

SOUTH AFRICA / JUDGMENT

Born Free Investments 247 (Pty) Ltd v Kriel NO (1183/17) [2019] ZASCA 21 (26 March 2019)

[2019] ZASCA 21

COURT

Supreme Court of Appeal

BEFORE

Wallis, Zondi, Mathopo, Schippers, Mokgohloa

CASE / FILE NUMBER

1183/17

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SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1183/17

In the matter between:

BORN FREE INVESTMENTS 247 (PTY) LTD APPLICANT

and

PIERRE DU PLESSIS KRIEL NO RESPONDENT

Neutral citation: Born Free Investments 247 (Pty) Ltd v Kriel NO (1183/17)

[2019] 21 ZASCA (26 March 2019)

Coram: Wallis, Zondi, Mathopo and Schippers JJA and Mokgohloa AJ

Heard: 08 March 2019

Delivered: 26 March 2019

Summary: Interpretation of court orders – special leave – whether final order confirmed provisional order – whether failure to obtain leave of court prior to institution of action rendered the action a nullity

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Hlophe JP, Le Grange and Dolamo JJ sitting as court of appeal):

1 Special leave to appeal is granted and the costs of the application for special leave are to be costs in the appeal.

2 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

3 The order of the full court is altered to read as follows:

‘(a) The appeal is upheld with costs.

(b) The special plea is upheld and the action is stayed pending:

(i) an order by the court granting leave to proceed with the action; or

(ii) the termination of the curatorship.’

Mokgohloa AJA (Wallis, Zondi, Mathopo and Schippers JJA concurring):

[1] On 20 August 2012, the whole of the collective investment scheme business and the business of providing financial services of Rockland Asset Management and Consulting (Pty) Ltd (RAM) and two other entities was placed under provisional curatorship under s 5 of the Financial Institutions (Protection of Funds) Act.[1] The respondent was appointed as the curator.

[2] In terms of paragraph 6.2 of the provisional order, a rule nisi was issued calling upon RAM, the two entities and any other interested party to show cause on the return day why:

‘an order should not be granted that, whilst the curatorship exists, all claims, actions, proceedings, the execution of all writs, summonses and other processes against any of the entities be stayed and not instituted or proceeded with, without the leave of the Court.’

[3] A final order was made on the extended return day, 6 December 2012 (the final order). Paragraph 1 of the final order reads:

‘Subject to the terms of this order, the rule nisi is confirmed in respect of the business of the First and Third Respondents (“the

Entities”) and the appointment of the curator is made final.’

[4] On 29 May 2014, the applicant instituted action against the respondent for payment of amounts due under certain lease agreements

concluded between it and RAM. The respondent defended the action and raised a special plea against the claim, asserting that the applicant did not obtain the leave of the court before instituting the action. He contended that since the applicant did not obtain such leave, the institution of the action was null and void and of no legal force or effect; alternatively, that the applicant could not take any steps in the action until the leave of the court has been obtained.

- [5] In its replication, the applicant accepted that the respondent's appointment was subject to the terms contained in the provisional and final orders. It admitted that it had not obtained the leave of the court before instituting the action. However, it argued that upon a proper construction of the provisional and final orders, it was not required to obtain such leave.
- [6] The Western Cape Division of the High Court (Mantame J) dismissed the special plea with costs, but granted leave to appeal to the full court. The full court, (Dolamo J, Hlophe JP and Le Grange J concurring) upheld the appeal and the special plea and dismissed the applicant's action with costs. It reasoned that the moratorium on legal proceedings which formed part of the rule in the provisional order was confirmed by the final order. Therefore, the applicant was required to obtain the leave of the court before instituting the action. This appeal is against the decision of the full court with special leave of this court. It turns on the interpretation of paragraph 1 of the final order.
- [7] The basic principles applicable to construing documents also apply to the construction of a court order. The court's intention must be ascertained mainly from the language of the order, construed according to the usual well known rules of construction.[2] What must be considered is the language used; the context in which the provision appears; the apparent purpose to which it is directed;

and the material known to those responsible for its production. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the order.[3]

- [8] In my view, paragraph 1 of the final order admits of only one interpretation, namely that the rule nisi in paragraph 6.2 of the provisional order was confirmed in respect of the two entities placed under final curatorship. This interpretation is also sensible and consistent with the context and purpose of the final order.
- [9] In terms of paragraph 6.2 of the provisional order, a rule nisi was issued calling upon all interested parties to show cause on the return day why an order should not be granted that actions against RAM and two entities should not be instituted without the leave of the court whilst the curatorship existed.
- [10] The language of confirming a rule nisi is frequently encountered and well understood in legal practice. A practical and common sense approach needs to be adopted in ascertaining whether paragraph 6.2 of the provisional order has been excluded.

[11] The usual procedure with a rule nisi is that, the applicant moves to have the order made final, whereupon the court may either make the rule final or discharge it.[4] In the absence of an exclusion or qualification, the confirmation of a rule nisi means that what was in the provisional order becomes part of the final order. Had it been the intention of the court to confirm only one part of the rule, one would have expected paragraph 1 of the final order to state this expressly. It did not. Paragraph 6.2 was confirmed in the final order.

[12] Counsel for the applicant submitted that the rule nisi in paragraph 6.1 referred to the curator's appointment being 'confirmed'

while 6.2 referred to the 'grant' of an order staying all legal proceedings. As the final order stated only that the rule was confirmed, so it was submitted, no order was granted in terms of paragraph 6.2. In my view, such interpretation is strained, technical and inconsistent with the practical realities regarding the confirmation of rules nisi as set out above.

[13] For these reasons the applicant's argument that paragraph 6.2 of the provisional order was not confirmed is unsustainable. There is no basis for the conclusion that the words 'subject to the terms of this order' in paragraph 1 of the final order excluded paragraph 6.2 of the provisional order. And likewise, the words 'in respect of the business of the First and Third Respondents' cannot be interpreted to exclude paragraph 6.2 of the provisional order.

[14] It was accepted that the purpose of putting in place the moratorium on legal proceedings in the provisional order was to offer a breathing space to the curator, allowing him to investigate the affairs of the distressed company and to prepare a report for the court. A moratorium would assist with the administration of the distressed company and help bring it back to its financial well-being without the extra burden of having to deal with litigation which may delay or disrupt the process. There is no reason in principle why the court, having imposed a procedural safeguard of this nature for the period of the interim order and issued a rule nisi calling for reasons why it should not be made final, would then have left it out of the final order.

[15] What remains is whether the applicant's claim should have been dismissed. This issue falls to be decided on a construction of paragraph 6.2 of the provisional order. Although paragraph 6.2 is clumsily worded, it does not state that non-compliance with its provisions would result in a nullity. To accept that failure to obtain leave of the court prior to instituting legal proceedings

leads to nullity would, in my view, lead to injustice. It would also lead to inconsistency, because existing actions would be stayed, but an action instituted without prior leave would be dismissed, which seems an extreme and unnecessary result. It would be contrary to s 34 of the Constitution which provides that 'everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court'. Suppose a creditor, oblivious to the moratorium, issued summons without obtaining the leave of the court, it would mean that it would be precluded from proceeding with its claim because its summons was a nullity for want of prior leave of the court. Such a construction, in my view, would be unjust. It

seems to me that a sensible

interpretation of paragraph 6.2 is that an action may not be instituted without the leave of the court, and where it has been instituted, such action should be stayed until leave is obtained.

[16] In the circumstances, the dismissal of the applicant's action in my view, was a denial of justice which justified special leave to appeal. For these reasons the appeal must also be upheld in part and the dismissal of the action altered to an order staying it, pending an order authorizing the action to continue or the termination of the curatorship.

[17] Regarding costs, on 7 November 2017, after the judgment of the full court was delivered, the applicant's attorney wrote a letter to the respondent's attorney enquiring whether the respondent would agree to abandon the portion of the full court's judgment which provided for the dismissal of the applicant's claim. The applicant warned that should the respondent not be agreeable to such abandonment, it would have no option but to petition the Supreme Court of Appeal and ask for the amendment of the order. The respondent refused to agree to such proposal. Consequently, the applicant had no option but to come to this court to obtain the amendment of the order to remedy the dismissal of its action. It has succeeded substantially in this appeal and it is therefore entitled to costs.

[18] The following order is made:

1 Special leave to appeal is granted and the costs of the application for special leave are to be costs in the appeal.

2 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

3 The order of the full court is altered to read as follows:

‘(a) The appeal is upheld with costs.

(b) The plaintiff's action is stayed pending:

(i) an order by the court granting leave to proceed with the action; or

(ii) the termination of the curatorship.’

FE Mokgohloa

Acting Judge of Appeal

APPEARANCES

For the Applicant: BJ Manca SC and FJ Gordon-Turner

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For the Respondent: E Fagan SC and M Janisch SC

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[1] Financial Institutions (Protection of Funds) Act 28 of 2001.

[2] Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) at 304D-H.

[3] Natal Joint Municipal Pension Fund v Endumeni Municipality

[2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[4] A C Cilliers, C Loots and H C Nel Herstein and Van Winsen: The Civil Practice of the High Courts & Supreme Court of Appeal of South Africa 5 ed (2009) at 456-457.

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