



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

23/9/16

Case number: A657/2014

DELETE WHICHEVER IS NOT APPLICABLE

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

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DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED

Appellant

and

LOCHENBERG: LEON RUDOLPH

First Respondent

LOCHENBERG: PATRICIA

Second Respondent

Heard: 26 August 2015

Delivered: 23 September 2016

JUDGMENT

A.A.LOUW J

Introduction

[1] This started as an application for voluntary surrender set down for 24 October 2013.

[2] Absa Bank Ltd intervened as creditor. As the papers show it is by far the largest and thus the main creditor of the Lochenbergs. The application was on 16 May 2014 decided in favour of the Lochenbergs, the present respondents, by Keightley AJ.

[3] At the initial hearing of the application the main assets were immovable properties situated in the suburb Clarina in Pretoria. According to the valuator these properties were worth R2 850 000. There were no movables worthy of mention – only R7 500 (without a description thereof) is mentioned.

[4] The appellant opposed the application on basically two grounds: Firstly that the valuations are not to be trusted and are too high; secondly that no benefit to creditors would result.

[5] Subsequent to the appeal hearing the trustee filed a supplementary affidavit and sought leave that it be admitted. This affidavit reveals that two weeks after we heard the appeal all the immovable properties were sold at public auction on 12 August 2015. The appellant oppose the admission of this further affidavit but, in any event made an answering affidavit to the trustees' affidavit conditional thereupon that the trustees' supplementary affidavit be allowed.

[6] Be that as it may, in May 2016 I wrote to both attorneys as follows:

"Reference is made to this appeal heard on 26 August 2015.

Supplementary heads of argument re admissibility of further evidence on appeal dated 1 October 2015 was received from appellant's counsel. These deal with the sales of the properties – sold on auction on 12 August 2015.

In the supplementary heads the following is stated in para 6.3:

"The consequences of the provisions of the section 150(3) of the Insolvency Act is further not relevant if regard is had to the wording of the said section: 150(3) When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned."

It speaks for itself that the insolvents would have given their permission.

In the light thereof the question arises whether the appeal has not become academic. Have the properties been transferred? I was not informed of any interdict to prevent transfer or any agreement in that regard.

If transfer has taken place to a bona fide third party there seems to be senseless to give judgment.

I am on sick leave until 30 May 2016 and will unfortunately only thereafter be able to attend hereto.

Kindly inform my registrar Joanita what the position is. In any event I apologise for the delay."

[7] The answer from Hack, Stupel & Ross, who acted as the attorney for the appellant throughout reacted to my letter as follows:

"The abovementioned matter as well as your email received on 11 May 2016 has reference.

We have taken note of the content of your letter and wish to advise you with respect that we share your view.

The properties have both been transferred and the proceeds paid to the trustee.

Strangely enough we submitted a similar proposal to our opponents before we received your letter who undertook to discuss same with their clients and revert.

We await your further response upon your return."

[8] As all the properties have now been transferred there is no sense in giving judgment at this late stage. At this point in time it is impossible to unscramble the scrambled egg. There are bona fide purchasers of the immovable properties. They have in the mean-time become owners as well.

[9] What strikes me as strange is that the appellant at no time sought an interdict or undertaking that the properties not be sold pending the hearing of the appeal.

[10] Thus on the merits there is no sense in giving a judgment. There remains the question of costs. I am of the view that Absa's initial opposition and appeal were justified and that it is entitled to a cost order, for what it may be worth.

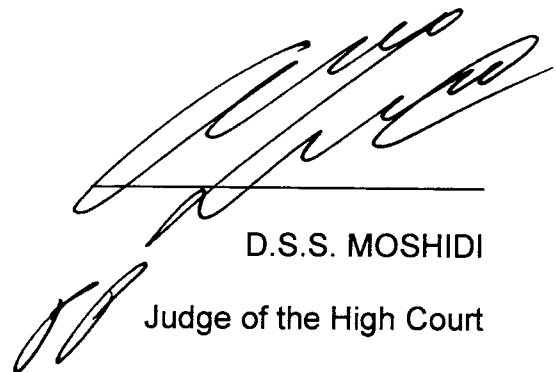
Order

1. The appeal is removed from the roll
2. The appellant's costs are payable from the proceeds, if any, of the insolvent estate.



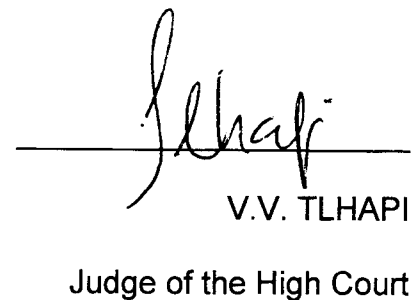
A.A. LOUW
Judge of the High Court

I agree



D.S.S. MOSHIDI
Judge of the High Court

I agree



V.V. TLHAPI
Judge of the High Court

For the Appellant	:	ADV. M RILEY
Instructed by	:	HACK, STUPEL & ROSS
For the First Respondent	:	ADV. B LEE
Instructed by	:	MICHAEL SENEKAL ATTORNEY