IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED

05/12/23 .....

DATE SIGNATURE

In the matter between:-

Case No. 29047/2015

MATTHEWS TUWANI MULAUDZI	1st Applicant
VIOLET MABONTSI MULAUDZI	2nd Applicant

and

CASH CRUSADERS FRANCHISING (PTY) LTD	1st Respondent
OSCAR JABULANI SITHOLE N.O.	2nd Respondent
CHRISTOPHER PETER VAN ZYL N.O.	3rd Respondent
SELBY MUSAWONKE NTSIBANDE N.O	4th Respondent
THE MASTER OF THE HIGH COURT, PRETORIA	5th Respondent

JUDGMENT

KHWINANA AJ

INTRODUCTION

[1] This is an urgent application in terms of rule 6 (12) of the Uniform Rules of Court wherein the applicants seeks the following orders:

1.1 That pending the final determination of the application to set aside the sequestration order before the above Honourable Court under case number 29047/2015:

1.2 The respondents are interdicted and prohibited from convening and/or holding a creditor's meeting on 31 October 2023.

1.3 The respondents are interdicted from administering the insolvent estate of the applicants pending the outcome of the SIU investigation into their conduct;

1.4 Directing the respondent who opposes this application to pay the costs of the application.

1.5 In the event the respondents have already held the creditor's meeting, the respondents are interdicted from implementing the resolutions taken therein pending the determination of the application to setting aside the sequestration order and pending the outcome of the SIU investigation;"

BACKGROUND

[2] The applicants were declared insolvent during 2016. The first applicant was faced with criminal proceedings that caused his estate to be said to be insolvent. The issue regarding the payout claim has become resolved and the criminal court has found him not guilty. The applicant's contention is that sine qua non for the claim of fraud he would not have been declared insolvent as his estate taking into account the payout would have entailed that he is solvent.

[3] Trustees have been appointed to deal with the insolvent estate of the applicants and a second meeting has been postponed for the 7th of December 2023.

THE LEGAL MATRIX

[4] The law on urgency is crystal clear. Urgent applications must be brought under the provisions of Rule 6 (12) of the Uniform Rules of Court with due regard to the guidelines set out in a plethora of caselaw. The question of whether a matter ought to be enrolled and heard as an urgent application is underpinned by the issue of the absence of substantial redress in an application in due course.

[5] In East Rock Trading (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others[1] the court quoted In Re: several Matters on the Urgent Court Roll with approval when it held that: “The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances in which he avers or renders the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress”. The court took a view that the delay is not on its own a ground, for refusing to regard the matter as urgent. The court further held that the important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course.

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[7] The applicant's counsel contends that in the event the trustees proceed to administer the estate the applicants would not be afforded redress if the order is not granted. He further states that there is an inquiry in terms of section 381 of the Insolvency Act and also criminal proceedings against the trustees. He also says that the relationship between the trustees and the applicants is estranged.

[8] Counsel for the respondents in reply submits that the applicants were sequestrated as far back as 2016 and an application for rescission has been previously brought but to-date has not been pursued. She says there is a letter that shows that the applicants are the ones who approached SIU for investigations and not that the SIU unilaterally started the investigations against the trustees. She contends that no repel effect exists against the applicants if the order is not granted however the creditors will be prejudiced. She submits that the applicants did attend the creditors meeting on 31 October 2023 which was postponed to the 07th December 2023.

[9] Counsel for the respondents submits that it is clear from the minutes of the meeting that the meeting did start, submissions were made and the Presiding Officer made notes. She says the matter cannot be urgent anymore as the meeting that the Applicants want to interdict has already commenced.

[10] In the matter of Sithole[2] the court held that "In my view, in determining whether the insolvent may interdict a second meeting of creditors, the process unfolding in section 40 should be read with those sections that deal with the insolvent's participatory role in the administration of the insolvent estate, as

[2] Sithole N.O. and Others v Mulaudzi and Another (A286/2020) [2022] ZAGPPHC 476 (24 June 2022)

defined in sections 64, 65 and 66 of the Act. Section 64(1) obliges the insolvent to attend the first and second meeting of creditors: “An insolvent shall attend the first and second meeting of creditors of his estate and every adjourned first and second meeting unless he has written permission of the officer who is to preside or who presided at such meeting granted after consultation with the trustee to absent himself. The insolvent shall also attend any subsequent meeting of creditors if required to do so by written notice of the trustee of his estate.” .

[11] A trustee has to account to the creditors, the insolvent, and any other interested person in his/her administration of the insolvent estate. Counsel for the respondent states that they may file objections to a Liquidation and Distribution Account lying for inspection, and the Master is obliged to seek an explanation from the trustee and to adjudicate over such objections.

[12] Counsel for the applicants however submits that the trustees will after the meeting be required to give the Master a report which will compromise the applicants. Counsel for the respondent submits that an application for the removal of the trustees in terms of section 60 has not been launched which would stay the proceedings.

[13] The respondents are entitled to approach the Master or the court as provided for in section 60 of the Insolvency Act which can be used to seek the removal of a trustee. It is my view that when the insolvent is engaging in such a process, it should not have the effect of stopping the administration of the insolvent estate otherwise this will gravely prejudice the interests of the creditors. If need be a creditors meeting may be called for by the creditors or

convened by the Master to appoint another trustee. In other words, that a concursus creditorum was established by granting a final order of sequestration, in protecting the interest of the general body of creditors the process under section 60 should not halt the administration of the estate.

[14] Counsel for the applicants submits that the matter that the respondent's counsel refers to cannot be applicable in this matter as there has been an intervening fact wherein the applicants has been found not guilty in the criminal court and is now busy with the funds that were seized by the State.

Requirement of Interdict

[15] 1. A prima facie right on the part of the applicant

2. A well-grounded apprehension of irreparable harm

3. A balance of convenience in favour of the granting of the interim relief

4. Absence of any other satisfactory remedy available to the applicant.

[16] The applicant has been declared insolvent but for the intervening fact. It is therefore clear that the applicant has the right to institute a rescission application. In the event, that the respondents are allowed to proceed to hold the meeting they will be completing the process which will then mean that they are now answerable to the process and will no longer require master's authorization. This can have dire effects on the applicants' case. There is no satisfactory remedy that will be available to the applicant as the trustee will be able to proceed with the administration of the estate.

[17] It is important to note that at this stage the trustees cannot put a liquidation and distribution account as nothing has been sold. However, the trustees if

this matter is rescinded can only submit a statement of account for work done which is subject to taxation by the master.

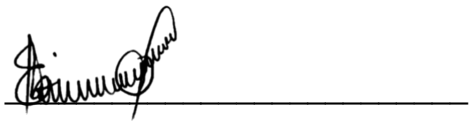
[18] Regard being had to the circumstances of this matter I find that it is urgent and must be heard in accordance with Rule 6 (12) of the Uniform Rules of Court.

[19] I have cumulatively taken into account the facts, law, and caselaw and I am inclined to agree with counsel for the applicant that the applicants were charged and were not acquitted then as it is the situation currently. The repel effect that will be suffered by the applicant is that their estate will continue to be administered in terms of the insolvency estate. The counsel for the respondents has avoided dealing with the intervening act at all. She says the applicants should approach the court in terms of the Insolvency Act, as they could have been rehabilitated, and says within the ambit of the act there are suitable remedies. She forgets that that is the bone of contention thus the pending rescission application.

[20] The respondents overlooked or disregarded the applicants' assertion that if it weren't for the now-dismissed fraudulent claim, they would not have been in their current predicament. The applicants are at risk of significant, irreversible harm if this order is not issued. Nevertheless, trustees are entitled to compensation for their work to date, provided it can be substantiated. The interests of the creditors are safeguarded, as they have already been identified.

Order

[21] I have considered the draft order filed, I mark it X and make it an order of this court.



ENB KHWINANA
ACTING JUDGE OF NORTH GAUTENG
HIGH COURT, PRETORIA

Counsel for the Applicant: Adv N Matidza

Counsel for the 2,3,4 Respondents: Adv Hageman-Strydom

Date of Hearing: 05 & 06 December 2023

Date of Judgment: 06 December 2023