29/3/201

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 78076/2015

DATE OF JUDGMENT: 29 MARCH 2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

In the matter between:

MAMORONGWA CLARA MARISHANE	First Applicant
TSOGWANE OVID MARISHANE	Second Applicant
and	
THE BODY CORPORATE OF MONT ROUGE A1	Respondent
In re	
THE BODY CORPORATE OF MONT ROUGE A1	Applicant
and	
MAMORONGWA CLARA MARISHANE	First Respondent
TSOGWANE OVID MARISHANE	Second Respondent

JUDGEMENT

KOOVERJIE AJ:

1. This is an application seeking leave to appeal against the confirmation of the Provisional Order and final order for the sequestration of the Respondents. ("The Applicants in this matter").

2. In the provisional sequestration order, Judge Molahleni had furnished a written judgment with an order; having the affect that:

- The Respondents' estate be provisionally sequestrated; the order should be served on the First and Second Respondent, the South African Revenue Service ("SARS") as well as the Master of the High Court.

- a Rule *nisi* be issued calling upon such parties to come to court and a date to be determined by the Registrar as to why the estate of the Respondents should not be finally sequestrated.

3. Various grounds of appeal were filed by the Applicants but at the hearing the Applicants only persisted with one aspect. For the purposes of this decision, I therefore do not deem it necessary to reiterate all the other grounds of appeal. The only ground persisted on related to the service on SARS, more particularly that the provisional sequestration order had not been served on The South African Revenue Service in terms of rule 11(2A) (c) of the Insolvency Act and the Practice Directive, which constitutes fatal non compliance.

4. It was argued that the final order was granted without complying with the aforesaid requirements. On the 19th of September 2017 this matter appeared on my unopposed roll and I granted a final order for sequestration.

5. At some point before this hearing the dispute in respect of service of the provisional sequestration order on the Applicants was ironed out between the parties. It was thus common cause that the Applicants were present at court when the final order was granted and there had also been service on the Master. As alluded to above, the only issue in dispute then was in respect of service on SARS.

6. Counsel for the Respondent had brought to my attention to the fact that a confirmatory affidavit of the Applicant's instructing attorney, Debora Christina Henning was in the court file at the time when the application was before me. This was indeed confirmed by Counsel for the Applicants as well. In such confirmatory affidavit she confirms that the provisional sequestration order granted by Judge Molahleni had been complied with in that the provisional sequestration order was served on the Master, on the Respondents as well as on SARS. I considered same and was satisfied when I perused her affidavit once again.

7. Counsel for the Applicants disputed that the service did not constitute proper service as the stamp ostensibly of SARS appears to be unclear and vague. Therefore, it was argued that it cannot be accepted that service was affected on SARS. I am however not convinced of this argument. I note that the stamp

of SARS may not be clear but SARS' reference number and a signature of an official of SARS certainly appear thereon.

There can therefore be no doubt that the provisional sequestration order was brought to the attention of SARS and such manner of service was in accordance with the processes in place at the SARS offices. Hence on this ground alone, the application for leave to appeal cannot be sustained.

8. A further aspect which I was requested to consider is whether the appeal procedure was the appropriate procedure utilized by the Applicants.

9. The Applicants' counsel had referred me to a decision of Chiliza v Govender 2016(4)SA 397 SCA (Chiliza matter) where the issue in dispute concerned the failure to serve provisional sequestration order on the South African Revenue Service (SARS). I take cognisance of the fact that in such matter the Applicant had sought a rescission before proceeding on appeal in respect of the aforesaid aspect.

10. In considering this point, I find a matter of Supreme Court of Appeal, in Pitelli v Everton Garden's Project CC 2010(4) SA 357 SCA instructive and relevant (Pitelli matter). The Court therein identified when matters are not ripe for appeal. I extract the relevant principles therefrom namely the test, whether a matter is right for an appeal depends on whether it is capable of being revisited and not whether such application for leave to appeal would succeed; For an order to be appealable, it must have one of the features that the order is final in effect, meaning that it is not susceptible to being revisited by the court that granted it; The court could not have considered an appeal against orders that might had been made by default because there would be then nothing to form

the basis for the appeal; Orders are being susceptible to being revisited and rescinded by a court that granted are not in final effect; It is final when proceedings of the court of first instance are complete and such court is not capable of revisiting the order.

11. Counsel for the Applicant particularly argued that this matter could not be appealed as the order was not erroneously granted and referred me to an authority; Seale v Van Rooyen N.O. and others 2008(4) SCA. I am mindful that an order is erroneously granted if it existed at the time of its issue, a fact of which the Judge was unaware, which would have precluded the granting of the judgment and would have induced the Judge if aware of it, not to grant the judgment. [1]

12. I also do not dispute the decision of the SCA set out in the Chiliza matter; namely that non-service of a provisional order of sequestration on SARS is fatal to the granting of a final order.

13. The reasoning for the peremptory requirement in respect of service as set out in Section 11(2A) of the Insolvency Act was set out at paragraph 12 of the Chiliza decision. ***"The only relevant connection between Section 11(2A) and its interpretation to Section 12, is that Section 12 requires the Court to consider, as one of the factors whether it is to the advantage of the creditors that a final order of sequestration should be granted. Whether a provisional order was served on SARS, which is a preferential creditor in terms of the Act must be one of those factors..... And***

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1 Berea v De Wet 2017(5) SA 346 CC at 366 E – 367 A

if a provisional order of an impending sequestration is not served on SARS, there is a risk that any amounts due to the public purse would remain uncollected".

14. During argument the Respondent's counsel requested me to take cognisance of the fact that even in that application, the initial recourse sought by the Appellant was to rescind the final order before eventually it appealed the decision.

15. I was further referred to Stortie v Nugent and others 2011(3)SA 783 where it was submitted that the Appellant was entitled to have applied for rescission either under the common law or in terms of Section 149(2) of the Insolvency Act. Counsel contended that the the grounds for rescission are not limited. I patently quote from the judgment on page 806 thereof:

"The court may rescind or vary any order made by it under the provision of this Act. There is a long and respected line of authority that this section may be invoked both where the orders should not had been granted, and where it was properly made but supervening factors make its rescission or variation necessary or desirable..... The principles to be gleaned from the authorities, often not harmonious are in my view the following:

(1) The court's discretionary powers conferred by this section is not limited to rescission on common law grounds.

(2) Unusual or special or exceptional circumstances must exist to justify such relief.

(3) The section cannot be invoked in obtaining the re-hearing of the merits of the sequestration proceedings.

(4) ***Where it is alleged that the order should not have been granted, the fact should at least support the cause of action for a common law rescission.....(my emphasis)***

16. In a Trustees for the time being of Ramvali Trust UDC Ltd and others 1998 SA 2803 ZS the Court at page 3 held that the default judgment was not appealable until an application for rescission had been refused. In my view the ground of appeal concerns obtaining judgment by default in respect of SARS, a creditor who had to be notified. Having regard to the Chiliza matter and the aforesaid decision it can only be that a rescission application was the appropriate recourse. Hence the Appellant should have first filed the rescission application. This rescission application was refused, does it justify an application for an appeal.

17. Even if the Applicants persists that the appeal process is appropriate, they are still succumbed to satisfy this Court that their application would pass muster and that the appeal has merit.

18. Section 17 of the Superior Courts Act, Act 13 of 2010 provides that ***"Leave to appeal may only be given where the Judge:***

(i) ***the appeal would have reasonable prospect of success; or***

(ii) ***there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;***

(iii) ***the decision sought on appeal does not fall within the ambut of Section 16(2)(a) and;***

(iv) ***whether the decision sought to be appealed does not dispose of all the issues in the case, the appeal will lead to a just and prompt resolution of the real issues between the parties". (my emphasis)***

19. It is also accepted that Applicants are required to meet a higher and stricter threshold in terms of the aforesaid Act.[2] Once again, I do not deem it necessary elaborate on the aforesaid criteria that a Court will have to consider in respect of such prospective appeal. A Court would not grant an application for leave to appeal merely on the basis that another Court would have come to a different conclusion. What is of parament importance in deciding whether a judgment is applicable, is the interest of justice. [3]

20. In respect of costs, Counsel for the Respondent particularly requested that in the event that the application for leave to appeal is unsuccessful, then the Applicants should be burdened with a punitive cost order namely an order between attorney and client. The Respondent's counsel submitted that the Appellant was well versed the rules and practice of the Court in respect of appeals and was clearly aware that a rescission application was the appropriate recourse.

21. Obviously, the Applicant's counsel objected thereto. On this aspect I am mindful that I have a discretion which must be exercised judicially. The general principle is that costs normally follow the result of the matter.

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2 The Mont Chevaux Trust (IT2012/2008) v Tina Goossen (Unreported) LCC Case No. LCC14R/2014 dated 3 November 2014 and Notshokovu v S (Unreported) LCC Case No. 157/5 dated 7 September 2016

3 Khumalo v Holomisa 2002(5)SA 401 CC at 411A-B

22. I am of the view the Applicants should not be burdened with a punitive costs order as such costs orders are granted in exceptional circumstances. Our authorities have spelt out various instances when such costs order are justified. [4]One of the grounds is when proceedings were brought over hastily and/or on ill-advised grounds. [5] In exercising my judicial discretion I find that the punitive costs order is not justified. I am therefore inclined not to order a punitive cost order.

23. The following order is thus granted:

1. The application for leave to appeal is dismissed with costs, which costs the Applicants are ordered to pay jointly and severally the one paying and the other to be absolved.

KOOVERJIE A.J.

ACTING JUDGE FOR THE HIGH COURT

DATE HEARD: 20/3/18

DATE JUDGMENT DELIVERED: 29 March 2018

APPLICANTS' ADVOCATE:	Adv. R Beaton SC
APPLICANTS' ATTORNEY:	VTM Sekukini
RESPONDENT'S ADVOCATE:	Adv. R Groenewald
RESPONDENT'S ATTORNEY:	Theron and Henning Attorneys

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4 Kent v Bevern 1907 TS 395 at 400-401

5 Makhuva v Lukoto Bus Service (Pty) Ltd, 1987(3)SA 376 V at 399 A-C