

SOUTH AFRICA / JUDGMENT

Gore N.O and Another v Van Wyk Van Heerden Attorneys Incorporated (17897/2019) [2021] ZAWCHC 95; [2022] 2 All SA 178 (WCC) (10 May 2021)

[2021] ZAWCHC 95

COURT

Western Cape High Court, Cape Town

BEFORE

Magona

CASE / FILE NUMBER

17897/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO:17897/2019

In

the matter between:

STEPHEN

MALCOLM GORE N.

O

First Applicant

SELBY

MUSAWENKOSI NTSIBANDE

Second Applicant

(In

their capacities as duly appointed joint liquidators

Of

Brandstock Exchange (Proprietary)Limited in Liquidation

Master's

Reference No. C428/2018)

And

VAN

WYK VAN HEERDEN ATTORNEYS INCORPORATED

Respondent

(Registration

No. 1995/003663/21)

Heard
on 29 April 2021
Delivered
electronically to the parties' legal representatives. The
judgment shall be deemed to have been handed down at 15h00
on 10 May
2021

JUDGMENT

ON LEAVE TO APPEAL

MAGONA, AJ

1. This is an application for leave to appeal to the Supreme Court of Appeal against the whole judgment and order of this court which was handed down on 11 February 2021. The relevant aspects of the order are as follows:

"IT IS ORDERED that -

1. The (interlocutory) application to strike out is dismissed with costs; and
2. The main application succeeds and

2.1 It is declared that the following payments made by Brandstock Exchange (Proprietary) Limited, to the respondent on the stated dates:

2.1.1 On 23 February 2018 in the amount of R75 000.

2.1.2 On 23 February 2018 in the amount of R1 250 000.

2.1.3 On 30 April 2018 in the amount of R200 000.

Are dispositions without value as contemplated by section 26(1) of the Insolvency Act 25 of 1936 read with the section 340 of the Companies Act 61 of 1973 and they are set aside.

3. The respondent is ordered to pay the afore stated amounts totalling to R1 525 000, 00 to the applicants.
4. Mora interest on the afore said amount at the legal rate calculated from 21 December 2018 until the date of payment.
5. The respondent is ordered to pay the costs of this application..."
2. Disgruntled by the above order the Respondent now approaches this court for an application for leave to appeal to the Supreme Court of Appeal. I shall proceed to refer to the parties as they were in the main application.

3. As a brief background, the order emanates from an application brought by the Applicants(as the duly appointed liquidators) to have certain payments made by Brandstock Exchange (Pty) Ltd (in liquidation) into the Respondent's trust account as dispositions without value as contemplated in section 26(1) of the Insolvency Act 24 of 1936 read with section 340 of the Companies Act, 1973.The order was granted in favour of the Applicants whereby Respondent was ordered to repay the amounts totalling R1 525 000,00 plus interest. It is therefore against this decision that the application for leave to appeal lies.
4. In terms of Section 17 of the Superior Courts Act[1]leave to appeal may only be granted where the Judge is of the opinion that the appeal would have reasonable prospects of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments.[2]
5. Respondent stated in its notice for leave to appeal that the

'...application for leave to appeal is brought in terms of section 16(1)(a)(i) read with section 17(6) of the Superior Courts Act 10 of 2013 and on the following grounds:

5. Should leave to appeal be granted, appeal would have reasonable prospects of success; and
6. One of the defences relied upon by the respondent, the scope of which is subject to conflicting judicial decisions, has not been directly pronounced upon by South African Courts; meaning that the appeal is one which properly falls within the ambit of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013.
7. Another compelling reason why an appeal should be heard, as envisaged in the aforesaid sub-section, is the importance of the relevant issue to the wider legal profession, in particular, the practice of attorneys and their employment of trust accounts in making payments such as occurred in the present instance."
6. The Respondent raised approximately 22 alleged errors made by the Court in support of its application for leave to appeal, these may be put into categories as stipulated in the paragraphs that follow.

Ground that the appeal would have reasonable Prospects of Success

7. First submission made was that the Court erred in refusing to grant an Application to strike out parts of the Applicant's affidavits. Second submission was that the court erred in making adverse findings against Mr Van Heerden (Van Heerden) who was not a party to the dispute. I have already stated in the judgment why the court accepted the hearsay evidence of Ms Pratt based on the hearsay rule, in the interest of justice whereby the Court applied the principle laid out also in the Lagoon Beach Hotel case.[3]
8. I have further dealt with the reasons why that interlocutory application was dismissed based on the nature of the evidence of Ms

Pratt. Ms Pratt's evidence was unrefuted by the Respondent and remained valuable in that under oath she disavowed the Utexx

agreement and further that she did not know Van Heerden before the date of the enquiry, in the interests of justice amongst others, the evidence was accepted.[4] This is a discretionary approach which must be based in law[5], in my view the Court has given sufficient basis for its decision when dismissing the application to strike out based on law[6]

9. I am therefore of the view that these grounds hold no prospect of success.
10. Third submission was that the Court erred in not following or to have regard to the decision in Iprolog[7] as it made a finding that the respondent benefitted by the impugned payments for the purpose of section 26(1)(b) of the Act.
11. I have also dealt with these points raised in detail in my Judgment,[8] most notably the important question to answer in casu was whether there was a benefit to the Respondent. Because "payment" of the impugned monies was made to the bank in favour of the Respondent where the latter had control over the funds, having the right of disposal the "benefit" element was fulfilled. The issue of the intention of the payment or such disposition did not arise.
12. Further to be clear it was based on the facts and the issue that was before the court in casu which included an enquiry whether the Respondent received the dispositions with a benefit in terms of section 26 of the Insolvency Act as was held in *De Villiers v Kaplan and Reynolds v Mercantile Bank and Others*.
- [9] Both these decisions, the full bench of this Division and the Supreme Court of Appeal (SCA) respectively held that no question of intent arises in the enquiry. I deal with these cases further below.
13. In that regard and though the court might not have referred to the Iprolog case such does not mean it was not considered. I understood the facts in that case were distinguishable in that the disposition by Mr M was found to have been made from a collusion with his wife Mrs M in terms of Section 31 of the Insolvency Act by making payments directly out of his own personal account which were found to be dispositions within the meaning of the Insolvency Act, that the first payment was made into an attorney's trust account for the credit of Iprolog[10]. (My emphasis)
14. The enquiry in casu ended on who received the transferred "payments" or the dispositions from Brandstock's account (and not the intent of the payment), the answer remained, that it was the Respondent and that it was not a mere conduit.[11] They were dispositions without value in terms of section 26(1)(b) of the Insolvency Act.

[1] Act 10 of 2013(the Act)

[2] See also *MEC for Health, Eastern Cape v Mkhitha* 2016 JDR 2214 (SCA) paras [16] to [17-

- [3] Lagoon Beach Hotel v Lehane (235/2015) [2015] ZASCA 210 (21 December 2015); Judgment para 54 and 61 to 70
- [4] Judgment para 57 to 70
- [5] McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd; McDonald's Corporation v Dax Prop CC 1997 1 SA 1 (A) at 27D-E
- [6] Judgment para 63 to 69
- [7] M [...]and Another v Murray and Others (251/2019) [2020] ZASCA 86(9 July 2020)
- [8] Paragraphs 93 to 102 of the Judgment
- [9] Reynolds and Others NNO v Mercantile Bank Ltd 2004(5) SA 220
- [10] Iprolog para [30] to [31]
- [11] Judgment para [93] to [100]
- [12] Judgment para [71] to [78]; para [97] to [98]
- [13] Para [97] to [98]
- [14] Judgment para [103]to [110]
- [15] Act 45 of 1988
- [16] Judgment para and [57] to [69]
- [17] Judgment para [57] to [70]
- [18] SCA decision mentioned supra-Reynolds p224 [D] to [J] p225 [A] to [G]
- [19] SCA decision mentioned supra Iprolog case para [30]to [31], [34]to [37]
- [20] Judgment [93] to [99]
- [21] Judgment [111] to [116]

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Prepared on 10 October 2026 · Esheria