


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 26009/2014

(1)	REPORTABLE: YES NO
(2)	OF INTEREST TO OTHER JUDGES: YES NO
(3)	REVISED.
	
SIGNATURE	10/04/2016 DATE

In the matter between:

REGISTRAR OF BANKS

APPLICANT

And

FUDI ABRAHAM KHAMBULE
HAPPY NOMBULELE KHAMBULE
TVI TRAVEL AND MARKETING AGENCY CCFIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

JUDGMENT

WINDELL J:

Introduction

[1] This is an application for the sequestration of the first and second respondents, and the winding –up of the third respondent. The application is brought by the Registrar of Banks ("the Registrar") in terms of sections 83(3)(b) and 84 (1A)(c) of the Banks Act ¹ ("the Banks Act").

[2] In terms of s 83(3)(b), the Registrar can apply for the sequestration or winding-up of a party if it fails to comply with a directive issued by the Registrar in terms of s 83(1) to repay money obtained by it in contravention of the prohibition in the Banks Act against conducting the business of a bank when not registered to do so. It is common cause that the Registrar had issued such a directive on 6 March 2012 and that the respondents had failed to comply.

[3] In addition to s 83(3)(b), the Registrar applies for the sequestration and winding up of the respondents in terms of s 84(1A)(c)² on the basis that the respondents are factually insolvent in that their liabilities far exceed their assets.

Background

[4] The applicant is the Registrar of Banks, appointed in terms of s 4 read with s 3 of the

¹ Act 94 of 1990

² 84 (1A)(c). If the report referred to in paragraph (a) concludes that the person subject to the directive is insolvent, the Registrar may, notwithstanding anything contrary contained in any law relating to liquidation or insolvency apply to a competent court for the winding-up in terms of the Companies Act or the sequestration in terms of the Insolvency Act, 1936 (Act No. 24 of 1936), as the case may be, of the person subject to the directive, and the Registrar shall have the right to oppose any such application made by any other person.

Banks Act. The first and second respondents are the only two members of TVI Travel CC (the third respondent).

[5] In terms of s11 (1) of the Banks Act *"no person shall conduct the business of a bank unless such person is a public company and is registered as a bank in terms of the Banks Act"*. The term "business of a bank"³ includes conduct such as the acceptance of deposits from the general public as a regular feature of the business in question and any other activity which the Registrar has, after consultation with the Governor of the Reserve Bank, by notice declared to be the business of a bank.

[6] The South African Reserve Bank Act⁴ empowers the Governor or Deputy Governor of the Reserve Bank to direct the Registrar to inspect the affairs of any person or entity who is suspected of conducting the business of a bank, whilst not registered as a bank. On 18 March 2011 the Deputy Registrar of Banks appointed temporary inspectors in terms of s 11 of the South African Reserve Bank Act to conduct an investigation into the business practises of TVI Express Makers and /or TVI Express and/or related persons or entities. TVI Express Makers and/or TVI Express were names given to a pyramid type investment scheme operating in South Africa during 2012.

[7] From March 2011 to March 2012 the inspectors conducted investigations into the TVI Express Scheme. As a result of the investigation the Registrar formed the view that that the respondents were conducting the business of a bank in contravention of s11 (1) of the Banks Act. On 6 March 2012 the Registrar issued a directive in terms of s 83(1)

³ Section 1, Act 94 of 1990

⁴ S 12(1) of the South African Reserve Bank Act 90 of 1989

of the Banks Act⁵ ordering the respondents to repay all the money which they obtained by conducting the business of a bank in contravention of the Banks Act. Repayment administrators⁶ were appointed in terms of s 84 of the Banks Act to manage and control the repayment of the money. The repayment administrators are obliged to report to the Registrar as soon as it is practicable whether the person or entity subject to the directive is solvent and if insolvent whether the person or entity is technically or legally insolvent.

[8] On 27 March 2012 and 30 March 2012 respectively, interim orders were granted by the North Gauteng High Court⁷ and the Pietermaritzburg High Court⁸ in terms of which the repayment administrators were authorized to recover and take possession all of the assets of the three respondents in terms of section 84 of the Banks Act. On 3 April 2012 simultaneous searches were conducted at premises in Germiston, Vosloorus and Ballito at which the respondents were believed to be conducting business from. Numerous documents, movable and immovable assets were seized. On 2 August 2012 the North Gauteng High Court confirmed the interim order granted on 27 March 2012 and on 7 November 2012 the Pietermaritzburg High Court confirmed the interim order of 30 March 2012.

[9] On 2 November 2012 the repayment administrators issued a final report in terms of

⁵ Section 83(1). **Repayment of money unlawfully obtained.**—(1) If as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Registrar is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank or without being authorized, in terms of the provisions of section 18A (1), to carry on the business of a bank, the Registrar may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements and within such period as may be specified in the direction, all money so obtained by that person in so far as such money has not yet been repaid, including any interest or any other amounts owing by that person in respect of such money.

⁶ The Banks Act used the term "manager" before it was amended in 2013. In the amended Act the official is now described as a repayment administrator.

⁷ Case number 17638/2012

⁸ Case number 2672/2012*

section 84 (1A) of the Banks Act. The report set out the nature of the business conducted by the three respondents as well as the final assessment of the solvency of the respondents. In the report it was alleged that the respondents had unlawfully taken deposits in the amount of R54 872 750.00.

[10] The seizure of assets by the repayment administrators yielded an amount of R 6 600 145.07. This left a shortfall of approximately R 48 million. The directive issued in terms of s 83(1) of the Banks Act pertains to the repayment of the shortfall.

[11] The respondents oppose the application and firstly submit that the repayment administrators' final report is factually incorrect and that no reliance can be placed on the contents thereof. They secondly deny that they have contravened the Banks Act by conducting the business of a bank and thirdly attack the constitutionality of the Banks Act.

Constitutionality of the Banks Act

[12] The respondents raised a point *in limine* relating to the constitutionality of s84(1A)(b)(i) of the Banks Act. The respondents' complaint is specifically directed against the two court orders that were granted against the respondents in the North Gauteng Court and the Pietermaritzburg High Court in terms of which the repayment administrators were authorized to recover and take possession all of the assets of the three respondents in terms of section 84 of the Banks Act. It is submitted that the orders should never been granted and that the Courts have failed in their duty under ss 8 and 39 of the Constitution.

[13] The respondents were made aware of the granting of the Interim orders. The respondents even filed a notice to oppose the application in the North Gauteng Court. The interim order was however made final in August 2012 and costs were granted against the respondents. The respondents did not lodge an appeal against any of the interim or final orders granted against them. It will be incompetent for this Court to make any finding on the proceedings before another court.

[14] The constitutional attack directed towards s 8491A)(b)(i) which empowers the repayment administrator to take control of the assets of a person subject to a repayment direction, is in any event not directly relevant to the present application. I am not convinced that it will serve any purpose to entertain it. Even if the provision were to be set aside in these proceedings it would have no impact on the present application. The point *in limine* is dismissed.

The report

[15] It is alleged in the report that the scheme known as Travel Ventures International ("TVI") is an international scheme which promotes a money making scheme known as TVI Express. Different manifestations of the TVI scheme have been found in South Africa since 2009. The scheme in South Africa constitutes a deposit-taking scheme falling within the definition of "the business of a bank" as defined in the Banks Act. According to the report at least 600 000 people across South Africa have invested in the scheme, in an amount exceeding R 1,6 billion. It is alleged that the activities of the three

respondents fall within the pyramid scheme type of conduct envisaged in the Government Gazette.⁹

[16] The report elaborates on the extent of the involvement of the three respondents in marketing the TVI scheme in South Africa. A combined assessment of their bank accounts revealed that deposits in the amount of R 54 872 750.00 were taken by them from investors in the scheme.

[17] The report also deals with the insolvency of the respondents. The report shows that the respondents are factually insolvent in that their liabilities far exceed their assets.

[18] The respondents contend that the report is based on hearsay and factually incorrect. They further submit that the report largely deals with the operations of TVI International and that the court should not place any reliance on it.

[19] The Registrar formed the view that the respondents were conducting the business of a bank after the initial investigations by the temporary inspectors. The directive was issued in accordance with s 83(1) before the final report was released. The issuing of the directive directing the respondents to pay is a public administrative decision. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁰ the question that arose was whether the respondent was entitled to disregard an administrative decision merely because it believed that the decision was invalid. The court held the following at [26] :

"Until the Administrator's approval (and thus also the consequences of the

⁹ No 17895 of 27 March 1997.

¹⁰ 2004 (6) SA 222 (SCA). See also *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC)

approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

[20] The respondents have been aware of the directive for more than three years. It has never been impugned and it remains unfulfilled. The decision of the Registrar is valid until set aside by a competent court. No attempt has been made to set aside or to review his decision. The issue whether it was correctly issued is irrelevant and the final report had no bearing on the directive issued.

Insolvency

[21] The Registrar formed the view that the respondents were conducting the business of a bank and issued a directive in terms of s 83(1). The respondents have not complied with the directive. A person or entity who fails to comply with a direction issued in terms of s 83(1) is deemed for the purposes of insolvency law not to be able to pay his or her debts or to have committed an act of insolvency as the case may be¹¹. I am satisfied

¹¹ Section 83(3)(b)

that the Registrar is entitled in terms of s 83(3)(b) to apply for the sequestration of the first and second respondents and the winding up of the third respondent.

[22] In addition the final report into the affairs of the respondents *prima facie* shows that the respondents are insolvent. The Registrar can therefore also rely on the provision of s 84 (1A)(c) to apply for the order.

[23] Counsel for the applicant submitted during argument that the main purpose of s 84 read with s 83(1) is to facilitate the repayment of creditors of money obtained from them pursuant to an illegal scheme. I agree. There are two main advantages that the sequestration/ winding up of the respondents will bring. It will enable investigations to be conducted to determine what has been done by the respondents with the funds appropriated by them and it will enable unidentified investors to come forward and stake a claim for repayment.

[24] I am satisfied that it would be in the interest of creditors to grant an order for the sequestration of the first and second respondent and the winding up of the third respondent.

Conclusion

[25] In the result the following order is made:

1. The first respondent, Mr Fudi Abraham Khambule is placed under provisional sequestration in the hands of the Master of the High Court of South Africa, Gauteng Local Division, Johannesburg.

2. The second respondent, Mrs Happy Nombulele Khambule is placed under provisional sequestration in the hands of the Master of the High Court of South Africa, Gauteng Local Division, Johannesburg.
3. The Master of the High Court is ordered to appoint the person nominated by the Registrar as trustee of the first and second respondents as envisaged by section 84 (1A)(d) of the Banks Act 94 of 1990.
4. The third Respondent is placed under a provisional order winding it up.
5. The Master of the High Court is ordered to appoint the person nominated by the Registrar as trustee of the third respondent as envisaged by section 84 (1A)(d) of the Banks Act 94 of 1990.
6. Costs of this application to be the costs of the sequestration and winding up of the first and second and third respondents respectively.



L WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Attorney for applicant: Baker & Mc Kenzie

Counsel for applicant: Adv S. Friedman

Attorney for respondent: Ramushu Morare Inc

Counsel for respondent: Mr Oliver Morare

Date matter heard: 22 February 2016

Judgment date: 23 March 2016