IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 94948/2015

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

SIGNATURE 28/01/2021 DATE

In the matter between:

SIFISO MBATHA **APPLICANT**

And

THE BODY CORPORATE OF CARLSWALD CREST **RESPONDENT**

JUDGEMENT

MOSOPA, J

1. This application is brought by the applicant for leave to appeal against my judgment of 22 February 2019 in its entirety, to the full court in this division, alternatively to the Supreme Court of Appeal.

2. The leave to appeal application was initially filed on 4 June 2019 and I issued a directive that the matter be heard on 30 September 2019. On that date however, I realized that no condonation application for the late filing of the leave to appeal was before me. Thus, as the application for leave to appeal was filed late, I struck the matter from the roll, with costs.

3. The amended leave to appeal application was then filed on 4 February 2020, this time accompanied by a proper application for condonation of the late filing of the leave to appeal.

4. I intended to hear the matter in March 2020, but the country was placed under lockdown due to the COVID-19 pandemic and the matter could not be heard.

5. In the interim, I tasked my clerk with retrieving the court file for this matter, but it could not be located. An attempt was made to have the parties provide the court with the documents pertaining to this matter, but to no avail. The matter was then set down for hearing on 18 December 2020, but on that day the matter could not proceed as the court file was still not available.

6. The matter was then postponed by agreement between the parties to 18 January 2021, with the condition that the applicant must create the matter on Caselines and upload all documents. The matter could not proceed on 18 January 2021 however, as the applicant's counsel was engaged in another matter where a preferential trial date was allocated. The leave to appeal application was eventually heard on 21 January 2021 and judgment was reserved, to be delivered at a later stage.

CONDONATION

7. The condonation application was not opposed by the respondent and I was satisfied with the reasons provided by the applicant for the delay. As such, the

condonation for the late filing of the application for leave to appeal was granted.

LEGAL PRINCIPLE

8. Section 17(1)(a) - (c) of the Superior Courts Act, 10 of 2013, provides:

"17(1) – Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a)(i) the appeal would have a 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;

(b) the decision sought on appeal does not fall within the ambit of 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues before the parties."

9. What emerges from section 17(1) is that the threshold to grant a party leave to appeal has been revised. Leave to appeal can only be granted under the circumstances set out in section 17(1). In the matter of ***The Mount Chevaux Trust v Tina Goosen and 18 Others 2014 JDR 2325 (LCC)*** at para 6, Bertelsman J stated:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343 H: 'The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed.'"

10. The Supreme Court of Appeal in the matter of ***Minister of Justice and Constitutional Development v Southern African Litigation Centre 2016 (3) SA 317 (SCA)***, when dealing with the issue of "there is some other compelling reason why the appeal should be heard" stated at para 24,

> *"That is not to say that merely because the High Court determines an issue of public importance, it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive..."*

11. The applicant does not specifically state under which leg of section 17(1) he brings this application of leave to appeal, but the consistent use of the phrase "another court will come to another conclusion" in this leave to appeal argument clearly demonstrates that the applicant is relying on the provisions of section 17(1)(a) – that he "has reasonable prospects of success.".

DISCUSSION

12. The applicant, despite listing a large number of grounds which he intends to rely on in seeking leave to appeal my judgment, Ms Strauss, on behalf of the applicant, only pursued two points in argument, being:

    12.1. That I relied on a stale *nulla bona* return to sequestrate the applicant; and further,

    12.2. I did not properly apply the test as set out in the matter of ***Body Corporate of Empire Gardens v Sithole***, in sequestrating the applicant.

13. In contention, Ms Strauss on behalf of the applicant, when dealing with the first leg of her ground of appeal, referred me to the matter of ***Rodel Financial Services Proprietary Limited v Ursula Madaleen O'Callaghan case no 2016/23121 (GLD)*** where, Windell J, when dealing with the staleness of the *nulla bona* return, remarked as follows:

"[14] The second aspect impacting on the return of service relates to stale service. It is common cause that at the time of the launching of this application, the return of service was 12 months old, and at the time of hearing the application it was 19 months old.

[15] In Abel v Strauss 1973 (2) SA 611 (W), the return of service relied upon was 7 months old. The court relying on the matter of Bhyat v Khubishi TPD 896, held that there must be allegations supported by facts that the debtor's position remains unchanged.

[16] This principle was reaffirmed in the matter of Nodrew (Pty) Ltd v Rossouw 1975 (3) SA 137 (O). In this matter, Steyn J found that he was unable to rely on the return of service as proof of an act of insolvency where it was 18 months old in the absence if any allegations that the debtor's position remains unchanged."

14. In casu, a warrant of execution was served on the applicant on 4 October 2014, when the applicant informed the sheriff,

> "No, I do not have any immoveable property which is executable."

Judgment against the applicant at the time was only for the amount of R7 331,61. The main application was issued in 2015 and only served on the applicant in 2016, as he could not be located and as a result thereof substituted service was sought. Thus, when the matter was heard in 2018, the service was two (2) years old.

15. I must pause to mention that the issue of the staleness of the *nulla bona* return was never raised in the applicant's papers nor in oral argument. This point was raised for the first time in the current application. No criticism was levelled against the *nulla bona* return and whether it is defective or not. Hence in my judgment I did not deal with the staleness of the *nulla bona* return.

16. What can be gleaned from the applicant's answering affidavit in the main application at paragraph 9.11 thereof is as follows:

> *"[9.11] The applicant refers to 18 default judgments obtained against me but refrains to mention that the same default judgments were also obtained against the other co-owners of the properties and that they were obtained in Pretoria Magistrates Court from 2010 to 2015. All these were previously used and attached and used as a cause in no less than 3 sequestration applications from 2012 until now set out by the applicant in their one papers [sic].*
>
> *[9.12] The applicant uses the same old judgments and the same amounts and the same amount to justify the bringing of sequestration application. In the meantime, I have made substantial payments towards the levies and the outstanding amounts due."*

17. What the applicant neglected to address in his papers is the fact that he extinguished the debt in respect of the *nulla bona* return. It is common cause that the respondent obtained default judgments against the applicant and they relied on the *nulla bona* return of 4 October 2014 to sequestrate the applicant. Whereas the applicant maintains that the *nulla bona* return of 2014 remains unsatisfied.

18. Section 8(b) of the Act provides:

> *"A debtor commits an act of insolvency if a court has given judgments against him and he fails, upon demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return by that officer that he has not found sufficient disposable property to satisfy judgment."*

19. The applicant informed the sheriff that he has no immoveable property and that was an honest affirmation by the applicant. He is a co-owner in the

bonded unit which I already found is not realizable property for the purpose of satisfying the debt. I am therefore of the view, contrary to what was argued by Ms Strauss, that no other court could come to a different conclusion and the applicant on this point has no reasonable prospects of success.

20. I now turn to deal with the applicant's second leg of attack on my judgment. The essence of ***Body Corporate of Empire Gardens v Sithole and Another 2017 (4) SA 161 (SCA)*** is that a body corporate of a sectional title scheme applying for the compulsory sequestration of its members (as in this case) is required to prove that the order of sequestration sought would be to the advantage of the general body of creditors, as contemplated in section 10(c) of the Insolvency Act, 24 of 1936, or there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole.

21. Most importantly, the following can be gleaned from the ***Sithole*** judgment:

> *"[9] The purpose and effect of the sequestration process are 'to bring about a convergence of claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that the creditors are treated equally' (see Investec Bank Ltd and Another v Mutemeri and Another 2009 ZAGPJHC 64; 2010 (1) SA 265 (GSJ) at 274-275). It cannot fittingly be described as a mechanism to be utilized by a creditor to claim a debt due by the debtor to one single creditor (see Collett v Priest 1931 AD 290 at 299). Once a sequestration order is made, a consensus creditorum comes into being. This means that the rights of the creditors as a group are preferred to the rights of the individual creditor.*
>
> *[10] The phrase 'advantage to creditors' is not defined in the Insolvency Act, but if the principle of consensus creditorum is taken into account, it means that there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole (see Lynn and Main Inc v Naidoo and Another 2005 (1) SA 59 (N) paras 33-35; Ex Parte Bouwer and Similar Applications 2009 (6) SA 382 (GNP) para 13). This*

requirement is fulfilled where it is established that there is reason to believe that there will be advantage to a 'substantial proportion' or the majority of the creditors reckoned by value… Although advantage to creditors is not a rigid concept (Stradford and others v Investec Bank Ltd and others 2015 (3) SA 1 (CC) para 44), it requires proof of a tangible benefit to the general body of creditors."

22. The applicant, in his answering affidavit in the main application, did not deny the fact that several creditors, apart from the respondent, obtained default judgments against the applicant in a number of different cases brought against the applicant. In argument, the applicant contended that despite all the default judgments obtained, the respondent decided to apply for the applicant's sequestration in reference to only one default judgment, in which the *nulla bona* return of October 2014 was obtained.

23. In my judgment when I dealt with this concept, the following is apparently clear;

"[27.1.] Turning to the last requirement, i.e., that it will be to the advantage of the respondent's creditors if his estate is sequestrated, the following are of importance.

[28] The financial position of the respondent is not known, what is before me is the undisputed fact that the respondent is gainfully employed.

[29] It is clear that the respondent has other creditors apart from the applicant and some have already obtained default judgment against the respondent.

[30] I am therefore of the view that the general body of creditors of the respondent will benefit if the estate of the respondent is sequestrated…"

24. From the above, it is clear that when sequestrating the applicant, I did not consider only the respondent as a creditor but a general body of the applicant's creditors. Evidence relating to default judgments obtained by other creditors of the applicant remains unchallenged. When the main application was argued, the ***Sithole*** (supra) judgment was already in place. The fact that I did not mention the ***Sithole*** judgment is in no way an indication that I did not apply the principle as set out in that judgment. I did not favour the body corporate as the only creditor, but a body of creditors.

25. Even though it is not a subject for determination from this current application, I also found in my judgment that the applicant committed a further act of insolvency in terms of section 8(c), in that he prefers some creditors above the others (para 23.2 of the judgment).

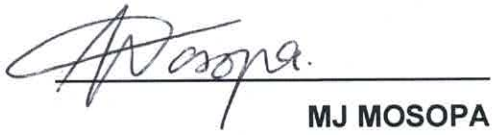
26. It is correct, as argued by Ms Strauss on behalf of the applicant, that it was never the case of the respondent to sequestrate the applicant under this subsection. The respondent did not have further information regarding the applicant aside from the fact that he was employed. The applicant himself brought this aspect to the court's attention when he averred in his answering affidavit (main application) that he pays bonds held by various banks in properties of which he is a co-owner. This was happening despite being indebted to the respondent and other creditors who obtained default judgments against him. It is therefore my considered view that he committed an act of insolvency as contemplated by section 8(c) of the Act. Also bearing in mind that the respondent struggled to reach the applicant so as to effect service of the sequestration application on him, until the order for substituted service was sought by the respondent. This in itself demonstrates that the respondent could not possibly have attested to the fact that the applicant prefers some creditors over other creditors.

27. I do not agree with the applicant that he has reasonable prospects of success which requires leave to be granted to appeal his final sequestration. The application, in my view, stands to fail.

28. Consequently, I make the following order:

[1] The application for leave to appeal is refused.

[2] The applicant is ordered to pay the costs of the application.



MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicant: Adv S Strauss
Instructed by: Scholtz Attorneys

For the respondent: Adv J Vorster
Instructed by: EY Stuart Inc.

Date of hearing: 21 January 2021
Date of judgment: Electronically delivered