

SOUTH AFRICA / JUDGMENT

Jacobs and Another v Van Niekerk N.O and Others - Appeal (114/2023) [2024] ZAWCHC 21 (2 February 2024) [2024] ZAWCHC 21

COURT

Western Cape High Court, Cape Town

BEFORE

Ndita, Cloete, Wille

CASE / FILE NUMBER

114/2023

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THE

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

WCHC

APPEAL NO: 114 / 2023

In

the matter between:

RONNIE

JACOBS

First

Appellant

SEROJINI

JACOBS

Second

Appellant

And

MORNE

ANDRE VAN NIEKERK N.O.

First

Respondent

CHRISTIAN

FINDLAY BESTER N.O.

Second

Respondent

RENE

BERNICE BAILEY N.O.

Third
Respondent
HERMIAS
CORNELIUS VAN ZYL
Fourth
Respondent
THE
MASTER OF THE HIGH COURT, CAPE TOWN
Fifth
Respondent

Coram: Ndita, Cloete et Wille, JJ
Heard: 22 January 2024
Delivered: 2 February 2024

JUDGMENT

WILLE, J:

Introduction

- [1] This appeal places a rather unusual situation before this court regarding an application to rescind final sequestration orders and some condonation applications. The initial rescission application was dismissed, but the appellants sought leave by way of application and were granted leave to appeal to this court.
- [2] The appellants seek an order rescinding and setting aside the final sequestration order concerning their respective estates. In the alternative, they seek relief and a rescission on appeal under our common law. They say this because they submit that exceptional circumstances exist to their extreme prejudice and advance fraudulent conduct on behalf of the petitioning creditor. They also say that it is in the interests of justice to set aside these final sequestration

orders.

Overview

- [3] The appellants are married out community of property and thus have two separate estates. It is these estates that were the subject of final sequestration orders. The first respondent was the executor of a deceased estate, and this estate was the petitioning judgment creditor. The second and third respondents are the joint trustees of the insolvent sequestrated estates. The fourth respondent is described as a property investor who, together with the fifth respondent, takes no part in this appeal. The fourth respondent was the purchaser of the immovable property which previously vested in these sequestrated estates. He has since taken transfer of this immovable property and the liquidation and distribution accounts of

the first and second appellant have since been finalized and confirmed by the fifth respondent.

- [4] The appellants' case is based on misrepresentation by the petitioning creditor and a failure to present then current financial facts to the various courts initially seized with this matter. Primarily, the first appellant avers that at the time he was both provisionally and finally sequestered, he was gainfully employed and remains so employed. Moreover, the sequestration of their estates was predicated upon the reliance on a return of service that was obtained by irregular means and fraudulently.
- [5] They say they provided credible evidence of sufficient movable assets to satisfy the judgment debt when the sheriff's return was fraudulently obtained and a null bona was rendered. The appellants also charter for condonation applications wherein they advance that they gave a satisfactory explanation for not opposing the granting of the final orders of sequestration, for not pursuing their rescission applications timeously and for not advancing their current appeal timeously. They say that they were not in willful default. I will deal with these condonation applications (in as much as this may be necessary) at the end of this

judgment.

Consideration

- [6] I will deal firstly with the common law read with our rules that indicate that a court may, in addition to any other powers it may have, upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.[1] The purpose of this rule is to correct a wrong judgment or order expeditiously.[2]
- [7] The rule provides for specified discrete procedures whereby such orders can be rescinded, including 'an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby' (which is relevant to this application).
- [8] In general terms, a judgment is erroneously granted if a fact existed at the time of its issue of which the court was unaware, which would have precluded the granting of the judgment and would have induced the court not to grant the judgment. It follows that if fraud is committed and facts are misrepresented to the court, such an order will have been erroneously granted. An order or judgment is also erroneously granted if there is an irregularity in the proceedings.[3] At common law, a judgment can be set aside for fraud.[4] The onus to succeed based on a fraudulently obtained judgment bears down on the party alleging the fraud.

- [9] To succeed on a claim that a judgment be set aside on the ground of fraud, the applicant must allege and prove: (a) that the successful litigant was a party to the fraud; (b) that the evidence was, in fact, incorrect; (c) that it was made fraudulently and with intent to mislead and, (d) that the court would, if the correct facts had been placed before it, have given a judgment other than that which it was induced by the incorrect evidence to give.[5]
- [10] In this case, the appellants also seek refuge in the provisions of our insolvency laws through legislative intervention.[6] The core issue for consideration in this appeal is whether the court a quo erred in its findings that the appellants failed to meet the threshold requirements for the setting aside of the sequestration orders.
- [11] The judgment in the court of first instance meticulously dealt with every one of the complaints raised by the appellants. The estates of the appellants were finally sequestrated almost three years before the matter was presented before the court of first instance. Nearly six years have passed since the final sequestration orders were granted.[7] Undoubtedly, the first, second and third respondents possessed the required standing to oppose the rescission application in the court of first instance. This must be so also considering the rights and interests of the general body of creditors.
- [12] Initially, the appellants were involved in a dispute about purchasing a property from the deceased estate, as negotiated by the first respondent. The appellants drew the short straw and faced a bill for the taxed legal costs incurred by this litigation. This was the judgment debt owed to the first respondent.
- [13] A sequestration application followed based on a 'nulla bona' return of service and was predicated on the positive averment that the appellants' did not have sufficient movable assets to satisfy the judgment debt upon the execution of the warrant of attachment against movables. It was not the subject of any dispute that proper service the provisional sequestration orders occurred before the granting of the final sequestration orders.
- [14] The provisional sequestration orders were served on both the appellants and final orders followed with no opposition. The appellants averred that they made a conscious decision not to oppose the final orders of sequestration of their respective estates, knowing that, according to them, the information about their financial position at the time needed to be supplemented and corrected. Undoubtedly, this adopted stance must be that of willful default on their part. Consider that it is undisputed that the appellants made a conscious decision not to oppose the final sequestration orders. They did this because (a) they did not have the financial means to cover the costs of legal representation,
- (b) according to them, the first respondent had a legal obligation to put forward fresh details of their financial position to the court before the final sequestration orders were granted and, (c) they were able to satisfy the judgment debt, but according to them, they were unwilling to do so at the time.

[15] Most importantly, even before the service of the warrant of execution, the appellants paid an installment towards the settlement of the judgment debt and requested to pay the remainder thereof through further instalments in the future. Without anything more, this is an act of insolvency in that it is an unequivocal indication in writing that the appellants could not settle their debts when they became due and payable. [8] The appellants seem to have been under the misapprehension that the first respondent was obliged to make a case for their solvency on the return day of the provisional sequestration orders. This is a novel approach and does not attach to our jurisprudence. The purpose of our insolvency legislation and the regulations would be undermined if the appellants were now permitted to advance their case for a rescission some five years later. One might be forgiven for thinking that the court, when considering a 'good cause' rescission application, would only be concerned with whether the act of insolvency had taken place before the presentation of the petition rather than with a substantive

challenge to the act of insolvency itself in the sense of creating a reverse onus on the first respondent.

[16] Our insolvency legislation and rules are designed to provide a quick and straightforward method for resolving questions related to insolvency matters. As far as I can ascertain, regarding issues such as these, our courts have always taken the view that if it can be demonstrated in a good cause application that the act of insolvency is in some way defective or invalid, the court will hold that there has been no act of insolvency.

[17] This is entirely different because the appellants claimed in their written submissions that the first respondent bore the onus of disclosing that the 'nulla bona' return was allegedly invalid. The 'nulla bona' return was a defined act of insolvency that needed to be squarely addressed by the appellants. At the hearing, the argument was whether the appellants could pay the judgment debt when demanded.

[18] Curiously, the resounding reply from the appellants on this score was that they could pay judgment debt but were unwilling to do so, save by way of monthly instalments. This is where the appellants held their feet to the fire. I say this because one cannot simultaneously dance at two weddings. If the appellants were financially able to pay the judgment debt but were unwilling to do so, this demonstrates the act of insolvency.

[19] This goes to the very reason for these principles in our insolvency law. The consequence for the debtor of not discharging or compounding the demanded amount is that he or she would then have committed an act of insolvency, which may result in an adjudication of insolvency. The appellants should have demonstrated they could satisfy the judgment when payment was demanded. Instead, they sought to orchestrate an unworthy attack on the first, second and third respondents and upon the credibility of an innocent court sheriff.

- [20] The appellants advanced that the first respondent was guilty of fraud and misrepresentation by not putting forward the then current financial details of the appellants' respective financial positions in support of the final sequestration orders. This was not the basis for sophisticated reasoning because the first respondent's founding affidavit made the clear and positive averment that the appellants were possessed of sufficient assets to satisfy the judgment debt.
- [21] Precisely, one of the primary reasons for the sequestration of the appellants' respective estates was for these assets to be realized to benefit the general body of creditors. Thus, the respondents submitted that the court's decision a quo constituted the exercise of 'true' discretion. They argued that none of the limited grounds for interference on appeal with the exercise of 'true' discretion were shown. Accordingly, they contended that the appeal had to fail.
- [22] It is trite that the scope for interference on appeal with the exercise of 'true' discretion is limited. For present purposes, it suffices to say that interference would be called for if discretion was based on a misdirection of fact or a wrong principle of law.[9] A 'true' discretion provides a court with a range of permissible options. This was eloquently articulated as follows in *Florence*.^[10]
- '...Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range...'
- [23] It must be so that the expression of broad decision-making powers in this passage refers to the multitude of permissible options that characterize true discretion. This must not be confused with a broad or loose discretion, which means '...no more than that the court is entitled to have regard to several disparate and incommensurable features in coming to a decision...'[11] By elaboration, as is the case here, where the setting aside of the final sequestration orders is sought based on subsequent events the test is whether the facts show that the continuance of the sequestration would be unnecessary or undesirable. The test for setting aside these sequestration orders (based on subsequent events) is whether the appellant has demonstrated that it is unnecessary or undesirable for their insolvency to continue. This does not involve a choice between permissible alternatives. The test is either satisfied or it is not.
- [24] Despite anxious consideration, I cannot unearth any grounds upon which it can be said that the court a quo misdirected itself on the facts and the law. Its decision was based on undisputed facts before the court and the correct law principles. Both the appellant's estates have been finally wound up, the liquidation and distribution accounts have been confirmed, and the creditors have been satisfied. A court is enjoined not to exercise its discretion in favour of a rescission application if undesirable consequences would follow.^[12] I say undesirable consequences would follow should these sequestration orders be set aside.

[25] I say this because the fourth respondent purchased the appellants' immovable property about four years ago. The appellants previously owned only one significant asset in the form of an immovable property. This property has now been transferred to the fourth respondent and registered in the relevant registry. The first and final liquidation and distribution account for the appellants' insolvent estates was prepared and filed with the fifth respondent. The fifth respondent approved this account and notified the joint trustees that it could be advertised.[13]

[26] Last year, this account was advertised as open for inspection at the fifth respondent's offices and the lower court's relevant offices for the required statutory period. No objections were received, the fifth respondent confirmed this account, and the joint trustees were authorized to pay the award to the secured creditor. Further, all subsequent distributions have been paid by the joint trustees. The consequences of setting all these steps aside will not be undesirable but also practically impossible.

[27] The final issue to address is the appellants' claim that the sequestration orders should be rescinded in the interests of justice. I am afraid I must disagree. The one-year period since the confirmation of the liquidation and distribution account will expire towards the end of this year, and then the appellants will be permitted to apply for rehabilitation.

[28] No exceptional circumstances exist for rescinding the sequestration orders, and it will not be in the interests of justice to do so. The appellants have the rehabilitation remedy at their disposal. Finally, I need to mention the applications for condonation for the late filing of the appeal, the late filing of the notice of appeal and the court record. Inextricably bound to these issues is the argument that the appeal has lapsed. I find it

unnecessary to deal with these issues and the determination thereof given the result of this appeal and, most importantly, because this matter must be brought to finality. For all these reasons, the appeal must fail.

Costs

[29] Given the result, there are no reasons why costs should not follow the result. Further, these costs should include all the costs of and incidental to the various applications for condonation.

Order

[30] I propose that the following orders be granted:

1. That the applications for condonation are granted.
- 2 That the appeal is dismissed.
3. That the appellants (jointly and severally), the one paying the other to be absolved, shall be liable for the costs of and incidental to the appeal (including the costs occasioned by the condonation applications) on the scale as between party and party, as taxed or agreed.

WILLE, J

I agree, and it is so ordered:

NDITA, J

I agree:

CLOETE, J

[1] Rule 42 (1) of the Uniform Rules of the High Court.

[2] Bakoven Ltd v GJ Howes (Pty) Ltd 1990

(2) SA 446 at 471 E-F

[3] De Wet and Others v Western Bank Ltd 1979

(2) 1031 (A) at 593 F.

[4] Makings v Makings 1958

(1) SA 338 (A).

[5] Rowe v Rowe 1997 (4) SA 160 (SCA) at 680 B.

[6] Section 149 (2) of the Insolvency Act, 24 of 1936.

[7] The final order was granted on 2 October 2018.

[8] Section 8 (g) of the Insolvency Act 24 of 1936.

[9] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015

(5) SA 245.

[10] Florence v Government of the Republic of South Africa 2014

(6) SA 456 (CC):

[11] Knox D'Arcy Ltd and Others v Jamieson and Others [1996] ZASCA 58; 1996

(4) SA 348 AD.

[12] Section 149 (2) of the Insolvency Act 24 of 1936.

[13] In terms of section 108 of the Insolvency Act, 24 of 1936.

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