



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 1175/2022

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **APPELLANT**

and

PYGON TRADING CLOSE CORPORATION **RESPONDENT**

(Case no. 14097/2020 in the court *a quo*)

and in the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **APPELLANT**

and

JCICC NETWORK 100 CLOSE CORPORATION **RESPONDENT**

(Case no. 4293/2021 in the court *a quo*)

and in the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **APPELLANT**

and

JEROME BENJAMIN SWARTZ **FIRST RESPONDENT**

LUCILLE SWARTZ **SECOND RESPONDENT**

(Case no. 4294/2021 in the court *a quo*)

Neutral citation: *Standard Bank of South Africa Limited v Swartz and Others*

(Case no 1175/2022) [2024] ZASCA 28 (22 March 2024)

Coram: MBATHA, GORVEN and MOLEFE JJA and BLOEM and KEIGHTLEY AJJA

Heard: 29 February 2024

Delivered: 22 March 2024

Summary: Practice and procedure – application for business rescue – no leave given to intervene and bring such application – no application before court – order placing close corporation in business rescue and allied orders not competent.

Practice and procedure – application for business rescue – any such application withdrawn – order placing close corporation in business rescue and allied orders not competent.

Practice and procedure – compromise – court has no jurisdiction to decide compromised dispute.

Practice and procedure – court order – binding nature – order to be enforced.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Goliath DJP, sitting as court of first instance):

1 The appeal is upheld with costs.

2 The orders of the court *a quo* are set aside and the following orders are substituted:

In case number 14097/2020

‘The provisional order of liquidation granted on 18 May 2021 is made final.’

In case number 4293/2021

‘The provisional order of liquidation granted on 9 June 2021 is made final.’

In case number 4294/2021

‘The provisional order of sequestration of the joint estate granted on 10 June 2021 is made final.’

JUDGMENT

Gorven JA (Mbatha and Molefe JJA and Bloem and Keightley AJJA concurring)

[1] If the errors and their consequences were not so serious, this appeal could be said to arise from a comedy of errors. It concerns three related applications. They were heard simultaneously in the Western Cape Division of the High Court, Cape Town (the high court) by Goliath DJP. The first was an application for the liquidation of Pygon Trading CC (Pygon). The second for the liquidation of JCICC Network

100 CC (JCICC). And the third sought the sequestration of the joint estate of Dr Jerome Benjamin Swartz and Mrs Lucille Swartz (the joint estate).

[2] Dr and Mrs Swartz were married to each other in community of property. I shall refer to Dr Swartz as Swartz for the sake of brevity. The joint estate held a 100 percent members' interest in both Pygon and JCICC (the CCs). Swartz was the controlling mind of the CCs and of a number of other entities. The CCs and the joint estate held various commercial accounts with The Standard Bank of South Africa Limited (the bank).

[3] The essential background follows. The application to liquidate Pygon was launched by The Body Corporate of the Montana Sectional Title Scheme (the Montana BC) on 2 October 2020. On 3 February 2021,¹ the bank was granted leave to intervene and the application was postponed to 17 March. On 16 March, Swartz launched a business rescue application in respect of Pygon but withdrew it on 14 May. The Montana BC withdrew from the application on 18 May, on which date a provisional order liquidating Pygon, and returnable on 15 June, was granted at the instance of the bank.

[4] JCICC was provisionally liquidated on 9 June. On 10 June, a provisional sequestration order was issued against the joint estate. On 14 June, Swartz launched an application for leave to intervene in the Pygon application so as to seek an order placing it in business rescue. That application closely mirrored the earlier application withdrawn by Swartz. The application for leave to intervene was stayed until a provisional trustee in the joint estate had been appointed. On 9 July, provisional

¹ After this point, all the dates referred to are 2021 dates unless otherwise indicated.

trustees were appointed to the joint estate. The application for leave to intervene and to launch a business rescue application, the liquidation applications and the sequestration application were all ultimately directed to be heard together on 25 October and the various *rules nisi* were extended to that date.

[5] The provisional trustees of the joint estate put up a report dated 21 October analysing the financial statements, assets and liabilities of Pygon. They concluded that it was hopelessly insolvent, both actually and commercially. They reported that there was no prospect of rescuing Pygon. Accordingly, they did not support the application to intervene or to seek leave to launch the intended business rescue application. They also declined to grant Swartz permission to launch such application himself.

[6] On 23 November, a settlement agreement was concluded. On the same date Goliath DJP made it an order of court. This provided, in essence:

- (a) that the business rescue application in respect of Pygon was withdrawn;
- (b) that the application for the final liquidation of Pygon was postponed and the *rule nisi* extended to 10 February 2022;
- (c) that by no later than seven calendar days before 10 February 2022, an amount of R18 million plus VAT would be paid to the conveyancing attorneys appointed by the liquidators of Pygon in terms of a sale agreement envisaged to be concluded between the liquidators and Zylec Investments (Pty) Ltd (Zylec);
- (d) for the distributions to creditors to be made from that amount;
- (e) that if the payment and distributions were made as indicated, the provisional liquidation orders in respect of Pygon and JCICC and the provisional sequestration order in respect of the joint estate would be discharged on the return date;

(f) that if the payment and/or distributions were not made as indicated, final liquidation orders in respect of Pygon and JCICC and a final sequestration order of the joint estate would be granted on the return date.

[7] The bank put up a supplementary affidavit deposed to on 24 January 2022 to inform the court of what had transpired in the interim. It annexed the sale agreement in which a signed offer in the sum of R18 million was ostensibly made on 21 November by Zylec for three sections in the Montana Sectional Title Scheme which were owned by Pygon. The offer was accepted by the joint liquidators for Pygon on 25 November. The sale agreement provided for payment of a deposit of R1,8 million within 48 hours from acceptance. The affidavit explained that the deposit had not been paid timeously. Due to non-performance by Zylec, the provisional liquidators for Pygon cancelled the sale agreement.

[8] The bank's affidavit set out allegedly fraudulent behaviour on the part of the person who had been on record as the attorney for the joint estate and the two CCs. This person was said to have forwarded supposed proofs of the payments of both the deposit and the full purchase price into an account of the conveyancers held with Nedbank Limited (Nedbank). Not only that but he claimed that the amount for the deposit had been paid by Zylec into his trust account. Nedbank put up an affidavit showing that both documents purporting to show that deposits had been made were fraudulent and that the moneys concerned had not in fact been deposited into any account held with it. A letter was also put up from the relevant Legal Practice Council which stated that it had 'no record that [the person who had been on record as attorney was] a practising/non-practising member of the Legal Practice Council . . .'. It is common ground that no payment of R18 million was made by the due date or at all.

[9] The bank submitted that, since the R18 million had not been paid, the consent order of 23 November should be put into effect. As such, final liquidation orders should be granted in respect of Pygon and JCICC and the joint estate should be finally sequestrated.

[10] On 10 February 2022, at the commencement of the hearing, counsel for the CCs and the joint estate handed up from the Bar an affidavit deposed to by Swartz. This did not in any way contradict the events following the grant of the order set out in the supplementary affidavit of the bank. He acknowledged the settlement agreement of 23 November and that it had been made an order of court by consent. He agreed that the amount of R18 million had not been paid on the due date or at all. He nevertheless contended that the two provisional liquidation orders and the provisional sequestration order should not be made final, as had been agreed to and ordered. The essential reason was that it had been envisaged that the R18 million was to be paid to Pygon as proceeds from a sale agreement concluded between the liquidators of Pygon and Zylec but that such agreement was never concluded. No criticism was levelled at the bank, nor was any averment made that the bank had in any way been involved in the conclusion or failure of the sale agreement. The only criticism was of Zylec and the person who Swartz had instructed to represent the CCs and the joint estate.

[11] After hearing argument, the high court reserved judgment. It was handed down on 4 May 2022. The upshot was an order which discharged the provisional liquidation order for JCICC and the provisional sequestration order, placed Pygon in business rescue and granted allied orders appointing a business rescue practitioner and suspending the liquidation proceedings against Pygon in terms of s 131(6) of the

Companies Act 71 of 2008. In addition, the bank was ordered to pay the costs of all the proceedings.

[12] The judgment of the high court did not mention or deal with the settlement agreement. It likewise did not mention or deal with the consent order of 23 November providing that the business rescue application had been withdrawn and that the two final liquidation orders and the final sequestration order had been consented to should payment not be made. The gist of the judgment was that the financial woes of the CCs and joint estate were brought about by the unreasonable conduct of the bank in closing the accounts held with it by the CCs and the joint estate.

[13] The bank sought the leave of the high court to appeal but this was refused. As will be detailed below, in the judgment refusing leave, the settlement agreement was mentioned in passing and the order not at all. The appeal before us is with the leave of this court.

[14] As regards the business rescue application, the position on 10 February 2022 was that the application for business rescue had never been launched. This because, in the first place, it was Swartz, a non-party to the Pygon application, who wished to do so. It was therefore necessary, before a business rescue application served before the court, for him to obtain leave to intervene in the Pygon application. The launch of the business rescue application required Swartz to have been granted such leave. No such leave was ever granted. As a result, the proposed business rescue application was never launched.

[15] In the second place, even if it could be said that Swartz had been given such leave, the first provision of the agreement and order of 23 November was that the business rescue application was withdrawn. By 10 February 2022, therefore, there was no business rescue application in existence.

[16] On no basis can it thus be said that a business rescue application served before the high court on 10 February 2022. Goliath DJP granted an order on a non-existent application. It need hardly be said that doing so was impermissible and incompetent. Clearly, therefore, whatever the outcome of the balance of the relief granted by the high court, the order placing Pygon in business rescue, and the orders which flowed from it, cannot stand.

[17] The balance of the relief granted by the high court now arises for consideration. This involves the liquidation applications and the application to sequester the joint estate. That dispute had been resolved by the settlement agreement of the parties on 23 November. That settlement amounted to a *transactio*, which is a compromise. It finally settles disputed or uncertain rights or obligations.² The outcome of the applications in question was agreed upon. If payment was made, the provisional orders in each matter would be discharged. If payment was not made, the provisional orders in each matter would be made final.

[18] A *transactio* is an absolute defence to the matter compromised, having the effect of *res judicata*.³ The object of a compromise is to ‘end, or to destroy, or to

² *The Road Accident Fund v Taylor and other matters* [2023] ZASCA 64; 2023 (5) SA 147 (SCA) para 36 (*Taylor*).

³ Per Innes CJ in *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 270.

prevent a legal dispute’.⁴ In *Taylor*, a prior *dictum* of this court was approved to the effect that once ‘the parties have disposed of all disputed issues by agreement *inter se*, it must logically follow that nothing remains for a court to adjudicate upon or determine’.⁵ *Taylor* concluded:

‘To sum up, when the parties to litigation confirm that they have reached a compromise, a court has no power or jurisdiction to embark upon an enquiry as to whether the compromise was justified on the merits of the matter or was validly concluded.’⁶

[19] In addition, the settlement agreement was made an order of court. When a settlement agreement is embodied in a court order, the effect:

‘. . . is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, “a matter judged”). It changes the terms of a settlement agreement to an enforceable court order.’⁷

Needless to say, that *dictum* applies foursquare to the present matter.

[20] The power to make a settlement agreement an order of court derives from a long-standing practice of courts to assist parties to give effect to their compromise. It does not derive from any jurisdiction over the issues in the settled dispute due to the nature of a *transactio* explained above. There are three considerations which determine whether a court should make a settlement agreement an order.⁸ Presumably the high court was satisfied on all three scores since the settlement agreement was made an order of court. There was certainly no attack launched against the grant of the consent order of 23 November.

⁴ *Estate Erasmus v Church* 1927 TPD 20 at 26.

⁵ *Taylor* para 39. The reference is to *Legal-Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA) para 22.

⁶ *Taylor* para 51.

⁷ *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) para 31 (*Eke*). References omitted.

⁸ *Eke* paras 25-26.

[21] An order once made may not generally be altered. The only bases of which I am aware to prevent the enforcement of a court order are if it is set aside or abandoned. A party in whose favour an order has been granted has the power to abandon it. The procedures available to set aside an order are stringent and few. The power to do so arises on appeal and by way of rescission or amendment. Grounds to rescind are narrow, the reasons for which were explained in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others (Council for the Advancement of the South African Constitution and another as amici curiae)*:

‘It is trite that orders of this Court are final and immune from appeal. They are, however, rescindable, and the Legislature has carefully augmented the common-law grounds of relief by expressly providing for narrow grounds of rescission by crafting rule 42. Narrow those grounds are, for good reason, for the very notion of rescission of a court order constitutes the exception to the ordinary rule that court orders, especially those of this Court, are final. By its nature the law of rescission invites a degree of legal uncertainty. So, to avoid chaos, the grounds upon which rescission can be sought have been deliberately carved out by the Legislature.’⁹

The Constitutional Court gave reasons why orders cannot be interfered with other than on those narrow grounds:

‘Once a Judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of Court has been made, it is final and they can arrange their affairs in accordance with that order.’¹⁰

⁹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others (Council for the Advancement of the South African Constitution and another as amici curiae)* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) para 82, citing with approval *Vilvanathan v Louw NO* 2010 (5) SA 17 (WCC); [2011] 2 All SA 331 (WCC) at 28J-29C.

¹⁰ *Zondi v MEC for Traditional and Local Government Affairs and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) para 28. See also *Firestone SA (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F-G.

[22] Setting the matter down for an order to be granted which gives effect to a prior consent order has been recognised by the Constitutional Court as a form of enforcement and is unobjectionable:

‘The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a *mandamus*.’¹¹

[23] That is what took place here. The consent order, which embodied the settlement agreement, had to be enforced if it was not set aside. No application was launched to rescind or appeal the consent order. Nor was it abandoned. It was of full force and effect. As such, the high court was not entitled to ignore it and to enter the terrain of the previous *lis* between the parties. The court had no jurisdiction to do anything other than give effect to the consent order. The only additional information required was whether or not the amount of R18 million had been paid timeously or at all. That undisputed information was before it. In the circumstances, it was obliged to make the final orders sought by the bank.

[24] Therefore, the position on 10 February 2022 regarding these three applications was as follows. An order had been granted that if the R18 million was paid by the due date, it would be distributed as agreed and the provisional orders discharged. If not, the provisional orders would be made final. The court no longer had jurisdiction to determine the settled disputes in the three applications. There was no longer a *lis* between the parties concerning those issues. The court’s only jurisdiction was to grant the orders which were agreed to and embodied in the order of 23 November.

¹¹ *Eke* para 31.

Which of those orders was to issue depended solely on the payment or otherwise of the R18 million.

[25] Despite having no jurisdiction to do so, the high court simply ignored the consent order and purported to enter into the merits of the settled liquidation and sequestration applications. What is of more concern is that the judgment did not even mention the settlement agreement or the court order let alone attempt to provide any grounds in law which entitled the high court to refuse to give effect to the latter. In addition, the judgment did not consider, or in any way deal with, the lack of jurisdiction of the high court to determine the compromised disputes.

[26] The high court accordingly made two fundamental errors. It granted an order on a non-existent application. It then assumed jurisdiction to adjudicate or determine issues which had been disposed of by agreement and over which it had no jurisdiction.

[27] The bank had squarely raised the existence of, and had sought to rely on, the settlement agreement, both in the main application and in that for leave to appeal. The only reference to the settlement agreement made by the high court was in the judgment on the application for leave to appeal, in the following terms:

‘Standard Bank also relied on a settlement agreement entered between the parties which provided that the application for business rescue of Pygon was withdrawn subject to the sale of property for 18 Mill. It was subsequently discovered that the person who had negotiated the contract was a fraud, and I concluded that the agreement was no longer binding on the parties.’

Apart from failing to give reasons why that conclusion was open to her, and the failure to even mention, let alone consider, the law concerning *transactio*, Goliath DJP did not even mention that a court order had been granted pursuant to the

agreement. More significantly, she did not mention or deal with the fact that she herself granted the consent order or why it should not have been enforced.

[28] Courts are not entitled to simply wish away previous orders or to ignore them totally when they bear on a matter at hand. In addition, where there is no application to set aside the order or the agreement, it is not acceptable to deal with either in the kind of offhand manner as was done in the judgment refusing leave to appeal. The entire approach taken to the matter by the high court must regrettably be deprecated in the strongest possible terms.

[29] All of this means that, in regard to the liquidation and the sequestration applications, the high court lacked the jurisdiction to grant the orders in question. Since it also granted relief on a non-existent application for business rescue, none of the orders granted by the high court were competent. It is thus clear that the appeal must succeed and the orders of the high court must be set aside. Effect must be given to the order of 23 November whereby the CCs are to be placed in final liquidation and the joint estate finally sequestrated. As was canvassed during the hearing, the relevant legislation provides that the costs of litigation leading to such orders form part of the costs of administration in insolvency. As such, no orders relating to costs need be made, either on appeal or in the high court substituted orders.

[30] In the result, the following order issues:

- 1 The appeal is upheld with costs.
- 2 The orders of the court a quo are set aside and the following orders are substituted:

In case number 14097/2020

‘The provisional order of liquidation granted on 18 May 2021 is made final.’

In case number 4293/2021

‘The provisional order of liquidation granted on 9 June 2021 is made final.’

In case number 4294/2021

‘The provisional order of sequestration of the joint estate granted on 10 June 2021 is made final.’

T R GORVEN
JUDGE OF APPEAL

Appearances

For the appellant: B J Manca SC (Heads of argument drawn up by B J Manca SC with A H Cowlin)

Instructed by: Edward Nathan Sonnenbergs Incorporated, Cape Town
MM Hattingh Attorneys Incorporated, Bloemfontein

For the respondents: W A Fisher

Instructed by: Sylvester Vogel Attorneys, Cape Town
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