THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 569/2015

In the matter between:

GOLDEN DIVIDEND 339 (PTY) LTD **FIRST APPELLANT**

ETIENNE NAUDE NO **SECOND APPELLANT**

and

ABSA BANK LIMITED **RESPONDENT**

Neutral Citation: *Golden Dividend v Absa Bank* (569/2015) [2016] ZASCA 78 (30 May 2016)

Coram: Tshiqi and Swain JJA and Tsoka AJA

Heard: **25 May 2016**

Delivered: **30 May 2016**

Summary: Application to set aside business rescue proceedings – creditors have a direct and substantial interest – non-joinder of creditors is fatal to the relief sought in the application.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (P Lazarus AJ sitting as court of first instance):

1. The appeal is upheld including the costs of two counsel where employed.
2. The order of the court a quo is set aside and in its stead is substituted:
   'The application is dismissed with costs including the costs consequent upon employment of two counsel.'

JUDGMENT

Tshiqi JA (Swain JA and Tsoka AJA concurring)

[1] The issue in this appeal is whether the non-joinder of creditors in an application to set aside a business rescue plan is fatal to the granting of that application.

[2] The appellant, Golden Dividend 339 (Pty) Ltd (the company) concluded a written loan agreement on 05 April 2016 with the respondent, Absa Bank Ltd (the bank) in terms of which the bank advanced an amount of approximately eight million to finance the acquisition of immovable property by the company. A first mortgage bond was registered over the immovable property as security for the loan. During January 2012 the company stopped making regular payments in terms of the loan agreement and as at 07 July 2013, an amount of approximately six million together with interest was outstanding. On 25 July 2013 the bank, through its attorneys served a letter of demand on the company in terms of s 345 of the Companies Act 61 of

1973 (read with clause 9 of schedule 5 of the Companies Act 71 of 2008 as amended), (the 2008 Act) but the company, for a period of three weeks after service of the letter, neglected to pay the amount due.

[3] On 27 August 2013 the company's board of directors passed a resolution placing it in business rescue proceedings in terms of s 129(1)*(b)* of the 2008 Act on the basis that it was financially distressed. Pursuant thereto the second appellant, Mr Etienne Naude (Naude) was appointed as a business rescue practitioner for the company. On 4 October 2013 Naude published a business rescue plan and a business rescue meeting was held on 8 October 2013 in terms of s 151 of the 2008 Act. The meeting however did not proceed due to inadequate notice and the plan was withdrawn and a new plan was published. At that meeting the majority of the creditors voted to extend the 25 day period provided for in terms of s 150(5) of the 2008 Act for the publication of the plan and the meeting was rescheduled for 22 November 2013. At that next meeting the plan was adopted by a majority vote of 89 per cent of creditors with voting rights.

[4] On 21 November 2013 the bank launched an application, served on Naude on 5 December 2013 (later amended on 15 December 2013) seeking an order declaring the business rescue plan published by the second appellant on 11 November 2013 unlawful and invalid.

[5] In its answering affidavit the company raised non- joinder as a point in limine and stated:

'2. In its amended notice of motion the applicant seeks to avoid a business plan that was accepted and adopted in terms of the provisions of s 152 of the Companies Act, 71 of 2008 (the Act).

3. In terms of the provisions of s 152(4) of the Act, an adopted business rescue plan is binding on the company concerned, each of its creditors, as well as every holder of the company's securities.

4. The applicant is a creditor of the first respondent. Other creditors, as reflected in the business rescue plan, have a direct and substantial interest in the subject matter of this litigation, and should therefore have been joined as parties thereto.

5. In the premises the application should be struck from the roll due to non-joinder.'

[6] In its replying affidavit the bank purported to meet the point by asserting that in its founding affidavit it had stated that notice of the proceedings would be given to all the company's creditors in terms of s 145(1)*(a)* of the 2008 Act and to the holders of securities in terms of s 146*(a)* of the said Act. Such notice was given to all the affected persons in the prescribed manner and none of them elected to participate therein. Consequently, so the bank stated, the point of non-joinder had no merit as a formal joinder of the creditors would not have achieved a result different from compliance with the provisions of s 145(1)*(a)* and *(b)* of the 2008 Act. In essence the bank did not deny that the creditors were not joined, but stated that formal joinder was not necessary as it would not achieve a result different from that achievable through service of the notice in terms of s 145(1)*(a)* and *(b)* of the 2008 Act.

[7] The application came before Lazarus AJ. At the commencement of the hearing counsel for the company requested that the point in limine be argued separately from the merits but the court declined the request and decided to hear it together with the merits. In support of its point in limine the company argued that as the right of interested parties to be joined is derived from common law[1], the introduction of the notice procedures did not purport to afford interested parties lesser rights than they had at common law. If that was the purpose, so it contended, it would have been clearly stated.[2] The company urged the court not to entertain the matter until all persons who had an interest in its outcome had been joined.

[8] The court dismissed the point in limine and was not persuaded by the company's reliance on an earlier judgment by Ismail J in *Absa Bank Ltd v EJ Naude*

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[1] *Rose's Car Hire (Pty) Ltd v Grant* 1948 (2) SA 466 (A) at 471-2; *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) at 781B-C; *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1062D-H; *S v H* 1986 (4) SA 1095 (T) at 1097J (confirmed on appeal in *S v H* 1988 (3) SA 545 (A); *Protective Mining & Industrial Equipment Systems (Pty) Ltd (formerly Hampo Systems (Pty) Ltd) v AudioLens (Cape) (Pty) Ltd [1987] ZASCA 33;* 1987 (2) SA 961 (A) at 991-992A; *SA Breweries Ltd v Food and Allied Workers Union & others* 1990 (1) SA 92 (A) at 99F; *Land- en Landboubank van Suid-Afrika v Die Meester en andere* 1991 (2) SA 761 (A) at 771A-C; *Palvie v Motale Bus Service (Pty) Ltd* [1993] ZASCA 105; 1993 (4) SA 742 (A) at 748A; *Fedlife Assurance Ltd v Wolfaardt* [2001] ZASCA 91; 2002 (1) SA 49 (SCA) at 58A-F.

[2] *Law Society of South Africa & others v Minister for Transport & another [2010] ZACC 25;* 2011 (1) SA 400 (CC) para 69-70.

NO and others, unreported, North Gauteng High Court, Johannesburg, case number 66088/2012) in which that court held that the company's creditors ought to have been joined in an application seeking to set aside a business rescue plan. It distinguished the present case from Ismail J's judgment on the basis that in that case no notice appeared to have been given to creditors. The court said:

[19] 'To the extent that Ismail J intended to find that, notwithstanding compliance with the notification provisions of the Act, it is nevertheless necessary to join creditors in an application such as the present, such a finding seems incongruous with Chapter 6 of the Act when read as a whole.'

In the result the court made an order setting aside the resolution placing the company under supervision and in business rescue and also ordered that the company be consequently placed in final liquidation. This appeal is with the leave of the court a quo.

[9] In the meantime Ismail J's judgment was taken on appeal and this court (*Absa Bank Ltd v Naude NO & others* (20264/2014) [2015] ZASCA 97 (1 June 2015) (the SCA decision) endorsed Ismail J's reasoning and said:

'[9] The argument by the bank that the issue of non-joinder did not arise because the creditors had knowledge of the proceedings, due to the notices dispatched to them, and did not intervene, is without substance . . . .

[10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, Kwazulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. That is the position here. If the creditors are not joined their position would be prejudicially affected: A business rescue plan that they had voted for would be set aside; money that they had anticipated they would receive for the following ten years to extinguish debts owing to them, would not be paid; the money that they had received, for a period of thirty months, would have to be repaid; and according to the adopted business rescue plan the benefit that concurrent creditors would have received namely a proposed dividend of 100 per cent of the debts owing to them, might be slashed to a 5,5 per cent dividend if the company is liquidated.'

[10] The court concluded that Ismail J was correct in upholding the non-joinder point. Not unexpectedly, the bank has since filed a notice of withdrawal of its opposition of the appeal. It is thus not necessary to traverse all the issues initially raised by the parties in this matter save to state that the court a quo's finding that it is not necessary to join the creditors for as long as the notices were served is flawed. It thus follows that that the non-joinder of the creditors was fatal to the relief sought by the bank and the appeal must therefore succeed.

[11] Although the bank withdrew its opposition to the appeal, it has not abandoned the order of the court a quo. Consequently that order still stands and the company had to approach this court in order to set it aside. Notwithstanding the fact that the bank elected not to participate in the appeal, it should be held liable for the costs. (See Financial *Services Board v Barthram & another* (20207/2014) [2015] ZASCA 96; [2015] 3 ALL 665 (SCA) (1 June 2015).

[12] I make the following order:

1. The appeal is upheld with costs including the costs of two counsel where employed.
2. The order of the court a quo is set aside and in its stead is substituted:
   'The application is dismissed with costs including the costs consequent upon employment of two counsel.'

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ZLL Tshiqi

Judge of Appeal

APPEARANCES

For Appellant:	J Suttner SC
Instructed by:	Prinsloo Bekker Attorneys, Pretoria
	Van der Berg Van Vuuren Attorneys. Bloemfontein
For Respondent:	No appearance