

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

Case no: 1990/2022

In the matter between:

MAFATE BUSINESS ENTREPRISE

APPLICANT

And

MANAWE ROSTER MALEPE

FIRST RESPONDENT

ROKA MALEPE TRADITIONAL COUNCIL

SECOND RESPONDENT

STANDARD BANK OF SOUTH AFRICAN LIMITED

THIRD RESPONDENT

JUDGMENT

MULLER J:

- [1] The applicant applied in the urgent court for two orders. The first is that the third respondent (Standard Bank)¹ reinstate an overdraft facility that the applicant has with the said bank and, secondly, that the operation and/or execution of an court order issued by Makoti AJ on 17 March 2022 not be suspended pending the finalization of an application for leave to appeal launched by the first and second respondent.
- [2] To understand the context of the relief claimed it is necessary to explain the background facts leading up to the order of 17 March 2022.
- [3] The first and second respondent applied *ex parte* for the liquidation of the applicant. Makoti AJ granted an order on 8 March 2022 in terms whereof the applicant was provisionally liquidated.

¹ Hereinafter called "the bank".

- [4] The applicant anticipated the return date and on 17 March 2022 the same Judge discharged the said provisional order and ordered the first and second respondent pay the costs of the application, on the scale as between attorney and client.
- [5] The next day the first and second respondent served and filed a notice of application for leave to appeal against the order dated 17 March 2022. In addition, reasons for the orders were requested from the learned acting Judge in terms of a notice. However, on 17 March 2022 the attorney acting on behalf of the first and second respondent forwarded a letter to attorney of the applicant and included the notice of application for leave to appeal, as well as a power of attorney, and the notice for a request for reasons. The attorney also reminded the attorney for the applicant that the orders granted on 17 March 2022 were automatically suspended.
- [6] The applicant launched an urgent application for an order that the operation and/or execution of the order of Makoti AJ dated 8 March 2022 be suspended pending the finalization of the appeal against his order of 17 March 2022.
- [7] The application was duly dismissed on 25 March 2022 with costs. I understood from counsel that no reasons were furnished by the learned Judge when the order was granted.
- [8] The applicant then changed tack. The present application followed a week later. On this occasion the court is requested to order that the order of 17 March 2022 is not suspended by the notice of application for leave to appeal. The bank is joined to the proceedings and an order that an overdraft facility be restored is claimed against the bank. The application is opposed by the first and second respondent. The bank did not oppose the application but was represented at court by Mr Moolman, an attorney, on a watching brief. Mr Moolman informed the court when questioned that the bank will abide by any order that court might make. The court requested him to indicate specifically whether the bank has withdrawn the overdraft facility for any reason other than the provisional liquidation order having being granted. He assured the

court that the overdraft was withdrawn for that reason only and again reiterated that the bank will abide any decision the court might make. (I will in due course explain why the court *abundanti cautela* adopted this course).

[9] The applicant in the founding affidavit stated that the applicant is a client of the bank which has afforded the applicant an overdraft facility in a substantial amount of R6 million. Subsequent to the provisional order having been granted, the banker in charge of the account of the applicant contacted the deponent and sole member of the applicant. He was informed that the bank was placed in possession of the provisional order.

[10] He stated further that at about 14-15 March 2022 it came to his attention that the bank account was placed on hold and that it was impossible to transact on the account. The day after the provisional order was discharged, he again attempted to transact on the account, without successes. He contacted his personal banker who confirmed that the overdraft facility has been withdrawn. He was informed that the withdrawal of the facility was due to the provisional order having been granted against the applicant. On 22 March 2022 the bank, in an email to the applicant, confirmed that a notice of appeal has been served on the attorneys of the applicant and continued to state:

“We have been given copies of these documents as there is a *concursus creditorum* and therefore a legal duty on Standard Bank to adhere thereto and the holds have to remain on the accounts. We reiterate that the rescission of the provisional liquidation order has been suspended by the filing of leave to appeal thereof and the provisional order remains in place, until such time that the appeal has been denied or a formal settlement agreement and notice of withdrawal has been filed by the applicants.

Further, in terms of clause 10.1.3.4 of the facility letter signed by your client on 17 February 2022, default in terms of the overdraft agreement will occur if a provisional or final liquidation order is passed placing the entity in liquidation and we may review the terms and conditions applicable to these facilities. In the event of a material deterioration in

your client's financial position (such as an application for liquidation) we may, at our sole discretion, in terms of clause 4.2.2.9 of the said facility letter, immediately suspend or withdraw, without notice to your client, all or part of the Limit, or Reduced Limit (if applicable), and all amounts owing will immediately become due and payable to us.

Based on the pending appeal of the rescission of the liquidation order and the legal obligations on us to ensure there is no transactions after liquidation, as well as the contents of the facility letter, we are not able to lift the hold on the facilities at this time.”

[11] The applicant addressed a letter to the bank on 28 March 2022 advising that the provisional order has been discharged and that the applicant approached the court in terms of rule 49(11), but mistakenly sought an order that the order dated 8 March be suspended. The bank was also informed that the application was dismissed and that the applicant now intends to approach the court in terms of section 18 of the Superior Courts Act² for an order that the order of 17 March 2022 not be suspended, pending the finalization of the application for leave to appeal. Hence the present application.

[12] The first and second respondent in the answering affidavit took the point that this application is not urgent and that the application for the suspension of the order of 8 March 2022, which was dismissed, is *res judicata*. I am of the view that the application is urgent. This is evident from the fact that the applicant is unable to transact on the account in the execution of its business. The applicant, moreover, is regarded by the bank as being provisionally liquidated, notwithstanding an order that effectively dismissed the application. The danger of granting a provisional liquidation order without prior service of the application have serious consequences, as is clearly demonstrated in this matter.

² Act 10 of 2013.

- [13] There is no merit in the argument that the application which was dismissed on 25 March 2022 is *res judicata* between the applicant and the first and second respondent and thereby barring the applicant to claim the relief in the present application. Although the facts relied upon in both applications are similar, the relief now claimed is different and the bank is joined as a party to the present application, which was not the case in the application of 25 March 2022.
- [14] The point was also taken by counsel for the first and second respondent that the order sought against the bank is incompetent as the court has no authority to make such an order based on the policy and credit rating of the bank. Counsel relied on the judgment in *Bredenkamp and Others v Standard Bank of South Africa*,³ for the contention that the relationship between the bank and the applicant is contractual and that the bank is entitled to cancel the overdraft facility. Counsel is no doubt correct from a principle point of view. The bank, on the papers before me, placed holds on the account on the acceptance that the provisional order which was discharged, has been revived as a result of the notice of application for leave to appeal. The holds placed on the account effectively deprived the applicant to access the overdraft facility, pending the outcome of the application for leave to appeal. The bank made it clear that it did not cancel the facility nor that it has demanded immediate payment of the loan in terms of the facility. The bank notified the applicant, in the email, of the reason why a hold was placed on the account and informed the applicant that the bank, in terms of their agreement, has the right to terminate the agreement, if the applicant is provisionally or finally liquidated or if its financial position changed to the detriment of the bank. I am not convinced that the bank terminated the overdraft facility. The bank endeavoured to act prudently whilst awaiting the outcome of the application for leave to appeal. The decision in the *Bredenkamp*-case, in my view, is of no assistance to the first and second respondent on the facts before me.

³ 2010 (4) SA 468 (SCA).

[15] I interpose here to refer to reason why the court requested the attorney who appeared on behalf of the bank to provide assurance that the revival of the provisional order was the reason for the holds to be in place in respect of the overdraft facility. The court needed clarity from the bank whether or not the overdraft facility was not revoked for any other reason, other than the revival of the provisional order as a result of the notice for application for leave to appeal. The court was given an assurance that the holds pertained only to the provisional order that was revived. The bank clearly had no wish to get involved in the dispute between applicant and the first and second respondent or to prejudice the applicant more than necessary. The bank elected not to oppose the relief claimed against it and made it clear that it will abide by whatever decision the court makes. The attorney on behalf of the applicant has given the undertaking to the bank that no costs order will sought against the bank.

[16] I turn now to consider whether the filing of the notice of application for leave to appeal has suspended the order with the effect of which that the applicant remained under provisional liquidation.

[17] Section 150 of the Insolvency Act⁴ provides:

“(1) Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may, subject to the provisions of section 20 (4) and (5) of the Supreme Court, 1959 (Act no. 59 of 1959), appeal against such order.

(2)...

(3) When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to sequestered estate shall be realized without the written consent of the insolvent concerned.

(4)...

⁴ Act 24 of 1936.

(5) There shall be no appeal against any Order made by the court in terms of this Act, except as provided in this section.”

[18] In terms of section 150(1), a party has a right to note an appeal against a final order of sequestration or an order discharging or setting aside a provisional order, with leave from the court. Section 150 limits the right to appeal a final order of sequestration and the setting aside of a provisional order of sequestration.⁵ It was held by the Full Bench in *Sirioupoulos v Tzerefos*⁶ that a provisional order of liquidation has lost its sequestration-creating operation at the precise time when the order of discharge was granted and that the noting of an appeal against the discharge of the provisional order do not revive the operation of the provisional order of liquidation.⁷ The correctness of this judgment has not been questioned.

[19] Section 18(1) of the Superior Courts Act provides:

“Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal, is suspended pending the decision of the application or appeal.”

[20] The judgment disposes of the view held by the bank that the provisional order was revived by the notice of application for leave to appeal. The provisional order has not been revived with the filing of the notice of application for leave to appeal. The applicant is not subject to any order of liquidation. The effect of the order is similar to an order dismissing an application.⁸ It is an order in favour of the applicant on the issues raised in the application.

⁵ *Gottschalk v Gouch* 1997 (4) SA 562 (C) 565B-F.

⁶ 1979 (3) SA 1197 (O). See also Magid PAM *et al* ed *Meskin Insolvency Law and its Operation in Winding-up* Lexis Nexis 2.2 page 2-58.

⁷ At 1203-1205.

⁸ *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) 563D-H.

[21] It follows from the above that section 18(1) of the Superior Courts Act, is not applicable to the order granted on 17 March 2022.

[22] As far as costs are concerned, counsel for the first and second respondent opposed the application on the grounds that an order in terms of prayer 3 is incompetent and, of course, also that the applicant was prevented in terms of the *res judicata* principle from obtaining relief. They were unsuccessful in respect of both issues. The applicant is, in my view, entitled to its costs. Counsel for the applicant requested costs for two counsel on a punitive scale. I am unpersuaded, after consideration of the facts, that the services of two counsel are warranted nor that a punitive costs order should be granted.

ORDER

1. **The third respondent is hereby ordered to terminate and lift the hold on and to reinstate the overdraft facility in respect of the bank account of the applicant held by the third respondent from the date of service of this order.**
2. **The first and second respondent is ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.**

GC MULLER

JUDGE OF THE HIH COURT LIMPOPO DIVISION: POLOKWANE

APPERANCES

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|----------------------------|---------------------|
| 1. For the Applicant | : Adv L.E Thobejane |
| 2. For the Respondent | : Adv DD Mosoma |
| | : Adv IT Ngwana |
| 3. Date if hearing | : 5 April 2022 |
| 4. Date judgment delivered | : 8 April 2022 |