

SOUTH AFRICA / JUDGMENT

## Crisp and Others v Sharemax Investments (Pty) Ltd and Others (1939/15) [2017] ZAGPPHC 737 (22 November 2017) [2017] ZAGPPHC 737

COURT

North Gauteng High Court, Pretoria

BEFORE

E Molahlehi

CASE / FILE NUMBER

1939/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

number : 1939/15

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

22/11/2017

In

the matter between

JASON

MALCOLM JAMES CRISP 1st

Plaintiff

SANGEETHA

NAIDOO

N.O 2nd

Plaintiff

MOONSAMY

NAIDOO

N.O 3rd

Plaintiff

WARREN

IAN CLIVE GRAHAM HALFORD 4th

Plaintiff

And

SHAREMAX

INVESTMENTS (PTY) LTD 1st

Defendant

LIBENBERG

DAVID RYK VAN DER MERWE N.O 2nd

Defendant

GERHADUS

ROSSOUW GOOSEN 3rd

Defendant

JOHANNES

WILEM BOTHA 4th

Defendant

DOMINIQUE

HAESE 5th

Defendant

ANDRE'

DANIEL

BRAND 6th

Defendant

DIRK

KOEKEMOER 7th

Defendant

FRONTIER

ASSET MANAGEMENT

INVESTMENT

(PTY)

LTD 8th

Defendant

CENTRO

PROPERTY GROUP (PTY) LTD 9th

Defendant

SHAREMAX

GROWTH (PTY) LTD 10th

Defendant

FINE

ASSET INVESTMENT 119 (PTY) LTD 11th

Defendant

ADVOCA

AUDITING

INC 12th

Defendant

SAREL  
JOHANNES ELOFF  
T/A  
NEW WORLD  
VALUATION 13th  
Defendant  
WALDEMAR  
GUSTAV HAESE L  
T/S  
WG HAESE and PARTNERS 14th  
Defendant  
CAPICOL  
(PTY)  
LTD 15th  
Defendant  
NOVA  
PROPERTY HOLDINGS LIMITED 16th  
Defendant  
NOVA  
PROPERTY GROUP INVESTMENT 17th  
Defendant  
THE  
MINISTER OF FINANCE  
NATIONAL  
GOVERNMENT 18th  
Defendant  
THE  
REGISTRAR OF  
BANKS 19th  
Defendant  
THE  
SOUTH AFRICAN RESERVE BANK 20th  
Defendant  
THE  
MINISTER OF TRADE & INDUSTRY  
NATIONAL  
GOVERNMENT 21st  
Defendant  
THE  
MASTER OF THE HIGH COURT 22nd  
Defendant  
THE  
FINANCIAL SERVICES  
BOARD 23rd Defendant

THE  
REGISTRAR OF THE FINANCIAL  
SERVICES  
BOARD 24th  
Defendant  
MR  
NEELS ALANT  
N.O 25th  
Defendant  
MR  
JACO SPIES  
N.O 26th  
Defendant  
THE  
REGISTRAR OF THE COMPANIES AND  
INTELLECTUAL  
PROPERTY COMMISSION 27th  
Defendant  
SHAREMAX  
ZAMBEZI RETAIL PARK HOLDINGS LTD 28th  
Defendant  
SHAREMAX  
ZAMBEZI RETAIL PARK INVESTMENTS  
(PTY)  
LTD 29th  
Defendant  
THE  
VILLA RETAIL PARK HOLDINGS LTD 30th  
Defendant  
THE  
VILLA RETAIL PARK INVESTMENTS (PTY) LTD 31st  
Defendant  
THE  
VILLAGE HOLDINGS  
LTD 32nd  
Defendant  
THE  
VILLAGE MALL INVESTMENTS (PTY) LTD 33rd  
Defendant  
WITBANK  
HIGHVELD HOLDINGS LTD 34th  
Defendant  
WITBANK  
HIGHVELD INVESTMENTS (PTY) LTD 35th

Defendant

TERENTAAL

CENTRE HOLDINGS LTD 36th

Defendant

TERENTAAL

CENTRE INVESTMENTS (PTY) LTD 37th

Defendant

FLORA

CENTRE HOLDINGS LTD 38th

Defendant

FLORA

CENTRE INVESTMENTS (PTY) LTD 39th

Defendant

CARLETONVILLE

CENTRE HOLDINGS LTD 40th

Defendant

CARLETONVILLE

CENTRE INVESTMENTS (PTY) LTD 41st

Defendant

RIVONIA

SQUARE SHOPPING MALL HOLDINGS LTD 42nd

Defendant

ROVONIA

SQUARE SHOPPING MALL INVESTMENTS  
(PTY)

LTD 43rd

Defendant

LIBERTY

MALL HOLDINGS LTD 44th

Defendant

LIBERTY

MALL INVESTMENTS (PTY) LTD 45th

Defendant

MONT

ROUGE RESIDENTIAL ESTATE DEVELOPMENT  
FUND

LIMITED 46th

Defendant

PLANET

WAVES 120 (PTY) LTD 47th

Defendant

SHAREMAX

WATERFALL ESTATE LTD 48th

Defendant

BORN

FREE INVESTMENTS 552 (PTY) LTD 49th

Defendant

SHAREMAX

BAY ESTATE DEVELOPMENT FUND LTD 50th

Defendant

SHAREMAX

BAY ESTATE DEVELOPMENT FUND LTD 51st

Defendant

Defendant

WEAVIND & WEAVIND ATTORNEYS 52nd

Defendant

Summary:

Application for leave to appeal. Application of the rule that orders given by the courts remain valid until set aside or rescinded. The exception to the rule apply where the court that gave the order did not have jurisdiction to make such an order or the order is obtained fraudulently. The court in the present matter had the power to sanction the schemes of arrangements in terms of section 311 of the Companies Act of 1973. The orders were not fraudulently obtained and there was full disclosure before the orders were made. The majority of the shareholders voted for the schemes of arrangements before they were sanctioned by the court.

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## JUDGMENT

MOLAHLEHI, J:

- [1] This is an application for leave to appeal against the judgment of this court made on 4 August 2017 regarding the exception raised by the defendants which were upheld with costs.
- [2] The exception was based on f the contention that the particulars of claim were scandalous, vexatious, irrelevant, lacked elements necessary to sustain a cause of action and was vague and embarrassing. The defendants contended that these grounds hindered their ability to plead or conduct their defence. The applicants have raised several grounds for leave to appeal. I do not, for the reasons that are apparent from this judgment, intent dealing with every one of them.
- [3] The two key grounds of appeal upon which this matter turns on relate to:
  - (a) attack on the finding concerning non-joinder, and

- (b) not finding that, based on the illegal and fraudulent transaction, a valid cause of action existed to have the scheme of arrangement

declared null and void.

The non-joinder point

- [4] At the hearing of this application, Counsel for the plaintiffs indicated that they were no longer pursuing the challenge of the findings relating to non-joinder.
- [5] On the other hand Counsel for the defendant argued that it would not be proper to refer the matter on appeal in the absence of other parties that had not been joined in the proceedings before this court because that would deny them the opportunity to be heard by the appeal court. The contention in this respect is that the non-joined parties have an interest in the outcome of the appeal.
- [6] The practical difficulty with the argument of the defendants is that the appellants won't be able, in light of the judgment of this court, be able to join the other parties on appeal. In this respect, the court has pronounced that the applicant has no cause of action because of the court order legalising the schemes of arrangements has not been set aside and thus is valid and enforceable. I will revert to this latter matter later in this

**judgment.**

- [7] The other fundamental difficulty with the defendant's argument is that the appellate court in considering an appeal is confined as a general principle to the issues that served before the lower court. The issue before this court was, of course, the privity of the contract between the parties, the appellant and the non-joined parties. The leave to appeal (the lis) is however between the parties which were cited when the matter served before this court.
- [8] Based on the above, I find that the respondents' point regarding non-joinder about this application is unsustainable.

Legality of the schemes of arrangements

- [9] I now turn to deal with the issue of the legality or otherwise of the schemes of arrangements. This issue is dealt with at paragraphs 59 to 65 of the judgment of this court.
- [10] In concluding as it did, the court essentially found that the appellants failed to disclose a cause of action for the claim about the validity of the different property syndication schemes and the invalidity and enforceability of the court orders made in terms of s 311 of the Companies Act of 1973.
- [11] The appellants argued that the different property syndications schemes were void and invalid and therefore the court orders could not be made in terms of s 311 of the Companies Act because such unlawful schemes could not become lawful through the utilisation of the scheme of arrangements. Another point made was that the schemes of arrangements did

not comply with the requirements of s 311 of the Companies Act and therefore the court could not have granted the orders as it did. The orders were in other words granted on a legal basis that never existed.

[12] In seeking to persuade me that there is a reasonable prospect that another court, if the same facts were to be placed before it, would arrive at a different conclusion reference, was made to the case of *The Master of the High Court v Motala*,<sup>[1]</sup> which was contrasted with that of *Jacobs v Baumann* NO.<sup>[2]</sup>

[13] The Master was in Motala's case charged with contempt of court. She contended that she was entitled to ignore the judgment because it was a nullity. The court below per Legodi J disagreed and found that the Master was guilty of contempt of a court order based on the principle that all orders of the court whether correctly or incorrectly granted are to be obeyed until they are properly set aside.

[14] In that case, the contempt proceedings arose from the failure by the Master to comply with the order made by Kruger AJ in terms of which judicial managers were appointed purportedly under s 429 of the Companies Act of 1973. It is clear that while s 429 of

the Companies Act gives the court the power to grant provisional judicial management orders, the power to appoint judicial managers

once such an order is made is reserved for the Master. In concluding that the finding of contempt against the Master could not be supported the Supreme Court of Appeals said:

*"[11] What appeared to weigh with Legodi J was the following general proposition: all orders of court whether correctly or incorrectly*

*granted have to be obeyed until they are properly set aside... No doubt there are important policy considerations why that must be so. But, that raises a logically anterior question, which Legodi J described as 'the most vexing aspect of this judgment' - namely the status of the order of Kruger AJ. The Master contended that it was a nullity and could, without more, be disregarded. Legodi J took a contrary view.*

[12] As long ago as 1883, Connor CJ stated in *G W Willis v L B Cauvin* 4 NLR 97 at 98-99:

*'The general rule seems to be that a judgment, without jurisdiction in the Judge pronouncing it, is ineffectual and null.. . The maxim extra territorium jus dicenti inpune non paretur.'*

[15] In *S v Absalom*,<sup>[3]</sup> a case quoted with approval in the above case, the court held that:

*'Dit volg dus dat die Volle Hof myns insiens geen bevoegdheid gehad het om die appèl aan te hoor nie. Die gevolg, meen ek, was, soos voorspel deur Strydom R, dat die Volle Hof se uitspraak 'n nietigheid was. Sien, benewens die bronne, aangehaal deur Strydom R, Voet Commentarius ad Pandectus 49.8.1 en 3; Groenewegen De Legibus Abrogatis, Ad Cod 7.64; Lewis & Marks v Middel 1904 (TS) 291 op 303; Sliom v Wallach's Printing and Publishing Co Ltd 1925 TPD 650 op 656 en Trade Fairs and Promotions (Pty) Ltd v Thomson and Another 1984*

- (4) SA 177 (W) op 183D-E. Soos blyk uit hierdie bronne, het die uitspraak van 'n hof wat nie regsbevoegdheid het nie, geen regskrag nie, en kan dit eenvoudig

geïgnoreer word. Groenwegen (loc cit) sê wel dat, waar dit gaan oor die nietigheid van 'n uitspraak van die Hooggeregshof, die Princeps se hulp ingeroep moet word, maar hierdie reël geld nie meer by ons nie.[4]

- [16] Counsel for the applicants also relied on the case of *S v Absalom*,[5] and *Vidasky v Body Corporate of Sunhill Villas*,[6] in support of the argument that the orders sanctioning the schemes were a nullity and unenforceable.
- [17] I have already indicated somewhere else in this judgment that the orders were not fraudulently obtained and also the court, unlike in the *Motala* matter, had the power to entertain the request to sanction the schemes of arrangement. The court in sanctioning the schemes did so in terms s 311 of the Companies Act of 1973. There is no dispute that the schemes of arrangements received the majority of votes by those who voted in their favour. There is also no dispute that all the relevant information was disclosed to the court before the order sanctioning the schemes was made. In other words the order was not fraudulently obtained.
- [18] In my view, the authorities whom the applicants relied on are distinguishable from the present matter.
- [19] In the *Motala's* case, as alluded to earlier, the court had exercised the power it did not have. The power to appoint judicial managers rested with the Master and not the court.
- [20] Similarly, in the *Absalom* matter the court found that the lower court had gone outside the jurisdiction which was regulated by the statute.
- [21] In the *Vidasky's* matter, the court found that the arbitrator lacked jurisdiction because the other party to the hearing was not properly notified of the set down of the hearing.
- [22] In brief it cannot be said that the decision in *Motala*, is in conflict with that in *Jacob's* matter. As alluded to earlier in the *Motala* case the SCA found that the order was a nullity because the court purported to exercise the power it did not have.
- [23] It is thus my view that the contention by the appellants that there are conflicting decisions of the SCA is unsustainable. In addition to the above my view is supported by the recent decision of the SCA in *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd*. [7] In that case the appellant had amongst other things relying on the provisions of ss 75, 112 and 115 of the Companies Act of 2008, contended that the agreement which had been made the order of the court was unenforceable and for that reasons the court order fell to be set aside.[8]
- [24] In dealing with the issue of the enforceability of a court order until set aside the SCA held that:

*“ [10] In my view that was not the correct starting point for the enquiry, because it ignored the existence of the order making the agreement an order of court. Whilst terse the order was clear. It read:*

*‘The Agreement of Settlement signed and dated 05 September 2013 is made an order of court.’*

For so long as that order stood it could not be disregarded. The fact that it was a consent order is neither here nor there. Such an order has exactly the same standing and qualities as any other court order.. . The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with s 165(5) of the Constitution, which provides that an order issued by a court binds all people to whom it applies.”

[25] Although the court in the Montic Dairy, was dealing with the rescission of a default judgment the decision does illustrate the exception to the general rule that orders of courts are to be obeyed and stand until set aside.

[26] In light of the above, I am not persuaded that another court presented with the same facts as those that served before this court would come to a different conclusion to the one reached by this court. I further find that there are no compelling reasons as envisaged in s 17 (1) (a) (ii) of the Superior Courts Act of 2013 to grant leave to appeal.

Order

[27] In the premises, the applicant’s application for leave to appeal is dismissed with costs.

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E MOLAHLEHI

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Appearances:

For the Appellant: Adv. JJ Brett SC

Instructed By: AJ Van Rensburg Incorporated

For the Defendant: Adv. A Allison

Instructed By: Hirschowitz Flionis Attorneys

Head on: 24 October 2017

Delivered on: 22 November 2017

[1] 2012 (3) SA 325 (SCA).

[2] 2009 (5) SA 432 (SCA).

[3] 1989

(3) SA 154 (A) at 164.

[4] See the translation from <http://www.etranslator.ro/translate-afrikaans-to-english>. "It follows that the Full Court in my opinion had no power not

to hear the appeal. The result, I think, was, as predicted by Strydom R, the Full Court ruled a vanity was. See, in addition to the sources quoted by Strydom R Foot Commentarius ad Pandectus 49.8.1 and 3; Groenewegen The Legibus abrogatis, Ad Cod 7.64; Lewis & Marks v Agent 1904 (TS) 291 to 303; Sliom v Wallach's Printing and Publishing Co Ltd 1925 TPD 650 to 656 and Trade Fairs and Promotions (Pty) Ltd v Thomson and Another 1984 (4) SA 177 (W) at 183D-E. As evidenced by these sources, the judgment of a court which has no jurisdiction, no legal effect, and can be simply ignored. . ." (My underlyning)

[5] 1989

(3) SA 154 (A).

[6] 2005

(5) SA 200 (SCA).

[7] (799/2016) [2017] ZASCA 54 (18 May 2017).

[8] The court of first instance upheld the application to set aside the agreement which had been made the order of court by agreement

between the parties on the bases that it was void and unenforceable because the trustee had no actual authority to conclude the settlement agreement on behalf of the family trust. On appeal the majority per Matojane J and Hawes AJ, upheld the appeal on the ground that the settlement agreement constituted a compromise of the pending litigation. The minority judgment per Moshidi J found that the settlement agreement remained void ab initio and un-enforceable largely based on the principle that trustees must act jointly unless the Trust Deed provides otherwise.

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