reg. No.: 2001/024948/23) 4th Defendant
GERENDRA CC (Reg. No.: 1995/038092/23) 5th Defendant
LUVHOMBA COMMUNICATIONS & INFORMATION TECHNOLOGY CC (Reg. No.: 2008/235739/23) 6th Defendant
MZANTSI RESTUARANTS CC (Reg. No.: 2009/113294/23) 7th Defendant
LEGAE LE MONATE RESTAURANT CC (Reg. No.: 2008/235719/23) 8th Defendant
LUVHOMBA PROJECTS & CONSTRUCTION CC (Reg. No.: 2008/242842/23) 9th Defendant
LUVHOMBA SECURITY SERVICES & PATROL CC (Reg. No.: 2008/235729/23) 10th Defendant
LUVHOMBA LEGAL AXE CC (Reg. No.: 2001/030613/23) 11th Defendant
LUVHOMBA FINANCIAL SERVICES CC (Reg. No.: 2003/048903/23) 12th Defendant

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JUDGMENT

(Application for leave to appeal)

AC SASSON, J

[1] On 28 July 2016 this court granted in favour of the applicant (Nedbank Limited) the following two default judgments against the entities cited in the respective matters:

> "Case number: 28220/2015
> After reading the documents and hearing counsel, default judgment is granted in favour of the Plaintiff against the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Defendants, jointly and severally, the one paying the other to be absolved, together with any judgment which may be granted against the Second Defendant, for:

CLAIM A

1. Payment of an amount of R1 138 970.16 (One Million One Hundred and Thirty Eight Thousand Nine Hundred and Seventy Rand and Sixteen Cents);
2. Interest on the aforesaid amount at the Plaintiff s prime lending rate (then 9.25%), as from time to time, less 0.8%, thus 8.45% per annum, calculated from 14 April 2015, to date of final payment, both days inclusive;
3. Costs of suit on the scale as between attorney and client.

As against the First Defendant only:

4. An order declaring the following immovable property specially executable:

   Remaining Extent of Erf […] Sunnyside (Pretoria) Township, Registration Division J.R., the Province of Gauteng, measuring 388 square metres, held under Deed of Transfer No. T082134/2008.

CLAIM B

5. Payment of an amount of R1 715 362.78 (One Million Seven Hundred and Fifteen Thousand Three Hundred and Sixty Two Rand and Seventy Eight Cents);
6. Interest on the aforesaid amount at the Plaintiff s prime lending rate (then 9.25%), as from time to time, less 0.8% per annum, calculated from 14 April 2015, to date of final payment, both days inclusive;
7. Costs of suit on the scale as between attorney and client.

As against the First Defendant only:

8. An order declaring the following immovable property specially executable:

   Remaining Extent of Erf […] Hatfield Township, registration Division J.R., the province of Gauteng, measuring 125 square metres, held under Deed of Transfer No. T006312/2010.

9. The action against the Second Defendant is postponed *sine die,* costs reserved."

"Case number: 28221/2015

After reading the documents and hearing counsel, default judgment is granted in favour of the Plaintiff against the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Defendants, jointly and severally, the one paying the other to be absolved, together with any judgment which may be granted against the Second Defendant, for:

1. Payment of an amount of R3 873 783.29 (Three Million Eight Hundred Seventy Three Thousand Seven Hundred and Eighty Three Rand and Twenty Nine Cents);
2. Interest on the aforesaid amount at the Plaintiff's prime lending rate (then 9.25%), as from time to time, less 1.05%, thus 8.2% per annum, calculated from 14 April 2015, to date of final payment, both days inclusive;
3. Costs of suit on attorney and client scale.

As against the First Defendant only:

4. An order declaring the following immovable property specially executable:

   Portion 132 (a portion of portion 6) of Erf […] Waterkloof Ridge Township, Registration Division J.R., the province of Gauteng, measuring 1225 square metres, held under Deed of Transfer No. T084283/2006.

5. The action against the Second Defendant is postponed *sine die,* costs reserved."

[2] I will refer to the parties as they are cited in the two applications for default judgment.

[3] The second defendant in both matters is Mr Matthews Tunwani Mulaudzi (hereinafter referred to as "Mulaudzi"). He was finally sequestrated on 27 May 2016.

[4] The remainder of the defendants are cited as close corporations. Mulaudzi took issue with the citations and submitted to the court that all of these close corporations have been converted to companies. (I will revert to this issue herein below.)

[5] Mulaudzi filed an application for leave to appeal against the two orders. It was brought to the court's attention that Mulaudzi has since filed two rescission applications for an order rescinding the two orders. The rescission applications are opposed. Despite having filed the rescission applications the applications for leave to appeal were not withdrawn or abandoned.

<u>The second defendant</u>

[6] I have already referred to the fact that Mulaudze was finally sequestrated on 27 May 2016. Mr Strydom of Strydom & Bredenkamp Incorporated was duly appointed as the attorney of record for the second defendant (the two trustees of the insolvent estate of Mulaudze). Strydom deposed to an affidavit that was handed up setting out some additional facts that were relevant to the hearing of the two applications for default judgment.

[7] Strydom confirms in his affidavit that the two trustees (Mr Sithole and Mr

Musawenkosi of Ngwenduna Trustees - hereinafter referred to as "the trustees) were appointed by the Master of the North Gauteng High Court, Pretoria as the provisional trustees in the insolvent estate of Mulaudzi. Once they have been appointed, they were substituted by Nedbank as the second defendant on 13 June 2016 by a notice in terms of Rule 15.

[8] Strydom states in his affidavit that he (as the attorney of record) as well as the joint provisional trustees have considered the pleadings and that they are of the view that they do not possess any information or evidence confirming that the second defendant or any of the other defendants have a valid defence against the claim. According to Strydom it would therefore not be to the benefit of anyone to proceed with litigation in this matter.

[9] Strydom also points out in his affidavit that he and the two provisional trustees did in fact attempt to obtain information from the insolvent that may have been relevant to the matters before court but that they were met by the following:

> "4.3 The joint provisional trustee and I have attempted to obtain information from the insolvent.
> 4.4 However we have been met with a barrage of criticism, racist slander and unfound allegations, which has resulted in our respective offices not being in a position to consider the merits of the matter. The insolvent has since we attached and removed his assets in terms of Section 19 of the Insolvency Act launched two urgent applications against us. The first was dismissed by this court and the second removed from the roll during last week.
> 4.5 I find such comments unwanted, insulting and in extremely bad taste. Receiving comments as below does not move the matter forward or place my office and that of the provisional trustees in a position to participate in this matter. Remarks such as, I quote:
>
> > 'Was it a case of pass-one pass-all at Tuks? You disappoint me Prof, unlike your so-called client's, I do not brief white attorneys. I hate whites. I am not as confused as your client, who have sold their souls by briefing incompetent whites ..."'

[10] Mulaudzi (as one of the grounds for leave to appeal) takes issue with the fact that the affidavit was placed before the court. In light of the fact that Nedbank had postponed the relief sought against the trustees *sine die,* this ground for leave to appeal has become moot.

[11] Mulaudzi also took issue with the fact that the court had refused to postpone the matter in order to allow for the second defendant to obtain legal representation. The point is not only moot for the aforesaid reasons, it is ill- founded in light of the fact that Mulaudzi has been substituted as the second defendant by the two trustees.

[12] I will now briefly deal with the remainder of the grounds for leave to appeal.

Grounds for leave to appeal

[13] I have already dealt with some of the grounds for leave to appeal. In respect of the other grounds for leave to appeal, Mulaudzi takes issue with the fact that this court found that he (Mulaudzi) has no *locus standi* to address the court in light of the fact that he was substituted as the second defendant by the two duly appointed provisional trustees in his insolvent estate as well as in light of the fact that he has no *locus standi* to represent the remainder of the defendants. He also takes issue with the fact that the court refused to grant him a postponement to obtain legal representation for the remainder of the defendants. Mulaudzi is further of the view that the Insolvency Act of 1936 is unconstitutional. In respect of the last-mentioned ground for leave to appeal, I should immediately point out that this point was not raised nor argued by any of the parties at the hearing of the applications for default judgment. I therefore do not intend dealing with ground any further.

[14] Mulaudzi also takes issue with the cost order and the fact that the court accepted the version of Nedbank. There is no merit in either of these grounds. In respect of costs it is trite that a court has a discretion to award costs and that a court on appeal will only in limited circumstances interfere with a costs order made by a lower court. In respect of the ground that the court erred in accepting the version of Nedbank there is equally no merit in this ground in light of the fact that the only version that was presented to the

court was the version advanced by Nedbank. I have already referred to the fact that the trustees have attempted to obtain information from Mulaudzi which could have assisted the court, but that he had refused to co-operate.

[15] Mulaudzi also avers that this court erred in granting an order to have the various properties declared executable. There is no merit in this argument as Nedbank has complied with all formalities required in this regard.

[16] I will now briefly turn to what seems to be the main ground for leave to appeal and that is this court's finding that Mulaudzi had no *locus standi* to appear on behalf of any of the defendants.

[17] Mulaudzi appeared in court at the hearing of the two applications for default judgement. He insisted on addressing the court and made lengthy submissions despite the fact that he had repeatedly been informed that he had no *locus standi* to do so.

[18] Apart from the fact that Mulaudzi had no *locus standi* to appear on his own behalf as a result of him having been substituted by the two provisional trustees as the second defendant, Mulaudzi, in any event had no *locus standi* to represent any of the other defendants before court as they are all corporate entities.

[19] If it is to be accepted that the defendants (except for the second defendant who is represented by the two provisional trustees) are close corporations, Mulaudzi is disqualified, as an unrehabilitated insolvent, from representing a close corporation by virtue of section 47 of the Close Corporation Act, 69 of 1984.

[20] In so far as these entities are companies as alleged by Mulaudsi, he equally has no *locus standi* to represent any of them. In this regard the rule is clear namely that a managing director of a company has no right to address the court (on behalf of a company) except in exceptional circumstances. In this regard I quote from the headnote of the decision in *Manong* & Associates *(Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 (SCA):

> "That a person in the position of the managing director of the company had no

right, such as counsel and in certain circumstances attorneys had, to address the Supreme Court of Appeal on behalf of the appellant company was well settled. But to observe that he did not have a right of audience was not to answer the question whether the court did not have, and whether the court should not on the facts of the case have exercised, a power to permit him to address the court on behalf of the corporate litigant. The main reasons for relaxing the rule were obvious enough: a person in the position of the controlling mind of a small corporate entity could be expected to have as much knowledge of the company's business and financial affairs as an individual would have of his own. It thus seemed somewhat unrealistic and illogical to allow a private person a right of audience in a superior court as a party to proceedings, but to deny it to him when he was the governing mind of a small company which was in reality no more than his business alter ego. In those circumstances the principle that a company was a separate entity would suffer no erosion if he were to be granted that right. There might also be the cost of litigation which the director of a small company, as well acquainted with the facts as would be the case if a party to the dispute personally, might wish to avoid. Such companies were far removed from the images of gigantic industrial corporations which references to company law might conjure up.

It followed that cases would arise where the administration of justice might require some relaxation of the general rule. Their occurrence was likely to be rare and their circumstances exceptional or at least unusual. Our superior courts had a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings. After all, it seemed that the power of a court to give leave to a corporation to carry on a proceeding otherwise than by a legal representative was of necessity an integral part of the rule itself. It was important to emphasise that the power vested in the court in this regard was a purely discretionary power. In general, and without attempting to lay down any hard and fast rules, discretionary audience should be regarded as a reserve or occasional expedient. For, whilst we had to be free to review the *Yates* rule in the light of currently prevailing conditions and requirements, we perhaps needed to remind ourselves that given the increasing complexity of litigation, the rule might well be required as strongly today as it ever was. In those circumstances an unqualified and inexperienced person might do more harm than good to the corporate litigant

that he purported to assist.

It had to be emphasised that in each instance leave had to be sought by way of a properly motivated, timeously lodged formal application showing good cause why, in the particular case, the rule prohibiting non-professional representation should be relaxed. Individual cases could thus be met by the exercise of the discretion in the circumstances of that case. It would thus be impermissible for a non-professional representative to take any step in the proceedings, including the signing of pleadings, notices or heads of argument, without the requisite leave of the court concerned first having been sought and obtained."

[21] I am of the view that no such (exceptional) circumstances exist which may warrant relaxing the rule prohibiting non-professional representation.

[22] I have considered whether an appeal would have reasonable prospects of success. I am not persuaded that there exist reasonable prospects of success on appeal. I can also find no reason why costs should follow the result.

[23] In the event the following order is made:

The application for leave to appeal is dismissed with costs.

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AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicant	: Mr Mulaudzi
	: In person
For the Respondent	: J Killian
Instructed by	: Baloyi Swart & Associates Inc