



**IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG**

CASE NO: 5834/12 & 9638/13

**TERENCE GERARD JOSEPH AKAL N.O.
JOLEEN AKAL N.O.
ANTONY VINCENT GEORGE AKAL N.O.
ANTONE PHILIPPE SYDNEY FREDERIC N.O.
STEVEN ANTONY FREDRIC N.O.**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT**

And

**QUEENSBRIDGE ESTATE) PTY) LIMITED
(IN BUSINESS RESCUE)
JD MICHAU N.O.
NEDBANK LIMITED
WILDNER & COMPANY
GARLICKE & BOUSEFIELD INC.
SOUTH AFRICAN REVENUE SERVICES
ETHEKWINI MUNICIPALITY RATES DEPARTMENT
QUEENSBRIDGE ESTATE BODY CORPORATE
STILUS UNDERWRITING MANAGERS**

**FIRST RESPONDENT

SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHT RESPONDENT
NINTH RESPONDENT**

JUDGEMENT

Delivered: 19 June 2015

MBATHA J

[1] This is an application for leave to appeal against the order of this Court refusing to grant the Applicants a postponement and placing the First Respondent in final liquidation.

[2] It has been advanced on behalf of the Applicants that the refusal to grant a postponement is final therefore appealable. I was referred to ***Zweni v Minister of Law and Order***¹ and ***Heymans v Yorkshire Insurance Company Limited***² and others on this aspect.

[3] Rightfully so, as advanced by the Applicants, it is acceptable that the test is whether or not there is a reasonable prospect of the appeal succeeding.

[4] It is submitted that the Applicants were not a party to the arrangement of the date for hearing of the leave to appeal against the judgment of this Court granted on the 22nd of August 2014. That the basic right to legal representation of the Applicant was refused, that their lack of legal representation prejudiced the Applicants in their application for leave to appeal, and lastly that the representative of the Applicants, Mr Akal, was not heard prior to the granting of the final order of liquidation. The Respondents submit that the date was agreed upon by all the parties.

¹ 1993 (1) SA 523 (A) at 531H – 533E.

² 1964 (1) SA 487 AD at 490D.

[5] I have considered whether the application for leave to appeal against the refusal of a postponement is appealable. I find that on its own, as it is a ruling cannot confer appealability. The refusal of a postponement did not have the final effect on the rights of the parties. The Applicants were given an opportunity to argue the application for leave to appeal which was before the Court. This Court is also *functus officio* in respect of its order dismissing the application for leave to appeal.

[6] It is my view that the appeal against the refusal for the postponement is interlinked to the application for leave to appeal and cannot be considered in isolation to that application. The ruling that I made with regard to the postponement is no longer relevant in the light of my final ruling regarding the application for leave to appeal.

[7] The ruling I made on the postponement was not a finding on legal issues. In ***Priday t/a Pride Paving v Rubin***³ at pages 547 to 549, the Court fully dealt with the impact of the provisions of Section 20 of the Supreme Court Act, being that it discouraged piecemeal appeals. It also set the record straight what decisions need to be taken on appeal. It categorically states that

³ 1992 (3) SA 542 (C) page 547 and 549.

decisions which are interlocutory, even if altered or reversed on appeal will remain purely interlocutory in their effect.

Therefore, one has to enquire if the decision of the Court decisively contributed to the final solution of the main issue between the parties. I align myself with the views of Conradie J in finding that litigants should not be encouraged to apply for leave to appeal in such cases and that it is better to regard the decisions as rulings which are not appealable.

In ***Absa Bank Limited v Mkhize and Two Similar Cases***⁴, the Supreme Court of Appeal expressed the same sentiment, that if an order does not have the effect of the final judgment, the Court lacked jurisdiction to entertain the appeal.

[8] I therefore find that I am *functus officio* not only in respect of the application for leave to appeal but also in respect of the application for refusal of a postponement. The interests of all the parties were taken into account when considering both applications.

⁴ 2014 (5) SA 16 (SCA).

[9] With regard to the submission that Mr Akal was not given an opportunity to argue whether the application for final order for liquidation should be made final or not. I accept the submissions made by Advocate Broster SC that there is nothing to suggest that there was anything that has transpired to suggest that the company has been taken out of its insolvent state, for instance, the sale of any real rights. The writing was on the wall as soon as the Business Rescuer Practitioner filed his affidavit regarding the hopeless state of affairs in the First Respondent. No sale of any unit has materialised since 2008, which is a clear indication that the status of the company remained as it was at provisional liquidation.

[10] Having found that the company was factually and commercially insolvent, the status *quo* was still the same in January 2015 as Advocate Lotz SC submitted, no sales have materialised, the business rescue practitioner has never been paid and the indebtedness to the major creditors is increasing on a month to month basis.

[11] The argument which has been raised is not *bona fide*, as the Applicants were fully aware of the status of the company. Asking Mr Akal, yes or no, would not have taken this matter any further. It is therefore my view that

there was no violation of the Applicants rights in granting the final order of liquidation.

[12] In the light thereof, I make the following order:

(a) The Application is dismissed with costs, including costs of senior counsel, where applicable.

MBATHA J

Date of hearing : 11 June 2015

Date delivered : 19 June 2015

Appearances:

For the Applicants : Adv. Potgieter SC

Instructed by : Azgar Ally Khan & Associates
Durban

For the Second Respondents : Adv. Lotz SC

Instructed by : Stowel & Co.
Pietermaritzburg

For the Third Respondents : Adv. Broster SC

Instructed by : Venns Nemeth & Hart Attorneys
Pietermaritzburg